Police Misconduct and Civil Rights Law Report

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ATTICA-HISTORY MADE AND LESSONS LOST

By Michael E. Deutsch and Dennis Cunningham
who along with Elizabeth Fink, Joseph Heath and Dan Meyers, were the class counsel for the Attica Plaintiffs

Almost 29 years after New York State troopers and prison guards carried out a massive military-style armed assault against defenseless, surrendering prisoners at the Attica state prison, followed by wholesale acts of brutality and torture, a settlement was reached early this year in a class action on behalf of the killed and injured prisoners. The civil rights suit, under 42 U.S.C. Sec. 1983, alleged that those in charge of re-taking the prison yard after five days of rebellion, including the commander of the State Police assault force, the Commissioner of Corrections, the Warden of Attica and his deputy, allowed the prisoners to be wantonly killed, shot, denied medical care and systematically brutalized and tortured after the prison was retaken, in violation of the Eighth Amendment prohibition against cruel and unusual punishment. Thirty-nine people were shot to death by state troopers and prison guards that day, including ten state employees who were held hostage; dozens more were seriously wounded, and almost all the 1280-some prisoners were subject to vicious beatings and other tortures, in what the U.S. Court of Appeals called "an orgy of brutality." *Inmates of Attica v. Rockefeller*, 453 F.2d 12, 15 (2d Cir 1971).

The settlement, in which the State of New York agreed to pay the prisoners and their lawyers a total of 12 million dollars, falls woefully short of fairly compensating them and their families for the loss of lives, limbs, broken bones, and other permanent physical and psychological damage suffered by hundreds of prisoners; nor are the attorneys fees more than minimal payment for the five lawyers who have worked on the case for 25 years. The agreement of the law and order administration of Governor George Pataki, to pay even this relatively meager amount of money, is more a testament to the power of the shocking and overwhelming evidence of systematic constitutional violations—which could be not be denied or covered up when presented to juries, despite decades of delaying tactics and obfuscation by the State and the judiciary—than to any sense of justice or acknowledgment of wrongdoing. Though said to be the largest amount of money ever obtained in a lawsuit on behalf of prisoners, the Attica agreement, like most settlements, specifically excludes acknowledgment of any wrongdoing by any employees of the State of New York. As former New York Times columnist Tom Wicker, who was one of the observers at the negotiations in the prison yard, was moved to point out in a column following the settlement:

> [W]hatever the convention in court settlements, one wonders what harm it would have done the state to admit its nearly 30 year-old guilt... Admitting that a previous administration grievously

Also in this issue...

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erred in its response to the Attica prison uprising might even salve some of the racial wounds the criminal justice system has inflicted and still inflicts upon black Americans. It might ease the psychological hurts suffered by thousands of people who were not even at Attica, but who came disillusioned as a result of it.

Another question raised by the settlement, given the strength of the evidence of official wrongdoing, is why the plaintiffs and their attorneys, after so many years, accepted an agreement which admittedly falls short of providing reasonable compensation for the plaintiff class. The answer lies in the tortured history of the litigation, and the bias in the judicial system, against the Attica inmates and prisoners in general, which dictated the course of the case from its very beginnings.

The Rebellion and Its Aftermath

On September 9, 1971, after months of peaceful efforts to obtain modest improvements in their conditions and treatment—more showers, less pork in the diet, rights of political and religious expression, better working conditions, minimally decent medical care, and freedom from arbitrary punishment and denial of parole—were ignored, a minor incident sparked a spontaneous riot by most of the prisoners at Attica. Parts of the institution, the "D" cellblock and exercise yard, were taken over, and 39 guards and civilian employees were held as hostages. The prisoners selected among themselves a group of negotiators, issued a list of 33 demands and called for a diverse group of outside "observers," including elected officials, journalists, and various political and prison reform activists, to assist in the discussions with prison officials. Negotiations took place over several days, but the Commissioner of Corrections broke them off when the prisoners overwhelmingly insisted on the replacement of the vicious warden, Vincent Mancusi, and amnesty for acts committed during the revolt. These included several alleged assaults on guards which took place in the beginning moments of the riot; one of the guards died from such injuries on the third day, making the issue of amnesty particularly urgent to all the prisoners.

The observers urged then-Governor Nelson Rockefeller to come to Attica, to help break the deadlock, and assure the prisoners of protection against wholesale physical and judicial reprisals. Concerned about his law and order image as he angled for another try at the presidency, Rockefeller refused, and instead ordered an armed assault by the assembled force of fuming state troopers and prison guards, all white, who had been fed calculated false rumors of prisoner atrocities against the hostages, and were visibly itching to vent their powerful and unrestrained anger and racial hatred against the prisoners.

The assault was carried out in the rainy morning of September 13, 1971, beginning with the dropping of weapons-grade "CS" tear gas, supplied by the U.S. Army, into the yard in a great cloud which forced the prisoners to the ground, gasping for breath and unable to see. As the gas fell, an announcement was made repeatedly by loudspeaker, directing the prisoners to put their hands on their heads and surrender, and promising that they would not be harmed. Despite this assurance and the lack of any resistance by the prisoners, a frenzied attack force indiscriminately fired over 4000 live rounds down into D yard over a period of about six minutes, while the hundreds of defenseless men huddled in terror on the muddy ground; when the shooting stopped, 39 men including ten hostages lay dead, more than 80 others were wounded, and the violence had just begun.

Although both injured and uninjured hostages were immediately evacuated in separate ambulances, the warden and other officials had made no provisions for emergency medical care for injured prisoners, with the result that many of them bled to death there in the yard; no prisoners were allowed to leave the prison for hospitals for more than four hours after the assault. Despite his prior knowledge that massive lethal fire power would be unleashed against the prisoners, the warden first called for outside medical help, to the chief surgeon of a hospital more than 40 miles away in Buffalo, an hour after the assault was concluded and bodies lay strewn all across D yard; then he said only quite vaguely that medical care was needed at the prison. Thus it was only after the doctor traveled all the way to Attica and saw the magnitude of the carnage that he began to summon the necessary medical assistance. Then, even after doctors were present, many of those injured were dumped off stretchers, beaten in the prison hospital while waiting to see a doctor and otherwise denied or kept from care; some doctors were ordered by guards and troopers not to help wounded prisoners, and threatened with bodily harm if they did. One man shot in the leg was kept hidden from the doctors in a closet basement for two days, until gangrene developed in his leg and it had to be amputated.

Once the prison was retaken, the wounded and terrified prisoners were beaten from D yard into A yard, stripped of their clothes, eyeglasses, dentures, etc., and made to crawl in the mud. Prisoners who were members of the negotiating or security teams were marked with large X's on their backs and separated for special isolation and additional beatings and torture. Frank "Big Black" Smith, who as elected chief of the prisoners' security force had protected the hostages, state negotiators and outside observers, was spreadeagled naked on a steel table in front of the other prisoners as they waited to be herded into the cellblock, and tortured for hours with lit cigarettes and hot shell casings. A football was placed on his throat, to be held with his chin, and he was told if the football dropped he would be killed; then he was struck repeatedly, especially in his testicles. After witnessing this, the other prisoners were made to run bare-

foot, limp or crawl along a floor covered with blood, water and broken glass, through a long tunnel from the yard to the cellblock, while being beaten by a gauntlet of dozens of officers using clubs, axe-handles and rifle butts; then they were beaten some more as they ran up flights of stairs and were herded four and five together into one-man cells, where they were held without food or clothing for the next several days. When they were all inside, Big Black was dragged off the table and taken to a room off the prison hospital, where guards placed a shotgun between his eyes while repeatedly threatening to kill him. They also threatened to beat him unmercifully with clubs.

The X-marked supposed leaders were beaten and driven through an additional gauntlet and placed in an isolation unit, where they were terrorized over the next days with guns pointed through the bars of their cells and repeated death threats. These prisoners were held in isolation for over a year, awaiting scapegoat indictments. Despite the prisoners' and observers' specific, articulated fear that acts of revenge and reprisals would take place after the prison was retaken, the defendants and other prison officials took no steps to prevent such reprisals, and in fact condoned and encouraged them, often in person. To cover up and justify the murderous nature of the assault, the defendants and other state officials told the press and the world that the hostages had died by having their throats cut by prisoners. Even after the county coroner announced that all the deaths were from gunshot wounds, the false rumors of inmate killings, including the castration of one hostage, continued to be spread by prison guards

Afterwards, ignoring the overwhelming evidence of official wrongdoing, a special grand jury largely composed of neighbors of the Attica guards was convened by the head of the state's "Organized Crime Task Force," whose mandate was suspended so he could investigate and prosecute "all crimes" committed at Attica. Fifteen months after the assault, 62 alleged "ring leaders" among the prisoners were indicted on a total of more than 1400 felony counts, about half of them carrying life sentences. No officers or state officials were charged until three years later, when one was charged with "reckless endangerment," for firing his shotgun ten times into the yard filled with unarmed men. Lawyers and supporters from across the country came to the aid of the indicted Attica Brothers, and a movement was built calling for the indictments to be dismissed and the real criminals to be jailed. After years of pre-trial litigation and several trials, a lawyer on the special prosecutor's staff publicly exposed the one-sided, prejudicial character of the 'special investigation', forcing then-Governor Hugh Carey to grant amnesty to all the indicted prisoners and pardon two who had been convicted, calling the prosecution, "The darkest day in the history of New York juris prudence."

The Civil Rights Suit

The civil suit, *Akil Al-jundi et al., v. Nelson Rockefeller, et. al.,* was filed in the Southern District of New York at New York City in September, 1974. A district judge who was a personal friend of Governor Rockefeller granted the defendants' request to change venue to the Western District of New York in Buffalo, and the case was reassigned to John T. Elfvin, U.S.D.J. Among other claims, plaintiffs charged Major John T. Monahan, the State Police major who planned and led the assault, Commissioner Russell Oswald of the Department of Corrections, Attica Warden Vincent Mancusi and his deputy Karl Pfeil with the infliction of cruel and unusual punishment in the assault, the reprisals, and the deliberate failure and delay in providing medical care. The original lawyers for the prisoners were still immersed in the criminal cases, so a new group of New York City lawyers took up the civil suit at first, but they soon departed, leaving the plaintiffs without representation after the case was transferred to Buffalo. There it languished for seven years—almost four of which the district judge took to rule on the defendants' motions to dismiss—with all but the four above-named defendants and the Estate of Nelson Rockefeller unserved, and no discovery getting done. In 1980, the district court decertified the class ordering the case dismissed if discovery did not commence within 120 days. Attica Brothers Akil Al-Jundi and Big Black contacted

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New York attorney, Liz Fink, who agreed to take over the with the help of other lawyers.

With re-certification, the plaintiffs began a David v. Goliath effort simply to get the case to trial, while the defendants were represented by private lawyers who received millions of dollars in hourly fees over the entire, dragged-out course of the litigation. Thousands and thousands of documents were finally disclosed and had to be reviewed and analyzed, while the district court continued to collude with the defendants' strategy of delay and obfuscation. The court allowed the defendants dilatory years in which to catalogue the documents, and bring separately timed qualified immunity claims, some filed months after deadlines had passed. Ultimately, the district court granted qualified immunity to the Estate of Rockefeller for his decision to order the assault, but denied it to the four other defendants for the assault and the reprisals. These decisions were both affirmed by the Second Circuit. *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir 1989), and *Al-Jundi v. Mancusi*, 926 F.2d (2d Cir. 1991). The class was re-certified and the liability phase of the trial finally began in September, 1991.

The trial began with the judge again exposing his prejudice against the plaintiff-prisoners, picking the first six jurors in less than two hours, while refusing to ask any questions about racial prejudice or bias against prisoners. It was only when plaintiffs' counsel threatened to walk out, arguing that the court was turning the trial into a sham, that he finally asked those questions—whereupon half the venire was excused—and the final panel proved to be bitterly divided between the jurors who were and were not properly screened. After almost four months of testimony and three weeks of deliberation, the unscreened jurors agreed to a compromise verdict against the deputy warden, Karl Pfeil, for failing to prevent the reprisals. The jury was hung as to the state police commander's liability for the assault, and that of the Commissioner and the Warden for the reprisals; they found cruel and unusual punishment in the denial of medical care, but exonerated the Commissioner for causing it, and the court would not allow the medical care claim against the warden to go to the jury.

In the trial itself, the prisoners for the first time put forward the true story of the Attica massacre and its brutal, shocking aftermath. National guard medics, doctors, observers, prisoners and even a state trooper who was part of the assault force and one of the hostages gave testimony in support of the prisoners' claims, many of them weeping on the witness stand as the horror of the event came back to them. Numerous photographs and a ragged videotape established beyond doubt the bizarre, sadistic actions of the officers, stripping and brutalizing the prisoners while lining them up for the gauntlet, and it was established that the deputy warden had been personally present as the vicious routine was being set up. The theory of the class action was that the defendants were responsible as supervisors for permitting and failing to prevent the infliction of cruel and unusual punishment against the prisoners *en masse*, so the finding against the deputy warden logically and legally made him liable to the entire class for the actions of his subordinates after the prison was retaken and under state control. What was left was then for the individual class members each to prove up the damages he suffered. Unfortunately, Attica is *sui generis*, and this would not turn out to be the case.

In the wake of the trial, a long and fruitless side-show developed, in which the State of New York—which, even under the great "liberal" Mario Cuomo, had no good faith desire to resolve the case—engaged the plaintiffs in almost four years of wasted effort in purported settlement discussions, which the State carried on in utter bad faith. At the same time, the defendants refused to appeal the liability verdict, despite the willingness of the court to certify the appeal, and, two years on, began to claim that the jury verdict did not have class-wide effect, so that each plaintiff would have to prove that the deputy warden's actions caused his specific injuries—that is, they essentially demanded retrial of the liability issue, 1280 times. The trial court vacillated, first saying the jury verdict established liability for the entire class, then saying each plaintiff had to show liability to him individually. After the plaintiffs filed two mandamus petitions, the trial court gave up its position of re-trying liability. In the end, it was decided that two representative damage hearings would be held, and judgments obtained, so that an appeal of the liability verdict could finally take place.

These trials took place in the summer of 1997, more than five years after the liability verdict. The first was on behalf of Big Black, who had been so brutally tortured in front of the other prisoners. In it, the court ruled that the issue of liability had already been determined, in 1992, and that the only issue for the jury was whether the unlawful reprisals had included injuries and deprivations of right to Big Black in particular, and, if so, the amount of money damages to be awarded. After hearing graphic and moving testimony showing his incredible pain and terror on that day, and the permanent physical and psychological harm which resulted, a jury largely composed of working people returned an award of four million dollars. A short time later a second jury heard the case of David Brosig, selected as typical of the prisoners who had been subjected to no special brutality, enduring "only" the systematic beatings, the gauntlet in the tunnel, confinement in a crowded cell with no clothing or food, and continuing intimidation and threats. The court again ruled that the liability of the deputy warden was already established, and the jury returned an award of $75,000.

Thus the stage was finally set for resolution of the case and meaningful compensation for the Attica Broth-

ers. Three juries had spoken, and two expressed the view that the prisoners plaintiffs were entitled to substantial payments for their injuries. By that time, of course, many of the brothers had died, including leaders Akil Al-Jundi and Herbert Blyden, two of the main organizers of support for the civil suit over the years; many others were sick or in other dire straits, socially and financially. All eyes now looked to the Second Circuit Court of Appeals, which was well familiar with the horrors inflicted on the prisoners at Attica and the unconscionable delay in bringing the case to a conclusion.

The Appeal and the Settlement

In addition to the issue of the class-wide effect of the liability verdict, which focused on the specific language in the jury verdict form, the other main legal question looming on appeal was the proper standard of liability for supervisors who failed to prevent the use of unnecessary force in a prison setting. The defendants argued that plaintiffs were required to show they had acted with sadistic and malicious intent, as set out in *Whitley v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillan*, 503 U.S. 1 (1992), and that the jury had not been properly instructed. Plaintiffs contended that, since the supervisor was not alleged to have actually used the unlawful force, but, rather, to have permitted and failed to prevent its use by others he was in charge of, the standard is one of deliberate indifference to violations committed by officers he was responsible for, which was what the jury instruction had said.

The case was briefed and finally argued in July 1998, before a courtroom packed with Attica Brothers and their supporters. The oral argument seemed to go well, with the Court questioning whether the defendants had ever even properly objected to the language in the verdict form, but positive projections began to evaporate as month after month went by with no decision. After a full year of silence, it appeared that the Court was not really concerned with the history of delay and denial of justice. The plaintiffs' fears were borne out in August 1999, when the Court reversed the liability verdict and vacated the two damage awards, finding that the language in the verdict form was too ambiguous to establish class-wide liability. *Blyden v. Mancusi*, 186 F.3d 252 (2d Cir 1999). Although the court said, "There is very substantial evidence that following the retaking, some, and perhaps most or even all, of the D yard inmates were the victims of brutal acts of retaliation by prison authorities," 186 F.3d at 257, and, "[T]here is substantial evidence from which a reasonable jury might have concluded that Pfeil's behavior was the proximate cause of all the unconstitutional acts that occurred," *Id.* at 266—and despite the extraordinary strength of the principle, not mentioned at all in the opinion, that every conceivable effort should be made to sustain a jury verdict—the court refused to find the supposed ambiguity in the jury verdict forms to be harmless error.

The Court did accept the plaintiffs' argument that the deliberate indifference standard applied to supervisors for failing to prevent the reprisals:

> The liability of a supervisor under Section 1983 is thus analytically distinct from that of a subordinate who directly caused the unlawful condition or event...Just as prison officials may be liable for their deliberate indifference to protecting inmates from violence at the hands of fellow inmates (citations omitted) they also may be liable for their deliberate indifference to violence by subordinates (citations omitted).

186 F.3d at 263.

The opinion went on, however, to literally sound the death knell for any real chance for the Attica Brothers to ever receive real justice. After 25 years of litigation in reliance on the certification of the class, the appeals court now strongly—and, in the circumstances, perversely—suggested that it had been an abuse of discretion to certify the class, and directed reconsideration of the issue by the district court on remand:

> [I]n hindsight, it is difficult to see how certification of this particular class produced any benefits once settlement attempts failed. With regard to the predominance issue, our discussion of the verdict sheet suggests that the district court's perception of common issues was a vast oversimplification. We cannot claim to have the same familiarity with the issues as the district court, but, even at a glance, the case bristles with individual issues.

186 F.3d at 270.

Thus the court completely disregarded the history and logic of the entire case, as well as plaintiffs' entire theory, that the failure of the supervisors—and specifically the defendant deputy warden—who was placed in charge of the rehousing of the prisoners after the prison was retaken, allowed for and thus caused all of the organized, systematic acts of reprisal suffered by all the affected prisoners in the plaintiff class. Putting it bluntly, construing the different stages, locations and forms of reprisal as raising individual issues, which would preclude class-wide liability against supervisors who permitted the reprisals to take place, was absurd; in truth, it reflected flagrantly result-oriented reasoning, intended to scuttle any chance of success for the plaintiffs. What the opinion suggestes is that the plaintiffs, after almost 30 years—in which the majority had died, and many more become infirm—should start over with individual cases. The Court did mention the possibility that some claims could be consolidated, but, given the history of delay and obstruction by the defense, and the overwhelming disparity of resources between the plaintiffs and their lawyers and the State of New York—let alone the patent 'predominance' of common questions regarding the acts

and omissions of those who supervised the whole event—how could rational minds have concluded that there was any other meaningful way to proceed than by class action? After reading the opinion, one could believe that the Court was uncomfortable, to say the least, with the implication the amount of the two damage verdicts held for the remaining claims of the class as a whole, and was determined to overturn the verdicts regardless of the legal issues.

Throwing a bone to the plaintiffs after devastating their case with its opinion, the court concluded with the following:

> Given the long history of this matter, we direct the district court to give it expedited treatment. We stand ready to exercise our mandamus power should unreasonable delay occur. We respectfully suggest that the Chief Judge of the district court consider assigning this matter to judge best able to expedite its resolution.
>
> We note that the defendants in this case, who are functionally the State of New York, have done all they could—frequently not without the court's acquiescence—to delay resolution. That strategy can no longer be tolerated. The district court should not hesitate to resort to appropriate sanctions to induce defendants to cooperate in promptly resolving this matter.

186 F.3d at 271.

On remand, the case was quickly reassigned to Judge Michael Telesca, former chief judge of the Western District, who enjoys a reputation for getting tough cases resolved. Promising in open court that "this case will settle," he personally set out to convince a reluctant Pataki administration to put money on the table, so he could turn his attention and considerable persuasive powers to twisting the arms of the plaintiffs. When the disappointingly low offer was finally made, he basically told the plaintiffs' attorneys that it was the last and best, and that their refusal could well lead to decertification of the class, potentially hundreds of individual trials and years of delays and appeals. This left plaintiffs and their lawyers with an excruciating decision. Given the manifest willingness of the Court of Appeals to set aside reasonable jury verdicts, despite the overwhelming nature of the evidence; and given the attrition of the plaintiff class by death, and a total lack of resources to continue with years of further litigation, there was little real choice. It was decided that it was better to get some compensation now, however inadequate the amount when measured by the injuries and suffering, and the level of deliberate wrongdoing, rather than rely on an obviously manipulable judicial system to ensure delayed justice at some unknown future date. The commitment, and outrage, which had brought the case this far against all odds had forced the State to make the multi-million dollar offer. Given the climate in 2000, this was a victory for those who had worked so hard for so long.

At a "fairness" hearing in Rochester, in February 2000, plaintiff class members in attendance agreed that the litigation had gone on too long, and that, despite their strong belief that the amount of money being paid was not nearly enough, it was time to end it. Expressing the feelings of many of the brothers, Big Black told the court and the courtroom full of plaintiffs and supporters that, "We did not go into D yard on September 9, looking for a barrel of money, we went to tell the world that we were human beings and were entitled to be treated as such." Now the Court with the assistance of plaintiffs' lawyers will hold further hearings, beginning in May, 2000, at which individual plaintiffs can put forth testimony about what happened to them and the injuries they suffered. After reviewing all the claims the Court will issue an order on how the money will be distributed. This will officially finish the Attica litigation, but the struggle for human rights for prisoners continues.

The experience at Attica should have been a lasting warning to those responsible for prisons in this country, but unfortunately this has not been the case. Although prison officials have been much more reluctant, since Attica, to use deadly force when confronted with rebellion and hostage-taking, the critically important lesson that prisoners must be treated humanely, and fairly and reasonably prepared for release, has been forgotten and ignored. The number of people in prison has increased five-fold since Attica, and three-fourths of those locked up in the last decade are incarcerated for non-violent drug and property offenses. The racial disparity has worsened, until a black person is now seven times more likely to go to prison than a white person. Indeed, prisons have become big business, a 40 billion dollar-a-year "growth industry," with increasing competition for super-profits among large corporations engaged in the building, running and servicing of institutions designed for warehousing poor people, in numbers now approaching two million souls. In a growing number of states, more tax money is spent for prisons than for higher education, and powerful guard unions give millions of dollars to political candidates to help pass more repressive laws sending more people to prison for longer periods.

The decade of reform immediately following Attica ended quickly. Meaningful drug rehabilitation and educational programs have been eliminated almost everywhere, and rehabilitation is no longer even a pretended goal. In most states, parole and other forms of early release has been abolished, and prisoners are serving extended sentences with little or nothing to do to pass the time. In a perverse response to the legacy of Attica, prisoners who speak out or are in anyway perceived as troublemakers are confined in special "control units," where they are held in isolation for lengthy, indefinite periods of time, often years on end, without meaningful

human contact, and many inevitably suffer substantial psychological harm, for which they get no help.

Rather than recognize the inherent humanity of prisoners, and the need to palliate their confinement and help them get ready for positive reintegration into society, they are now generally treated more like animals, to be caged and tormented, and shunned and forgotten by the world outside. Despite all high-tech efforts to keep prison populations under wraps, however, and the growing prohibition of contact with the outside, including the press, repeated acts of resistence and protest—"the sound before the fury of those who are oppressed," as the murdered Attica spokesman L.D. Barkley put it—should come as no surprise. As Tom Wicker noted in his New York Times piece, January 7, 2000:

> [I]n a more lasting sense, the Attica matter is anything but closed. It lives on, settlement or no settlement, a blot on the nation's pride in itself, a terrible if unadmitted example of how American justice can go badly wrong—and not just in New York or in 1971.
>
> Could it really have happened in this country? It could, because it did. If not admitted, it could even happen again.

POLICE ABUSE AND CORRUPTION FROM NEW YORK TO L.A.: A LOOK AT THE STANDARDS FOR BRINGING FEDERAL CRIMINAL PROSECUTIONS FOR THE VIOLATION OF A PERSON'S CIVIL RIGHTS

By Peter J. Schmiedel*

Introduction

Shortly after midnight on February 4, 1999 Amadou Diallo, a West-African immigrant was shot 19 times by four New York City police officers as he stood peacefully and unarmed in front of his apartment building. The officers were part of New York's special Street Crime Unit, whose motto "We own the night," symbolizes the unit's aggressive police tactics, tactics that have angered many residents of the Bronx where Amadou Diallo lived.

The four officers were indicted for murder in the Diallo case by a Bronx grand jury. The case was later removed to Albany, New York. Last March the officers were acquitted of all charges. Following the acquittal there was widespread criticism of how the Bronx district attorney's office handled the prosecution, and questions were raised about whether the local prosecutors "vigorously" pursued the matter. *See* N.Y. Times, March 5, 2000 at 39.

While these events were unfolding in New York, Los Angeles was in the throws of its own police scandal. Last September, Rafael Perez, a former Los Angeles police officer who was a member of the department's Community Resources Against Street Hoodlums ("Crash") unit, that operated in the inner-city Rampart police district, was blowing the whistle on his fellow officers. Perez's accusations reveal a systemic culture of police corruption, brutality and criminal behavior that includes perjury, racist profiling, framing innocent people and, in Perez's case, the shooting and paralyzing of an innocent unarmed man who was sent to prison based on the testimony of Perez and his partner. This scandal implicates not only the conduct of the police, but also the conduct of the Los Angeles district attorney's office that time and again, in prosecution after prosecution, used tainted evidence and perjured testimony to convict innocent people. Given the breadth of the corruption, someone in the prosecutor's office must have known that something was terribly wrong. While the "Rampart" scandal is currently being investigated by both local and federal authorities, it is highly unlikely that the Los Angeles district attorney's office is capable of vigorously pursuing a scandal that may lead right back to that office

In Chicago three police officers were recently fired for shooting an unarmed women after ignoring a command by superior officers to break off a high speed pursuit. While the officers were terminated, to date they have not been charged criminally. In Highland Park, Illinois, a wealthy suburb north of Chicago that is the home of Michael Jordan, current and former Highland Park police officers are suing their own department for, among other things, training them to target African-Americans and Hispanics. The officers allege that they were trained to shine their headlights into passing vehicles to determine whether people of color were entering Highland Park. The officers also state that the department had a "No Nut" policy, which stood for "No Niggers Uptown." Pursuant to this directive the police were told to keep African-Americans and Hispanics out of the Highland Park business district during peak shopping hours. While the township denies the allegations, it has retained a former U.S. Attorney to investigate the matter. Chicago Tribune, Lake Edition, March 25, 2000 at 25.

The problems of racist profiling and the abuse of police power is a national one. The above incidents as well as others require investigation and where appropriate criminal prosecution. In light of the close working relationship between local prosecutors and their respective police departments, it is unlikely that police violence, racial profiling and other abuses of police power will be vigorously pursed at the local level. A more active federal role is one possible

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remedy. This article will briefly examine the standard for bringing a federal criminal prosecution for the violation of a victim's civil rights, the Justice Department's guidelines for bringing a criminal civil rights' prosecution and whether a federal prosecution is justified in the Diallo case and the Rampart's scandal.

A. The Legal Standard for a Federal Civil Rights Prosecution

Following passage of the Fourteenth Amendment Congress passed 42 U.S.C. § 1983, which provided a civil remedy to any person whose civil rights were violated by someone acting under color of state law. With the passage of 18 U.S.C. §§ 241 (Conspiracy) and 242 Congress also imposed criminal sanctions for the willful violation of a person's civil rights. 18 U.S.C. 242 provides:

> Deprivation of rights under color of law.
>
> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years...if death results... imprisoned for any term of years or for life, or both, or may be sentenced to death.

One of the most important cases that establishes the necessary elements for a criminal civil rights prosecution is *Screws et al. v. United States,* 325 U.S. 91 (1944). Screws was the sheriff of Baker County, Georgia. He, along with a local police officer and a deputy sheriff, arrested Robert Hall , who was African-American, at his home. Hall was arrested for allegedly stealing a tire. Hall was handcuffed and beaten with a solid-bar blackjack as he exited the police car in front of the local jail. The police claimed that Hall used insulting language and attempted to reach for an officer's gun. After beating Hall unconscious the police dragged him feet first through the courthouse lawn and into a jail cell. An ambulance was eventually summoned and Hall was taken to a hospital where he died as a result of the beating he suffered. 325 U.S. at 92-93.

Screws and his fellow officers were indicted for violating Hall's civil rights. A jury convicted the defendants and they appealed challenging the constitutionality of the statute. The defendants argued that the statute did not provide them with fair notice of what conduct was proscribed by the statute. The defendants claimed that in outlawing violations of a person's right to due process of law the statute did not contain any "ascertainable standard" of guilt, and consequently was over broad and vague. *Id.* at 96-98.

In a plurality opinion Justice William O. Douglas wrote that the statute could be saved by limiting its reach to acts that were done wilfully, that is done with the purpose of depriving a person of a specific constitutional right. While Justice Douglas acknowledged that the presence of willful intent or a bad motive standing alone might not save the statute:

> We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.... It is said, however, that this construction of the Act will not save it from the infirmity of vagueness since neither a law enforcement official nor a trial judge can know with sufficient definiteness the range of rights that are constitutional. But this criticism is wide of the mark. For the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.

325 U.S. at 103-104.

The specific right which the defendants in *Screws* were convicted of violating was Hall's right to due process of law, that is the right not to be punished without a trial. On this point Justice Douglas noted the "fact that the defendants were not thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution... Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him. And such a purpose need not be expressed; it may be inferred from all the circumstances attendant from the act." *Id.* at 106.

The plurality also rejected the argument that the defendants were not acting under color of law because they abused their police power. Instead the plurality held that under color of law means "under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Id.* at 111. While the plurality in *Screws* upheld the constitutionality of the statute, the convictions were reversed based on the failure of the jury instructions to include the willful language.

More recent cases have refined *Screws* and have upheld convictions even where the jury instructions did not specifically use the willful language. In *United States v. Johnstone,* 107 F.3d 200 (3rd Cir. 1997) a Kearny, New Jer-

sey police officer was charged with violating 18 U.S.C. § 242 by using excessive force in a number of arrests. The jury convicted Johnstone on several counts and he appealed claiming that the jury instructions on excessive force were incorrect. The instruction that was read to the jury stated:

> If you find, as to the particular count under consideration that a defendant used force, you should consider whether the force used by him was reasonable or whether it was greater than the force which would have been reasonably necessary under the circumstances to an ordinary and reasonable officer on the scene.

107 F.3d at 204.

Johnstone complained that the court should not have included an objective reasonableness standard in instructing the jury because much of the conduct for which he was convicted occurred after the victims were handcuffed and in custody. Instead, Johnstone argued that the district court should have given an instruction as to whether the force was excessive under a "substantive due process "shocks the conscience' analysis." *Id.* at 205. The Third Circuit disagreed, holding that under *Graham v. Connor,* 490 U.S. 386 (1989):

> [A] "seizure" can be a process, a kind of continuum, and is not necessarily a discrete moment of initial restraint. ...a citizen can remain "free" for Fourth Amendment purposes for some time after he or she is stopped by the police and even handcuffed. Hence, pre-trial detention does not necessarily begin the moment that a suspect is not free to leave...

Id. at 206-207.

Under the rationale of *Screws* the Third Circuit also rejected Johnstones's argument that the jury was not properly instructed with respect to the intent element necessary for a conviction under § 242. Johnstone argued that the jury should have been instructed that he had to intend to violate state law against the use of excessive force. Noting that the underlying right he was accused of violating was a Fourth Amendment right, the court held the constitutional standard as to what constitutes the unreasonable use of force applies:

> [T]o convict a defendant under § 242, the government must show that the defendant had the particular purpose of violating a protected right made definite by rule of law or recklessly disregarded the risk that he would violate such a right. The government does not need to show that the defendant knowingly violated any right.

107 F.3d at 210.

In *United States v. Koon et al.,* 34 F.3d 1416 (9th Cir. 1994) the defendants were convicted of violating the Fourteenth Amendment rights of Rodney King. On appeal the defendants challenged the jury instructions arguing that the instructions did not properly instruct the jury on the issue of the officers' intent. The instructions stated that it "was not necessary" for the jury to find "that a defendant was thinking in constitutional terms at the time." Instead the instructions stated that the jury could find the defendants guilty even if an individual defendant "had no real familiarity with the Constitution or with the particular right involved," so long as the jury found that the defendant "intended to accomplish that which the Constitution forbids." Significantly, the instructions also informed the jury that the government "may meet its burden, even if the defendant was motivated by fear, anger, or some other emotion, provided that the intent...described [in the instruction] is present." 34 F.3d at 1449.

Based on the above authority, the government may secure a conviction under § 242 with proof that a defendant acted willfully or in reckless disregard for a person's constitutional rights. Therefore where the force necessary to secure an arrest is unreasonable under the circumstances, or where the police after securing an arrest beat and injure a person in custody, or where the police subject a person to "different punishments, pains, or penalties" based on the person's color (racial profiling) or their "alien" status a basis exists to pursue a criminal civil rights case. 18 U.S.C. § 242.

While a basis may exist to pursue a federal prosecution, this fact does not guarantee that federal authorities will in fact initiate a prosecution. This is because the Justice Department has its own "guidelines" that govern when it will initiate a case against the police. The guidelines require: 1. A substantial federal interest; 2. That interest was not vindicated in the State trial; and, 3. There must be strong enough evidence to convict. *See* N.Y. Times, March 1, 2000, Sec. B p. 1. Even a brief examination of the facts surrounding the shooting of Amadou Diallo and the Rampart scandal establish that federal intervention is justified.

B. The Amadou Diallo Case

Amadou Diallo was standing outside of his apartment building shortly after midnight on February 4, 1999. The West-African immigrant was approached by four armed white New York City police officers in civilian dress. The officers claimed that Diallo was acting suspiciously because he was "peering" up and down the street. According to the officers they identified themselves as the police and asked Diallo to "show his hands." N.Y. Times, February 23, 2000, Section A at 1. According to the police, Diallo did not respond, instead he stepped into the vestibule of his apartment, turned and withdrew a black object (his wallet) from his pants. Claiming they thought the object was a gun, the officers opened fire. The police fired 41 shots, 19 of which struck Diallo, killing him. Civilian witnesses in the area testified that they did not hear the police identify themselves prior to the shooting and no one other than the police officers themselves testified that Mr. Diallo's actions were suspicious in any way. *Id.*

After Diallo's death there were numerous street demonstrations throughout New York City. The Bronx district

attorney, Robert T. Johnson secured murder charges against the four officers from a Bronx grand jury. Prior to trial, a defense motion for a change of venue was granted and the trial was moved to Albany, New York. The officers were eventually acquitted of all state charges.

Following the verdicts there was widespread criticism of how the Bronx district attorney's office handled the case. Many questioned why he did not fight harder to keep the case in the Bronx, while others, including Charles Rangle, the Manhattan Congressman, complained that the prosecution was not "vigorously" pursued. N.Y. Times, March 5, 2000, Section 1 at 39.

Aside from the sheer viciousness of the attack on Amadou Diallo, a particularly troubling aspect of the case is why the police approached him at all. The best the officers could come up with for even approaching Diallo was that he was "peering" up and down the street. These actions, standing alone, provide no justification whatsoever to suspect that Diallo was involved in any wrongdoing. The lack of any justifiable cause to approach Diallo strongly suggests that the police approached not because of he was doing something wrong, but rather because of his race. This troubling aspect of the case, coupled with the excessive and unreasonable reaction of the police and the questionable tactics and vigor of the state prosecutors all support federal intervention in this troubling and important case.

C. The Rampart Scandal

In February of 1998 two Los Angeles police officers falsely imprisoned and beat a handcuffed arrestee inside the Rampart district police station, both officers were part of the Rampart Crash unit. Shortly after this incident, in March of 1998 another Rampart Crash unit member, Rafael Perez, was arrested for stealing three kilograms of cocaine from the police department's Property Division. *See* Los Angeles Police Department Board of Inquiry into the Rampart Corruption Incident, March 1, 2000 at 1 ("BOI"). Perez was also a close friend of another rogue police officer, David Mack, who, along with his girlfriend robbed a Los Angeles Bank of America, escaping with $722,000. Perez and Mack partied together in Las Vegas shortly after the bank robbery and before Perez's arrest on the cocaine charges. Mack was later convicted of bank robbery in federal court and sentenced to 14 years in prison. *Id.*

Perez's first trial resulted in a hung jury. Shortly before his second trial, in an effort to secure leniency for himself, Perez began providing information on his fellow Rampart Crash unit officers. Perez told a harrowing tale of deep-seated police corruption, and a police unit that was allowed to run amok in the Rampart district. *Id.* at 2. Perez told of how Crash officers went through a gang-like initiation that included "jump-in" beatings by fellow officers, tattoos and special patches. N.Y. Times, March 4, 2000, Section A at 8 After "initiation" Crash officers were given plaques and awards for shooting and even killing suspects. N.Y. Times, March 2, 2000, Section A at 26.

The level of corruption is truly staggering. The Los Angeles district attorney's office compiled a list of 3000 cases that were handled by corrupt Crash unit officers. L.A. Times, February 3, 2000, Section A at 1. According to recent reports over 70 officers are currently under investigation for providing false evidence, planting weapons and drugs on victims and for shooting unarmed civilians. Forty cases have been overturned to date, with hundreds more under investigation. N.Y. Times, March 1, 2000 Section A at 26. The financial fall out over the scandal has already been significant, and city attorneys predict that the city will have to pay as much as $125 million dollars to settle the expected lawsuits. L.A. Times, February 3, 2000 Part A at 1.

In addition to wholesale perjury, falsification of evidence and the shooting of innocent victims, the Rampart Crash unit members, according to Perez, also conspired with local Immigration and Naturalization Service ("INS") officials in targeting for deportation persons who had witnessed the police abuse. INS officials report that they informed their superiors that they felt the Crash officers had targeted a "whole race of people" for harassment. Newsday, February 25, 2000 at 6.

This article has only scratched the surface of the Rampart scandal, and new details are coming out almost daily. Given the systemic nature of the corruption, the collusion of INS and local police and the possible role of state prosecutors in knowingly presenting corrupt evidence, the Rampart scandal cannot be effectively handled at the local level. Those responsible for the wholesale and shocking violations of the many victims constitutional rights must face federal prosecution.

CASE UPDATES

In the Supreme Court

In *Florida v. J. L.*, 120 S. Ct 1375 (2000), the Supreme Court refused to extend *Terry v. Ohio*, 392 U.S. 1 (1968), to permit a police "stop and frisk" on the basis of an unrecorded and uncorroborated anonymous tip. In *JL*, the Miami-Dade police received a telephone tip from a source who neither identified himself nor was otherwise recognizable to the police, that a young African-American man dressed in a plaid shirt at a particular bus stop was in possession of a concealed weapon. The police responded to the bus stop and observed three young African-American males "hanging out." One of the young men, a 15 year old juvenile (JL), was wearing a plaid shirt. Although the men were not engaging in any illegal conduct, no firearm was observable, and they did not make any threatening or suspicious movements, the police stopped and frisked them, finding a concealed handgun on JL. After his arrest for possession of a concealed weapon, JL moved to suppress the gun as illegally seized, and the trial court granted the motion. Ultimately, the Florida Supreme Court upheld the trial court's decision, holding that anonymous tips are less reliable than

tips from known informants, and can supply reasonable suspicion sufficient for a stop and frisk only where it is accompanied by "specific indicia of reliability," such as the correct forecast of a suspect's "not easily predictable" movements. 727 So. 2d 204, 207 (1998).

The Supreme Court granted certiorari, and a unanimous court, in an opinion written by Justice Ginsburg, affirmed. The court began its analysis with *Terry* which held that:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. 492 U.S. 30.

120 S. Ct. 1378.

Noting that JL's case did not involve personal observations of an officer, or a tip from a known informant whose reputation could be assessed and who could be held responsible if her allegations turn out to be fabricated, the Court further asserted that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." Id. Turning to its prior decision in *Alabama v. White*, 496 U.S. 325, 332 (1990), the Court then reiterated the *White* Court's determination that "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' Id. at 327." 120 S. Ct 1378. In *White*, the anonymous tipster asserted that a woman was carrying cocaine and predicted that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel. While the *White* Court determined that such a tip, standing alone, would not have justified a *Terry* stop, it became reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine after police surveillance established that the informant had accurately predicted the woman's movements. Nonetheless, the Court categorized the *White* case as "borderline," because "knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband." 120 S. Ct 1379.

The Court then addressed the arguments advanced by the state of Florida and the United States, as amici, that: 1. the tip was reliable because its description of the suspect's visible attributes proved accurate and 2. a stop and frisk should be permitted when (a) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (b) police promptly verify the pertinent details of the tip except the existence of the firearm, and (c) there are no factors that cast doubt on the reliability of the tip:

> These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop. An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: it will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. *Cf.* 4 W. LaFave, Search and Seizure 9.4(h), p. 213 (3d ed. 1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).

120 S. Ct. 1379.

The Court then addressed the other major argument advanced by Florida and the United States—that the standard *Terry* analysis should be modified to permit a firearm exception under which a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing under *Terry* and *White*:

> We decline to adopt this position. Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. *See* 392 U.S. at 30. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms. Several Courts of Appeals have held it per se foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well...If police officers may properly conduct *Terry* frisks on the basis of bare-boned tips about guns, it would be

reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in *Adams* and *White,* the Fourth Amendment is not so easily satisfied. *Cf. Richards v. Wisconsin*, 520 U.S. 385, 393-394 (1997) (rejecting a per se exception to the 'knock and announce' rule for narcotics cases partly because 'the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others,' thus allowing the exception to swallow the rule).

120 S. Ct. 1379-80.

In conclusion, the Court stated that "the facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability" and further that:

> We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, *see Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam), and schools, see *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere. Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue.

120 S. Ct. 1380.

Justice Stevens, joined by Justices Souter, Ginsburg and Bryer dissented from the part of the Court's ruling dealing with the Eleventh Amendment . In addition to believing that the ADEA was a proper exercise of Congress' authority under Section 5 of the Fourteenth Amendment, Justice Stevens continued his assault on the Court's recent Eleventh Amendment decisions, particularly *Seminole Tribe of Florida v. Florida,* 514 U.S. 44 (1996):

> The Eleventh Amendment simply does not support the Court's view. As has been stated before, the Amendment only places a textual limitation on the diversity jurisdiction of the federal courts....Because the Amendment is part of the Constitution, I have never understood how its limitation on the diversity jurisdiction of federal courts defined in Article III could be "abrogated" by an act of Congress. Here, however, private citizens did not invoke the federal court's diversify jurisdiction; they are citizens of the same State as the defendants and they are asserting claims that arise under federal law. . .I remain convinced. . .that the decisions of the five Justices in *Seminole Tribe* to overrule (*Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1889)) was profoundly misguided.

Id. at **62-64.

In *Martinez v. Court of Appeal of California*, 2000 U.S. Lexis 502 (1-12-00) the petitioner, Salvador Martinez, while working as a paralegal, was accused of converting a client's money for his own use. Martinez chose to represent himself at a jury trial on the charges against him. He was acquitted of grand theft, but was convicted of embezzlement. He then appealed, again waiving counsel and seeking to represent himself. His motion to waive counsel was denied by the California Court of Appeals and his writ of mandate to the Supreme Court of California was likewise denied. The California Court of Appeals explained that while the U.S. Supreme Court's decision in *Faretta v. California,* 422 U.S. 506 (1975) allowed for self-representation at trial, *Faretta* was premised on the right to counsel under the Sixth Amendment while the right to counsel on appeal was governed by the Fourteenth Amendment. Based on this distinction the California Court of Appeals held that there was no constitutional right to self-representation on appeal. 2000 U.S. at **7-8.

The Supreme Court granted *certiorari* in order to resolves numerous conflicting decisions in both the federal and state courts. Reviewing *Faretta* the Court noted that decision based its conclusion that the Sixth Amendment supported the right to self-representation on "historical evidence identifying a right to self-representation that had been protected by federal and state law since the beginning of our Nation." *Id.* at *9. Conversely, the Court held: "We are not aware of any historical consensus establishing a right of self-representation on appeal." *Id.* at *13. The Supreme Court went on to agree with the California Court of Appeals that the Sixth Amendment does not apply to appellate proceedings and therefore concluded:

> [N]either the holding nor the reasoning in *Faretta* requires California to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. Our holding is, of course, narrow. It does not preclude the States from recognizing such a right under their own constitutions. [However] [i]n requiring Martinez, under these circumstances, to accept against his will a state-appointed attorney, the California courts have not deprived him of a constitutional right.

Id. at **22-23.