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Criminal Defense Newsletter

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CDBA/MCLE FEBRUARY MONTHLY MEETING

Tuesday, February 24th Meeting:

Athens Market
First and F Downtown

5:00—5:30 p.m.
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Program

Legislation Update

by Alex Landon

PRESIDENT'S COLUMN SD LAWYER ARTICLE BY MICHAEL CROWLEY

EVIDENCE THAT COULD SINK YOU

You are a brand new attorney and get your first job at the Law Office of Aaron Burr. You agree to go with your new employer early on the morning of July 11, 1804 across the Hudson River to the cliffs of Weehawken, New Jersey. There is to be a meeting with Burr's legal rival, Alexander Hamilton.

While you are rowing across the river through the fog, Burr says you may have to represent him because this is not going to be an ordinary meeting, but rather a duel. Having studied your criminal law, you know the reason you are rowing to New Jersey is because dueling is illegal in New York, punishable by death, and although illegal in New Jersey also, the penalty isn't as tough.

The duel occurs with Burr mortally shooting Hamilton and then fleeing to South Carolina. After dropping his dueling pistol on the ground, Burr asks you "don't you think you should get rid of the gun" while looking toward the river. You don't have a chance to answer him as he is fleeing, but Burr later sends you a letter stating he didn't intend to shoot Hamilton. He said he was aiming over his head, as was the unwritten dueling custom at the time, but something must have been wrong with the sight on the gun.

What to do about the dueling pistol? Barring your prosecution for aiding and abetting a crime, perhaps you could at least prevent an ethical lapse.[1] The pistol, of course, is evidence of a crime. You remember that California Penal Code section 135 makes it a misdemeanor to willfully destroy or conceal evidence.

So it is not in your best interest, if you want to remain a lawyer, to get rid of the gun. Additionally, even though Burr's incriminating question to you about the gun may be privileged (assuming you could show his statement was

[1] *Since you are reading this in San Diego Lawyer this article will focus on California law even though if you made the wrong move you might have been prosecuted in New York and New Jersey as Aaron Burr was, although never convicted of any crime for the duel.*

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REAL LIFE EXAMPLE BY BOB BOYCE

WITH FOREWARD BY MICHAEL CROWLEY

The hypothetical situation in my accompanying article occurred in real life to our own Vice President, Robert Boyce. Here is Bobby's account of what occurred:

In 1983, I represented Leland Blackington accused of the murder of Eric Humphries. Blackington had two minor children who lived with his former wife, Beverly Humphries, and her husband, Eric Humphries.

On November 11, 1983, Blackington and Beverly's brother, Donnie Eldred, decided to check on the welfare of Blackington's minor children because Eldred told Blackington Humphries was abusing the children. Eldred brought a baseball bat and Blackington brought a gun because Humphries had threatened to kill Blackington and had a reputation for violence.

When Blackington and Eldred arrived at a house where the children were visiting, Humphries came out of the house and advanced on Blackington. Blackington fired one shot in the direction of Humphries and fled. Humphries was hit and died from the gunshot wound. Blackington threw the gun into the San Diego River and later surrendered to police.

Blackington claimed self-defense. Because Blackington told me additional rounds remained unfired in the gun, I believed the gun could only help. Proving Blackington could have continued firing the gun but fled, was consistent with self-defense and inconsistent with premeditation and deliberation and intent to kill.

Blackington was released on bail and we hired criminalist Parker Bell, who, coincidentally, was also a scuba diver. Parker, with directions from the client, retrieved the gun from the San Diego River, which, as described, contained additional unfired rounds.

I notified the District Attorney's Office who demanded I immediately surrender the gun. I advised I would, but only after the defense completed an examination of the firearm and the

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EVIDENCE THAT COULD SINK YOU—CONTINUED FROM PAGE 1

made in confidence and the communication was for legal services or advice, *see Cal Evid. Code § 951*) the physical evidence, *i.e.,* the gun itself is not covered by any privilege. *People v. Lee* (1970) 3 Cal. App. 3d 514, 526. "A defendant in a criminal case may not permanently sequester physical evidence such as a weapon or other article used in the perpetration of a crime by delivering it to his attorney." *Id*.

You become nonplused about whether to take the gun with you or just leave it on the Weehawken cliff. California law provides some consequences if you take it. The prosecutor may be allowed to comment on where you found the gun if you move it. *See People v. Meredith* (1981) 29 Cal. 3d 682, 686, stating: "we conclude that an observation by defense counsel or his investigator, which is the product of a privileged communication, may not be admitted unless the defense by altering or removing physical evidence has precluded the prosecution from making that same observation." *Id*.

You decide it's not a good idea to leave the gun and take it with you. As the nation mourns the loss of one of its founders, the criminal investigation begins and you still have the gun. What to do? First, you should consult some seasoned criminal defense practitioners about your ethical and perhaps criminal considerations. We know from *People v. Lee, supra*, you cannot hold on to the gun indefinitely. Two interesting issues arise however, neither of which have been definitively answered by the California courts. How do you turn over the gun without breaching your duty of confidentiality; and could you keep the gun for a reasonable time to test it?[2]

First, you must turn over the gun in a manner which preserves as much as possible of the attorney-client privilege. This could include concocting a method for the production anonymously or through the offices of a third party. *ABA Standards for Criminal Justice Prosecution Function and Defense Function* (Standards) (3rd ed. 1993) Standard 4-4.6, Physical Evidence and commentary; Hall, *Professional Responsibility fo the Criminal Lawyer* (1987) section 10.53, pp. 341-353. Second, there is authority for the notion of holding the evidence for a reasonable time in order to, *inter alia*, "test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client." *Id*.

This notion comes from the seminal case of *State v. Olwell* (1964) 64 Wn.2d 828 [394 P.2d 681, 16 A.L.R.3d 1021], which was relied upon and quoted with approval, including the holding of the evidence for a reasonable time, by the *Lee* court. 3 Cal.App.3d, at 526.

So here you are, having taken the gun, you could be required to testify where you found it. But you could also hold it for a reasonable time to test it for Burr's theory about it being defective and then produce it anonymously through a third party. You may not have a job when Burr returns from being on the run, but you should preserve your right to practice law.

This article originally appeared in the November/December 2009 issue of San Diego Lawyer magazine and is reprinted with the permission of the San Diego County Bar Association.

[2] Retesting of evidence and the potential comment upon the results has become a hotbed issue in California criminal cases. *See People v. Varghese* (2008) 162 Cal. App. 4th 1084, upholding the right of the prosecution to be present at a scientific testing because of the lack of sample quantity, and *People v. Zamudio* (2008) 43 Cal.4th 327, 352-356, upholding the right of the prosecution to comment to the jury on a sample being provided to the defense for testing over a claim of work product privilege. *See also*, *People v. Cooper* (1991) 53 Cal.3d 771.

REAL LIFE EXAMPLE—CONTINUED FROM PAGE 1

court upheld that right. When we completed our examination, I notified the prosecution they could now conduct their own examination.

There is a rather lengthy postscript: I tried the case 3 times.

The first trial, Blackington and Eldred were jointly tried for first degree murder. Blackington testified; Eldred, the co-defendant, did not. The Prosecutor quoted, in a most demonstrative fashion in front of the jury, from what was obviously a transcript of the non-testifying co-defendant's interview by police, to impeach Blackington during his testimony, but also to get Eldred's damaging hearsay statements before the jury.

Counsel for co-defendant, Frank Nageotte, and I both objected. I, because the prosecutor made obvious to the jury he was reading from a transcript of the co-defendant's hearsay statements and depriving my client of his rights to confront and cross examine witnesses.

The court granted a mistrial as to co-defendant Edred, but denied the mistrial as to Blackington.

The Jury convicted Blackington of second degree murder.

BUT it is not over. None other than Chuck Sevilla to the rescue! Reversed on appeal for prosecutorial misconduct using the co-defendant's inadmissible statements to cross-examine the defendant in a published opinion. *People v. Blackington* (1985) 167 Cal.App.3d 1216.

In second trial, jury hung 9-3 for guilt on second.

Third trial, not guilty of second, hung on voluntary manslaughter.

We settled for a plea to manslaughter and stipualed sentence of 6 years.

CDBA SCHOLARSHIP

The CDBA and CDLC are jointly granting a scholarship in the name of one of CDBA's founding fathers Tom Adler to pay for a deserving new attorney to go to the **National Criminal Defense College (NCDC)** in Macon, Georgia. If you know of a deserving attorney dedicated to criminal defense (or you are one yourself), please send a letter or e-mail explaining why to Executive Director Stacey Kartchner. The deadline to apply for the NCDC Scholarship is March 1, 2009.

THE FEDERAL TATLER © BY JOHN LANAHAN

No. 135: Reiterating *Rita*: *Nelson* and *Spears*

Last month I wrote about *Oregon v. Ice*, ___U.S.___, 129 S.Ct. 711 (2009), and how the Supreme Court had drawn a clear boundary on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by holding the Sixth Amendment does not require a jury to find facts that are used to impose consecutive rather than concurrent sentences where a judge has the discretion to do either. That line is pretty ceratin, given that Justice Stevens, the author of *Apprendi*, joined the majority in holding that *Apprendi* does not apply to consecutive sentences. Just after that, however, the Supreme Court reiterated in two cases, *Nelson v. United States*, __ U.S. ___, 172 L.Ed.2d 719 (2009); and *Spears v. United States*, ___U.S.___, 172 L.Ed.2d 596 (2009), how far *Apprendi* has gone in the realm of the Sentencing Guidelines and makes it clear how a district court may, in effect, apply them.

In *Nelson*, the defendant was sentenced to thirty years in prison for one count of conspiracy to possess cocaine base with intent to distribute. He appealed to the Fourth Circuit (always a daunting and dismal prospect), which held that the sentence of 360 months was within the guideline sentencing range and was therefore "presumptively reasonable" and would be affirmed on appeal. The Supreme Court remanded for reconsideration in light of *Rita v. United States*, 551 U.S. 338 (2007), but the Fourth Circuit reaffirmed the sentence without further briefing. The Fourth Circuit recognized the district court cannot assume a guideline sentence is presumptively reasonable, unlike a Court of Appeal on review, but it still affirmed the sentence because the district court understood the guidelines were not mandatory. The Supreme Court *again* reverses the Court of Appeals, and remands because it was clear the district court appeared to believe that even though the guidelines were not mandatory, they were presumptively unreasonable. Even Justice Breyer concurs in this, given that the Solicitor General confessed error. What this means is that a district court cannot rely upon the Sentencing Guidelines to determine a reasonable sentence. Instead, the district court must look to all of the factors under 18 U.S.C. § 3553(a), and determine from these what is appropriate and reasonable for an individual defendant. Only a Court of Appeals may on review presume that a sentence within the Guidelines is reasonable (although in the Ninth Circuit that is not the standard, under *United States v. Carty*, 520 F.3d 984, 994 (2008)).

Spears holds that the judge not only doesn't need to follow the Guidelines as mandatory, but may recalculate them if s/he finds them to be excessive based on policy reasons, not just as applied to an individual defendant. In this case, the district court judge calculated the Sentencing Guidelines using the 100:1, crack:powder cocaine ratio. That resulted in an offense level 38, and a sentencing range of 324-405 months at Criminal History Category IV. The judge found that was excessive, and recalculated the ratio at 20:1 instead. This resulted in a level 34, with a range of 210 to 262 months, and the district court imposed the mandatory minimum sentence of 240 months, or twenty years. The Eighth Circuit vacated the sentence and remanded, holding that neither *United States v. Booker*, 534 U.S. 220 (2005), nor 18 U.S.C. 3553(a) authorizes a district court judge to reject the 100:1 ratio set forth under the Guidelines and use a different one. The Supreme Court vacated that judgment last year and remanded for reconsideration in light of *Kimbrough v. United States*, ___U.S. ___, 128 S.Ct. 558 (2007). The Eighth Circuit reversed the sentence and remanded for resentencing, writing that the district court could not reject the 100:1 ratio set forth by the guidelines and replace that ratio with another. The dissent wrote that *Kimbrough* made it clear that even where a defendant presents no special mitigating factor, a judge may reject the guideline sentence based upon an unwarranted disparity between crack and powder cocaine.

The Supreme Court reverses the Eighth Circuit in a *per curiam* decision and makes it clear that under *Kimbrough*, "a categorical disagreement with and variance from the Guidelines is not suspect." It holds that a district court judge may not only reject the Guidelines based upon individualized factors under section 3553(a), but may also vary from them "based upon *policy* disagreements with them." The majority writes "we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines. Here, the District Court's choice of replacement ratio was based upon two well-reasoned decisions by other courts, which themselves reflected the Sentencing Commission's expert judgment that a 20:1 ratio would be appropriate in a mine-run case. See *Perry, 389 F. Supp. 2d, at 307-308; Smith, 359 F. Supp. 2d, at 781-782*; Report to Congress 106-107, App. A, pp. 3-6." The Court prefers the district court judges have the freedom to state their policy disagreements with the crack:powder cocaine ratio instead of masking them as an "individualized" case using the language of the 3553 factors.

There are four dissents from the process of this decision, but one of them is *not* Justice Breyer, so he seems to have

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accepted that district court judges can differ from the wizards of the Sentencing Commission not only on individual cases, but on the Guideline formulations. Justice Kennedy would set the case for oral argument and Justice Thomas dissents for no stated reason. The Chief Justice and Justice Alito dissent from the summary reversal. He finds there was language in *Kimbrough* that would support the holding of the Eighth Circuit that a district court judge cannot reject the Guidelines for policy reasons, given that two other circuits have adopted the same approach. He writes:

> *Apprendi, Booker, Rita, Gall*, and *Kimbrough* have given the lower courts a good deal to digest over a relatively short period. We should give them some time to address the nuances of these precedents before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy.

For those less than constant gardeners, I guess this means that at least some (why not all?) of the Guidelines are truly advisory and a judge may reject them not only because a particular defendant does not fit within them, but because the judge disagrees with those Guidelines for any defendant. So far, this has been applied only where the district court has found the Guidelines would result in an excessively high sentence. None have reviewed cases where a district court judge believes the Guidelines are too low for policy reasons (we all know of at least one local judge who'd be willing to put that to the test). For the time being, however, the once mighty Guidelines seem to be mere gossamer trails of extra-judicial sky writing.

I can't end this *Tatler* without mentioning a recent Ninth Circuit case, *United States v. Beltran-Moreno*, ___F.3d___ (07-10368, 2/10/09). This should be held out as the paradigm of when *not* to appeal a sentence. The defendants in this case, Jose and Abraham Beltran-Moreno, pled guilty to a drug trafficking offense and had two separate counts of firearm enhancements under 18 U.S.C. § 924(c). The judge imposed five years on the first 924(c) count, and imposed a second five year consecutive sentence on the other. That was error because the Supreme Court held fifteen years ago in *Deal v. United States*, 508 U.S. 129 (1993), that the two counts were considered separate and that by statute the mandatory sentence for the first violation was five years, and the second was *twenty-five years*, even if in the same case. The district court judge also departed downward from offense level forty-two, which would have mandated a sentence of life without parole. Instead, he imposed a total of thirty-five years in prison for the drug count and both firearm counts.

Judge Reinhardt writes the opinion. He is often portrayed as a darling of the defense bar, but he can be a bear when he sees a lawyer make a grave mistake that hurts a client. He writes:

> The Beltrans' trial counsel had the good sense not to object to the district court's sentence, which—given that it was lower than legally permitted—was certainly better than they could have possibly imagined. Their *appellate* counsel, however, have exhibited anything but good sense.

He explains why the sentence imposed was illegal and that if the case were remanded for resentencing, as the Beltrans lawyers ask on appeal, the district court would then have to impose the mandatory twenty-five year sentence on count two. The opinion notes that the defendants are saved only by the recent decision of *Greenlaw v. United States*, ___U.S.___, 128 S.Ct. 2559, 2562 (2008), which holds that an appellate court cannot raise a defendant's sentence, even if illegal, if the Government does not appeal. "Here, the government has for some reason -- we would like to think out of a sense of justice or mercy -- exercised its discretion not to seek on appeal the additional years of incarceration for which the statute provides. This decision alone has saved one of the Beltrans, Abraham, from a higher sentence, despite his counsel's efforts to the contrary." The appeal by Jose, however, "is even more brazen, and accordingly, holds more potential for self-immolation." He appealed his thirty-five year sentence as unreasonably high, even though the guideline sentence for the drug conviction alone was life without parole. The Court of Appeals, however, finds the judge's reasons for imposing a twenty-five year sentence on the drug count were procedurally sound under 18 U.S.C. § 3553(c), and, therefore, spared Jose "from the adverse consequences he would likely have suffered had he succeeded." Should all our mistakes have such fortuitous endings.

John Lanahan has been a lawyer for the accused for almost 30 years, first in Illinois and now in California. His practice includes cases in both state and federal court, ranging from capital trials while a Public Defender in Chicago, to handling appeals in both state and federal court as well as state and federal post-conviction petitions. He is a past-President of the San Diego Criminal Defense Lawyer's Club and lectures and teaches in areas of criminal practice, most recently as a faculty member for the Darrow Death Penalty Defense College at DePaul School of Law in Chicago.

A CALL TO END ALL RENDITIONS BY MARJORIE COHN

Binyam Mohamed, an Ethiopian residing in Britain, said he was tortured after being sent to Morocco and Afghanistan in 2002 by the U.S. government. Mohamed was transferred to Guantánamo in 2004 and all terrorism charges against him were dismissed last year. Mohamed was a victim of *extraordinary rendition*, in which a person is abducted without any legal proceedings and transferred to a foreign country for detention and interrogation, often tortured.

Mohamed and four other plaintiffs are accusing Boeing subsidiary Jeppesen Dataplan, Inc., of flying them to other countries and secret CIA camps where they were tortured. In Mohamed's case, two British justices accused the Bush administration of pressuring the British government to block the release of evidence that was "relevant to allegations of torture" of Mohamed.

Twenty-five lines edited out of the court documents included details about how Mohamed's genitals were sliced with a scalpel as well as other torture methods so extreme that waterboarding "is very far down the list of things they did," according to a British official quoted by the *Telegraph* (UK).

The plaintiffs' complaint quotes a former Jeppesen employee as saying, "We do all of the extraordinary rendition flights – you know, the torture flights." A senior company official also apparently admitted the company transported people to countries where they would be tortured.

Obama's Justice Department appeared before a three-judge panel of the Ninth U.S. Circuit Court of Appeals on February 9 in the *Jeppesen* lawsuit. But instead of making a clean break with the dark policies of the Bush years, the Obama administration claimed the same "state secrets" privilege that Bush used to block inquiry into his policies of torture and illegal surveillance. Claiming that the extraordinary rendition program is a state secret is disingenuous since it is has been extensively documented in the media.

"This was an opportunity for the new administration to act on its condemnation of torture and rendition, but instead it has chosen to stay the course," said the ACLU's Ben Wizner, counsel for the five men.

If the judges accept Obama's state secrets claim, these men will be denied their day in court and precluded from any recovery for the damages they suffered as a result of extraordinary rendition.

Two and one-half weeks before Obama's representative appeared in the Jeppesen case, the new President had signed Executive Order 13491. It established a special task force "to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control."

This order prohibits extraordinary rendition. It also ensures humane treatment of persons in U.S. custody or control. But it doesn't specifically guarantee that prisoners the United States renders to other countries will be free from cruel, inhuman, or degrading treatment that doesn't amount to torture. It does, however, aim to ensure that our government's practices of transferring people to other countries complies with U.S. laws and policies, including our obligations under international law.

In his confirmation hearing, Attorney General Eric Holder categorically stated that the United States should not turn over an individual to a country where we have reason to believe he will be tortured.

One of those laws is the International Covenant on Civil Political Rights ("ICCPR"), a treaty the United States ratified in 1992. Article 7 of the ICCPR prohibits the States Parties from subjecting persons "to torture or to cruel, inhuman, or degrading treatment or punishment." The Human Rights Committee, which is the body that monitors the ICCPR, has interpreted that prohibition to forbid States Parties from exposing "individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."

Order 13491 also mandates, "The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future." The order does not define "expeditiously" and the definitional section of the order says that the terms 'detention facilities' and 'detention facility' "do not refer to facilities used only to hold people on a short-term, transitory basis." Once again, "short term" and "transitory" are not defined.

In his confirmation hearing, Attorney General Eric Holder categorically stated that the United States should not turn over an individual to a country where we have reason to believe he will be tortured. Leon Panetta, nominee for CIA director, went further and interpreted Order 13491 as forbidding "that kind of extraordinary rendition, where we send someone for the purposes of torture or for actions by another country that violate our human values."

But alarmingly, Panetta appeared to champion the same standard used by the Bush administration, which reportedly engaged in extraordinary rendition 100 to 150 times as of March 2005. After September 11, 2001, President Bush issued a classified directive that expanded the CIA's authority to render terrorist suspects to other States. Former Attorney General Alberto Gonzales said the CIA and the State Department received assurances that prisoners will be treated humanely. "I will seek the same kinds of assurances that they will not be treated inhumanely," Panetta told the Senators.

Gonzales had admitted, however, "We can't fully control what that country might do. We obviously expect a country to whom we

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have rendered a detainee to comply with their representations to us . . . If you're asking me, 'Does a country always comply?' I don't have an answer to that."

The answer is no. Binyam Mohamed's case is apparently the tip of the iceberg. Maher Arar, a Canadian born in Syria, was apprehended by U.S. authorities in New York on September 26, 2002, and transported to Syria, where he was brutally tortured for months. Arar used an Arabic expression to describe the pain he experienced: "you forget the milk that you have been fed from the breast of your mother." The Canadian government later exonerated Arar of any terrorist ties. Thirteen CIA operatives were arrested in Italy for kidnapping an Egyptian, Abu Omar, in Milan and transporting him to Cairo where he was tortured.

Panetta made clear that the CIA will continue to engage in rendition to detain and interrogate terrorism suspects and transfer them to other countries. "If we capture a high-value prisoner," he said, "I believe we have the right to hold that individual temporarily to be able to debrief that individual and make sure that individual is properly incarcerated." No clarification of how long is "temporarily" or what "debrief" would mean.

When Sen. Christopher Bond (R-Mo.) asked about the Clinton administration's use of the CIA to transfer prisoners to countries where they were later executed, Panetta replied, "I think that is an appropriate use of rendition." Jane Mayer, columnist for the *New Yorker*, has documented numerous instances of extraordinary rendition during the Clinton administration, including cases in which suspects were executed in the country to which the United States had rendered them. Once when Richard Clarke, President Clinton's chief counter-terrorism adviser on the National Security Council, "proposed a snatch." Vice-President Al Gore said, "That's a no-brainer. Of course it's a violation of international law, that's why it's a covert action. The guy is a terrorist. Go grab his ass."

There is a slippery slope between ordinary rendition and extraordinary rendition. "Rendition has to end," Michael Ratner, President of the Center for Constitutional Rights, told Amy Goodman on *Democracy Now!* "Rendition is a violation of sovereignty. It's a kidnapping. It's force and violence." Ratner queried whether Cuba could enter the United States and take Luis Posada, the man responsible for blowing up a commercial Cuban airline in 1976 and killing 73 people. Or whether the United States could go down to Cuba and kidnap Assata Shakur, who escaped a murder charge in New Jersey.

Moreover, "renditions for the most part weren't very productive," a former CIA official told the *Los Angeles Times*. After a prisoner was turned over to authorities in Egypt, Jordan, or another country, the CIA had very little influence over how prisoners were treated and whether they were ultimately released.

The U.S. government should disclose the identities, fate, and current whereabouts of all persons detained by the CIA or rendered to foreign custody by the CIA since 2001. Those who ordered renditions should be prosecuted. And the special task force should recommend, and Obama should agree to, an end to all renditions.

This Article first appeared in *Jurist*.

KUDOS, KUDOS, KUDOS!

Kudos to **Kurt Hermansen** and **Heather Beugen** on their recent hung jury in a full confession, marijuana border-bust trial in federal court. Nine jurors voted solidly for guilt on both counts (importation and possession with intent to distribute). Three jurors voted solidly not guilty on both counts based on a duress defense. After confirming the jurors were hopelessly deadlocked, the court declared a mistrial. The client testified and the jury was instructed that the defendant had to prove duress by a preponderance of the evidence. Yet, the first jury note from the personal-trainer foreperson was whether the government had to disprove duress beyond a reasonable doubt. The court quickly disabused them of that notion, while preserving the defense's constitutional objection. Kurt's client has been a legal permanent residence since 1984 and will hopefully get a plea offer that will give him a fighting chance in immigration removal proceedings. If not, a retrial will be in the works with more proof from the defense targeted to address the jurors' concerns, which they expressed after the mistrial was declared. Some of the guilty-voting jurors wanted the defense to provide them with a video of the client showing he was acting under duress at the border to combat the government's DVD of the client's supposedly calm confession. Notably, the packaging material was very heavy. The gross weight was 78 kilograms; however, the net weight (after removing the packaging) was 48 kilograms. This shows that demanding the DEA7 report is a minimum before stipulating to quantity. Great job Kurt and Heather!

Congratulations to **Richard Katzman** for his recent not guilty in a DUI case in Vista. Richard stipulated at trial that IF the client was driving he was under the influence. Client was found at the scene of an accident in a residential neighborhood and told cops his "friend" was driving and fled the scene. Neighbors did not see anyone else, and client could not give a lot of information about his "friend". The evidence took less than a day; however, the jury was out for an entire day. After the not guilty verdict, jurors told Richard that there was not enough evidence for DA to overcome reasonable doubt, but client lucky and should change his ways, to which Richard replied he already has.

SPECIAL KUDO!

Cheers to **Chris Plourd** for his remarkable work on a post-conviction Bitemark case that he has been working on with the University of Wisconsin Law School Innocence Project for the past four years. The DA in Milwaukee, WI, on the eve of the PCR hearing for a new trial (scheduled for the week of February 8th) caved in and is now agreeing to the grant of a new trial and the defendant's immediate release. The DA states it is unlikely the case will ever go back to trial. The defendant in this case, Robert Lee Stinson, has been incarcerated since his arrest in 1984. His conviction in 1985 resulted in the landmark Bitemark legal opinion: *Wisconsin v. Robert Lee Stinson* (1986) 134 Wis. 2d. 224; 397 N. W.2d 136. The Stinson decision was one of the key cases that put Bitemark evidence on the map of United States jurisprudence as a valid type of forensic identity evidence. As one expert told Chris, it was the "Crown Jewel" of legal opinions that forensic odontologists pointed to as validation of Bitemark evidence as an approved Science.

The reality is that Robert Stinson was wrongfully convicted by Bitemark evidence. A recent re-examination of the evidence excluded him as the person who killed the victim. DNA evidence from presumed saliva on the victims clothing excluded Stinson. The unknown DNA is now being investigated to see if the true killer can be identified. The case history reads like many horror stories for the wrongfully convicted. Seventy-three year-old Ione Cychosz had been a neighbor of 18 year-old Stinson. Cychosz was found dead in a back yard near were she lived. Her body was allegedly bitten a number of times in the course of a vicious assault that killed her. Mr. Stinson consistently maintained his innocence for the past 24+ years.

At Stinson's 1985 jury trial, Dr. Raymond Rawson (this is the same expert who convicted Ray Krone twice before DNA exonerated him) and Dr. L. Thomas Johnson each testified for the State. Each ABFO Board Certified odontologist stated under oath that he was sure that the Bitemarks had come from Robert Lee Stinson. Dr. Johnson testified that the bites "would have to have been made by Robert Lee Stinson," and, when asked how sure he was of this conclusion, Dr. Johnson stated that he had "zero margin for error." Dr. Johnson further stated that his conclusions were "...to a reasonable degree of scientific and dental certainty". Dr. Rawson testified that: "It was an overwhelming case..." Dr. Rawson also opined: That this was an "exceptional case"; that: "there was no question that there was a match to a reasonable scientific certainty." Each odontologist issued a pre-trial report making similar statements of certainty. Johnson's report: "it is also my professional opinion to a reasonable degree of scientific certainty, that the teeth of Robert Lee Stinson would be expected to produce bite patterns identical to those which I examined and recorded in this extensive and exhaustive analysis." Rawson: "in my opinion beyond any reasonable doubt..."

In October of 1986, Stinson's direct appeal of his first degree murder conviction was denied. (*State of Wisconsin v. Robert Lee Stinson* (1986) 134 Wis.2d 224; 397 N.W. 2d 136). In his appeal, Stinson argued that the evidence produced at his trial was insufficient to support a jury verdict of first-degree murder. Stinson contended that the State's case was dependent upon only the bitemark evidence (which he argued was inadmissible), and that no direct or other circumstantial evidence linked him to the Cychosz murder. The Wisconsin Appellate Court overruled Stinson's objections, holding: "Arguably, without the admission of the bitemark evidence, the state's case against Stinson may not have been sufficient to convict him. However, since we have already held that the bitemark evidence was admissible, we must review the entire record, including the bitemark testimony, in determining if the evidence was sufficient to support the jury verdict convicting Stinson of first-degree murder". (*Wisconsin v. Stinson*, at 235.)

Thanks to Chris' unrelenting efforts, along with those of the Wisconsin Innocence Project, another innocent individual has been released from custody. **Truth forever on the scaffold wrong forever on the throne, the mighty have fallen.** The University of Wisconsin-Madison's email News Release has been reprinted below.

WISCONSIN INNOCENCE PROJECT ANNOUNCES REVERSAL OF MILWAUKEE MAN'S 985 MURDER CONVICTION

MADISON - Robert Lee Stinson, a Milwaukee man convicted of homicide in 1985, is expected to be released from prison today (Jan. 30, 2009) based on new evidence of his innocence.

Stinson's attorneys with the Wisconsin Innocence Project and Milwaukee County District Attorney Norm Gahn have agreed that the new evidence—consisting of new forensic analysis of bite mark evidence and new exculpatory DNA evidence—requires setting aside Stinson's conviction. Pending the expected approval of the court, Stinson will walk out the doors of New Lisbon Correctional Institution after 23 years of wrongful incarceration.

"We are thrilled that the truth has finally come out," says Byron Lichstein, the lead attorney on the case for the Wisconsin Innocence Project, which is part of the University of Wisconsin Law School. "Lee has been an inspiration to work with, and the evidence supporting his longstanding claim of innocence has always driven our devotion to the case. He has waited a long time for this day."

Stinson was convicted of first-degree intentional homicide in 1985 based almost exclusively on evidence purporting to match bite marks found in the victim's skin to his teeth. Since the time of Stinson's trial, new evidence has come to light that strongly supports his claim of innocence. First, four nationally recognized forensic odontologists – David Senn, Gregory Golden, Denise Murmann, and Norman Sperber, who all volunteered their time -- evaluated the dental evidence and conclusively excluded Stinson as the source of any of the bite marks found on the victim. Furthermore, DNA evidence corroborated these conclusions - male DNA found on the victim's sweater also excluded Stinson.

In 2004, the Milwaukee County District Attorney's Office provided access to the Wisconsin Innocence Project to the physical evidence in the case. This past Wednesday, Assistant District Attorney Norm Gahn announced that his office would not oppose the Wisconsin Innocence Project in asking Judge Patricia McMahon to vacate Stinson's conviction.

Faulty forensic science is one of the main causes of wrongful convictions. Mistaken or misleading forensic science was implicated in more than 60 percent of DNA exonerations nationwide. Bite mark evidence has been called into question in at least five wrongful convictions later overturned by DNA testing and multiple other cases in the United States.

Stinson's long-awaited release will happen thanks to the hard work of several Wisconsin Innocence Project attorneys and law students, along with significant pro bono assistance from renowned California attorney **Christopher J. Plourd**, one of the nation's leading experts on forensic science evidence. The Stinson team is headed by Supervising Attorney Byron Lichstein, who worked with Wisconsin Innocence Project co-directors John Pray and Keith Findley, and law students Michael Atkins, Adam Deitch, Sarah Henery, Brooke Schaefer, and many others.

THE WAR ON DRUGS, AND ULTIMATE DRUGS: WEALTH, POWER AND POLITICAL INFLUENCE
BY GEORGE MICHAEL NEWMAN

"Gangs have been a major contributor to the growth of violent crime in the past decade. Heavily armed with sophisticated weapons, gangs are involved in drug trafficking, murder, witness intimidation, robbery, extortion, and turf battles. Gangs now operate in cities of all sizes, as well as suburban communities throughout the United States; gang violence is no longer limited to major cities."[1]

Since January, 2007, more murders were committed in Mexico than the total number of casualties suffered by U.S. forces in the Iraq War. The deaths were attributed primarily to turf wars, as former competitors and upstarts in the lucrative trans-border drug trade strove to gain control over the remnants of the now-fractured *Arellano Felix Organization*'s ("AFO") rich drug smuggling empire, wrought by the killing and arrest of many of the cartel's dominant family members and minions.

In the latter portion of the 1970s, an "arms race" and virtual all-out war erupted amongst South Central Los Angeles gang sets, which heretofore had fought one another with fists, knives, and usually poor quality firearms. With *South Central* as its epicenter, within a decade the eruption, fueled by the volcanic merchandising of *Crack* cocaine and buoyed by the arms which drug fortunes enabled, had spread through cities across the nation to Florida, merging into the equally violent cocaine wars that had been fought between the established Cuban crime/drug lords resisting incursion by South American entrepreneurial drug smugglers and Jamaican *Posses*.

The eastward expansion would boomerang back to the west coast in the late 1980s, as the U.S. government initiated a crackdown in the southeast. Lucrative routes via airplane, intermediate islands and sea lanes were shifted to the land bridge represented by Mexico; in reality, simply a revival of smuggling routes of sixty years earlier, during the era of alcohol *Prohibition* circa the 1920s. Midway between the two eras, heroin laboratories had begun to flourish in Mexico subsequent to the French chemists who had perfected the art of creating the drug being driven from their bases in Southeast Asia and the Middle East as the French colonial empires crumbled. As the chemists established their somewhat less-sophisticated laboratories in Mexico, their refining capabilities decreased, causing a shift from *China White* heroin to *Mexican Brown* heroin filtering along generally the same routes into the streets of the U.S.

By the 1980s, the tidal wave of drugs surging through the nation and the carnage wrought within the competition also mirrored, on a macro scale, those then-more-isolated gangster wars fueled by the enormous profits enabled by the Eighth Amendment's, and *Volsted Act*'s, 1919 *Prohibition* enacted across the U.S. (effectively, 1920-33). In spite of the numerous incarnations meant to stem this flow, seen in one perspective as initiating circa 1972 with the *Controlled Substance Act* ("CSA") and in the morphing of the *Bureau of Narcotics and Dangerous Drug*s into the *Drug Enforcement Administration* ("DEA") in 1973 representing the *War on Drug*s, the tsunami-like cycle was to become a stationary hurricane, wreaking torment without abatement; fueled by the profits illicit enterprises engender.

Yet another unintended consequence of both Prohibition and the CSA involved methamphetamine. First developed from its precursor, amphetamine, in Japan in 1919, it and amphetamine were utilized as intoxicants during Prohibition. Commercially available until the time of the CSA, "meth" then became the stock of trade for independent groups; it entered "popular culture" in the 1960s as *Crank*, reputedly owing to it being ferried by outlaw motorcycle cliques in the crankcases of their motorcycles. Purportedly, around 1966, a chemist associated with outlaw biker organizations taught the methods to manufacture the chemical, and it rode into history akin to the thunder of a Harley.

Ever-tightening regulations of the chief ingredients ephedrine and pseudoephedrine, while minimally causing a reduction in the ability to manufacture the drug in the U.S., simply pushed the profit potential into Mexico, where the laboratories capable of mass quantities could manufacture the drug and the supplies needed to do so were readily available, after which it was simply ferried along with other contraband into the U.S.

The specter of drug abuse in the U.S. generally was first addressed in 1876, when opium was outlawed in San Francisco, California, and Virginia City, Nevada; however, the thrust was largely meant to impact the growing population of Chinese laborers emigrating to the U.S. and providing cheap labor in industries such as railroads and mining. In spite of the fact that more than fifty percent of the opium addicts were white women who bought the then-legal drug, not unlike the cloistered middle class abuses of prescription drugs in the 1950s/60s, the laws were enabled by sensationalized stories of "horrifying opium dens where yellow fiends forced unsuspecting white women to become enslaved to the mischievous drug."[2] In truth, it is estimated that by the late 1800s, eighty-five percent of the nation was addicted to one form or another of opiate derivatives.

Generally, the first recognized drug epidemic occurred in the U.S. subsequent to the Civil War (1861-65), known as the *Army Disease*. Owing to the horrific carnage of that conflict, within which medical remedies largely relied upon a knife and saw, the recently synthesized morphine combined with the also recently invented syringe seemingly offered a miracle relief to pain and suffering.

During the last half of the 1800s, heroin and cocaine, too, were legal; heroin was advertised through venues such as Sears/Roebuck as a cough suppressant, ideal for minimizing the effects of then-rampant tuberculosis, and even as a sedative for colicky children; cocaine was initially deemed a bountiful means of interdicting alcohol and morphine addiction.

[1] Urban Street Gang Enforcement.; Series: Monograph; Author: Bureau of Justice Assistance; Published: August 1999.

[2] Heroin: Humberto Fernandez.

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By the 1900s, addiction had become such a social blight that in 1914 the federal Harrison Act established that such substances were to be dispensed only by a physician. It was a law based upon taxation, a premise which would exist in one incarnation or another until the '70s. An interesting aside to the law, and a harbinger of the future, is seen in the fact that the federal penitentiary at Leavenworth, Kansas, which was implemented in 1906, was, by 1923, populated more than fifty percent by those incarcerated for drug related crimes.

Marijuana, interestingly, had been touted at the 1876 New York World's Fair, along with its derivative hashish. Available to the less affluent, particularly during Prohibition, and used universally in poor people's medical remedies, it was to run afoul of some of history's great moguls, newspaperman William Randolph Hearst and chemical giant Lamont DuPont. Hearst reputedly developed an enmity toward Mexicans owing to Doroteo Arango (*Poncho Villa*) purportedly having at one time usurped thousands of acres of his timber land as Villa's armies gained control of Northern Mexico where Hearst had such holdings. Additionally, Hearst and Dupont had reportedly entered into a lucrative merger which might have been threatened by the farming of the hemp plant, a once-heavily-subsidized commodity.

Here again, buoyed by the threat to small farmers by the use of cheap Mexican immigrant labor by farming conglomerates, insecurities were enflamed by pronunciations akin to: "There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos, and entertainers. Their Satanic music, jazz, and swing, result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers, and any others."[3]

In 1930, Harry J. Ainslinger, nephew-in-law to Lammont DuPont's banker, Andrew Mellon, was given control of the newly formed *Federal Bureau of Narcotics*, precursor to the Bureau of Narcotics and Dangerous Drugs. He would help shepherd in the 1937 *Marijuana Tax Act*, segueing upon 1936's infamous film, *Refer Madness*. The film, however, targeted largely middle-class White youth, who, in the halcyon euphoria of the 1950s would form the generation which embraced the genre depicted in the '50s movie *Rebel Without a Cause*, setting the stage for the era of license which became "the '60s".

Radio, movies, and even drive-in theaters largely became part of the American fabric in the 1920s, just in time to glamorize the excess of the infamous gangsters of Prohibition, and the indulgences and opulence of the heretofore marginalized immigrant communities, as embodied by Al Capone. Capone, as did many others, recognized the need for a profit substitute as the end of Prohibition loomed. The obvious substitute became drugs; Capone was among the early pioneers of the establishment of a French heroin connection. As it had been with the fact of alcohol's prohibition enabling stratospheric profiteering, over time the substitute became equally lucrative as successive governments enabled profiteering by effectively and more stringently prohibiting the intoxicating, seemingly liberating, substances.

"Although the subculture of the professional thief depicted in Dickens, Melville and Victor Hugo was first eroded by Prohibition's organized crime and their turf wars, it was destroyed by drugs and the drug underworld."[4]

And while politicians utilized enflamed rhetoric to further political and power positioning agendas, the lessons of the '20s seemingly went unheeded; particularly the fact that upon Prohibition's repeal the national crime rate dropped by roughly two-thirds. In fact, Prohibition was repealed by the *First Amendment* owing directly to the fact that criminal enterprises were growing more powerful than the federal government, in both arms and the buying-off of politicians. Society, too, lost the lesson of the past, in the form of "entertainment" media's continuing glamorization of crime's excesses.

Marginalized populations heeded the mantra, "Respect is something your dad can't buy for you"[5], and the most available route to glamour and respect was the lucre of modern prohibition's commodity.

Gestating in the backwater that *South Central* had become, the hurricane found fuel within the umbrella of politics, when, in the late 1970s as a result of the civil war in Nicaragua, tons of cocaine was routed into the U.S.; evidence exists demonstrating that those who delved in such shipments were doing so with U.S. law enforcement sanction; at a minimum owing to a "blind eye".

By fate's happenstance, a young entrepreneur encountered a major conduit for the massive, west coast cocaine infusion. Ricky Donnell Ross, AKA *Freeway*, became a community distribution point for the cocaine of Nicaraguan drug lords Norwin Meneses Cantarero and Danilo Blandon, and had roots in the then-burgeoning *7/4 Crips*; and Ross had learned of the then-rare cocaine derivative, Crack.

Within three years, staggering amounts of Crack inundated first *South Central*, then greater L.A.; then, skipped across the U.S. landing in metropolitan areas in its traverse. With it went the empowerment huge amounts of cash endowed, and the lust for demonstrated excesses. No longer were knives and trash guns needed; sophisticated weaponry in the form of automatic rifles, even explosives, were just a handful of cash away.

Throughout the 1980s, the significant amounts of street corner cash was not missed by the dominant cliques associated with Southern California gangs; by 1993, one among them had begun to secure dominance in the drug dealing arena. After all, unlike Blacks and Whites and even Asians in the U.S., generally Latinos,

[3] The 1st Drug Czar: http://www.heartbone.com/no_thugs/hja.htm.

[4] Education of a Felon: Edward Bunker.

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SDCBA PRESIDENT HEATHER ROSING'S RESPONSE TO THE NOVEMBER 2008 PRESIDENT'S COLUMN

SAN DIEGO COUNTY BAR ASSOCIATION

February 3, 2009

RECEIVED
FEB 04 2009

Michael L. Crowley, Esq.
550 West "C" Street, Suite 1960
San Diego, CA 92101

Re: **SDCBA Private Conflicts Counsel (PCC) Program**

Dear Mike:

As an initial matter, I want to thank you, on behalf of the SDCBA, for your selfless work on the PCC Advisory Committee (PCCAC). At the meetings I attended, I observed not only your dedication to our criminal justice system and the rights of the defendants, but your strong and effective leadership within the Committee.

I write this letter to discuss your article in the November 2008 CDBA-CDLC Newsletter. After reading the article, I felt it was incumbent upon me, as President of the organization last year, to give you some additional facts, and an additional perspective.

First, there is an implication in your article that the SDCBA, and its Board of Directors, did not devote enough time in 2008 in trying to enter into a new contract with the County, and rather expended its time and resources on the Civility, Integrity & Professionalism Campaign. To the contrary, the Board of Directors spent anywhere from 20 minutes to several hours at *every board meeting* discussing and carefully considering issues pertaining to the PCC program. In addition, approximately one-half of our out-of-town Board retreat in March was devoted to a consideration of PCC issues. On top of all that, I called two special Board meetings during the year, on an emergency basis, to discuss and vote upon PCC issues that arose at the last moment. Finally, in addition, we required all available members of the Board to attend the special SDCBA-PCCAC retreat on March 1, 2008. The entire Board spent, in the aggregate, at these meetings, probably close to 40 hours on PCC issues. This contrasts with the 30 minutes of time that the Board, as a whole, spent addressing issues pertaining to the Civility, Integrity & Professionalism Campaign throughout the course of the year.

In addition to the consideration of the program by the entire Board, numerous experienced and dedicated SDCBA leaders devoted over a thousand hours in 2008 negotiating the contract, working with the County, working with the PCCAC, and generally trying to keep the program within the organization. These included, but are not limited to, myself, Jill Burkhardt, Howard Wayne, Jerri Malana, Tim Richardson, and Pat Hosey, on the volunteer side, and numerous senior staff members on the staff side. I can say with great confidence that, as President of the organization, I spent at least five times more of my time on PCC issues than any other program or issue of the organization.

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February 3, 2009
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I will always remember the extremely well-written e-mail you sent in February 2008 in anticipation of the SDCBA-PCCAC retreat, discussing why it was important for the SDCBA to host the PCC program. I can tell you that we considered your e-mail, and the points in it, at virtually every Board meeting, and that our Board was committed to maintaining the program within the Bar Association, if at all possible. We understood the importance of the program to the justice system, the criminal defendants, our panel attorneys, and the court. **It was for this reason, and no other reason, that we spent such an incredible amount of time thoughtfully discussing and considering the issues.**

In your article, you also made reference to the Bar Association ultimately not agreeing to the program because of the risk involved. I have two points to make in response to that. First, the proposal that was submitted to the County was created through a joint collaboration of the Board of Directors' appointed representatives, and the PCCAC leaders. Except for one point, which had nothing to do with the cost of the program, the contract submitted by the SDCBA to the County was agreed upon by the organization and the PCCAC. At no time after its submission in May 2008 did the County present a counteroffer. Rather, it was a process of us sharing information, and more information, with the County, up until the time that it put the matter out for another bid in September 2008. It was shortly thereafter that we were informed they were taking the program in-house. In an effort to change the County's mind, I personally enlisted Judge Irving's assistance in contacting the Board of Supervisors (BOS), met with Supervisor Horn and his staff to present our desire to continue administering the program, and wrote letters to every member on the BOS asking them to reconsider.

Second, in your article, you referenced the issue of the financial risk of a contract to the Bar Association. Simply put, the Board of Directors had a fiduciary obligation to consider the financial risk to the organization when entering into a contract with the County. While, for the 1999 contract, and the first part of the September 2002 contract, there was money remaining after satisfying all of the obligations, this, as you know, changed. During the final year of the 2002 contract (July 1, 2007-June 30, 2008), the difference between the amount paid by the County to administer the program and pay the attorneys and investigators, and the amount received, was in the range of seven figures. This shortfall was a serious matter that was considered by both the Bar Association and PCCAC leadership in putting together the May 2008 proposal. Basically, the pricing structure we had originally agreed to in 2002 no longer made any sense for the organization. While, due to the amounts of money saved from other closed years, the Bar Association and the PCC could "weather" the rather severe deficiency for a short period of time, this could not continue for long without completely depleting the PCC accounts, and putting the Bar Association in serious jeopardy. *Operating the PCC program for even a few months without sufficient County funding could literally deplete the SDCBA's general membership reserves.* It therefore was absolutely necessary that the County pay, at the minimum, the amount of money that it actually costs to run the program. As you

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February 3, 2009
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know, the County simply had not budgeted enough money to allow that to happen, thus leading to their decision to take the program in-house.

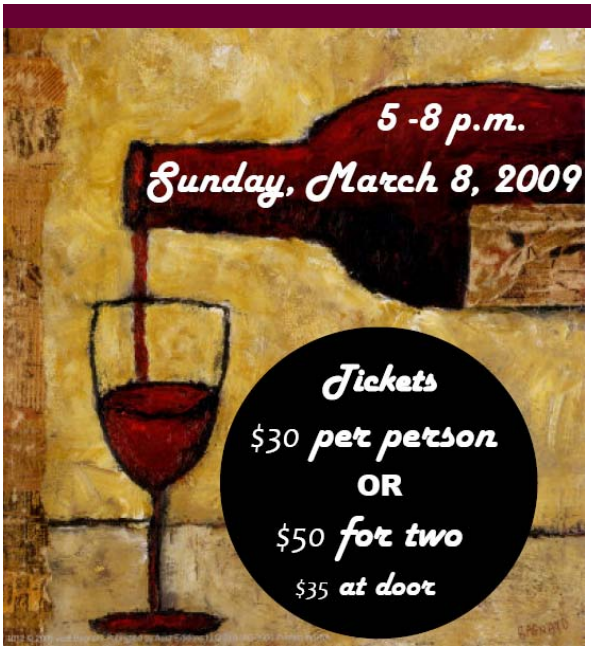
Again, I write this letter for no other reason than to correct what I believe are inaccuracies in your article. It is important to me and our entire Board of Directors, that you, as well as the other members of the PCCAC and the criminal defense community, know that the SDCBA fought to maintain the program, while still being aware of and considering its fiduciary responsibility to be fiscally responsible to its almost 10,000 members.

Thank you again for your leadership and, as I have already conveyed to Bill Daley and Alex Landon, the SDCBA looks forward to working with the criminal defense community on other projects in the future.

Heather Rosing /lr

Heather L. Rosing
SDCBA Immediate Past President

cc: Jerrilyn Malana, Esq.



- You are cordially invited -

To attend a
Wine Tasting
Fundraiser
Hosted by
The Lawyers Club of
San Diego
at
WineStyles
928 Orange Ave., Coronado
http://www.winestyles.net/coronado
Enjoy a Six Wine Tasting
Hors d'oeuvres & Music

All proceeds will benefit upcoming Women's Resource Center Project "Green Thumb Fun," in which volunteers will plant a garden and revamp the playroom of the Women's Resource Center domestic violence shelter in Oceanside, a facility helping local women and children transition to permanent, non-violent living situations.
www.womensresourcecenter-wrc.org/

For more information and to purchase tickets please contact project coordinator Dana Grimes at dgrimes@grimesandwarwick.com

MEMBERSHIP PROFILE—REBECCA JONES
BY STACEY A. KARTCHNER

Rebecca "Becky" P. Jones moved to San Diego sixteen (16) years ago. She is originally from Center Valley, Pennsylvania. Becky graduated from Penn State, majoring in journalism and music. She then went on to obtain her law degree from Georgetown.

Prior to becoming a lawyer, Becky was an editor and reporter at three East Coast newspapers. She also worked briefly in book publishing. When asked why she decided to become a lawyer, she stated:

Rebecca Jones

> I loved "The Brethren" and the legal analysis in it and thought it would be great to make those arguments. Maybe even more importantly, I was getting tired of working for some very bad bosses in the newspaper business and couldn't afford to buy my own paper but knew I could be my own boss if I were a lawyer. I also wanted to move into a career that could make a difference in people's lives. Although newspapers are important to our society, I was spending my nights writing headlines about sewer board and school board meetings and thought I could find more meaningful work in the law. Now folks I used to work with, who have been at my last paper for 25 years, are being laid off.

After taking the California bar exam, Becky went to work at Federal Defenders. Three (3) years later, she joined the firm of Semel & Feldman. When that firm dissolved, she continued to work for Steve Feldman. After seven (7) glorious years, Becky decided that she wanted to hang up her own shingle. She has been practicing alone since 2002.

Becky is very active. In addition to running her own practice, she stays busy chasing her two (2) children (ages 3 and 8) around. She also loves to read and play field hockey (from which, she says, "I refuse to retire and which gives me some of the biggest bruises you've ever seen"). Her favorite vacation spot is Hawaii as she thinks "the ocean is beyond incredible."

Notwithstanding the above, Becky still finds time to teach Sunday school at First Unitarian Universalist Church, and to serve as the Vice-President of the Criminal Defense Lawyer's Club, and as the Chair of the Nominating Committee for the ACLU of San Diego and Imperial Counties.

LAWYER BECKY MOST ADMIRES: "I most admire the lawyers – public defenders and private counsel – who fight like the dickens for clients who can't pay them, and the courageous lawyers, like Steve Feldman and Bob Boyce in the Westerfield trial (Laura Schaefer and I didn't get much, if any, of the negative publicity), who risk public reproach to ensure that even much-despised clients get quality representation."

NON-LAWYER BECKY MOST ADMIRES: "Martin Luther King Jr., for obvious reasons, and Jimmy Carter, for using his post-Presidential time to work hard on a wide variety of issues, including housing justice (Habitat for Humanity), peace (Israeli-Palestinian conflict), and health problems in Africa."

RECENT NOTEWORTHY VICTORY: "I got the gang enhancement reversed in a Sacramento case where my client, who is 25 and said he had left the gang, got life for being involved in a shoot-out that clearly arose from a personal dispute between his brother and another Hmong young man. The victory means my client will be sentenced to five years instead of life."

PROUDEST CAREER MOMENT: "Most of my pride in being a criminal defense lawyer comes from working hard and giving my clients the respect, dignity, and professional services that most other members of society – including, unfortunately, some of their trial lawyers – deny them. If I were going to pick a single moment that makes me proud, I think I would point to helping Steve Feldman get a not-guilty verdict in a rape case, where the client was a single dad who was accused of raping his live-in nanny every night for two months. If we had lost, he would have been deported and would have lost a life he worked very hard to build here in the U.S. We litigated tons of evidentiary issues, and won many of them, including getting some very helpful psychiatric records from the juvenile court about the complaining witness's delusions. Joan Bradley and I also went to Puebla, Mexico, and found a great witness who seriously impeached the complaining witness on other matters. The client threw a wonderful party afterward, complete with home-made mole."

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FAVORITE QUOTE: "Injustice anywhere is a threat to justice everywhere."

FUNNIEST THING A JUROR HAS SAID TO BECKY: "Some idiotic comments about the quality of my clothing after a felony drug trial. Honestly, is that what they were paying attention to?"

MOST OUTRAGEOUS CHARGE BECKY HAS HAD TO DEFEND SOMEONE FOR: "I can't recall all the details now, but remember doing an evidentiary hearing before Judge Papas years ago to prove my client was bringing pumpkin seeds (semillas), not pot, across the border."

FAVORITE OPINION: "Many of Judge Kozinski's opinions make for some of the most entertaining reading I've had to do as a lawyer. The opinion that makes me cry, and helped me marry my wife, is In re Marriage Cases, by the Cal Supremes."

LEAST FAVORITE OPINION: "There are so many – *Korematsu v. U.S.* sticks out, affirming the right of our government to intern Japanese Americans during World War II."

ADVICE TO COLLEAGUES: "The greatest service we can do for our clients is to be respectful and treat them with dignity. Everyone else is treating them like dirt, because of their charges, their race, their poverty, their nationality. They look to us to treat them like human beings who deserve a fair shot."

THE WAR ON DRUGS, AND ULTIMATE DRUGS . . . CON'T FROM PAGE 9

especially those of Mexican heritage owing to the proximity of Mexico, had a virtual umbilical-cord-like supply connection.

This connection notwithstanding, all segments of those seeking the impressive wealth proffered by the illicit drug trade strive for dominance, synergistically buoyed by the enormous profiteering -enabled by the current state of governmental *and societal* approach to "recreational" drugs.

An interesting and equally relevant aside related to the Mexico -to-U.S. drug commerce is the fact that while drugs flow from south-to-north, the firearms used to bolster the strong arm of the drug runners flow from north-to-south. Unscrupulous firearms dealers reap their own fortunes from the illegal sales of guns into Mexico. As it has been with drugs, the growing reaction is to inflict restrictive, generic laws upon gun ownership. The "downstream" effect of this *reaction*, as opposed to an appropriate *response*, has been to empower the criminal element by denuding the right of the innocent, law-abiding citizen of his/her right to own arms and defend themselves, *and* the Constitution's *Second Amendment*.

With respect to both ingredients of this criminal constellation, drugs and guns/violence, the standard reaction, which flies in the face of the reality that "Those who do not remember the past are doomed to repeat it", continues to be to chase the tail of the viper while failing to address the venomous head. Then, feigning wonderment at the serpent's ability to turn back on itself with venomous strikes.

The War on Drugs as it has been fought, rather than impacting the scourge with abatement, has instead fueled the holocaust, and will continue to do so. In spite of often exemplary actions, and even heroism, on the part of agents; rendered fruitless on a predictable and cyclical schedule.

In tandem, the outlawing of gun ownership has begun to involve criminalization of otherwise "ordinary" citizens, and increased crime by impeding a law-abiding citizen's ability to own a gun for defense; a fact which criminals capitalize upon. And, publicity afforded the few mentally infirm individuals who run amuck with a firearm ensures that others afflicted with such maladies will follow along the same path to infamy.

Mexican cities, especially along the border, have been breached by the drug violence, and the seeds for replication are already in place in the U.S.; recently Mexico's courageous reporter *Vicente Calderon* revealed that many of the Mexican "puppet masters" controlling the Mexican drug cartels actually do so from within enclaves in the U.S.

As in the '20s Prohibition, wherein the gangland leadership needed logistical/support minions and found them in street gangs, cadres from among the lost have begun to form the nucleus of *narco* armies within the U.S.

This, ironically, includes literally thousands of combat-wise veterans of wars in El Salvador, Honduras, Guatemala, Nicaragua, and Costa Rica who were actually taught urban guerilla warfare tactics by U.S. forces; which at the time were attempting to bolster anti-communist governments or battle rapacious cartels in those nations. "Veterans", often from all sides of a foreign conflict now populate, often as second class citizens, barrios in the U.S. Distinct examples include members of the now-infamous Mara Salvatrucha, and Mara-13.

Undeniably, no simple solution presents itself in the constellation of indulgence-inflamed drug consumption and hedonistic profiteering. As undeniably, the huge profits assured the purveyors of illicit, illegal contraband guarantees that the current escalation of crime and violence will accelerate unabated, until such time as individual responsibility is embraced in a venue other than simply punitive castigation.

(*Board Certified Criminal Defense Investigator* George Michael Newman, CFE, CCDI, CII has excerpted edited portions of his presentation *Ganging Up: Roots & Routes: A Current of Colossal Synthesis* for this piece. The presentation's focus is neither to demonize nor glamorize the realities of gang culture, but rather to address factually and pragmatically those factors which have brought this phenomenon into existence.)

CRIMINAL DEFENSE NEWSLETTER

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