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CRIMINAL PROSECUTION AND SECTION 1983

Barry C. Scheck*

JUDGE PRATT:

The next section of our program focuses upon the interplay of criminal prosecutions and Section 1983 claims. This interplay has given rise to a number of problems that Barry Scheck is going to discuss.

PROFESSOR SCHECK:

When Marty Schwartz called asking me to speak, I felt obligated to speak as a penalty for calling him and asking a lot of stupid questions. It made sense to ask me to attend, given the series of cases that my partners and I have become involved in over the last few years. There is a fairly unusual set of cases that involve the decision to criminally prosecute police officers, and then to try to figure out how that will affect a future 1983 claim.

The Abner Louima case is one of these cases.¹ This case started as a state investigation and indictment, but before the state case was ever tried it became a federal criminal case.² The first part of

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¹ United States v. Volpe, 78 F. Supp.2d 76 (E.D.N.Y. 1999).

² *Id.* at 81.

the case was tried on certain substantive crimes and then the conspiracy to obstruct justice charges were severed.³

Then there is what I am calling the New Jersey Four case.⁴ This case involved four young New York City men who were driving down the New Jersey Turnpike on their way to basketball tryouts at North Carolina Central University.⁵ All of these young men were junior college students and the sons of police officers, corrections officers, and military personnel. They were carrying bibles and John Steinbeck novels in their car, when they were pulled over by two New Jersey state troopers on what we, and the State of New Jersey, contends was a racial profiling stop.⁶

I will not go into too much factual detail, but can talk about information found in the officer's indictments.⁷ At some point the van shifted into neutral or reverse and slowly started moving backwards. One of the troopers broke a window firing point blank at one of the young men in the front seat hitting him quite a few times.⁸

The van then drifted into the middle of the New Jersey Turnpike and was hit by another vehicle, which pushed it back towards the police officers who fired more shots. One shot was allegedly fired by Trooper Hogan which hit Danny Reyes in the back.⁹ Two other passengers were hit in addition to Danny Reyes. The police

³ BLACK'S LAW DICTIONARY 1077 (6th ed. 1990) (defining "obstructing justice" as "impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice therein. The act by which one or more persons attempt to prevent, or do prevent, the execution of lawful process").

⁴ Nancy Ritter, *Racial Profiling: Trenton's Legal Strategy? Dodge Punitive Damages*, 8 N.J.LAW WKLY 920 (1999). The case involved four minority men stopped by New Jersey state troopers and subsequently shot at, leaving three of them wounded. The officers were later charged and indicted for attempted murder and assault. *Id.*

⁵ *Id.*

⁶ Katheryn K. Russel, 'Driving While Black': Corollary Phenomena and Collateral Consequences, 40 B.C.L. Rev. 717, 719 (1999).

⁷ Rebecca Porter, *Skin Deep: Minorities Seek Relief From Racial Profiling*, 35 J.T.L.A. TRIAL 13 (1999).

⁸ Michael Raphael, *One Piece at a Time This Much is Clear. Two Troopers Fired 11 Shots Into a Minivan That They Stopped; But a Painstaking Probe has Undercut their Explanation*, THE STAR LEDGER (Newark, N.J.) Sep. 10, 1999.

⁹ *Id.*

officers were charged with aggravated assault for those actions¹⁰ and the two troopers who fired at Danny Reyes were each charged with one count of attempted murder.¹¹ In the course of the investigation, it was revealed that these two officers had been the subjects of prior allegations of racial profiling stops.

As soon as this incident occurred, it became clear that these two particular troopers were under the microscope. A member of the public defender's office in Mercer County revealed that this particular trooper had arrested a client and it was alleged that his search of the client violated the Fourth Amendment.¹² In the criminal proceeding a motion, called a Kennedy motion in New Jersey,¹³ was filed alleging that this trooper was engaging in racial profiling. Based on this information, we engaged in discovery of information related to other stops in order to prove that there was racial profiling in our case. We wanted to show that it was not an accident that these men were stopped, that it is part of a modus operandi, scheme or plan of this particular trooper,¹⁴ and that there was notice that this officer had indeed engaged in racial profiling on earlier occasions.

As a result, prosecutors began looking into the prior stops of these two troopers. This search included any prior stops that may have been made that night. Our clients contended that they were driving within the speed limit since they had the cruise control operating, and noted the fact that the trooper's car passed them, pulled over to the side and looked in and only then pulled them

¹⁰ *Id.*

¹¹ *Id.*

¹² U.S. CONST. amend. IV which states in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

¹³ See *People v. Kennedy*, 47 N.Y.2d 196, 205, 391 N.E.2d 288, 293, 471 N.Y.S.2d 452, 457, (1979) (holding that the trial court must exercise discretion when determining admissibility of evidence of prior bad acts for the purpose of impeaching witness credibility during a pre-trial hearing). *C.f.* *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413.

¹⁴ Rocco Cammarere & Nancy Ritter, *Racial Profiling: A Legal Time Bomb Avalanche of Suits Expected*, 8 N.J. LAW. WKLY. (1999).

over to the side of the road. Moreover, the stop was never called in. Thus, it was contended that this was a racial profiling stop to begin with.¹⁵

Next, there was an examination of the prior stops of these individuals. Starting with that night it was found that the people who were pulled over just an hour and a half before our clients, were also black. Yet, in the forms required by the State of New Jersey, the race of the person was indicated as white.¹⁶

The next step was to go back and look at prior stop reports of these two troopers. It was discovered that they had been filing reports which not only mischaracterized the race of the person stopped, but they were also doing something which is called ghosting.¹⁷ Ghosting is a practice whereby a police officer would look at a vehicle, see the license plate number and that there was a white person in the car; then write down that this car was stopped even though the car driven by the white person was never stopped. However, a stop was called in performed, it is simply the case that the actual stop was somebody of a different race. This is a practice which you should be aware of and watching out for in these kinds of cases.

In our case, the officers were indicted under New Jersey law for official misconduct due to the prior racial profiling stops which arose out of that investigation.¹⁸ This case became very significant because of the number of lawsuits going on in the State of New Jersey concerning racial profiling.¹⁹ Included in these lawsuits was a Gloucester County criminal class action suit where an extensive study was conducted about the number of stops on the highway.²⁰

In the Gloucester County case there was an allegation of a policy of racial profiling by state troopers, which occurred over many

¹⁵ Ronald Smothers, *New Jersey State Troopers Indicted in Turnpike Shootings*, N.Y. TIMES, Sept. 8, 1999, at B1, B5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Ritter, *supra*, note 4 “[M]ullin, who’s part of a team pursuing a class action on behalf of minority motorists stopped . . . since 1988”

²⁰ *State v. Soto*, 734 A.2d 350, 351-53 (N.J. Super. Ct. 1996). See also Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review*, 28 COLUM. HUM. RTS. L. REV. 551, 564-5 (1997); see also notes 68-71 and accompanying text.

years in the State of New Jersey.²¹ The trial judge found that the practice was in fact occurring.²² It was on appeal when the New Jersey attorney general's office opposed it by offering arguments that perhaps blacks drove worse than other races and that this was the reason for the discrepancy.²³

When our clients were stopped and the criminal investigation of these troopers began, the State of New Jersey and the attorney general's office began investigating this practice. The day that the troopers were indicted for mislabeling the drivers' race, a report was produced that detailed the problem of racial profiling in the State of New Jersey.²⁴ It is a state prosecution, by a state prosecutor, but there is also a process of federal monitoring.²⁵

Another case deals with the jail in New York's Nassau County.²⁶ In this case, there was an inmate in the Nassau County jail named Pizzuto.²⁷ Mr. Pizzuto, who had never been incarcerated before, was in the jail on a vehicle and traffic violation. He was on a methadone maintenance program and asked for methadone when he was put in the Nassau County jail. One thing led to another and Mr. Pizzuto was beaten to death by correction guards.²⁸ The case started off with an investigation by the state authorities but the federal government took over. Consequently, the perpetrators have been indicted in the Eastern District of New York.²⁹

²¹ *Soto*, 734 A.2d at 351.

²² *Id.*

²³ *Id.* at 354-55.

²⁴ See Report of Joseph B. Kadane and Norma Terrin, In the Matter of State of New Jersey v. Kevin Jackson, cited in Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review*, 28 COLUM. HUM. RTS. L. REV. 551, 604 (1997), note 68, and accompanying text.

²⁵ See *infra* note 127 and accompanying text. See also Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1183 (1999) (stating that newspapers have reported that "the [Justice] Department will propose a consent decree establishing federal monitoring and oversight of the New York City Police Department"), Robert Polner & Patricia Hurtado, *Rudy Says No/Vows Opposition to Federal Monitoring of NYPD*, NEWSDAY, Mar. 24, 1999, at A7.

²⁶ Monte R. Young, *Outside Choice: Ex-city corrections chief picked for Nassau jail post*, NEWSDAY, Jan. 30, 2000, at A03.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Robin Topping, *Pizzuto Family Sues Nassau: Jail system blamed for '99 beating death*, NEWSDAY, Jan. 29, 2000, at A32.

Other cases that we have been involved in lately illustrate these problems. One arose in Brooklyn. I am quite sure you would not have heard of it. A young man was standing on line in a Motor Vehicles Bureau in New York when he asked a Hispanic man to save his place. Without characterizing the facts too much, one thing led to another and the Hispanic man started beating him up.³⁰ When he had him in a headlock and was beating him about the eye, eventually the orbit of his eye was fractured and his eyeball almost came out. When various people in the Motor Vehicles Bureau came by and looked at what was going on, the Hispanic individual held out a badge and said that "he was doing 'police business,'" and then continued hitting him.³¹

Interestingly, this case is post-Louima. The local precinct in Coney Island is just a block away from the Motor Vehicles Bureau and this is where Mr. Kernisant, the victim, was taken. To the credit of the people in the precinct, they immediately took one look at Kernisant, one look at the officer, and said, "There's something weird here." The Department of Internal Affairs was called and officers were sent out to the Motor Vehicle Bureau within an hour or two to look for witnesses.³² Ten or eleven independent civilian witnesses were found.

JUDGE PRATT:

Still in line.

PROFESSOR SCHECK:

Yes, still in line. The next thing that happened was an indictment of the officer for assault by the Brooklyn district attorney's office.³³ A man named Ed Boyer, who tried the Howard Beach case,³⁴ prosecuted it. The officer waived his right to a jury

³⁰ Michael O. Allen, *Beat Victim Still Hurting*, DAILY NEWS (New York), January 3, 1999, at 13.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See Marilyn Berkery, *Prosecution Witness Defends Credibility*, UNITED PRESS INTERNATIONAL, June 17, 1988.

trial and was acquitted, much to the surprise of a lot of us, and certainly to the surprise of the district attorney.³⁵ We have subsequently filed a section 1983 case in the Eastern District of New York.³⁶

The next case arose out of the manslaughter conviction of a police officer in the Bronx after shooting a man named Gaines, where we represent the estate of the deceased.³⁷ After an altercation in a subway station, the officer thought Mr. Gaines was attempting to rob somebody on the subway train. The officer ordered Mr. Gaines off onto the platform and pulled out his gun. When Mr. Gaines began to run, the officer shot him in the back.

After the criminal conviction, we filed a lawsuit alleging federal section 1983 claims in the state court.³⁸ As some of you may know, the Bronx is the borough in New York City where the judgments tend to be higher than in other boroughs.³⁹

Then of course there is the Diallo case,⁴⁰ which most of you know about. Finally, there is the recent case which raises some

³⁵ Helen Peterson, *Judge Clears Cop of Assault Charge*, DAILY NEWS (New York), February 26, 1999 at 78.

³⁶ *Id.*

³⁷ *See* People v. Colecchia, 251 A.D.2d 5, 674 N.Y.S.2d 10 (1998).

³⁸ *Id.* at 6, 674 N.Y.S.2d at 10. The defendant was convicted in a non-jury trial of manslaughter in the second degree. He was sentenced to a term of one and a half to four and a half years. *Id.*

³⁹ *See* Larry McShane, *Suspicious Minds Bronx Juries Often Find Police Officers' Stories Hard to Believe*, FT. WORTH STAR TELEGRAM, Jan. 16, 2000, page 4. (citing statistics that Bronx juries have had the lowest conviction rate for the past 11 years as compared to Brooklyn or Manhattan, and quoting lawyer Ron Kuby on the great generosity of Bronx juries in civil cases: "Let's face it: The Bronx civil jury is the greatest tool of wealth redistribution since the Red Army.").

⁴⁰ John Caher, *Diallo Trial Opens Before Diverse Jury*, 223 N.Y.L.J. 22 (2000).

Joseph C. Teresi selected a diverse panel of jurors to hear evidence against four white New York City police officers charged with killing an unarmed African immigrant... A three-count indictment returned in March (of 1999) accuses the officers of second-degree murder, under both an intentional homicide theory and depraved indifference. It also charges them with first-degree reckless endangerment, on the theory that they created an unreasonable risk to others by firing a volley of 41 shots at Mr. [Amadou] Diallo as he stood in the vestibule of his apartment.

Id.

interesting issues involving a young man named Gideon or Gary Busch.⁴¹ He was an emotionally disturbed gentleman living in the Borough Park section of Brooklyn. He was shot by police officers when he was holding a hammer up in the air or, as the police contend, he was “moving forward in the direction of the officers with the hammer”.⁴² But basically, papers and public comments of officials and police indicate that there was a group of police officers facing Mr. Busch who had a hammer. The question is whether he was lunging towards the officers or just holding it in the air; and whether the officers were justified in shooting him eleven times?⁴³

These cases are peculiar, as are all of the cases which involve the interplay between potential criminal prosecution of police officers by either state or federal authorities and the eventual bringing of various section 1983, 1985, and 1986 actions.

When looking at a potential criminal prosecution of police officers, you think about the significance of a conviction. Plainly, on many of the critical issues in Section 1983 litigation, there can be a collateral estoppel effect.⁴⁴ If the police officer is convicted, you are certainly going to run into some problems with the locality indemnifying the individuals.⁴⁵ You can almost certainly be assured indemnification will not occur in most of these instances where a police officer is convicted. Therefore, you must start thinking of Monell theories in order to get a deep pocket.⁴⁶

⁴¹ Dan Janison, *New Queries In Brooklyn Shooting*, NEWSDAY, Oct. 5, 1999, at A06. Gary Busch, a mentally ill man, lunged at police wielding a hammer. The police responded by shooting Busch 11 times. *Id.*

⁴² *Id.*

⁴³ *Id.* The Police Commissioner, Howard Safir, and Mayor Rudolph Giuliani claim that seven civilian witnesses corroborated the police account that Busch put officers in immediate danger when he lunged at them with a hammer. In contrast, Safir's account of the events came under fire in the wake of statements produced by three witnesses who claim the officers were at least seven feet, and as much as 15 feet, away from Busch when they fired.

⁴⁴ See generally, Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379 (2000).

⁴⁵ M. David Gelfand, *Guest Editor's Introduction to the "Symposium on Reconsidering Monell's Limitation Upon Municipal Liability for Civil Rights Violations"*, 31 URB. LAW. 395, 403-5 (1999).

⁴⁶ See *infra* note 106.

If there is an acquittal, there may be administrative sanctions against the officer, but indemnification is unlikely.⁴⁷ In New York, recovery can occur under the doctrine of respondeat superior, but there could be some problems in those situations.⁴⁸ What happens if the police officer is acquitted as in the *Kernisant* case?⁴⁹ One thing I would heartily recommend in New York is to have the records sealed under section 160.50 of the Criminal Procedure Law.⁵⁰ In a majority of other jurisdictions, there are no such sealing provisions where fingerprints, photos, and the records of the proceeding can be sealed.⁵¹ Thus, although this applies in New York, it does not apply in many jurisdictions across the United States.⁵²

The New York State cases that confront the sealing issue, indicate that the courts have gone far towards keeping the district attorney's file, the court records, and almost everything from a civil plaintiff. The theory relied upon by the courts is that this particular statute was passed to prevent any kind of stigma attaching to the exonerated or acquitted criminal defendant, and that you should not have that advantage in a civil litigation.⁵³

⁴⁷ See Gelfand, *supra* note 45, at 404-05 (stating the plaintiff must overcome the qualified immunity defense in order to recover).

⁴⁸ *Id.*

⁴⁹ See *supra* notes 30-36.

⁵⁰ N.Y. CRIM. PROC. LAW § 160.50 (McKinney 1992). This section provides in pertinent part:

Upon the termination of a criminal action or proceeding against a person in favor of such person . . . the record of such action should be sealed...Upon receipt of notification of such termination and sealing: (a) every photograph of such person and . . . all palm prints and fingerprints taken or made of such person . . . shall forthwith be, at the discretion of the recipient agency, either destroyed, or returned to such person, or to the attorney who represented such person.

Id.

⁵¹ *Id.*

⁵² See Gary D. Spivey, Annotation, *Right of Exonerated Arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted*, 46 A.L.R.3d 900 (1972).

⁵³ See 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1(a) (1999), "Uniform Rules for the N.Y.S. Trial Courts – Sealing of Court Records in Civil Actions in the Trial Courts", which states in pertinent part:

Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records,

However, the law is pretty clear in federal court relating to the exercise of these privileges. In pursuing a section 1983 action, the Federal Rules of Evidence will apply and material will be attainable notwithstanding section 160.50.⁵⁴ Therefore, I would urge you to go to federal court if you anticipate a problem with section 160.50.

The criminal prosecution of a law enforcement officer is one of the most difficult kind of prosecutions you can ask a state or a federal authority to assert. Such a claim both is psychologically and politically difficult. Moreover, it is a difficult investigation to conduct.

Under these circumstances, it is necessary to appreciate the point of view of representing a plaintiff in such a situation, who is a victim. One issue to consider is the constitutional architecture that surrounds the rules of investigation of the police.⁵⁵ Basically, if an officer is compelled to talk to an investigating state, federal or local authority, as a matter of constitutional law, he is immune

whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

Id.

⁵⁴ See FED. R.CIV. P. 26(a)(1)(B), which states in pertinent part:

Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties...a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings.

Id.

⁵⁵ See, e.g., *Elder v. Holloway*, 510 U.S. 510, (1994). The Supreme Court found that “[t]he doctrine of qualified immunity shields public officials like respondents from damages actions unless their conduct was unreasonable in light of clearly established law.” *Id.* at 512; see also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that officials “are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”), *Conn. v. Gabbert*, 526 U.S. 286 (1999). The Court noted that the trial court must “..first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.” *Id.* at 289.

from both criminal prosecutions and disciplinary proceedings.⁵⁶ However, there is some case law which holds officers liable in a civil case.⁵⁷

In terms of investigating a criminal case, if an officer is immediately compelled to talk, the statements are immunized.⁵⁸ Appreciating this immunity is important because if a criminal prosecution is imminent, the prosecutor cannot know about the compelled statements without jeopardizing the case on appeal.⁵⁹ Therefore, you need to be aware of this and to be cautious about it. If an officer refuses to talk under any circumstances, he can be fired.⁶⁰ This situation is the reason that the immunity rules exist.

There is a completely different situation where a shooting or other incident occurs and fellow officers respond by simply asking, "What happened?" Is a response to this question considered a compelled answer? I would argue that it is not a compelled answer

⁵⁶ See *People v. Feerick*, 93 N.Y.2d 433, 714 N.E.2d 851, 692 N.Y.S.2d 638 (1999), "In order to protect a defendant's Fifth Amendment rights, a Kastigar hearing is held to ensure that statements by police officers, which are compelled under penalty of dismissal, are not used in a criminal investigation or proceeding." *Id.* at 441, 714 N.E.2d 851, 692 N.Y.S.2d at 640, referencing *Kastigar v. United States*, 406 U.S. 441 (1972); see also U.S. CONST. amend. V, which states in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

⁵⁷ See, e.g., *Richardson v. McKnight*, 521 U.S. 399 (1997) (holding that prison guards who are employees of a private prison management firm were not entitled to qualified immunity in a §1983 suit brought by prisoners).

⁵⁸ See *supra* note 58; see also N.Y. CRIM. PROC. LAW § 50.20(3). This section states in pertinent part: "A witness who is ordered to give evidence pursuant to subdivision two and who complies with such order receives immunity . . ." *Id.*

⁵⁹ See, e.g., 18 U.S.C.A. § 6002, which states in pertinent part: ". . . no testimony or other information compelled under the order . . . may be used against the witness in any criminal case . . ." *Id.*

⁶⁰ See e.g. *Tanico v. McGuire*, 80 A.D.2d 297, 300, 438 N.Y.S. 2d 791, 793 (1st Dep't 1981) (finding that "[I]t is now clear that a public employee, if granted 'use immunity', may be narrowly and specifically questioned about his official duties and dismissed from his position if he refuses to answer questions properly put to him"); *Caruso v. Civilian Complaint Review Board*, 158 Misc. 2d 909, 912, 602 N.Y.S. 2d 487, 489 (Sup. Ct. N.Y. County 1993) (*citing* section 1-10 of Civilian Complaint Review Board rules and regulations, which provides that "If you refuse to testify or to answer questions relating to the performance of your official duties, you will be subject to police department charges which could result in your dismissal from the Police Department").

unless the individual indicates that he does not want to talk.⁶¹ Once the officer so indicates, then this becomes a compulsion situation. However, if the officer is simply asking, "What happened?; Where were you standing?; Who fired?; or What happened here?" I would argue that this is not necessarily a compelled situation, but simply asking what happened. Those answers appearing in an ordinary police report for virtually any jurisdiction would describe in some fashion the events at issue. This information can be used in any proceeding.

Local investigatory rules for police forces vary widely within New York and across the United States.⁶² Knowing the rules applicable to your jurisdiction is important to your case. An article from the front page of the Wall Street Journal elucidated the fact that the New York rules are somewhat unique.⁶³ The first thing that may be surprising is a rule in the patrol guide governing police shootings. Police officers arriving at the scene are instructed, "Don't ask the officer who shot or what happened."⁶⁴ This is hard to imagine. The rule book says, "Don't ask what happened." It instructs them to wait for the district attorney or somebody else who may not be notified until twenty-four to forty-eight hours after the incident.⁶⁵

This is quite an incredible rule. How is it possible to examine the scene of a shooting, unless it is known where everybody was standing? How can the evidence be picked up? You know that shots were fired and cartridges ejected; and you know that these cartridges may go three feet in a particular direction, depending on the kind of gun involved, but figuring out the angles of the bullets is hard if you do not know where the shooter was standing.

⁶¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966) (noting that an individual may waive the fifth amendment right to silence).

⁶² See *infra* note 69; see also generally, Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. Cal. L. Rev. 1453 (1993).

⁶³ Laurie P. Cohen, *New York Rules Mean It's Tough to Convict Police in Diallo Case*, WALL ST. J., April 7, 1999, at A1.

⁶⁴ *Id.*

⁶⁵ *Id.*

Another peculiar New York rule is known as the forty-eight hour rule.⁶⁶ This rule is the result of collective bargaining between the City of New York and the Policemen's Benevolent Association [hereinafter, "PBA"]. Essentially the rule states that an officer under suspicion can refuse to talk with investigating authorities for forty-eight hours, thereby giving him an opportunity to consult with a PBA representative.⁶⁷ The representative is invariably another police officer, who is also a local union delegate within that particular precinct. Incidentally, there is also a four-hour rule for witnesses.⁶⁸

What is often misunderstood about this rule is that a statement taken in violation of the forty-eight hour rule will only bar the statement for use in an administrative proceeding to fire the police officer.⁶⁹ The rule would not necessarily be a bar to the use of that statement in a criminal prosecution.⁷⁰

Nevertheless, the custom, pattern and practice of the City of New York, its police investigators, and the district attorney's office is to refrain from talking to people within forty-eight hours of an incident. I think this is questionable in many ways, as it does not take a genius to know that swift and effective investigation at a crime scene is indispensable for obtaining the truth.

Now, of course there are other interesting rules in New York involving the PBA itself. It is important to start looking at Section 1983 cases in light of the roles that police and correction unions play in impairing the swift and effective investigations of law enforcement officials. This can be the subject of a pattern and practice case under 1983 conspiracy theories. In fact, this theory was posited in the Louima case.⁷¹

An interesting issue that arose in the Louima case was that the PBA representatives who had spoken to the officers involved were

⁶⁶ See Kevin Flynn, *Shooting in the Bronx: The Investigation*, N.Y. TIMES, February 14, 1999, § 1, col. 1, at 38.

⁶⁷ Cohen, *supra* note 63.

⁶⁸ Michael J. Gorman, *Rule Protects Police*, N.Y. TIMES, JULY 3, 1998, at A20.

⁶⁹ Cohen, *supra* note 63.

⁷⁰ *Id.*

⁷¹ See Devlin Barrett and Murray Weiss, *Feds Still Aiming to Tear Down Infamous 'Blue Wall of Silence'*, N.Y. POST, June 9, 1999.

subpoenaed to testify before the grand jury.⁷² The representatives raised what is called the PBA privilege as a basis for refusing to disclose what the officers told them.⁷³ Quite expeditiously, Judge Raggi rejected that claim, saying there was no such privilege.⁷⁴ After the recent Clinton experience and the ensuing Secret Service privilege claims, most Americans could probably answer the question themselves after a good dose of Larry King and Geraldo.⁷⁵

This is significant because the PBA representatives have been operating as though they are lawyers.⁷⁶ Specifically, a consultation with a fellow officer who makes a statement that constitutes an admission or provides incriminating evidence in a potential criminal prosecution, is being regarded as privileged and as such not subject to disclosure. On the other hand, it is the duty of a police officer to report information about another officer to the appropriate investigating or prosecuting authorities.⁷⁷

There was a case many years ago involving a young man named Michael Stewart.⁷⁸ After he was brought into police custody, a number of officers were around him and he was strangled to death.⁷⁹ Eventually, the officers were tried in New York County and acquitted.⁸⁰ However, there was a subsequent investigation into the circumstances surrounding the Michael Stewart case.⁸¹ The report indicated that the moment the PBA representatives got

⁷² See Joseph P. Fried, *Union Officials Must Testify in Louima Case*, N.Y. TIMES, February 28, 1998 at B3.

⁷³ *Id.*

⁷⁴ See *In re Grand Jury Subpoenas Dated January 20, 1998*, 995 F. Supp. 332, 337 (E.D.N.Y. 1998).

⁷⁵ *Larry King Live*: (CNN television broadcast, July 17, 1998); *Rivera Live: Federal Court Rules that Secret Service Must Reveal its Secrets* (CNBC television broadcast, July 7, 1998).

⁷⁶ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (A lawyer should preserve the confidences and secrets of a client).

⁷⁷ See *Off-Duty Officers Failed to Step Forward in Killing*, N.Y. TIMES, September 2, 1992, at B3.

⁷⁸ See Isabel Wilkerson, *Jury Acquits all Transit Officers in 1983 Death of Michael Stewart*, N.Y. TIMES, November 25, 1985 at A1.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Deborah Squires, *2d Circuit Clarifies Rights of Grand Juror*, N.Y.L.J., December 12, 1990.

to the scene and began talking to the officers, it was impossible to proceed with a criminal prosecution.⁸²

Next, there was the Mollen commission report, which was an investigation of police misconduct in New York.⁸³ The same kind of findings were made with respect to the forty-eight hour rule and the involvement of PBA representatives hindering the swift and effective investigation of law enforcement misconduct.⁸⁴ As a result, it looks promising to consider positing constructive knowledge in these types of pattern and practice cases.⁸⁵

The most recent example is the case of a young man who was choked to death by Officer Livoti in the Bronx.⁸⁶ Livoti was acquitted in the state court, but was subsequently indicted in the Southern District of New York and ultimately convicted.⁸⁷ What was extraordinarily revealed in this case and noted on sentencing as well as in press reports, was that the police officers and PBA delegates met in a parking lot and fabricated a cover story.⁸⁸ In a story on *60 Minutes* about the code of silence and retaliation

⁸² Sam Roberts, *Hit-and-Run Death Debate Over Police Officers' 'Code of Silence'*, N.Y. TIMES, March 29, 1985, at B1

⁸³ See Clifford Krauss, *Corruption in Uniform: The Overview; 2-Year Corruption Inquiry Finds a 'Willful Blindness' in New York's Police Dep't*, N.Y. TIMES, July 7, 1994, at A1.

⁸⁴ See Joe Sexton, *The Mayor and the Union: New Complexity in Relations*, N.Y. TIMES, July 9, 1994, at 23.

⁸⁵ 42 USC § 14141(a) (2000). This section provides:

It shall be unlawful for any governmental authority or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives the persons of rights, privileges or immunities secured or protected by the Constitution or the laws of the United States.

Id.

⁸⁶ U.S. v. Livoti, 22 F. Supp. 2d 235 (S.D.N.Y. 1998), *petition for cert. filed*, 68 U.S.L.W. 3535 (U.S. Feb 3, 2000) (No. 99-1344).

⁸⁷ *Id.* at 238. Livoti was convicted of violating Anthony Baez's civil rights in violation of 18 U.S.C. Section 242. *Id.*

⁸⁸ *Id.* at 249-50 (citing the sentencing memorandum at pages 16-20 and finding that police witnesses testified falsely, the court found that judicial enhancement applied because Livoti sought the officer's false testimony); see also Benjamin Weiser, *U.S. Asserts Police Officers Planned to Lie*, N.Y. TIMES, June 25, 1998, at B1 (disclosing the alleged parking lot meeting).

against police officers.⁸⁹ An officer from the Livoti case was interviewed and claimed that when she came forward, she was not receiving backup.⁹⁰

The most interesting part of the *60 Minutes* segment was the statements made by John Timoney, who served for many years in the upper echelon of the New York City Police Department and is currently the police commissioner in Philadelphia.⁹¹ He was asked point blank if there was a code of silence. Now, the mayor and the police commissioner of New York City had said that it was a myth.⁹² But, Timoney said, "No, I think—I think it exists."⁹³ He was actually quite frank about how he was trying to circumvent the code in Philadelphia. He basically said that you can not get around it, but you can try to get the officers at the scene to prevent misconduct when they see it.⁹⁴ So, it is a very pervasive problem that makes the prosecution of these kinds of cases very difficult.

Recently, the Nassau County corrections unit had an interesting section 1983 and pattern and practice case, which involved a young mentally retarded man.⁹⁵ He was in the Nassau County jail and alleged that he was beaten by corrections officers.⁹⁶ He specifically alleged that a sergeant named Gemelli had him in front of a gauntlet of officers who were beating him. Allegedly, Gemelli said, "I'm God. I'm Jesus Christ. Beg for my forgiveness. Get on your knees and beg my forgiveness."⁹⁷ The plaintiff also alleged that Mr. Gemelli told him to look only at him, "so you can't

⁸⁹ *60 Minutes: The Blue Wall of Silence; Police Officers Who Report the Crimes and Wrongdoing of Other Officers Often Face Retribution* (CBS television broadcast, October 3, 1999).

⁹⁰ *Id.* Ms. Daisy Boria states that her instructors at the police academy taught her "there would be a price to pay for breaking the blue wall of silence." *Id.*

⁹¹ *Id.*

⁹² *Id.* (noting that the mayor suggested that the federal prosecutor's ability to obtain four officers to testify against other cops in the Louima case was proof that the code of silence is a myth).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Paul Zielbauer, *Nassau to Pay \$500,000 in Jail Beating*, N.Y. TIMES, March 3, 1999, at B1.

⁹⁶ *Id.* Mr. Donovan was left with broken ribs and spinal fractures.

⁹⁷ See David M. Halbfinger, *Jury Is Told Guard Used Frying Pan To Hit Inmate*, N.Y. TIMES, February 23, 1999, at B5.

identify anybody but me because nobody will believe it."⁹⁸ When the plaintiff got out of jail, he reported this to the Nassau County prosecutors, who rejected his case.⁹⁹ He eventually filed a 1983 action and a *Monell* claim.¹⁰⁰ As it turned out, this sergeant had a number of other claims against him, and it seemed as though every time one of these claims was settled, he would rise back up until he became president of the corrections union.¹⁰¹ So, frankly, I think that whatever jurisdiction you are in, you have look at the interplay between unions and the police in terms of some of the difficulties that are involved in these actions.

Eventually there was a finding against Gemelli.¹⁰² As soon as there was this finding, Nassau County cut him loose.¹⁰³ The county refused to indemnify him right after there was a finding against him by the jury. Their case was settled before the *Monell* claims were ever reached.¹⁰⁴

In dealing with prosecutors in these matters, it is important to have credibility. It is important in dealing with state or federal prosecutors to appreciate that these are very tough cases to consider and to bring. It is necessary to be credible with them in terms of what you will and will not do.

⁹⁸ *Id.*

⁹⁹ *Id.* (referring to Mr. Donovan's father's efforts to get an investigation, but the investigators and politicians "turned their backs" on his case). *Id.*

¹⁰⁰ See *Monell v. Dep't of Social Services of N.Y.*, 436 U.S. 658, 660-61 (1978) (finding liability of a municipal government for violating civil rights of employees under 42 U.S.C. 1983 where an official policy forcing pregnant workers to take unpaid leaves of absence before such leave was medically necessary).

¹⁰¹ See David M. Halbfinger, *Man Says Union Chief Beat Him in Jail*, N.Y. TIMES, February 24, 1999, at B5 (noting that Gemelli was the past president of the correction officer's union, and was currently its vice president). See also *Zielbauer*, *supra* note 95 (reporting that Gemelli was named in four other brutality cases).

¹⁰² *Id.* (reporting the verdict of March 1, 1999 of this unreported case).

¹⁰³ See *Halbfinger*, *supra* note 101 (noting that Gemelli was fired by Sheriff Joseph P. Jablonsky right after he was convicted of violating Mr. Donovan's civil rights).

¹⁰⁴ See *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995) (holding that personal liability arises under Section 1983 if there is personal involvement). Nassau County had the option of indemnifying Gemelli, which they had done in the past, amounting to \$900,000 in jury awards total, including the instant case. *Zielbauer*, *supra* note 95.

It helps to have been a former prosecutor to have credibility with the individuals with whom you are discussing these matters, but it is also useful to be a former criminal defense lawyer. Many of the people that we have dealt with had never met us before or never had cases with us and we developed very good relationships. It has been true everywhere that if you act like a professional and emphasize professionalism, people will treat you like a professional in return. This is particularly true when you are in a tough situation with a high degree of scrutiny. All you really have to rely on is the premise that if you just follow the rules and you act like a professional, maybe you will emerge from the case without looking bad. So it is always good to play by the rules.

One way to get credibility is to demonstrate that information will not be leaked, particularly when there is press scrutiny on the case. Any conversations that you have with these individuals, unless expressly indicated otherwise, should not be leaked. If there is any development you hear about before the prosecutor does, or you are going to say something because you do not like what the prosecutor is doing; you should give them notice; give them a 'heads up' about what is going to happen and why, so that everybody is clear about what is going to happen next.

You really have to make a big effort to understand the prosecutor's problems. One of the first things to understand is that a relationship with the prosecutors is essentially a one-way street. You should know the grand jury secrecy law in your jurisdiction.¹⁰⁵ Ken Starr notwithstanding, right?¹⁰⁶ You should really know this law and appreciate it.

Prosecutors should not and cannot tell you certain things that are occurring in front of the grand jury or even things that they anticipate are going to go before the grand jury.¹⁰⁷ You should not

¹⁰⁵ See e.g. NY CRIM. PROC. LAW § 190.25 (4)(a) (McKinney 1993). This section provides in pertinent part that "Grand Jury proceedings are secret." *Id.*

¹⁰⁶ See *In Re Grand Jury Proceedings*, 1998 U.S. Dist. LEXIS 17290 at *3 (September 25, 1998). In this case, the court suggested "serious and repetitive" violations of FED. R. CRIM. P. 6(e)(2) by Mr. Starr, from the news reporting of the grand jury investigation of President Clinton. *Id.*

¹⁰⁷ See N.Y. Crim. Proc. Law § 190.25 (McKinney 1993). This section provides in that the District Attorney may not "except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of

expect them to give you this information. Rather, you should try to ease the prosecutors' nervousness by assuring them that you recognize and understand that the relationship is a one-way street. Furthermore, you should let them know that you are there to give information that might help the criminal prosecution, and that you may have witnesses, or suggestions, but are not there to try to gain access information.

I can tell you that in the Louima case I did not know half, or even nine-tenths of what happened until the trial unfolded. You only know what your own investigation reveals and, frankly, you are better off not wanting to know everything that they know, because you are only going to complicate matters if they are seriously pursuing a criminal prosecution.

One of the problems is immunity.¹⁰⁸ Things could become complicated if you attempt to investigate or put your nose where it does not belong. In these cases, there may be statements made that are immunized.¹⁰⁹ There are what is known as 'clean teams,' which are groups of investigators from Internal Affairs or other branches who are investigating the cases.¹¹⁰ These teams may have received statements from various police witnesses which are immunized. The people prosecuting the case would not even know about the statements, and you have got to keep it that way. You should restrict your discussions to public filings, courtroom discussions and that which is generally known. Play it very straight and pray you do not complicate matters for them.

The other thing you have to do is to make an assessment of the intentions and courage of the prosecutors involved in the case. Your tactics in dealing with them are going to vary depending on

any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding." *Id.*

¹⁰⁸ See *id.* at § 190.40 (McKinney 1993) (granting immunity to a grand jury witness unless he waives immunity, is unresponsive, or only gives documentary evidence without a privilege against self-incrimination).

¹⁰⁹ See Dan Barry, *Officers' Silence Still Thwarting Torture Inquiry*, N.Y. TIMES, September 5, 1997 at A1 (stating that "The granting of immunity in exchange for officers' cooperation, known in police jargon as a 'G.O. -15' - for General Order 15, the original document providing immunity - presents prosecutors with cumbersome problems as they prepare to shift the case from the Brooklyn District Attorney's office to the United States Attorney's office").

¹¹⁰ *Id.*

how much you trust them and the investigators working on the case. This is not a knock as some of these people are in next to impossible positions, because the people that they are being asked to prosecute are the same officers that they know work with on a daily basis for many years. This is not easy.

You also have to pay careful attention to the investigators. I would like to discuss a New Jersey case as an example. The appointed prosecutor was a man named Jim Gerrow, who was actually the executive assistant from a county neighboring the one where the incident took place.¹¹¹ He was conducting the investigation with other state troopers who were members of the barracks and knew the individuals targeted in the investigation.¹¹² This obviously gave us great concern.

So we questioned it and worried about it, but at the same time, after a while, we became completely convinced that no matter what the outcome of the grand jury, we were dealing with an individual of uncommon integrity and character who had some guts and was going to do the right thing no matter how it came out in that particular investigation. So very early, you have to make a decision as to whether you are going to ask for federal intervention.¹¹³ This was not a case where we asked for it.

Remember that you are representing a victim. Even though the prosecution's case is against police officers, your client is a crime victim and you can play that card when you are dealing with the prosecutors who frequently extend courtesies to crime victims

¹¹¹ See David M. Herszenhorn, *State Grand Jury to Hear Case of Three in Van Shot by Police*, N.Y. TIMES, May 5, 1998 at B9.

¹¹² *Id.*

¹¹³ Federal intervention where the fair and equal benefit of laws are not being applied could be based upon 42 U.S.C. § 1981 (1991) which states in subsection (a):

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

under ordinary circumstances.¹¹⁴ There are victims' rights statutes,¹¹⁵ and issues about crime victims' compensation.¹¹⁶

Additionally, there are even insurance claims. For example, early on in the investigation of the New Jersey case, when it became clear that our clients were not the targets of the investigation, we had insurance problems because the insurance companies did not want to cover these people for their injuries. For all the insurance companies knew, they were potential felons or suspects in this matter.¹¹⁷ The prosecutor can give you a letter indicating that you are not a target, but rather a witness and a victim. Whatever the result, this is going to be of some assistance to you. So think in those terms.

You also must remember that you are representing not just a victim, but a potential witness in a state or federal criminal case. You have to think differently about taking notes than you ordinarily would. In civil work, a fundamental concept is that any statements that you take from a witness are work product.¹¹⁸

In criminal cases, if a prosecutor takes notes or an agent takes notes from a witness, those notes will be turned over as section 3500 material,¹¹⁹ or *Jencks* material¹²⁰ in federal court, or they are

¹¹⁴ See N.Y. COMP. CODES R. & REGS. tit. 22 § 129.3(f) (1999) which states: "Any judicial or nonjudicial personnel of the Unified Court System having contact with a crime victim or witness, whether for the prosecution or the defense, shall treat such crime victim or witness with dignity, courtesy and respect."

¹¹⁵ See, e.g., N.J. STAT. ANN. § 2C:44-6 (West 1995) (requiring the probation department to "notify the victim or nearest relative of a homicide victim of his right to make a statement for inclusion in the pre-sentence report").

¹¹⁶ N.J. STAT. ANN. § 52:4B-1 to 49 (West 1999).

¹¹⁷ See, e.g., N.J. STAT. ANN. § 39:6A-7 (West 1990) (permitting auto insurance companies to withhold coverage of claimants where their conduct contributed to their injuries through their own felonious actions).

¹¹⁸ *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947) (holding that the attorney's work product produced in anticipation of litigation is not discoverable).

¹¹⁹ 18 U.S.C.A. § 3500 (West 1985) (requiring the prosecution to deliver the statements of direct testimony of the witness to the defense).

¹²⁰ See *Jencks v. U.S.*, 353 U.S. 657, 667 (1957) (affirming production of evidence is necessary when it is "relevant, competent and outside of any exclusionary rule").

going to be turned over in state court. In New York, this is called *Rosario* and *Consolazio* material.¹²¹

If you are present as the civil attorney for a victim when a prosecutor or agent is debriefing the victim witness and you are taking notes of that session, you may wind up having those notes subpoenaed by the criminal defense lawyers in the criminal case. If the prosecutor or agent is taking notes and your notes differ from their notes, even on small or trivial things, this variation will not be good.¹²² Therefore, if you notice that the people on the other side of the table are not taking notes, this should be a pretty good signal for you to refrain from taking notes either because they may wind up as potential impeachment material at the trial.¹²³

Now, I will turn speak about lay witnesses. You may make a decision to send a lay witness that comes to your attention to the prosecution first. This will depend on the level of credibility the prosecutors have with you. If you trust your prosecutors – and I know this is hard - you might say, “I don’t want to talk to this person first. I’m going to direct them to talk to the prosecutors first so nobody at the criminal trial can say that I spoke to them first.” However if you do not trust the prosecutors, you may take a different approach.

You have got to protect your victim client from press inquiries. If the person is in the hospital and people at the hospital ask what happened, it shows up on the medical records. You have to keep the clients away from reporters who want to talk to them about versions of the case. Lay witnesses and certainly clients in these cases may need police protection, and I mean real protection because these kinds of cases are very scary and very dangerous.

¹²¹ See *People v. Rosario*, 9 N.Y.2d 286, 290, 173 N.E.2d 881, 883-84, 213 N.Y.S.2d 448, 450 (1961) (holding that the defendant is entitled to see the entire pre-trial statement of a prosecution witness); see also *People v. Consolazio*, 40 N.Y.2d 446, 453-54, 354 N.E.2d 801, 805, 387 N.Y.S.2d 62, 66 (1976) (holding that prosecutor’s worksheets and abbreviated notes of a prosecution witness’ statement made before trial is not exempt from the work product doctrine).

¹²² *Consolazio*, 40 N.Y.2d at 453 (noting that the “character of a [witness’] statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature”).

¹²³ N.Y. CRIM. PROC. LAW 240.20(c) (McKinney 1993) (permitting defendant to discover statements made by prosecution witness).

There are police witnesses that testified in this case that receive protection around-the-clock, so your client deserves it as well. We make no apologies for the fact that Mr. Louima was under guard and protected during the entire course of the prosecution. He should have been and he was.

Relative to double jeopardy,¹²⁴ when asking for the federal government to become involved in the case, you must remember that this could be a problem. If the federal government goes first and loses, that could be double jeopardy in the state court.¹²⁵ On the other hand, if the state goes first and there is an acquittal, the feds can look at it a second time under the dual sovereignty doctrine.¹²⁶

However, there are many reasons in these kinds of cases, notwithstanding the double jeopardy risk, that it may very well be a good idea to have the federal government in there first. There are better evidence rules, better rules with respect to conspiracy and, frankly, with rare exceptions it is probably only federal authority that can break the code of silence.¹²⁷ Federal prosecutors have a federal grand jury that can put pressure on people.¹²⁸ They have the Federal Bureau of Investigation, which can do things that are really hard for local police to do on their own. It is just a matter of human nature. The federal prosecutors are going to be more independent.

¹²⁴ U.S. CONST. amend. V., which states in pertinent part, “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb” *Id.*

¹²⁵ N.Y. CONST, art. I, § 6, which states in pertinent part, “No person shall be subject to be twice put in jeopardy for the same offense.” *Id.*

¹²⁶ *United States v. Lanza*, 260 U.S. 377, 382 (1922) (finding that “[w]e have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”)

¹²⁷ *See 60 Minutes*, *supra* note 89, and accompanying text.

¹²⁸ *See, e.g., United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (illustrating the pressure put on a defendant to testify in front of a grand jury, because it would be in his best interest to do so at the time).

In the Nassau County case, we met with the Nassau County prosecutors. They had all these problems and that is why I told you about the Donovan story. We looked them right in the eye and we told them that we were going to ask for the federal government to intervene, and that they should consider that. They did and consented to have the federal government come in and take the case.¹²⁹ It was not really appropriate for the prosecutors to pursue that prosecution, and given the history of the case, it would have been difficult.

When speaking about the federal government, you have to remember that the Southern District of New York can be different from the Eastern District. There are different people that have civil rights and bailiwicks in both of those places, or wherever you are practicing.

There is yet another group of people, the Civil Rights Division in Washington, with whom you can speak separately and independently. In the state cases, even if the state authorities are pursuing it, there is a practice known as monitoring where the FBI literally looks at the police reports.¹³⁰

Finally, there is a very interesting and important statute you should aware of. Article 42 of the United States Code section 14141 entitles the federal government to bring a cause of action against a governmental authority or any person if they find that there is a "pattern or practice of conduct" by law enforcement officials or employees that deprives people of their civil rights.¹³¹ The Justice Department has been pretty aggressive in looking at these things, and the threat of a section 14141 civil action by the federal government against a municipality is really very helpful to you in persuading people to pursue a criminal prosecution.

In New Jersey, there is a section 14141 investigation concerning racial profiling, and without that threat in the background, I am not altogether sure that the attorney general's office there would have

¹²⁹ See *Topping*, *supra* note 29 and accompanying text.

¹³⁰ See *Federal Agents Monitor Fatal Shooting Case*, N.Y. TIMES, April 13, 1997 A1, at 37. (quoting a spokesman for the Federal Bureau of Investigation who indicated the F.B.I. often monitors police shootings and reviews police files in connection therewith).

¹³¹ See generally 42 U.S.C.A. § 14141 (West 1995). See also Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 Buff. Crim. L. Rev. 815 (1999).

stepped up to the plate and investigated racial profiling as vigorously. The federal government could bring a pattern and practice action, so it gives the prosecutor who wants to pursue the case more independence and it certainly buttresses your *Monell* claims. Furthermore, it is in the public's interest, as it helps to foster eventual settlement of a civil case. Hence, you should go to the government and bring the various different clients that you have.

Currently, there is this type of investigation pending against the City of New York for police practices in the Eastern District,¹³² a separate one in the Southern District.¹³³ There is also one under consideration in the Nassau County jail case.¹³⁴ Believe me, all of those things help you get action in your cases.

You can suggest expert witnesses to prosecutors if they want to use them. You have to think about how you would pursue the case and make helpful suggestions. In addition, I would suggest that you request a second autopsy in wrongful death cases. Give the prosecutors the kind of experts you would bring, if you want to do a reconstruction of crime scenes. I must tell you that police authorities in general do not do enough with these kinds of experts.

JUDGE PRATT:

Barry, thank you very much.

¹³² See *National Congress v. City of New York*, 75 F. Supp. 2d 154, 167 n.7 (E.D.N.Y. 1999).

¹³³ *Id.*

¹³⁴ See *Topping*, *supra* note 29.

