

# American Board of Criminal Lawyers

## THE ROUNDTABLE

Vol. MMXV, No 8

To Sweet Liberty.

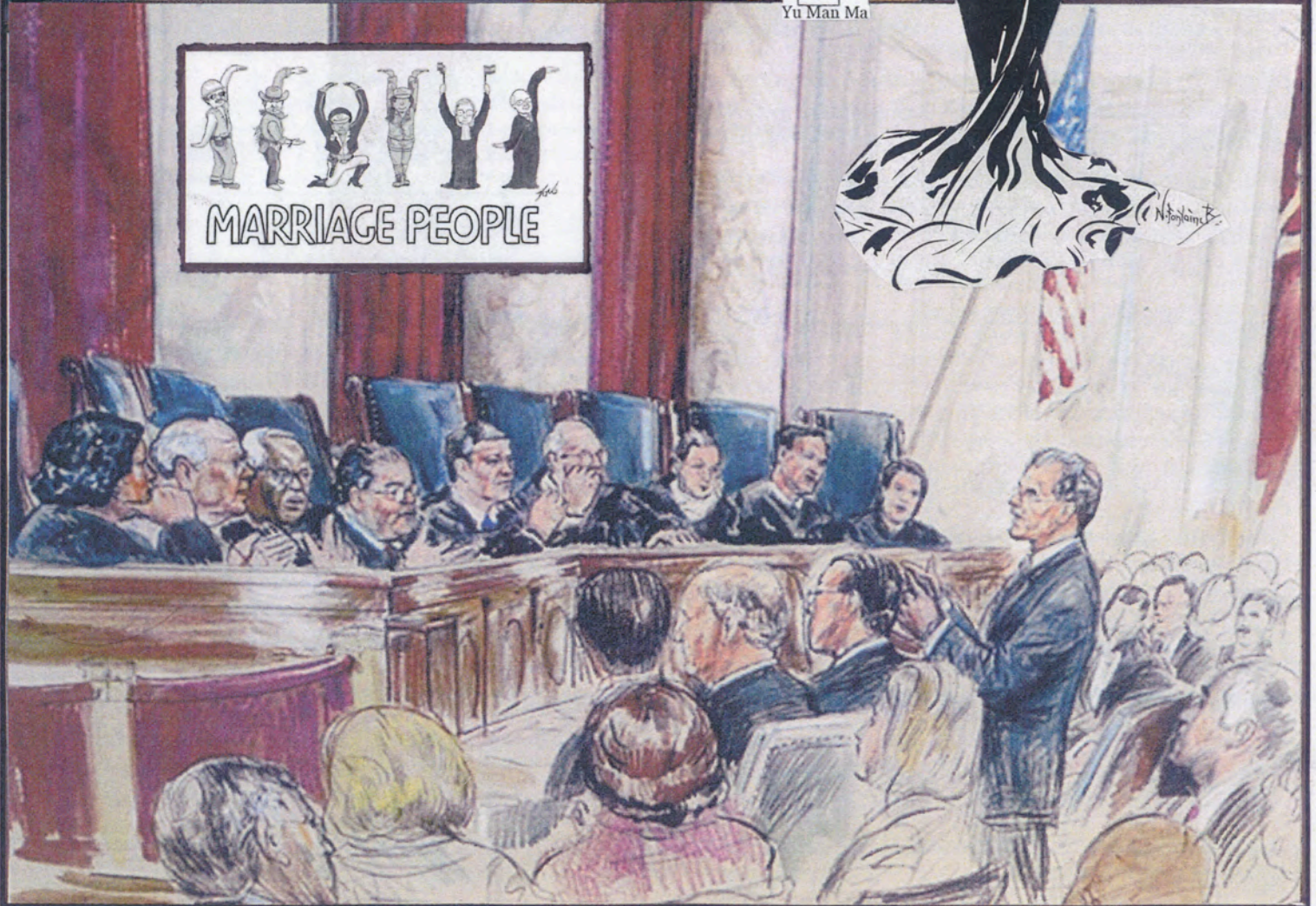
July 2015



To the two choicest blessings that come from above:  
The love of the liberty and of love.



Yu Man Ma





## QUOTE OF THE MONTH QUESTION OF THE AGE

For too long, too many judges have been too quiet about an evil of which we are a part: the mass incarceration of people in the United States today. It is time that more of us spoke out.

...  
Unless we judges make more effort to speak out against this inhumanity, how can we call ourselves instruments of justice?

- Hon. **Jed S. Rakoff**  
"Mass Incarceration:  
The Silence of the Judges"  
*The New York Review of Books*,  
Vol. LXII, No. 9, May 21, 2015

## DISMISSAL OF MURDER CHARGES

Self reporting a recent victory in a murder prosecution. Judge just issued a 25-page Order holding that my defendant was entitled to immunity from prosecution under South Carolina's defense of habitation and stand your ground law. SC allows a pre-trial determination of immunity (not sure of procedure in other states) in a homicide prosecution. In what amounts to a mini-trial, I called 9 witnesses including a crime scene expert who laid the groundwork that the statute applied under the defense of habitat and stand your ground provisions of the Act. I also called the chief investigating detective, who left the Sheriff's Department a year after the shooting. He testified that he told the Solicitor (our DA) that the facts clearly fell under the statute, was a clear case of self defense, and the defendant should not be prosecuted.

**Jack B. Swerling** (5/3/15)

Dear Fellows,

It is with great pride and personal pleasure that I announce Fresno Fellow **Tony Capozzi** will be recognized and honored with the Bernie E. Witkin Lifetime Achievement Award presented by the Fresno County Bar Association. The award is given annually to recognize a member of the Bar Association for dedication to the legal profession.

Tony is the Past President of the State Bar of California and is currently the Vice Chair of the Commission on Judicial Performance, the watch dog group which reviews the conduct and activities of California judges.

Tony is a good friend and neighbor, who highly deserves this award.

Congratulations, Tony! My best to all, **Jim Homola**

## ASSAULT VICTORY

Colorado Springs fellow, **Rick Bednarski** won a self defense assault case this week. He was given the customary "plead to the charge with an open sentence" offer in the case. His client gave the loser of the fight a good old fashioned ass whippin' that was second only to the one Rick handed the arrogant prosecutor. Congratulations Rick! (Reported by **Pat Mika** (5/1/15))

## Sentencing delay for ex-NFL player Sharper in Vegas sex case

Sentencing is being postponed for former NFL star Darren Sharper (represented by **Blair Berk**) in Las Vegas on a felony attempted sex assault charge as part of a four-state plea agreement.

Sharper had been scheduled to appear Thursday by video from Louisiana, where he pleaded guilty last week to three rape charges.

Prosecutor James Sweetin says a new Nevada sentencing date will probably be in late August.

A plea deal calls for the 39-year-old Sharper to serve 38 months to eight years after pleading guilty in March in Las Vegas to attempted sexual assault.

He'd serve the Nevada time concurrently with sentences in California and Arizona, and state and federal sentences in New Orleans that are expected to amount to about nine years.

Sharper retired in 2011 after a 14-year NFL career.

(Reported by **Jerry Gold**, 6/25/15)

## Ohio Man Sentenced In Grandmother's Strangulation Death

DAYTON, Ohio (AP) — A prosecutor says a man convicted of causing his grandmother's strangulation death in an argument over a dog in southwest Ohio has been sentenced to nine years in prison.

Montgomery County Prosecutor Mat Heck, Jr. says 24-year-old Dylan Harrison was sentenced Wednesday in 69-year-old Regina Davis' 2012 death to nine years for involuntary manslaughter and three years for tampering with evidence. The sentences will run concurrently.

Heck's statement says Harrison was moving out of Davis' suburban Dayton home in Trotwood when they began arguing about one of her dogs that he wanted to take with him. Heck says Harrison grabbed Davis by the neck in a chokehold, causing her death.

Defense attorney **Jon Paul Rion** says the sentencing reached after a plea agreement with prosecutors was satisfactory.



## Judge Dismisses Child Abuse Charges Against Chattanooga Attorney; Says "Every Parent Makes Mistakes"

Friday, June 12, 2015 - by Emmett Gienapp

A judge on Friday dismissed child abuse charges against a Chattanooga attorney, Morgan Adams, for an incident with his son earlier this year.

Judges here recused themselves and it was heard by Judge Casey Stokes of Meigs County.

Attorney Adams had allegedly spanked his 12-year-old son on his buttocks with a fly swatter 100 times, leaving deep bruising that Child Protective Services found might be consistent with abuse.

Corporal punishment is legal in Tennessee but in those cases where serious injury, lasting marks or disfigurement are apparent, it is considered abuse.

A CPS investigator testified before Judge Stokes on Friday that the agency was notified about the bruising on Jan. 28 by officials at the boy's school, McCallie, which is legally obligated to report possible instances of child abuse. The spanking itself had taken place over the weekend, on or about Jan. 25, but bruising was still apparent three days later.

After receiving this information, CPS contacted the police and sent the investigator along with a Lookout Mountain detective and lieutenant to the Adams' home on Lookout Mountain at 7:50 p.m. There the authorities found Mr. Adams and his wife, Kim Adams, along with their children.

The detective who handled the investigation stated that Mr. Adams complied readily and even greeted them saying, "I know what this is about and I'm glad you're doing your job."

The detective also stated that upon seeing the child he seemed "normal and happy."

During an interview with the authorities, Mr. Adams explained that his son had been scoring poorly in school with incomplete assignments and that he had been increasingly disobedient to his parents, even lying to his mother.

The parents originally tried to rectify this behavior by establishing a system of rules and subsequent punishments for poor grades and disobedience—taking away electronics or spanking him five to ten times for assignments that received a zero in school.

Finally conditions had become troublesome enough that the combination of failed assignments and lying warranted the one hundred smacks with the fly swatter. The investigator also said that the child had been spanked with his pants on.

In the interview, Mr. Adams also reportedly stated, "I love my son and he loves me."

During the investigation, the CPS investigator and her assistant went with the child into another room to photograph his injuries and found that he had extensive bruising and discoloration on his buttocks. The investigator had the child show this to his father as well and before suggesting that Mrs. Adams take him to the emergency room for treatment.

At that time CPS also enacted a safety plan for the child that required Mr. Adams to leave the home and have no contact with the child until a meeting the following day. The same stipulations were not applied to the other two children since the allegations only concerned one in particular and he was allowed to return to the home several days later.

Hospital records cited at trial showed that the medical professionals who examined the child acknowledged the bruising was severe, but also that he otherwise appeared perfectly happy and aware, reporting a zero on the pain scale.

The detective received a warrant for Mr. Adams the following month on Feb. 18 for the charge of child abuse and neglect.

After hearing the statements and evidence from both sides on Friday, Judge Stokes stated that the decision was difficult, but that she did not see how attorney Adams' actions could possibly be a Class B felony of child abuse as the state had earlier claimed.

Judge Stokes said, "Parents need to discipline their children. We see young people every day here and you can tell when they haven't been disciplined."

She also said, "Maybe this wasn't handled perfectly, but there's no guidebook on raising kids. My parents did the best they could with me and every parent makes mistakes."

Attorney Adams was represented by attorney Jerry Summers.

**LUST FOR JUSTICE**

*J. Tony Serra*

## Bulger writes lesson for teens



James "Whitey" Bulger wrote from the Florida prison where he is serving two life terms.

Former Boston crime boss James "Whitey" Bulger had a message for three high school girls, 17, who wrote to him for a history project: Crime doesn't pay.

Bulger, 85, sent the handwritten letter, dated Feb. 24, from federal prison in Florida, where he is serving two life sentences, the Boston Globe reported Sunday.

"My life was wasted and spent foolishly, brought shame and suffering on my parents and siblings," Bulger wrote. "I know only one thing for sure — If you want

to make crime pay — 'Go to Law School.'" Bulger, a former FBI informant, was convicted in 2013 on racketeering charges that included a role in 11 murders.

The students said they chose him for a National History Day competition on leadership and legacy to stand out among entries and to learn about someone they hadn't studied in school. Their work took first place in the district but didn't place at the state level. — AP

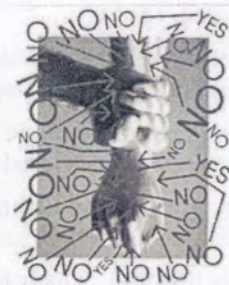
## Stumped, Your Honor? (NYT 5/20/15) Call a Judge

By BENJAMIN WEISER

Federal district judges are often described as the quintessential deciders, whether from the bench or in written opinions. But what happens when a difficult question arises, the parties are in sharp disagreement, and the answer is not obvious?

Turns out they often rely on a rarely discussed resource: the jurist-to-jurist lifeline.

Interviews with more than a dozen judges in Manhattan's Federal District Court show that almost all have telephoned colleagues when they were puzzled by legal questions or other issues, or been on the receiving end of the game-show-like call for help.



Yu Man Ma



Judge Paul A. Engelmayer, right, called on Judge Jed S. Rakoff for advice on an Occupy Wall Street-related case in 2011.

JOSH HANER/THE NEW YORK TIMES



## **HENRICO MAN NOT GUILTY OF ALLEGED RAPE OUTSIDE INNSBROOK RESTAURANT**

By Bill McKelway Richmond Times-Dispatch | Posted: Thursday, June 25, 2015 4:30 pm

In a dramatic reversal set up by findings of prosecutorial misconduct, a Henrico County man was found not guilty Friday of raping and sodomizing a young woman two years ago outside a popular Innsbrook restaurant.

Family members burst into celebration when Driton Sulejmani, 27, turned from the defense table after jurors had been dismissed following a five-day trial and six hours of deliberation.

"I have never been more proud to be an American citizen," Sulejmani's older brother, Muhamet, said of the family's two-year wait and their escape from war-torn Kosovo some 15 years ago.

The alleged victim in the case, accompanied by her family and Henrico police, left the courtroom sobbing and supported by loved ones as she struggled to walk toward an elevator.

The high-profile case that flowed from a night of drinking and dancing at the Beach House Bar & Grille at Innsbrook Shoppes in July 2013 ended with a mistrial last year that stemmed from findings of prosecutorial misconduct and a failure to disclose exculpatory evidence to the defense.

In the trial last year, a female-majority jury found Sulejmani guilty of both counts and recommended a sentence of 15 years in prison before a retrial was ordered by Circuit Judge Gary A. Hicks. Sulejmani had faced up to two life terms in the case and refused any offers of a plea bargain, said defense lawyer **Steven Benjamin**, who tried the case this week with law partner Betty Layne DesPortes.

In his final argument, Benjamin belittled a police investigation that never obtained a full interview of the accuser and what he said was the sloppy and delayed work of investigators in their examination of the scene, a brushy area near the Beach House, a popular meeting place for singles.

Benjamin argued to the jury that a consensual sexual encounter occurred between Sulejmani and the alleged victim after the two met for the first time at the nightspot. Benjamin stressed that a condom located in the bushes clearly showed that Sulejmani was hiding nothing. Sulejmani did not testify in the case this week.

In addition, the condom's inner lining showed a preponderance of the accuser's DNA, suggesting that she had engaged in some form of sexual contact with Sulejmani in a manner that conflicted with her testimony.

Benjamin also used a blood spatter expert to suggest to the jury that blood on a nearby wall was not consistent with the woman's head being slammed into the wall, as she testified, but indicated that she had flung blood from a nosebleed against the wall.

Medical witnesses called by Benjamin successfully undercut the woman's assertions about the degree to which she was willing to undergo invasive vaginal examinations after the incident.

The accuser had made multiple court appearances since Sulejmani's arrest and defiantly testified to the events that transpired after Sulejmani offered to walk her to her car late at night.

Benjamin described the accuser's long history of anxiety and fear of public places coupled with her use of medications the night of the alleged attack and her refusal in the hours afterward to deal with police investigators who eventually became involved.

In his first trial, Sulejmani testified at length about his involvement with the woman, describing her as a willing sexual partner.

Benjamin stressed to jurors that the accuser left the bar with Sulejmani and headed in the wrong direction to reach her car and that the alleged attack took place within close proximity from where people leaving the nightspot would have easily heard her cries for help had she made any.

Deputy Commonwealth's Attorney Toni Randall, whose handling of the case at the first trial served as grounds for the mistrial, offered in her opening statement to the jury only a single sentence, telling the jury that evidence in the case would prove Sulejmani's guilt.

Sulejmani wept openly at the verdicts Friday, and family members hugged and kissed Benjamin and DesPortes as spectators supporting the accuser filed out into a hallway.

Tears streamed down Muhamet Sulejmani's face as his still-shackled younger brother stood smiling nearby. Last year, Muhamet had spoken to jurors from the witness stand about why they should show mercy on his brother. He described the family's brutal, difficult escape from Kosovo.

"We lived in the woods like animals," he said then. "We had to start from scratch. ... Dre was always the guy that helped everybody else."

On Friday, shortly before 6 p.m., Driton Sulejmani was freed after some two years behind bars.



# Judge Expunges Criminal Record That Left Woman Jobless

BY ANDREW KESHNER

New York Law Journal (6/8/15)

A woman whose 13-year-old fraud conviction crippled her ability to hold a job ever since has persuaded a judge to expunge the felony.

U.S. District Judge John Gleeson of the Eastern District of New York said the public interest was far greater served by having Jane Doe be an "employed, contributing member of society" than having her conviction be part of the public record.

It has been almost 20 years since Doe played a minor role in a fraud scam to make ends meet and 13 years without re-offense since her probation sentence, Gleeson noted in *Jane Doe v. United States*.

"Doe's criminal record has prevented her from working, paying taxes, and caring for her family, and it poses a constant threat to her ability to remain a law-abiding member of society. It has forced her to rely on public assistance when she has the desire and the ability to work. ... There is no justification for continuing to impose this disability on her. I sentenced her to five years of probation supervision, not to a lifetime of unemployment," Gleeson said.

Doe was born in Haiti and came to New York in 1983 at age 24, looking for a better life. By 1997, she was raising four children by herself, making \$783 a month.

The sum was less than rent in her Queens apartment building, which had drug dealers and addicts hanging around the lobby.

That year, Doe took part in an automobile insurance fraud scam involving corrupt doctors, health care professionals and minor staged collisions. The scheme was "ubiquitous" in the jurisdiction at the time, Gleeson said.

Doe was a passenger faking injury; she had no criminal history. A civil claim was filed on her behalf and she ended up with \$2,500.

In 2001, Doe was convicted after a jury trial over which Gleeson presided. He sentenced her to five years' probation, 10 months of home detention and \$46,701 in restitution.

Doe filed her expungement request in 2014, and Gleeson reviewed the almost 1,000-page file documenting her years under supervision. It contained information such as an October 2006 report from Doe where she wrote, "When I'm looking for job the criminal background give me a problem. No job for me nowhere? Very sadness."

The judge said when Doe applied for work as a home health aide, she was not asked about criminal records at the hiring stage. Yet once hired, background checks turned up the conviction and Doe was fired.

This happened six times, Gleeson said.



Photo by Rick Kopstein

U.S. District Judge John Gleeson of the Eastern District of New York.

The Eastern District U.S. Attorney's Office opposed expungement, arguing that Doe's employment difficulties were not the sort of extreme circumstances that would merit that action. Moreover, they said it was appropriate for health care employers to know of Doe's health care fraud conviction.

Gleeson acknowledged expungement was usually meant for extreme circumstances, but he said this was such a case.

The distance in time from the offense and her lack of re-arrest weighed in favor of Doe, he said. Meanwhile, the conviction had a "dramatic adverse impact" on Doe's ability to work—outcomes compounded by the age and race of Doe, who is black.

Gleeson said the government was correct to note that courts traditionally refused expungement based just on adverse employment consequences. Still, the judge recognized the "growing recognition that the adverse employment consequences of old convictions are excessive and counter-productive."

He noted various efforts, such as a request by then-U.S. Attorney General Eric Holder Jr. in 2011 for states to review statutes and regulations on collateral consequences that do not increase public safety.

Gleeson also pointed to state-level initiatives, such as a proposal by Chief Judge Jonathan Lippman to allow sealing of criminal records for non-violent felons who avoid re-arrest for 10 years and have no prior felony convictions. The bill, A7030/S5169, is pending.

There was "obvious superficial appeal" to the prosecution's contention that a health care fraud conviction should not be expunged

because Doe sought work in the health care field, Gleeson said.

If her crime was linked to her work as a home health aide, Gleeson said there could well have been a different result. "But facts matter, and the facts here are that a young woman raising four children by herself on wages that did not even cover the rent availed herself of an opportunity to make \$2,500 illegally," he said. "That the scheme offered to her resulted in health care fraud was essentially fortuitous."

There was "no specter" that she used her training in furtherance of the crime or that she now was a "heightened risk" to prospective employers. There also was "something random and senseless" about the arguments that Doe's past conduct rendered her ineligible to work as a home health aide, he said.

Gleeson said a "patchwork quilt of collateral consequences ... produces results that are so anomalous they border on the farcical."

He noted that while a minor crime disqualified someone from being a barber in New York, the Internal Revenue Service last year re-certified a tax preparer who was convicted of preparing a fraudulent tax return for a major drug trafficker.

In that case, which is under seal, prosecutors asked Gleeson to let the preparer keep working without giving notice of the conviction to clients. As a result, he said, prosecution arguments here about the interest in health agencies knowing about Doe's past rang "somewhat hollow."

Assistant U.S. Attorney Bradley King appeared for the prosecution.

Nellin McIntosh, a spokeswoman for the Eastern District U.S. Attorney's Office, declined to comment.

Doe was represented by Bernard Udell, a Brooklyn solo practitioner who represented Doe in the underlying criminal case.

In an interview June 2, he said Gleeson "could have cut this off a long time ago" if he so wanted, noting, for example, that Doe did not argue she had been unfairly convicted.

"The intensive tracking of Miss Doe's history and employment frustration are beyond commendable. I am sure that the court's decision will benefit others similarly situated," Udell said in court papers.

He said Doe cried when she heard of the judge's decision to expunge, and that she was now actively presenting herself to care agencies. "I think she'll be working steady very soon."

Andrew Keshner reports for the New York Law Journal, an ALM affiliate of The Legal.



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IF YOU'RE POOR  
AND GET CAUGHT  
WITH DRUGS, IT'S  
"A CRIME"

I'M DOING 8  
MONTHS FOR  
POSSESSION



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IF YOU'RE RICH  
AND GET CAUGHT  
WITH DRUGS, IT'S  
"A SCANDAL"

I'M GOING  
TO REHAB



## Future Meetings

October 9-11, 2015: Sante Fe, NM

## 2016 Meetings

Feb. 11-15, 2016: Havana, Cuba

May 26-31, 2016: Rome, Italy

October ? - ?, 2016: Austin, Texas

*The RoundTable*

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