TERRORISM PROSECUTION IMPLODES:
The Detroit 'Sleeper Cell' Case Case

By Barry Tarlow

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In the three years after September 11, 2001, the Bush Administration had almost no convictions on terrorism charges to show for its effort. The rounding up of about 5,000 people for preventive detention produced no such convictions. By September 2004, about 500 people were deported, but each deportation order required a finding that the individual was not connected to terrorism. *Id.* Although the administration touted a record of 100 convictions in terrorism cases, almost all of those were for minor offenses, not terrorism charges. *Id.* For example, Sheikh Abdirahman Kariye, who was arrested amid much fanfare on false allegations that his baggage had explosive residue, was only indicted on charges of Social Security fraud. He later pled guilty to lying about his income and using false identification to obtain health insurance benefits. Even the charges that purported to assert a link to terrorism, like the indictment leading to the guilty pleas of the Buffalo Six, charged not actual terrorism, but providing material support for terrorists.

The administration's most significant terrorism convictions involved the hapless "shoe bomber," captured by an astute flight attendant, and the jury's guilty verdict as to the three men accused of being part of the so-called Detroit "Sleeper Cell." *Id.* As a court recently found, however, even that was three out of four too many.

The Detroit "Sleeper Cell" Case, *United States v. Koubriti* (U.S. Dist. Ct. E.D. Mich. Case No. 01-CR-80778), is a disturbing chapter in the larger War on Terror. Three of the four defendants in the case were arrested within a week of the September 11 hijackings. When the file came across the desk of administration officials who were hungry for a win in the newly minted War on Terror, they seized upon it. This was the first trial on charges of terrorism after9/11 and the only one to yield a jury conviction. After a long investigation and a trial in 2003, a jury ultimately returned two convictions on terrorism-related charges, one conviction of document fraud, and one acquittal.

Despite that result, it would soon come to light the case had a seamier side. Too eager to put notches in its belt, the prosecution committed grave misconduct. It simply ignored and suppressed statements by key government witnesses who did not reach the conclusions the lead prosecutor wanted. It buried the opinions of experts who suggested that critical documents or jottings were not likely terrorist diagrams and that the defendants, while at most being common fraudsters, were not terrorists. After the verdict and a court-ordered review of the prosecution, the Department o Justice found itself compelled to admit a pattern of misconduct and to recommend that the court grant the defendants' motions for post-trial relief.

Although the court ultimately granted post-trial relief, a number of questions remain unanswered. Who is responsible for the misconduct that permeated the Detroit case? Is the case just the work of an overzealous prosecutor and a few agents, as the DOJ contends, or is there more to it? In these troubled times, can those accused of terrorism receive a fair trial in which they are prosecuted by lawyers attempting "to do justice" and in which their fate is objectively determined by an impartial jury?

The Detroit case appears to be part of a pattern of situations in which zealous policies originating at the highest levels of the Executive Branch go awry, with mid-level officials left holding the bag. "[T]op officials at the Justice Department were involved in almost every step of the [Detroit] prosecution . . . ." Danny Hakim & Eric Lichtblau, *After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A1. In addition to the numerous mid-level officials connected to the case, Barry Sabin, Chief of the counterterrorism section for the DOJ's Criminal Division since January 2003, was intimately involved in the drafting of the final version of the indictment and many of the discussions about whether the terrorism charges could be pleaded and proven.

Of course, former Attorney General John Ashcroft focused on the case from the start. As early as October 31, 2001, he commented publicly about the case, asserting a link between September 11 and the Detroit defendants and prompting a judicial rebuke for his violation of a gag order. On the other hand, in an organization as large as the federal government and amid anxious times, it is difficult to keep tabs on individual agents and officials. In such circumstances, it can be hard to determine where the blame should rest. Nonetheless, as in any large organization, the philosophical approach and intrinsic values are largely defined by the people who lead and supervise the troops.

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When You're Right, You're Right: Seeing The World Through Blue-Blooded Glasses

Some people are still under the illusion that people who are not guilty, such as the men in the Detroit "Sleeper Cell" Case, will not be charged, much less convicted of crimes. But the charging and conviction of innocent men in the Detroit case is not entirely surprising. The case is symptomatic of what happens when the executive or prosecutorial power is combined with a zealous belief in the righteousness of one's cause and the infallibility of one's judgment. Willfully blind commitment to ends over means inevitably leads to a bending or breaking of the rules.

For example, Oregon lawyer Brandon Mayfield who had converted to the Muslim faith was arrested on charges of involvement in the train bombings in Madrid, Spain. There was no proof, however, that Mayfield had ever been to Spain anytime after 9/11. One major problem was that a supervising FBI expert, who first conducted the fingerprint analysis for the DOJ, rushed to judgment in analyzing a hazy copy of a fingerprint obtained from a bag of explosives in Spain. He was confident he had the right man. Although "a reliable match would normally entail at least 12 to 13 matching characteristics," the expert viewed the cloudy print and made his judgment based on only seven similarities. *See* Rukmini Callimachi, *Panel Clears Lawyer of Role in Bombings*, L.A. Daily J., Nov. 17, 2004, at 4. The expert was a senior person in the department. Given his status, the other concurring analysts did not dare to question him, although they should have had reason to pause and revisit this conclusion. *Id.* In fact, "[p]olice in Spain had expressed doubts early on about [the] U.S. investigators' claims . . . ." Tomas Alex Tizon & Sebastian Rotella, *U.S. Frees Oregon Lawyer Held in Madrid Bombings: Spanish Police Say a Fingerprint that Seemed to Link Him to the Case Belongs to an Algerian*, L.A. Times, May 21, 2004, at A21.

Fortunately, weeks later, U.S. District Judge Robert Jones dismissed the charges, and the FBI formally apologized to Mayfield and his family. *See* Sarah Kershaw & Eric Lichtblau, *Bomb Case Against Lawyer Is Rejected: Dismissal Comes After F.B.I. Faults Poor Fingerprint Images*, N.Y. Times, May 25, 2004, at A16. But the case stands as an example that innocent people, even respected citizens, can be put through the wringer based on the, wrong-headed prejudgments of zealous prosecutors and agents. That, unfortunately, is just what happened in the Detroit case.

Making It Up As You Go: Creating A Case In Your Own Image

Few recent cases provide such a stark example of how prosecutorial misconduct perverts the search for justice as the Detroit "Sleeper Cell" Case, *United States v. Koubriti* (U.S. Dist. Ct. E.D. Mich. Case No. 01-CR-80778). This was the first post 9/11 terrorism prosecution in the country, and it involved not only prosecutorial misconduct, but also the abuse of the Executive Power in the War on Terror. Undoubtedly, the stakes were high and the help spotlight was on. Yet in such circumstances, theoretically one is supposed to feel the pressure to get things right, to dot every "i" and to cross every "t." History of course has demonstrated that in troubled times, that is not what happens. Despite help from the DOJ, the CIA, military consultants and numerous FBI agents, the prosecution here, including the lead prosecutor, AUSA Richard G. Convertino, with the assistance or tacit approval of his supervisors, resorted to a grave pattern of misconduct to win the terrorism convictions of these innocent men.

In hindsight, perhaps Convertino's handling of the case comes as little surprise. He has a reputation in Detroit for being a zealous gunslinger. He has been described as "a prosecutor cut in the Ashcroft mold: religious and righteous, patriotic but polarizing," as well as "abrasive" and "antagon[istic]." Richard Serrano & Greg Miller, *Terrorism Case Shows U.S. Flaws in Strategy*, L.A. Times, Oct. 12, 2004, at A16.

Sources close to the case say the characterizations are accurate. Convertino was known to push the envelope. He has the sort of rough-up-the-bad-guy mentality and style that endears him to law enforcement officers and rankles others who hesitate to prejudge guilt before the evidence is in. In fairness, when he testified before the Senate Finance Committee, he presented himself as a committed but reasonable prosecutor fulfilling the oath he had sworn to uphold. His approach, however, has not escaped the attention of the federal courts. In 1995, for example, the Sixth Circuit Court of Appeals discussed his

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posing of "concededly improper questions." *United States v. Wiedyk*, 71 F.3d 602, 607 (6th Cir. 1995).

It is a mistake, however, to think that Convertino was alone in wrongfully prosecuting the case. ***Veteran defense attorney and NACDL member William W. Swor, one of the lawyers in the Detroit case, said, "This was not a rogue prosecutor. This was a rogue prosecution. It took more than one person to create this fraud."***

Indeed, the wrongful convictions were a year and a half in the making, and the case was surrounded by error from the start. On September 17, 2001, less than a week after the attacks in New York and Washington, agents of the Detroit Joint Terrorism Task Force descended upon a Detroit apartment at 2653 Norman Street. The search team was composed of "FBI Special Agents Mike Thomas, Paul Heyard and Mary Ann Manescu; INS Agents Joe Gillette and Mark Pilat, State Department Special Agent Edward Seitz and FBI language specialist Nazih 'George' Moaikel." *United States v. Koubriti (Koubriti Suppression)*, 199 F. Supp. 2d 656, 659 (E.D. Mich. 2002).

They were looking for Nabil Al-Marabh, "No. 27" out of about 200 people on the FBI's terrorist "watch list" whom agents wanted to question. Ronald J. Hansen, Craig Garrett & David Shepardson, *FBI Arrests 3 Men at Detroit Home*, Detroit News, Sept. 19, 2001. Al-Marabh reportedly had some connection with Osama bin-Laden that prosecutors now admit was never supported by evidence. However, Al-Marabh had already moved on. He had applied to the state for a driver's license listing an address in Three Oaks, Michigan, more than 200 miles away from Detroit on the Indiana border toward Chicago. In fact, he was arrested in Chicago just days after the raid. David Shepardson, Charlie Cain & Craig Garrett, *Detroit Fugitive Arrested Near Chicago, FBI Says*, Detroit News, Sept. 20, 2001.

None of that gave the agents any pause on September 17 or thereafter. Not satisfied with their lack of success in locating Al-Marabh, they cornered the occupants of his former apartment, defendants Karim Koubriti, Ahmed Hannan and Farouk Ali-Haimoud), questioned them and searched the residence, deciding midway through the fishing expedition to obtain a warrant.

The raiding officers stumbled upon a tired, hapless bunch who appeared to meet no one's definition of sophisticated and dangerous terrorists. Hannan and Ali-Haimoud were sleeping, and Koubriti answered the door in his boxer shorts. Agents saw in these exhausted, quiet, and admittedly cooperative men the workings of a fearsome terrorist cell. What could possibly lead to this conclusion? Like many persons new to a country, Koubriti and Hannan worked some odd jobs while they searched to find suitable, steady employment. At one point, for example, they had been off-site dishwashers at a catering company servicing planes at the airport. *Koubriti Suppression, supra*, 199 F. Supp. 2d at 65962. Although the job did not actually take them to the airfield or the airplanes, they received airport-related employee badges, which the investigating agents considered to be very suspicious.

The raiding agents were also influenced by the national origins and the apparent religion of the men. They, as well as prosecutors and others connected with the case, looked at Koubriti, Hannan and Ali-Haimoud and saw visions of Islamic fundamentalism among persons of Middle Eastern descent. Their misperceptions led them far from the truth. Koubriti's sister described him as a person who rarely attended a mosque and who "did not go to class [in college], but instead hung out in a coffee shop with friends, smoked hashish and drank." Ann Mullen, *Deliberations Begin: Fate of Four Alleged Terrorists in the Hands of a Jury*, Metro Times Detroit, May 21, 2003. A former roommate of two defendants told the FBI that "the men never talked about religion, were lazy, and often drank and smoked." Robert E. Pierre, *Terrorism Case Thrown Into Turmoil: Factors Judge Is Considering Include Evidence Withheld From Defense*, Washington Post, Dec. 31, 2003, at A5.

While the agents perceived aliens who were up to no good, the accused were lawful permanent residents of the United States. Koubriti and Hannan each came to the United States during the previous year by winning an immigration lottery in Morocco, where they never had been acquainted. Ali-Haimoud immigrated lawfully with his mother.

Regardless of the facts, the agents searched for evidence to confirm their preconceived notions and found what they described to be false identity documents, as well as a day

planner, a tourist videotape, audio tapes of speeches delivered in Arabic and the old work badges from the dishwashing jobs. *Koubriti Suppression, supra*, 199 F. Supp. 2d at 65962. Inside the day planner were some wild scrawlings. According to the agents' characterization in the affidavit supporting the search, these were sketches of an airport and flight patterns, with references to locations in Turkey. Amid the furor still palpable from the attacks in New York and Washington, the agents arrested Koubriti, Hannan and Ali-Haimoud. Ronald J. Hansen, Craig Garrett & David Shepardson, *FBI Arrests 3 Men at Detroit Home*, Detroit News, Sept. 19, 2001.

The next day, the prosecution filed a complaint charging the men with possession of false documents, and the case was assigned to United States District Judge Gerald E. Rosen. AUSA Convertino assumed control of the prosecution team. Despite the thinness of the evidence, news reports went out and the case took on an elevated profile. Discussing the same scrawlings that CIA agents would later find to be uncompelling as evidence, one unidentified government official said ominously, "[t]he references to the American military base in Turkey are *chilling*." *Id.* (emphasis added). With keen foresight Imad Hammad of the America-Arab Anti-Discrimination Committee remarked, "In the past we've had many cases where law enforcement rushed to judgment in actions that were found baseless. . . . I don't think it will benefit any of us to spread fear." *Id.*

Given the high profile of a case based on finding men who did not even have any noteworthy fraudulent documents, let alone terrorist plans or propaganda, perhaps it is unsurprising that the prosecution team continued to build its case upon foundations that were questionable at best. Interestingly, the government is now pursuing not these document fraud charges, but rather some unrelated charges against Koubriti and Hannan for faking auto accident injuries to obtain insurance money. *See 2 Ex-Terrorism Suspects Face Fraud Charges*, N.Y. Times, Dec. 16, 2004, at A31.

During the "Sleeper Cell" investigation, federal agents found themselves an informer Youssef Hmimssa, and in May 2002 they offered him a deal, raising all the dangers of informer testimony. *See Best Testimony Money Can Buy: Ethical Rules and Witness Payments: RICO Report*, The Champion (April 1995). Hmimssa was a fraudster who had immigrated to Chicago from Romania. Before entering the United States, he had traveled widely throughout Romania making contacts and getting into trouble in Bucharest and other places. He was accused of engaging in illegal money changing and other offenses in areas dominated by Romanian crime syndicates. Hmimssa also traveled to Morocco on a false passport. When he entered the United States using phony documents, he claimed to have nothing of value. Within six months, he had his own apartment full of new furniture in northern Chicago with indications that he might be running with the Romanian crime syndicate there. One witness interviewed by the FBI had "information that Hmimssa was working for a Romanian gang . . . ." (Defs.' Mot. for Judgment Notwithstanding the Verdict or New Trial, at 24.) By the time AUSA Convertino caught up with him, Hmimssa was facing federal charges of document fraud, credit card theft and credit card counterfeiting in three different districts. Despite all this, the prosecution was more than willing to deal in an effort to win the desired convictions, no matter how bad Hmimssa might turn out to be.

Although Hmimssa had only stayed with the defendants for about two weeks, he was willing to say they were terrorists and that during those two short weeks they tried to recruit him into terrorist activities. *See* Ann Mullen, *Deliberations Begin: Fate of Four Alleged Terrorists in the Hands of a Jury*, Metro Times Detroit, May 21, 2003. "In exchange for his cooperation and testimony at trial [the AUSA] stipulated in a *Rule 11* Agreement to a sentencing range of 37 to 46 months and further agreed to, and has, in fact, requested a more than 50% downward departure from that range for 'substantial assistance.' " *United States v. Koubriti (Koubriti* Brady *Materials)*, 297 F. Supp. 2d 955, 959 (E.D. Mich. 2004).

Perhaps more important, Hmimssa's cases were consolidated so that he could avoid consecutive sentencing, and the reported losses from his frauds were disingenuously capped at $70,000.00, rather than the many multiples of that amount, which he actually stole. At one point, Hmimssa might also have been offered an S-visa in exchange for his testimony, allowing him to avoid deportation.

Hmimssa's false testimony would become critical to the investigation and the trial. Not only did he provide five days

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of "evidence" in a seven-week trial, *id.*, but also he was responsible for more than one round of amendments to the indictment to add terrorism-related charges and a fourth defendant, Abdel Elmardoudi.

Throughout the case, the actual charges against the defendants continued to shift. One version of the indictment included a charge of providing material support to terrorists, in violation of 18 U.S.C. § 2339A, but it remains unclear to this day just what evidence the prosecution honestly could cite to support that charge. The statute prohibits, in part, any person from providing anyone with "currency . . . , lodging, training, safe houses, false documentation or identification, . . . weapons, lethal substances, explosives, personnel, . . . and other physical assets, except medicine or religious materials" intending that they be used for certain enumerated offenses, like the destruction of national defense premises, the malicious destruction by explosives of the property of the United States and the destruction of certain aircraft. 18 U.S.C. § 2339A(a),(b). However, the evidence supporting the charge was thin or non-existent.

In the final version of the indictment, filed just weeks before trial, Karim Koubriti, Ahmed Hannan, Farouk Ali-Haimoud and Abdel Elmardoudi faced charges of conspiring to provide material support or resources to terrorists in violation 18 U.S.C. §§ 371 and 2339A (Count *I*); engaging in fraud and misuse of visa, permits and other documents (Count 3) and conspiracy to do the same (Count 2), in violation of 18 U.S.C. §§ 1546(a) and 2 and 371, respectively; and fraud and related activity in connection with identification documents in violation of 18 U.S.C. § 1028(a)(6) and 2 (Count 4).

What exactly was the conspiracy to provide material support? That, too, was never exactly clear. In the Third (and final) Superceding Indictment, the prosecution alleged that the men intended to provide assistance to the Armed Islamic Group (GIA) in Algeria. A few weeks later during trial, and without any reasonable basis to support this earlier theory, the prosecution changed course and emphasized a theory that the men intended to falsify immigration documents to smuggle "brothers," or Muslims sympathetic to radical causes, into the United States to purchase weapons in support of terrorism. The theory stood or fell almost entirely upon the testimony of Hmimssa.

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Getting Burned In The Crucible

If the prosecution's theory of the case was an amorphous one essentially asserting that the men were terrorists and so must be guilty of something, the defense team adopted the theory that the entire case was a fabrication made up of national fear, smoke, mirrors and lies.

Unlike Hmimssa, Koubriti, Hannan, Ali-Haimoud and Elmardoudi had no assets. Koubriti, Hannan and Ali-Haimoud had been sleeping on the floor "with no furniture to speak of and their clothing kept in duffel bags, suitcases and garbage bags." *Koubriti Gag Order*, 305 F. Supp. 2d at 727. When the weight of the federal government descended upon them, they relied on the one constitutional right that would eventually save them, their right to counsel. The court appointed the Federal Defender's Office

to represent Koubriti, and other counsel were appointed to represent Hannan, Ali-Haimoud and Elmardoudi.

Fortunately for the accused, especially given the difficulty of defending this type of case, all the lawyers served "in the highest and best tradition of appointed counsel and the legal profession, and the American justice system," *United States v. Koubriti (Koubriti Dismissal)*, 336 F. Supp. 2d 676, 680 (E.D. Mich. 2004). ***Rick Helfrick and Leroy Soles of the Federal Defender's Office are seasoned trial lawyers, skilled in complex motion practice who have excellent reputations for their work and dedication to their clients. Hannan was represented by Attorney James C. Thomas, a longtime NACDL member and a former treasurer of the American Board of Criminal Lawyers with about thirty years of experience in defense of sophisticated criminal matters, and his dedicated co-counsel, NACDL member Joe Niskar. Bill Swor and Margaret Raben, who represented Elmardoudi, are both longtime NACDL members and members of the board of directors of Criminal Defense Attorneys of Michigan with outstanding reputations and decades of criminal defense experience. Finally, Robert M. Morgan, another NACDL member who was appointed to represent Ali-Haimoud, is a former AUSA and strike force attorney who has argued before the United States Supreme Court in Michigan v. Harvey, 494 U.S. 344 (1990) (holding that a statement taken in violation of the Sixth Amendment right to counsel can be used for impeachment purposes), and who has been described by his peers as a "criminal defense attorney par excellence."***

These seasoned lawyers concluded almost from the beginning, that something was truly wrong with this prosecution. From the onset of charges against Hannan, for example, Jim Thomas made persistent discovery requests for numerous critical documents. AUSA Convertino repeatedly claimed that all the relevant discovery had been turned over, and as happens all too often, the court took him at his word. Unbeknownst to Judge Rosen, however, Convertino continued to conceal a mountain of material.

For example, Thomas persistently asked for the medical records of a dead insane man, Ali Ahmed, who for a significant period of time possessed the day planner containing the so-called terrorist casing sketches. The defense surmised that the so-called "sketches" of military targets in the planner were simply the jottings of a delusional loon who died before Koubriti and Hannan ever moved to Michigan, and the lawyers sought evidence confirming this fact. Before his death, Ahmed was involuntarily committed and had a thick psychological file. For months, no one supposedly could locate the records. Astonishingly, midway through the trial, the defense learned that the hospital had turned the records over to the prosecution pursuant to a grand jury subpoena. When caught red-handed, AUSA Convertino presented the documents to the court for disclosure to the defense. Jim Thomas noticed that one document was still missing; namely, the document involuntarily committing the man as insane and as having delusions of being a general in the military. ***With dogged persistence, Thomas ultimately forced the prosecution to produce the exculpatory document.***

As another example, during the discovery process several defense lawyers repeatedly asked for material relating to the impeachment of Hmimssa. When AUSAs Convertino and Corbett were not forthcoming, the defense team wrote letters to the United States Attorneys' Offices in Chicago and Iowa identifying the information counsel had received so far and asking whether more exculpatory materials existed. Fortunately, these prosecutors met their constitutional obligations to provide helpful information. Only through this kind of persistence, which the prosecution called a "cheap shot," would the defense ultimately obtain the information undermining the cases against their clients.

By constantly seeking these types of exculpatory materials, Thomas and the other lawyers continued to put the issue of the Detroit prosecution team's evasiveness and misconduct before the court, even as the AUSAs continued to deny that they had anything responsive to the requests. ***Indeed, the long and troublesome process led Robert Morgan, Ali-Haimoud's lawyer, to comment that one of the key lessons to be learned from this case is that defense lawyers must "never stop asking literally. Ask as many people as you can and as often as you can to get the information your clients need."***

When the trial, which might

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be described as a security pageant, finally began in March 2003, the case was showing few signs of improvement. The war in Iraq started during jury selection. Despite counsels' motions, Judge Rosen approved strict security measures that were bound to prejudice the jurors. To begin with, the jury was anonymous. Further, the jurors met at a secret location, rode directly into a separate entrance of the courthouse in two vans with dark-tinted windows, received armed federal escorts during their movements throughout the building, and passed not only through ordinary court security but also through a second metal detector at the courtroom door. Once inside the courtroom, more than ten court security officers, rather than the usual one or two, waited to guard the room. These measures reinforced the atmosphere of terror the prosecution was trying to create and no doubt eroded whatever presumption of innocence the jury might initially have been willing to entertain. *See* Linda Deutsch, *Blake Jurors Are Confused on Presumption of Innocence*, L.A. Daily News, Nov. 17, 2004.

Counsels' persistent objections throughout trial were also of little immediate avail. As in most criminal cases, the objections were often met with the all too familiar, "That will be denied, counsel." Over defendants' objections, the court admitted into evidence more than 100 hours of audio recordings from cassette tapes seized at the apartment during the initial mistaken raid. These recordings contained at most fifteen brief passages in which, depending upon one's and translation and interpretation of the materials, one might hear something disapproving of Western ideals. There was no evidence that any of the accused had actually listened to the tapes, and complete translations of the tapes were never provided to the defense. In fact, the prosecution's expert translator apparently obtained on the Internet his so-called expertise in Islam and Salafism, the teachings of a radical sect identified in the Third Superceding Indictment and central to the prosecution's theory.

There is also some indication that the expert was a member of the Phalengist party, a right-wing Lebanese Christian sectarian party founded by Pierre Gemayel to quell emerging Muslim interests. The other translators presented different problems. The rebuttal expert continued to translate the tapes even after the court's cutoff date had passed. AUSA Convertino also paid a man named Marwan Farhat, a violent criminal involved with Hezbollah associates who was awaiting cocaine charges, to summarize each of the tapes. At trial, the tapes turned into a huge and fruitless distraction, helping to obscure the weakness of the prosecution's case.

Beyond the faulty tapes, the case essentially relied upon three key witnesses: the untrustworthy Hmimssa and two experts, Paul George and Mary Peterson. FBI Supervisory Special Agent Paul George ostensibly had come from a career in intelligence, and his background was shrouded in secrecy. Before entering the service, he claimed he graduated Phi Beta Kappa in college and reportedly graduated *summa cum laude* from a law school. Following a pre-trial foundational hearing during which the defense team was only permitted to elicit limited facts relating to his background, the court determined he had the relevant expertise.

The problem with all this nondisclosure was that George was the key expert witness for the prosecution who "explained most clearly . . . [t]he government's theory of the case" (Government's Consolidated Resp. Concurring in Defs.' Mots., at 11), and he provided critical testimony at trial about terrorist tradecraft and the activities of clandestine cells. The bits of evidence gleaned from his hearing testimony and from a summary written by AUSA Convertino disclosed just before the foundational hearing suggested that Agent George assumed other identities. Without access to his background, however, the defense was unable to conduct any meaningful background investigation and was obstructed from conducting an effective cross-examination at the hearing and, more important, from challenging his credibility before the jury. *See Defendants Prevail in Challenges to Soft Expert Testimony: RICO Report*, The Champion (May 2000).

As to the basis of Agent George's testimony, the court had permitted him to testify on the condition that the prosecution would present lay factual witnesses to provide the foundation, who would then be subject to cross-examination. But that's not what really happened at trial. Given a lack of foundation as to why he relied on the assertions of Hmimssa, a known fraudster, Agent

George resorted to evasive muttering and doubletalk. When the court questioned him at trial about why investigators ruled Hmimssa out as a terrorism suspect, George said that investigators could corroborate enough of Hmimssa's assertions to make him credible. He then added: "[AGENT GEORGE]: It was a continued corroboration. And as you're aware, there were other other testimony that we could not bring in.

"MR. THOMAS: Wait a minute.

"MR. SWOR: Oh, my God.

"MR. MORGAN: Whoa.

"THE COURT: I order the jury to disregard that. I tell the jury to disregard that.

"MR. NISKAR: Did we say objection?

"THE COURT: I think I got the gist.

(Defs.' Mot. for Judgment Notwithstanding the Verdict or New Trial, Exh. K, Draft Tr. 04/29/2003 at 364.)

Rather than providing the defense with the real basis of his opinion and opening the testimony up to a fair cross-examination, the prosecution suppressed essential evidence and permitted the agent to allude to purported facts wholly beyond the evidence. This allows the prosecution soft expert simply to create a scenario about the defendants' purported involvement in the charged conduct and the informer's reliability, relying on the force of credentials that cannot be challenged and the imprimatur of the United States to fill the gaps.

Little could be more offensive to the defendants' constitutional right fairly to confront the witnesses against them. Such "overview testimony" has recently surfaced in the courts and has been widely condemned. The problem is that a so-called expert testifies about a mix of expert opinion evidence that theoretically will be produced at trial and his alleged experience investigating similar crimes. This mixture produces an outwardly persuasive theory of the prosecution's case, which is essentially impossible to attack through cross-examination. *See generally United States v. Casas*, 356 F.3d 104 (1st Cir. 2004) (discussing the dangers of "overview testimony" and the error of its admission into evidence); *United States v. Griffin*, 324 F.3d 330 (5th Cir. 2003) (same).

The Detroit prosecution also offered, relied upon and failed to correct false testimony. For example, the testimony of key witnesses Agent George and Lieutenant Colonel Mary Peterson was so misleading and fraught with problems that when Judge Rosen later ordered the DOJ to audit the entire prosecution, the DOJ's post-trial recommendation to set aside the convictions would largely be due to problems surrounding their statements. (Government's Consolidated Resp. Concurring in Defs.' Mots., at 1441.) Each of these two purported experts provided critical testimony as to the so-called "casing materials" upon which Agent George relied heavily in his damning testimony.

What were the "casing materials"? First, there was the videotape of American tourist attractions, which Agent George thought to be sinister. The tape was a hodge-podge of miscellaneous innocuous recordings of news, cartoons and musical footage, as well as some vacation footage including shots of the MGM Grand Hotel and other buildings in Las Vegas. Unfortunately for the prosecution, the Las Vegas

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FBI and U.S. Attorney's Office expressly disagreed with Convertino's and George's characterization of the vacation tape as a "casing" of the landmarks.

As to the purportedly inculpatory statements on the tape, it is unclear what the speakers, a group of young Tunisians touring the country, even said. The voiceover on the tape had a Tunisian dialect, which is difficult to translate for those not specifically familiar with it. Before and during trial, defense counsel repeatedly argued that this problem made some of the translations inaccurate. As it turns out, in 2002 Detroit FBI Special Agent Michael Thomas wrote an email recognizing the difficulty of translating the dialect, but the email was never provided to counsel until post-trial motions were filed. Instead, AUSA Convertino actually attacked the theory at trial. (*Id.*, at 40.) He disregarded the testimony of the defense translator, Naima Benkoucha, who, unlike the prosecution's hired guns, was a department store manager who had never testified in court or worked as a translator before. Ann Mullen, *Deliberations Begin: Fate of Four Alleged Terrorists in the Hands of a Jury*, Metro Times Detroit, May 21, 2003.

In addition, there were the so-called surveillance sketches that newspaper reports had described as "chilling." The Third Superceding Indictment incorporated a convoluted charge accusing the men of conspiring to provide material support for a conspiracy to attack military targets like the Incirlik Air Base in Turkey. This conspiracy-to-support-a-conspiracy theory allowed the prosecution to cloud the issues and introduce evidence of questionable relevance, including the so-called "sketches." These chicken-scratches are so barren of content that it is difficult for the untrained eye to see in them anything but the meanderings of a seriously deficient artist. In this case, the honest, trained eye sees the same meaningless scrawling.

As to a sketch that Colonel Peterson testified as depicting the Incirlik an air base in Turkey, William McNair, who worked in U.S. intelligence for more than 40 years, including work as an Information Review Officer for the Directorate of Operations at the CIA, reviewed the sketch and shared it with numerous CIA document analysts, paramilitary persons and people in the CIA's Counter Terrorism Center. With all their training, they each opined that the sketch did not seem useful and most likely was not the work of a terrorist cell. (Government's Consolidated Resp. Concurring in Defs.' Mots., at 35.) More to the point, no one to whom McNair talked was willing to testify that it was the work of a cell. This exculpatory evidence was never disclosed to the defense team.

When McNair communicated these opinions to AUSA Convertino over a series of telephone calls, Convertino " 'didn't much care what [McNair] was saying.' . . . Convertino was not really asking for the CIA's opinion. . . . It was McNair's opinion that Convertino was shopping for an opinion consistent with his own." (*Id.*, at 35.) Similarly, on the eve of a visit by AUSA Convertino to Turkey, the sketch was presented to a high ranking official in the Intelligence Division of the Turkish National Police. The official said the drawing "did not look like any terrorist sketch that they had seen in the past." (*Id.* at 33.) Needless to say, this evidence was also not disclosed.

Early on in the trial, Air Force Special Agent Goodnight submitted a critical report and addendum that called into question the key testimony of Colonel Mary Peterson. Colonel Peterson, who was flown in five days before trial and remained something of an unknown quantity, testified that she was previously stationed at Incirlik Air Base and that the sketch was of that base. This was based on four key factors, including the notion that a scribble represented a hardened aircraft shelter (HAS). Goodnight, by contrast, opined that "Although this report provides an analysis of the day planner, other versions of the analysis also exist. . . . [T]he speculative portions of the sketch were 'sold' to the AUSA too strongly as fact. . . . [I]t was apparent that [the AUSA] believes strongly in the HAS theory and wants someone from AFOSI [i.e., Air Force Special Investigations] to testify that the drawing is in fact a HAS. . . . [I]t might be difficult to convince a jury that the drawing represents a HAS, particularly since the door of the alleged HAS shows it opening from the rear [contrary to fact]." (*Id.*, at 29.)

Ostensibly, the HAS theory originated with Peterson and she gave the jury the false impression that official agreement on the theory was unanimous. Goodnight's report, as well as other evidence, revealed that this was not so. (*Id.*, at 3031, 31 n.19.) Goodnight cautioned Convertino against relying on the theory. Indeed, rather than a military outpost, Defense

Attorney James Gerometta saw that the drawing looked more like an amateur outline of the Arabian Peninsula, consistent with the defense's theory that the insane Ahmed had scribbled it out as part of one of his delusions of grandeur. Not surprisingly, the defense never learned of Goodnight's expert opinion.

Still relying on the conspiracy-to-support-a-conspiracy theory to connect the defendants with any terrorist activity, the prosecution interpreted another "sketch" to depict a map to the Queen Alia Hospital in Jordan. Although the AUSA elicited misleading testimony suggesting a consensus among government experts as to the reference of the "map," undisclosed internal reports revealed that the consensus was a myth.

In fact, experts stated that they could not establish a correlation between the scrawling and the site. Although prosecution witnesses led the jury to believe that no photographs of the actual sites could be obtained to permit a comparison with the sketch, this was simply a lie. At AUSA Convertino's request, photographs were made available to him. The photographs did not contain so-called landmarks, like a conjured dead tree, that witnesses emphasized. Indeed, the DOJ later concluded after trial that "[i]t is difficult, if not impossible, to compare the day planner sketches with the photos and see a correlation between the drawings and the hospital site . . . ." (*Id.*, at 23.) Although the defense repeatedly attempted to obtain photographs of the sites, this exculpatory evidence was never made available. The prosecution team led defense counsel and the jury to believe that it did not exist.

Similarly, the informer Hmimssa was allowed to concoct defendant Elmardoudi's purported involvement in a flight school visa document scam, even though the FBI 302s of the other persons involved revealed that Elmardoudi had nothing to do with that transaction. Hmimssa was also permitted to testify that he learned of Elmardoudi's surname through the identity documents of the latter's sister, which he supposedly viewed in the summer of 2001. Yet contrary to Hmimssa's tale, months after he agreed to cooperate the government filed an amended indictment still failing to identify the surname.

The government also elicited misleading testimony from James Sanders, who claimed to have held the day planner and to have gone with Koubriti and Hannan to obtain identity documents. Sanders claimed to have met the men in an employee lunchroom when they were co-workers. In fact, his employment in the same company actually only overlapped with theirs by a handful of days, during which they only worked on the same day three times and never on the same shift. This testimony also directly contradicted notes taken by the FBI Agent who interviewed Sanders soon after Defendants' arrest and wrote comments like "did not get asked for ID," and "never knew K-H personally" and wrote that another person "is the one that actually asked him about the ID's not K & H." (Defs.' Mot. for Judgment Notwithstanding the Verdict or New Trial, Exh. B.) None of these or other falsehoods were brought to the attention of the defense, the court or the jury. The case was built on liars and their lies. (*Id.*, at 1220.)

The prosecution also prevented witnesses favorable to the defense from being available to testify. For

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example, they concealed the identity of one of the people whose 302s directly contradicted Hmimssa's testimony, Brahim Sidi, along with his statement that Elmardoudi was not a terrorist. Sidi had received a deal in a separate criminal case by pleading nearly a year before the trial to one count of a conspiracy to defraud the United States by obtaining false social security cards and numbers. In August 2002, he was sentenced to time served. In fact, he was deported just six weeks before the "Sleeper Cell" Case was originally scheduled to start. There is also some suggestion that he and witnesses like him were offered a chance to stay in the United States if they would "remember" events in a more helpful light.

By the time Sidi testified at trial via cell phone, the reception was poor and he could not receive documents to refresh his recollection. Perhaps worst of all, the defense was left to use its own sleuthing skills to unearth Sidi's identity and testimony without prosecutorial compliance with *Brady* (*Id.*, at 25.) If the defense had not persisted for months in trying to locate Sidi, the exculpatory and impeaching evidence would never have come to light. The prosecution also concealed the identities of seven secret witnesses and prevented the defense from interviewing Sanders by rushing him out of court. The materials suppressed by the prosecution also contained a wealth of helpful documentary evidence. The AUSAs failed to produce documents relating to the mental illness of Ali Ahmed, the author of the so-called "chilling," "terrorist" sketches and scrawlings. Worse, because of AUSA Convertino, some potential documentary evidence simply did not exist. He adopted a policy contrary to the advice of other prosecutors, even including his trial partner, AUSA Keith Corbett, prohibiting any note-taking but his own during interviews of Hmimssa; 302s just didn't exist.

Finally, after trial had already begun, the prosecution turned over some travel documentation from Turkey, telling the court it had just been received. In fact, the witness who produced the documents said he turned them over to the prosecution team six months before trial. Not satisfied with its effort to conceal evidence, the government buttressed the testimony of the fraudster Hmimssa through improper vouching. *See Some* pically *Prosecutors Just Don't Get It: Improper Cross and Vouching: RICO Report*, The Champion (Nov. 2004). AUSA Convertino engaged in a prototypically overreaching closing argument. For example, he vouched for his witness Hmimssa, saying, "What did [Hmimssa] get out of this? . . . Coming down with a bullet-proof vest with a target in his head?" (Defs.' Mot. for Judgment Notwithstanding the Verdict or New Trial, at 22.)

AUSA Convertino did not mention Hmimssa's sweetheart deal to the jury, although defense counsel reminded them of the bias. Similarly, although the AUSA had specifically adopted the policy of not taking notes during his interviews with Hmimssa, he reportedly told the jurors that they "should acquit the defendants if they believed the claim that the government spent 30 hours with their star witness before taking any notes, thereby allowing him to get his story straight." Ann Mullen, *Deliberations Begin: Fate of Four Alleged Terrorists in the Hands of a Jury*, Metro Times Detroit, May 21, 2003. Despite the misleading, sarcastic tenor of AUSA Convertino's argument, that's exactly what the jurors should have done. ***As Attorney Rick Helfrick countered in his closing argument, "This case [was] based on fear, half-truths and deception."*** *Id.*

Down, But Not Out

In June 2003, the jury returned its verdicts. Although Robert Morgan's client, Ali-Haimoud, was acquitted on all counts, the other men were not so fortunate. Hannan was convicted of conspiracy to commit immigration document fraud, in violation of 18 U.S.C.

§§ 371, 1546(a) and 2. The jury found Koubriti and Elmardoudi guilty of conspiring to provide material support to terrorists in violation of 18 U.S.C. §§ 371, 2339A and of the same type of conspiracy to commit document fraud as Hannan. While the underlying frauds could carry penalties of up to 25 years for Koubriti and Elmardoudi and 10 years for Hannan, the conspiracy convictions themselves carried a maximum penalty of five years.

While waiting for the transcripts to be completed, on October 15, 2003, the defense filed a 51-page motion on seeking either an acquittal or a new trial. Citing many of the errors recounted above, the motion set forth seven independent bases for the requested relief, five citing the court's errors and two highlighting serious and prejudicial prosecutorial misconduct. As to the court's decisions, the defense recounted how Judge Rosen failed to diffuse the jury's knowledge of extensive trial security measures, to follow proper procedures in resolving translational disputes over tape transcriptions, and to authorize the production of important defense witnesses, as well as the court's improper commentary and questioning of Agent George.

Critically, the motion also detailed how prosecutorial misconduct permeated the case, tainting the verdict. Point-by-point, the defense argued that the tactics of the prosecution team violated due process, hampered the rights to a fair trial and to confront adverse witnesses, and undermined the presumption of innocence, which already has precious little actual traction in the minds of many jurors. *See* Defs.' Mot. for . 17, Judgment Notwithstanding the Verdict or New Trial; Linda Deutsch, *Blake Jurors Are Confused on Presumption of Innocence*, L.A. Daily News, Nov. 17, 2004.

Champions Of Justice By Default

What went so wrong with the trial that the DOJ was eventually required to recommend not only that the court set aside the convictions and grant a new trial, but also that it dismiss the terrorism-related charges? Why did Judge Rosen feel compelled to dismiss those charges and reverse the convictions and grant a new trial on the minor charges? *Koubriti Dismissal*, *supra*, 336 F. Supp. 2d 676. It is reasonably clear that the DOJ did not have a sudden change of heart, leading to a heightened sensitivity about constitutional rights. Rather, one would expect them to admit as little as they could, which *still* turned out to be so bad that the convictions had to be set aside.

The defense motions were the beginning of a snowball. In the months following trial, AUSA Richard Convertino was relieved of his authority, an investigation began, and AUSA Eric Straus took over the case. Straus soon came across a crucial letter by a locally notorious criminal, Milton "Butch" Jones.

In December 2001, Jones was in a maximum-security cell next to Hmimssa. Jones said that his concern for national security led him to take verbatim notes of his conversations with Hmimssa, who claimed to have lied to the FBI and the Secret Service and told him "about terrorist things." *Koubriti (*Brady *Motion), supra*, 297 F. Supp. 2d at 95960. Despite comprehensive discovery motions and repeated *Brady/Giglio* disclosure requests, "[n]either the letter nor the notes were turned over to Defendants by the Government either prior to or during trial, [even though] the Government prosecutors had the letter, and, on its face, the letter contains *Brady* and/or *Giglio* material." *Id.*, at 958.

The letter was originally given to Convertino long before trial by fellow AUSA Joe Allen, a man described as a "hard-core, true-believer." Allen was handling Jones's case, and despite his leanings, he recognized the importance of these statements. He took something of a career risk in disclosing them. When Hmimssa testified without any mention of the letter, AUSA Allen grew suspicious. As it turns out, Convertino claimed he suppressed the letter simply because he believed it was not credible. This is a bizarre proposition that the court later specifically rejected during a hearing, (Government's Consolidated Resp. Concurring in Defs.' Mots., at 13 n.5), and that, if correct, would make *Brady* a dead letter. The legal error was so obvious that the Criminal Chief of the Detroit U.S. Attorney's Office, Alan Gershel who is widely known for being a straight-shooter, later called it a "no brainer." (*Id.*, at 44.)

Focusing narrowly upon some of the potential prosecutorial misconduct, the court held an evidentiary hearing in December 2003 concerning the letter. There, AUSA Gershel admitted the error of not disclosing the letter, but he and his fellow AUSAs Convertino and Corbett gave conflicting testimony about their actions with respect to it. Knowing that

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someone was lying and still reluctant to reverse the convictions, Judge Rosen ordered the prosecution to conduct a thorough review of their documents to determine what else might have slipped through the cracks. *See Koubriti Dismissal, supra*, 336 F. Supp. 2d at 678. That way, the court could receive more information as to who might be lying and could also reserve judgment as to whether the misconduct was, according to the *Brady* standards, material to the outcome of the trial.

If one tells the truth, one is sure, sooner or later, to be found out.

~ Oscar Wilde

Following Convertino's filing of a Whistleblower lawsuit in February 2004, the DOJ handed leadership of the review over to Craig Morford, the No. 2 lawyer in the United States Attorney's Office in Cleveland, Ohio who has a sterling reputation and a solid track record of high-profile prosecutions. In the ultimate response submitted by Morford, the DOJ remained silent in the face of most of the defense's accusations. But following a painstaking, nine-month review of the record, on August 31, 2004, the DOJ issued its fifty-nine page response to the defendants' motion for acquittal, in which it detailed how the case, built upon the testimony of Agent George and the informer Hmimssa, simply could not stand. Agent "George based [his] conclusions [about the accuseds' actions] on (1) his opinion that the drawings and videotape seized from the defendants constituted operational terrorist 'casing material'; (2) the testimony of Hmimssa; and (3) the defendants' acquisition of fraudulent identity documents and their involvement in other fraudulent activities . . . ." (Government's Consolidated Resp. Concurring in Defs.' Mots., at 11.) Each of these legs of the stool was infected with error. (*Id.*, at 13.)

As to Hmimssa, the DOJ admitted that it had erred in failing to disclose the Jones letter, as well as evidence of documents and testimony containing Hmimssa's caustic comments generally deriding the United States. This combined with AUSA Convertino's anti-note-taking policy and Hmimssa's portrayal of himself throughout trial "as secular, loyal to the United States and, at least since his arrest, entirely forthcoming," was enough for the DOJ to concur in counsels' motion for a dismissal of the terrorism-related charges. (*Id.*, at 43.)

As to the purported corroborating evidence, AUSA Morford wrote that in a critical FBI memorandum memorializing Hannan's post-arrest statements, a key inculpatory paragraph was added at Convertino's request. The 302's author could not recall a statement in which Hannan supposedly admitted to knowing that certain false documents were in the apartment, and there was no record of it in the interview notes. (*Id.*, at 5152.) The post-trial investigation also revealed that Convertino paid a violent criminal, Farhat for his summaries of the audio tapes. Of course, Farhat "received an unusually large sentence reduction recommendation by AUSA Convertino" in exchange for his assistance. (*Id.*, at 50.)

The bulk of the DOJ's admissions came in connection with the mythical "casing materials," which supposedly showed that the accused were "casing" possible targets for terrorism, and upon which Special Agent George and Lieutenant Colonel Peterson had so heavily relied. Citing all the problems set out above, the DOJ admitted that the prosecution had fallen far short of constitutional and ethical standards in its failure to disclose exculpatory materials like the internal government documents showing that George's and Peterson's opinions did not reflect a universal consensus among the government's own available experts. Seeing all these errors in a case that was built on lies, the DOJ reached the inescapable conclusion that the wrongful convictions must be overturned and a new trial granted on what few charges of document fraud might be tenable. It submitted its response saying as much on August 31, 2004, just days before it was due to complete an additional discovery response estimated at approximately 1,000 pages.

Persistence Pays Off

Just three days later on September 2, 2004, Judge Rosen, a George H.W. Bush appointee, entered a historic order in the case. He

dismissed the terrorism charges under 18 U.S.C. §§ 371 and 2339A and granted a new trial for Karim Koubriti, Ahmed Hannan and Farouk Ali-Haimoud on minor charges of document fraud. See *Koubriti Dismissal, supra*, 336 F. Supp. 2d 676. Judge Rosen eloquently wrote:

"For those of us who work in our Nation's courts and whose responsibility is the administration of justice including not only judges but prosecutors and defense lawyers, perhaps our greatest challenge will be to ensure that th[e] new [terrorist] threat is confronted in a way that preserves our most fundamental and cherished civil liberties. Certainly, the legal front of the war on terrorism is a battle that must be fought and won in the courts, but it must be won in accordance with the rule of law. Those of us in the justice system, including those prosecuting terror suspects, must be ever vigilant to insure that neither the heinousness of the terrorists' mission nor the intense public emotion, fear and revulsion that their grizzly work produces, diminishes in the least the core protections provided criminal defendants by our Constitution. To permit anything less to allow our constitutional standards to be tailored to the moment would be to give the terrorists an important victory in their campaign to bring us down because they will have caused us to become something less than we are a nation of laws based upon constitutional foundations developed over more than two centuries of jurisprudential evolution." *Id.*, at 680.

Fundamental legal notions like the rule of law usually do not appear in an opinion in an unexaggerated way that d makes concrete sense. If it happens, it is worth a second look. When a judge such as Judge Rosen, a smart, ambitious, hard-working and fairly conservative Republican loyalist who is certainly not considered a civil libertarian, writes such an opinion, it is of particular interest. After all, in the same opinion, Judge Rosen remarked, "jury verdicts should be disturbed only upon a court's firmest conviction and belief formed after the most searching and comprehensive review of all of the evidence and issues that a miscarriage of justice has occurred and a defendant's fundamental constitutional rights violated." *Id.* at 679. People who know Judge Rosen recognize that when he said that, he meant it.

If the DOJ had to be compelled by such extraordinary evidence of misconduct to recommend dismissal of the terrorism-related charges, the same might be said of Judge Rosen in granting the motion. Upon reading the eloquent passages of his opinion, it is easy to view the judge as sympathetic to the defense. But the defense rarely won a significant point before him along the way. The real champions of liberty here are the defense lawyers who fought at every step, even after the trial was apparently lost, to unearth the truth hidden under a mountain of misleading statements and the suppressed evidence.

In his opinion, Judge Rosen did not independently review many of the claims of Koubriti, Hannan and Elmardoudi. He relied instead upon the DOJ's limited, albeit devastating, admissions. Judge Rosen probably would have reached the same result even if the DOJ had written its response differently, and the DOJ probably surmised this. But it is worth noting that Judge Rosen (and, understandably, the DOJ) declined to explore the misconduct and to clarify the precedent on any matter, such as whether the court, not the prosecutor, has the authority to decide whether statements impeaching key prosecution witnesses are *Brady* material or are "credible." Instead, the judge simply said that the DOJ's admitted errors cumulatively infected the trial beyond repair. And if the DOJ had not been as forthcoming or had been faced with a slightly more defensible legal position, it is unclear whether the opinion would have been written the same way.

Perhaps Judge Rosen was simply recognizing that no meaningful fight over the proper outcome remained and he was taking the opportunity, rarely provided in the heat of litigation, to reflect succinctly upon fundamental principles. He went one step further, however, in discussing the importance of preserving constitutional rights in times of national fear and tragedy. On the other hand, even in this serious case where the specific contours of due process were ready for articulation, he refrained from finding that each or any of these errors alone could support a reversal. *Koubriti Dismissal, supra*, 336 F. Supp. 2d 676. Where, as here, the lies are plain and unavoidable, the error is clearly visible. What is easy to forget in a less obvious case, however, is how stricter adherence to the process gives everyone a better opportunity at getting as close as possible to a just outcome, regardless of whether the falsehoods can be perceived.

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In the push and pull of zealous advocacy, it is easy for some prosecutors to forget that winning isn't everything. The procedures and standards that have been developed over the past two centuries and that have survived the Rehnquist Court give us the best current possible opportunity to reach a just outcome. In difficult cases some zealous prosecutors continue to commit blatant violations of due process, which have already been held to be reversible error. Yet it is well known that misconduct is the source of the majority of the wrongful convictions of actually innocent people. Prosecutorial corner-cutting ultimately amounts to a reckless disregard for the proper outcome.

See Innocent Imprisoned Committee Update: The Truth May Set You Free, The Champion (Jan./Feb. 1995), at 30; *see generally* William C. Thomson & Michelle Nethercott, *Forensics: The Challenge of Forensics Evidence*, The Champion (Sept./Oct. 2004), at 50 n.1 (discussing the role of pro-prosecution scientific misconduct in obtaining wrongful convictions); *Limitations on the Prosecution's Ability to Make Inconsistent Arguments in Successive Cases: RICO Report*, The Champion (Dec. 1997), at 40 (citing, e.g., *Miller v. Pate*, 386 U.S. 1 (1967); *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993); *Tyson v. Indiana*, 1993 Ind. Ct. App. LEXIS 926 (Aug. 6, 1993); *United States v. Tashjian*, No. CR-88-124(B)-PAR (C.D. Cal. 1988); *Wang v. Reno*, 837 F. Supp. 1506 (N.D. Cal. 1993)).

Owning Up

Who is to blame for this travesty? The front-line troops, analysts and prosecutors clearly must take responsibility for their roles in the process. But what responsibility rests at the doors of higher-ups? In the Detroit case, AUSA Convertino undoubtedly must shoulder much responsibility. At the same time, high-ranking members of the DOJ were involved in every facet of the case. In fact, Attorney General John Ashcroft and his senior staff were looking for, and speaking publicly about, connections between this case and the September 11 attacks before AUSA Convertino was willing to say he had any evidence connecting Koubriti, Hannan and Ali-Haimoud to the events (and before Elmardoudi was even a defendant). *See* Danny Hakim & Eric Lichtblau, *After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A26.

If the law is only upheld by government officials, then all law is at an end.

~ Herbert Hoover

Former Attorney General Ashcroft even had to be publicly reprimanded by Judge Rosen for making baseless statements about such fabricated connections to the press, violating a gag order. *See id.*; *Koubriti Gag Order*, 305 F. Supp. 2d 723.

So questions remain as to who all was directly or indirectly responsible and who pressured or influenced Convertino to act in the way he did, even if he already had a zealous and intense predisposition. Unfortunately, the question will largely go unanswered. Veteran AUSA Keith Corbett "bristled at Washington's intense d at the oversight." Danny Hakim & Eric Lichtblau, *After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A26. The *New York Times* quoted him as saying to the United States Attorney in Detroit, "In the 25 years that I have worked in the Department of Justice, I have never seen anything approaching this level of micromanagement." *Id.* Convertino chaffed at the cautious questioning of Barry Sabin, who since January 2003 has been the Chief of the Counterterrorism Section for the DOJ's Criminal Division, as to whether the evidence supported an indictment on terrorism charges. *Id.* Convertino and Corbett, moreover, apparently shut out the DOJ attorney, Joe Capone, who was sent to oversee the trial. They relegated him to the third row of the gallery rather than the counsel table, and they ostensibly did not consult with him or include him in strategy meetings. Defense counsel reported seeing him eating dinner alone, excluded from the prosecution team's activities.

Perhaps Convertino was simply, as he suggests, at the center of a confluence of others' wrongdoing. It is possible that Richard Convertino was viewed as a rogue by various officials because he was too meek for the zealots and too zealous for the meek, ultimately walking on the wrong, more zealous side of the line to meet the expectations that the media and top administration officials had built up. Whatever the case might be, however, it is clear that there was palpable division in the U.S. Attorney's office and the DOJ between prosecutors who held sharply different views about how the case should be investigated and prosecuted, with the lead

prosecutor, AUSA Convertino, ultimately sitting in the hot seat. *Id.* Of course, those tending to sound the voice of reason are the ones taking the spotlight now, while the other war-drummers are standing in the shadows as Convertino takes the heat.

The Timeless Tension Between Executive Power and Constitutional Limitations

The ill-fated Detroit Sleeper Cell case and the War on Terror provide a classic example of what happens when the Rule of Individuals meets the Rule of Law. AUSA Convertino or former Attorney General Ashcroft might be completely convinced that they are right on the facts. Indeed, some of the prosecution team still contends that the Detroit case was a good one. To some of them, the evidence and legal process become just an annoyance or a hindrance. So convinced are they of the righteousness of the ends they seek, they might bend, break or rewrite the rules along the way. *See* Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at A1.

With respect to these actions, the power of the judiciary to punish misconduct comes as little consolation. An independent judiciary is supposed to provide a check on the executive and legislative Powers. But in terrorism matters in times of national anxiety, the members of the judiciary with some few notable exceptions can well be described as constituting the weakest branch. While the judiciary has the rarely invoked authority to dismiss charges after the damage has been done, only the self-restraint of law-enforcement agents, prosecutors and executive officials can provide the best solution to these problems. In terrorism investigations overseen by the most zealous of prosecutors, this is hopelessly unrealistic.

For all the fanfare about the DOJ's lengthy response and Judge Rosen's eloquent opinion, what is most disturbing about the Detroit Sleeper Cell Case is how close the prosecution team came to getting away with a degree of misconduct this bad. By now, the public should be asking, How many other cases are there in which the prosecution plays fast and loose with the Constitution? Here, three men who were innocent of terrorism charges found themselves in an arduous ordeal and were ultimately convicted of crimes based upon a mistaken raid, a few chicken-scratch sketches created by a mentally ill person, the lies of an informer singing for his supper, and the seriously misleading testimony of so-called expert witnesses. Now, they have the opportunity to obtain their freedom, but what would have happened if the accused had not been represented by such seasoned and dedicated lawyers; if these lawyers had not persisted in seeking the discovery materials again and again for more than a year and even after the trial was over; if counsel in Iowa had not alerted the defense lawyers to information about deported witnesses; if defense sleuthing had not led to the discovery of Ahmed's psychiatric records; if a few conscientious AUSAs had not come forward with the exculpatory evidence, outing the lead prosecutor; and so on? Indeed, if the court had simply dismissed the charges after learning of the Butch Jones letter, the sheer scale of the misconduct probably would never have been publicly known.

This disturbing case serves as an example of the essential role that well trained, persistent, committed and even severely under funded criminal defense attorneys can play, even when the deck is especially stacked against the accused. ***This was a case as J. M. Thomas said, that "began as a lawyer's nightmare and turned out to be a lawyer's dream." In the words of Bill Swor, the Detroit Sleeper Cell Case shows how important it is that defense lawyers be "willing to put themselves on the line to fight this necessary fight, especially at this time in our history. It tells you that we all have obligations and that we're not alone."***

Judge Rosen's reversal of the convictions and dismissal of the terrorism-related charges is the only proper outcome based on the evidence. In spite of the conclusions reached by the 12 citizens in the jury box, the proof just did not support a finding of guilt on the terrorism charges. Even so, in these troubled times results like these often can only happen when committed advocates are willing to do battle and, even then, to lose and lose and lose, until justice sometimes prevails.

Barry Tarlow is a nationally prominent criminal defense attorney. He is a frequent author and lecturer on criminal law. He was formerly a prosecutor in the U.S. Attorney's Office and is a member of The Champion *Advisory Board.*

NEAL BUSH, *Jury Consultant*

By Neal's daughter,
Kate Bush

Neal Bush, activist and attorney, joined the legal team as a jury consultant. Jury consulting is just one of the many hats Neal has worn in his years of practice. In fact, Neal's jury work is an outgrowth of his early involvement with the National Jury Project, the very first effort in this country to apply all the sciences to jury selection. Its groundbreaking methodology was tested for the first time when the Project challenged the lack of minority representation on Erie County New York jury panels on behalf of Attica Defense.

Before graduating from the University of Michigan Law School in 1970, Neal was a student leader of the National Lawyers Guild, and remained active in that organization as a board member of the Guild and the Guild's Sugar Law Center and as the president of the NLG's Detroit Chapter.

Neal has volunteered his time for many causes and defendants; Attica Brother Shango owed his release, in large part, to the brilliant appellate work Neal applied to his Michigan case. Married to the late Judith Magid, Neal is the proud father of 23-year old Kate Bush. His job in the "terrorist case" was to help assemble jurors who could put aside their fears of 9/11; perhaps if given all of the facts, they could have.

Neal Bush

Neal calls the experience of working with the defense team a positive and rewarding one, especially since their work has now been vindicated.