January 23, 2008

The Uneven Playing Field Part IV: The Bad Faith Request Under Youngblood

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INTRODUCTION

This fourth article in the series focusing on discovery and the government's violations arising out of violations under *Brady v. Maryland* and its progeny seeks to address the issue of spoliation of evidence. Spoliation constitutes the most egregious violation under the ambit of discovery and it certainly can be the most damaging to a defendant. Accordingly, in a criminal context, prosecutorial spoliation violations should carry with them severe consequences. The Supreme Court supported and enforced defendants' rights to spoliation remedies for twenty-five years post-*Brady*. In the last twenty years, a significant obstacle to obtaining remedies for spoliation abuses was imposed upon defendants which still presents issues for courts and defendants today.

BRADY AND ITS PROGENY

In *Brady v. Maryland*, the Supreme Court considered the question of what constitutes “What might loosely be called the area of constitutionally guaranteed access to evidence.” *Brady* created a three-part test employed when reviewing compliance with discovery: (1) “[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching”; (2) “the evidence must have been suppressed by the State, either willfully or inadvertently”; and (3) “prejudice must have ensued.” A *Brady* violation therefore, does not
result from the mere failure to turn over evidence to the defense, but requires a negative effect as a result of the suppression.

The Court then set about buttressing this protection for defendants over the next twenty-five years. Once issues began arising as to prosecutorial intent for the suppression of evidence in question, the Court in several decisions readily dismissed the idea that a defendant would be required to make a showing of bad faith. The Court further endorsed the importance of materiality and justice in finding the defendant's guilt were the crucial factors in spoliation determinations, casting aside prosecutorial intent as an unimportant factor, in United States v. Agurs. In California v. Trombetta, the Supreme Court held that “irrespective of the good faith or bad faith of the prosecution,” the suppression of evidence favorable to a defendant violates due process where the evidence is material to guilt or to punishment. In United States v. Bagley, it was held that prejudice ensues where there is a “reasonable probability that, had the evidence been discharged to the defense, the result.....would have been different [emphasis added].”

The protections of due process rights also afforded defendants remedies. Any suppression of evidence, much less the out-and-out destruction of evidence, would have been grounds for dismissal and sanctions. In Bank of Nova Scotia v. United States, the Supreme Court held that District Courts could dismiss indictments on the basis of prosecutorial misconduct where that misconduct was prejudicial. In United States v. Badalamente, the Second Circuit Court of Appeals overturned a conviction and granted a new trial to the defendant when prosecutors failed to turn over a letter purporting to show government pressure of a co-defendant to falsely testify.

Decades of law predated the Rehnquist Court, holding sacrosanct a defendant’s right to a
remedy for withheld or destroyed exculpatory evidence by the prosecution. Despite those
decades, on a cold November morning in 1988 the Supreme Court fired a fatal shot into the heart
of Brady and its progeny. In Arizona v. Youngblood\textsuperscript{12}, the majority, lead by Chief Justice
Rehnquist, asserted that the state had complied with Brady requirements in the underlying sexual
assault case by providing semen samples to the defense. Semen samples were, however, not
preserved and were therefore not available at the time of trial. The Court, agreeing with the
Arizona Court of Appeals, held that because there was no allegation of bad faith on the part of
the police in not preserving the evidence, at worst the police conduct could be described as
negligent. It was likely that the Rehnquist Court was waiting for a case like Youngblood to
further limit a defendant's rights, given the Rehnquist Court's ongoing assault on defendants'
rights.\textsuperscript{13}

In contrast to precedent, the majority in Youngblood adds into the Brady requirements a
new and seemingly insurmountable burden “that unless a criminal defendant can show bad faith
on the part of the Government, failure to preserve potentially useful evidence does not constitute
a denial of due process of law.”\textsuperscript{14}

Youngblood's good faith/bad faith burden represented a little-noticed tectonic shift in the
protections affecting defendants under the 14th Amendment and Brady and its progeny. Since
its inception, the holding in Youngblood has been challenged as having no precedential basis and
being inconsistent with pre-existing legal standards. In his dissent, Justice Blackmun speculated
as to how the majority came to their conclusion, noting a curious disregard for the Court's prior
holdings on the subject of spoliation. “Brady and Agurs could not be more clear in their holdings
that a prosecutor's bad faith in interfering with a defendant's access to material evidence is not an
essential part of a due process violation.  

Post-Youngblood, a defendant must demonstrate, (1) an exculpatory value that was apparent before the evidence was destroyed, of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means; whether it was, (2) “material” to the verdict of guilt, and (3) the result of prosecutorial bad faith. The first two elements themselves form a reasonable standard to which defendants are held in order to merit the remedy of exclusion of evidence. When combined with the third element, however, they present such a monumental obstacle to prevailing where material evidence has been destroyed that it is nearly impossible for a defendant to prevail short of demonstrating bad faith by the government. The requirement of proving bad faith on the part of prosecutor gives the government yet another advantage over defendants. Prosecutors already have greater access to the evidence of a crime than defendants. Prosecutors have greater access to grand juries. Prosecutors have greater resources at their disposal to present their case, and virtually no limit to their funding. Defendants, on the other hand, are in the exact opposite situation. Despite the judicial system affording defendants innocence until guilt is proven beyond a reasonable doubt, defendants must fight an uphill battle- a psychological presumption of guilt by jurors. Defendants are limited in what they can present to a grand jury. They are limited to the skill and resources of the defense attorney that they can afford. The addition of the bad faith requirement handicaps defendants in one more capacity- it places them in the position of having to prove bad faith on the part of the government. This nearly-insurmountable challenge shifts a heavy burden onto the defendant.

The now-infamous Duke Lacrosse case\textsuperscript{16} demonstrates the nearly-impossible standard
the Court instituted in Youngblood. There, the prosecutor suppressed evidence that would have totally exonerated the defendants. He did not destroy the evidence but rather withheld it. This act was so egregious that the prosecutor was ultimately disbarred. Youngblood requires that the defense prove that exculpatory evidence is not merely withheld and not merely destroyed, but rather that the prosecutor deliberately and intentionally destroyed exculpatory evidence, an almost impossible task. Youngblood further held that negligence on the part of the government which causes the destruction of exculpatory evidence is not enough to warrant a dismissal of the charge.

As a result of the evolution of the case law involving instances of spoliation, it becomes clear that proving bad faith under Youngblood remains a high burden for the defendant to prove. But once the defendant does prove bad faith, what does that mean for the prosecutor? Looking at bad faith in another light, it becomes evident that there may be greater repercussions for both the prosecutor and the legal system upon a finding of bad faith.

**YOUNGBLOOD IN ACTION- THE OBSTRUCTION OF JUSTICE**

Federal law criminalizes the act of destroying evidence as an aspect of obstruction of justice. This crime requires specific intent to impede justice. Obstruction of justice via the destruction of evidence has a notorious history in the last few decades. Perhaps the highest-profile case within the American legal system of spoliation leading to obstruction of justice lies with Richard Nixon and the Watergate Scandal. Nixon had ordered a break-in at the headquarters of the Democratic National Committee in the Watergate Hotel Complex. White House aids had testified to this order, however, there existed a necessary missing link. Remarkably, the Senate uncovered that Nixon had secretly been recording all of his
conversations in the Oval Office on audio cassette tape, which the House of Representatives promptly subpoenaed. When Nixon claimed executive privilege, the Supreme Court unanimously held that Nixon had to relinquish the tapes. After the tapes were turned over, however, there existed an 18-minute gap in one of tapes, subsequently labeled “the smoking gun.” Though Nixon's secretary, Rose Mary Woods, admitted to possibly having inadvertently erased no more than five minutes; the remaining thirteen minutes remain unaccounted. This destruction of evidence led the House of Representatives to draft articles of impeachment. Before a trial for impeachment could commence, Nixon famously became the first President of the United States to resign. By hoisting himself on his own petard, Nixon avoided potentially becoming the first President to be removed from office. Over three decades later, spoliation on the part of the Executive Branch has reared its ugly head again. The Justice Department, as well as the House Judiciary Committee, have probes currently underway into the methods of interrogation used against enemy combatants. The House probe involves at least one potential count of spoliation, examining the 2005 destruction of CIA tapes allegedly torturing two Al Qaeda suspects.

A recent spoliation hearing in the case United States v. Vella, involving the destruction of two key pieces of evidence by the Nassau County Police Department as Agents of the United States Government and the Custodian of Evidence intended to be used at a federal trial, had as its focus the question of bad faith as it related to the destruction of potentially exculpatory gambling machines.

Factually, the Nassau County Police Department seized two video poker machines from the premises of the Delta 7 Social Club, in West Hempstead, New York on or about December,
2003. This evidence was seized and held by Nassau County and used to obtain a Federal
Indictment under 18 USC 1955 for gambling conspiracy in United States v. Gruttadauria.\textsuperscript{26}

Thomas F. Liotti represented John Vella, one of only two co-defendants brave enough to proceed
to trial and challenge the Government's indictment based upon patent discovery violations.\textsuperscript{27}
The Court severed Mr. Vella and one other defendant's cases from the other Gruttadauria
defendants based upon the Government erroneously charging multiple and antagonistic
conspiracies.\textsuperscript{28} In Vella, after jury selection, but before the trial commenced, the Court held a
two-day spoliation hearing, where it was determined conclusively for the first time that the two "
joker poker machines" at the heart of the indictment, had in fact been destroyed many months
before the start of trial.

       Pursuant to the requirements of Youngblood\textsuperscript{29} the defendant satisfied elements one and
two by demonstrating that the government destroyed evidence that possessed an apparent
exculpatory value, and that the destroyed evidence could not be replaced.\textsuperscript{30} The defense also
made a compelling case that the destruction by agents of the Government was done with bad
faith thereby purportedly satisfying Youngblood's third element. It was further alleged by the
defense that this machine was in fact inoperable and as such incapable of being used by the
defendant or anyone else to commit the alleged gambling conspiracy. It was further posited that
a defense expert could have testified that the machines were in fact inoperable, or had never been
used for a "pay out" of winnings and were merely video games. Curiously, the Government was
unaware of even a manufacturer's name or a serial number. Remarkably, even though the
defendant demanded this and other discovery information, the Government concealed the fact
that they knew that the evidence had been destroyed. This incredible fact came out on the eve of
trial during the spoliation hearing. The Government had actual knowledge from state authorities that the machines were going to be destroyed and yet did nothing to preserve or protect them. Furthermore, the Government never told defense counsel that the machines had, in fact, been destroyed.

The Court, not wanting to punish the Government\textsuperscript{31} found that the Government did not act in bad faith, even though the testimony by Nassau County Detectives and property clerks as custodians of the evidence revealed that the government was aware and had been aware for several months of the destruction. The Court determined that even though it believed that the Government's case was in serious doubt\textsuperscript{32} it nonetheless would permit introduction of photographic evidence relating to the two alleged video poker machines. As a result, Mr. Liotti's client determined that it was in his best interest to accept the government's plea offer, as he was being threatened with a lengthy sentence as well as deportation should he have lost at trial.\textsuperscript{33}

The above scenario serves as a shining example of the extreme difficulty a defendant faces when attempting to meet the onerous bad faith requirement set forth under \textit{Youngblood}. Demonstrating bad faith is potentially an insurmountable challenge which should be eliminated. Rehnquist's "bright-line rule" in \textit{Youngblood} created more questions than it answered, such as (1) does a defendant have to demonstrate actual malice? (2) does a defendant have to demonstrate recklessness? (3) does a defendant have to demonstrate gross negligence? (4) does a Defendant have to demonstrate that there is a certain level of diligence\textsuperscript{34} required by law enforcement? (5) are there differing standards between jurisdictions based on training and techniques used across the county? In \textit{Vella}, for instance, the Nassau County Police Department acted as the custodians of evidence for the Federal government, since the State had a prosecution which preceded the
federal prosecution. Therefore, the question arises as to whose bad faith was in question.

Despite the Rehnquist Court's determination in *Youngblood*, lower federal courts have attempted to keep the spirit of *Brady* alive by remedying prosecutorial spoliation violations. In *United States v. Dollar*, the District Court for the Northern District of Alabama ruled that the government's failure to turn over evidence warranted dismissal of conspiracy counts in an illegal firearms trade case.\textsuperscript{35} *Dollar* involved defendants accused of conspiring to illegally trade firearms. The government did not turn over documents relating to witness interrogation, and as a result the government's transgressions warranted a dismissal of the case with prejudice.\textsuperscript{36} In *United States v. Wilson*, the Eleventh Circuit Court of Appeals advocated sanctions against individual prosecutors for *Brady* violations.\textsuperscript{37} The defendant in *Wilson* was convicted of one count of distributing a small amount of narcotics. At trial, the prosecutor characterized the defendant as a major drug dealer and placed an undue focus on prior bad acts. Although the court ruled the misconduct was non-prejudicial, it put prosecutors on notice that such misconduct in the future would result in sanctions against the individual prosecutor.

In *United States v. Yevkapor*, the District Court for the Northern District of New York ruled that the destruction of evidence warranted exclusion of that evidence, and subsequently dismissed the case.\textsuperscript{38} In *Yevkapor*, the federal government introduced three video surveillance clips allegedly showing the defendant accepting narcotics. However, there were gaps between the three clips totaling twenty-two minutes, and the clips which were introduced showed no search of the defendant by police which yielded illegal drugs or any subsequent arrest. In addition, the remainder of the video (which the gaps entailed) was not preserved. The District
Court held that “the missing record was, at best, neutral, and at worst, prejudicial to the Government's case or of an exculpatory nature to the Defendant. Thus, there is an appearance of impropriety on the government agency in only preserving" a portion of the evidence. The Court further acknowledged precedent in the Court of Appeals for the Second Circuit establishing an affirmative duty on the part of prosecutors to instruct governmental agencies to preserve evidence. As a result of the government's bad faith, the District Court ruled the evidence was more prejudicial than probative, and excluded the clips.

Recently, a Federal District Court judge in Boston held prosecutors' feet to the fire when they merely withheld exculpatory evidence. In that case, Federal prosecutors from the Department of Justice had recently procured a plea from Vincent Ferrara, an alleged Capo in the Patriarca Crime Family, resulting in a 22-year sentence. Only later did Mark L. Wolf, Chief Judge of the United States District Court for the District of Massachusetts, learn that the government had withheld key exculpatory evidence. At trial, one of Ferrara's associates, Walter Jordan, testified that Ferrara had ordered a murder, whereas Jordan had told a police detective that the murder occurred without Ferrara's permission. The government withheld the detective's report, and allowed the contradictory testimony. Judge Wolf learned of the misconduct, ruled that Ferrara's due process rights had been violated and immediately ordered him to be released from prison. The federal prosecutor only received an internal written reprimand, but Judge Wolf was not satisfied. Writing to Attorney General Alberto Gonzalez, Judge Wolf characterized the prosecutor's actions as “extraordinary misconduct by the Department of Justice” and demanded further sanctions. The actions of Judge Wolf holding the federal prosecutors accountable establishes a bright beacon for defendants post-

Youngblood.
The aforementioned examples provide evidence that in order to prove an instance of post-
Youngblood bad faith, defense counsel must show that prosecutors have essentially committed
the crime of obstruction of justice. Both the bad faith requirement and the obstruction of justice
statute require a showing of intent, and both bad faith and the obstruction of justice have the
same end result. Addressing this issue requires a new solution.

**THE VELLA HEARING**

In the mid-1980's, Assistant United States Attorney David Perlmutter worked in the
Narcotics Unit in the Southern District of New York. AUSA Perlmutter, though an
accomplished prosecutor at the time, had a tendency to "dip" into the evidence locker. Much
evidence was destroyed by his own consumption.\(^4^5\) Perlmutter was disqualified as a prosecutor,
and a special prosecutor was appointed to his cases.\(^4^6\) A decision had to be made as to whether
all of the disappeared evidence would require Perlmutter's cases to be dismissed, or whether trial
would proceed without the evidence. In place of the actual narcotics as evidence, the
prosecution would utilize lab reports and agent testimony. Ultimately, the special prosecutor
decided to proceed without the spoliated evidence; convictions were still ultimately obtained.

The *Vella* case provides a marked contrast to the Perlmutter cases. In the Perlmutter
cases, huge quantities of drugs were the spoliated evidence; in *Vella*, the destroyed evidence
consisted of video poker machines. The policy concerns regarding the regulation of major
narcotics cases far outrank the concerns surrounding a street-level gambling case. In the
Perlmutter cases, the prosecution relied upon agent testimony observing the sales of the drugs,
and lab reports analyzing the narcotics; though not as powerful as the drugs themselves, the
evidence was sufficient to secure a conviction. In *Vella*, the only supporting evidence remaining
after the machines were destroyed were photos and the testimony of the detective who seized the machines, and the property clerk responsible for keeping them in evidence. This evidence and testimony does not provide a sufficient basis for a conviction where no lab reports exist as to the operability of the machines. Operability is a key element in determining guilt in a gambling conspiracy where gambling machines are at issue. In addition, the absence of the evidence could potentially deprive the defendant of defenses based on that evidence. For example, in Vella, the absence of the machines also meant an absence of serial numbers, manufacturer information, and proof that the machines were actually operational. All of this information could have been utilized in crafting a defense. A determination should have been made as to whether the spoliated gambling machines were prejudicial to the defense.

Such a determination could be made in a Vella hearing. In a Vella hearing, the court could implement a two-tier standard to determine the prejudicial effect of the spoliated evidence. First the court would determine whether the defense could have utilized the destroyed evidence in preparing its defense. For example, in Vella, the defendant was denied the opportunity to present a defense based on the nature of the machines themselves, due to their destruction. Expert testimony could have been introduced to demonstrate how the evidence could have been utilized in order to demonstrate that the machines were not capable of paying-out and were for entertainment purposes only. Upon a sufficient showing of the first tier, the second tier would involve a determination as to whether the destroyed evidence would have made a difference to the outcome if available to the defense. Such a finding would rely upon a preponderance of the evidence standard, because it was the defense's contention all along that the machines were inoperable, and a different outcome was more than likely in Vella.

Upon a satisfactory determination that both tiers of the Vella standard have been met, the
court would grant one of three suggested remedies. First, the court could dismiss the charges against the defendant. This remedy should have been granted in *Vella*, where the spoliated evidence was more important to the Defense than to the Government. Second, the court could grant a curative instruction to the jury regarding prosecutorial misconduct. Third, the court could charge the jury to consider the destruction of evidence in order to determine what, if any, prejudicial effect it may have had.

The question also arises as to the fate of the prosecutor. Because under *Youngblood*, a Defendant must demonstrate bad faith which, in effect, rises to a level commensurate with obstruction of justice, penalties against individual prosecutors must be severe. If the court does find bad faith/obstruction of justice, the court should immediately appoint a special prosecutor. The subject prosecutor would also have to be advised of their Fifth and Sixth Amendment rights. Further, the prosecutor should be reported to the appropriate grievance committee for disciplinary action.

**CONCLUSION**

The Rehnquist Court's *Youngblood* decision has placed an undue burden on defendants in criminal cases and in so doing the Court has further trampled the due process rights of defendants. What was once a venerated protection of defendant's rights in the event of spoliation of evidence has become an ominous mountain to surmount. Corrective measures must be taken by our highest court to rebuild the rights gradually degraded over the last several decades, lest our notion of “due process” becomes extinct. As a corollary, action must be taken to prevent the obstruction of justice. Ultimately, the availability of a *Vella* hearing to determine the prejudicial effect of spoliation of evidence would seek to level the playing field between the prosecution and
defense.

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2Thomas F. Liotti & Christopher Zeh, “The Uneven Playing Field: Part I, Ethical Disparities Affect Criminal Cases,” 17 Touro L. Rev. 2 (2001); *The Attorney of Nassau County*, March, 2000 at 5, 14-16 and *The New York State Bar Association, Criminal Justice Section*

4Black's Law Dictionary defines “spoliation” as “The intentional destruction of evidence and when it is established, fact finder may draw inference that evidence destroyed was unfavorable to party responsible for its spoliation. Such act constitutes an obstruction of justice.”


13Lane, Charles. A Look at a Rehnquist Legacy. The Washington Post. Monday, June 6,

14 See also Napue v. Illinois, 360 U.S. 264 79 S.Ct. 1173 (1959), Giglio v. US, 405 U.S. 150, 92 S.Ct. 763 (1972) and Rovario v. US, 353 U.S. 53 77 S.Ct. 623 (1957), all standing for the pre-Youngblood bright-line rule that the good or bad faith of the prosecution is irrelevant to any discussion of a defendants due process rights.

15 Youngblood, at 64.

16 See generally Durham County Superior Court CRS Nos. 4332-4336, 5582-5583 (North Carolina, 2006) for criminal charges, and Evans, et al., v. City of Durham, et al., Docket No. 07-739 (M.D.N.C., 2007) for the resulting civil case against the government.

17 The omnibus clause of 18 USC §1503 penalizes “whoever...corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."


27 Several voluminous discovery demands were made and to which the Government never responded.


29 See also, *US v. Rastelli*, 870 F.2d 822, 833-35 (2nd Cir. 1989)


“It was just a few short years ago that this Court watched with dismay the intimidation of a federal judge who had suppressed evidence. Ultimately his cowering showed the weakness of our judiciary and the fact that it is not an equal branch of government. Courts and judges do not have the power of impeachment, Congress does. In *U.S. v. Bayless*, 913 F. Supp. 232 (1996), Judge Baer from the Southern District of New York, suppressed evidence seized during a cocaine and heroin distribution conspiracy. The decision produced a public outcry particularly among politicians against Judge Baer. The Judge then recanted his decision on a motion to renew and reargue by the Government. See *U.S. v. Bayless*, 921 F. Supp. 211 (1996).

The *Bayless* case eventually found its way to the Second Circuit Court of Appeals where Judge Guido Calabresi wrote the opinion of the Court, affirming the conviction. But the Court described the political pressure faced by Judge Baer including that he could be impeached. The Court held:

“Judge Baer's ruling immediately drew heavy criticism in the press and from local political figures, including New York's Mayor and Police Commissioner, as well as Governor George Pataki. See Chester L. Mirsky, *The Exclusionary Rule Was Appropriately Used*, Nat'l L.J., Feb 26, 1996 at A21. The decision itself, and the language in the opinion, referring as it did to widespread police corruption, was perceived by many as an affront to the police and to victims of drug-related crime. An editorial in the *New York Times* called Judge Baer's decision “judicial malpractice,” and accused him of “undermin[ing] respect for the legal system, encourag[ing] citizens to flee the police and deter[ring] honest cops in drug-infested neighborhoods from doing their job.”

“In February, the government filed a motion for reconsideration of the order granting the suppression motion. The decision, however, continued to attract attention and quickly became the focus of a nationwide controversy and a flashpoint for the 1996 Presidential campaign, as Democrats and Republicans competed to enhance their reputations as proponents of law and order by denouncing Judge Baer. In early March, more than two hundred members of Congress, led by Republican Representatives Bill McCollum, Fred Ipton, and Michael Forbes, sent a letter to President Clinton calling Judge Baer's ruling “a shocking and egregious example of judicial activism.” John O. Newman, *The Judge Baer Controversy*, 80 Judicature 156, 156 (1997). The letter claimed Judge Baer had “sid[ed] with drug traffickers and against hard-working police officers and the frightened residents of violence-ridden communities," and that he had “demonstrated a level of ideological blindness that render[ed] him unfit for the proper discharge of his judicial duties." *Id.* The writers asked President Clinton to join them in calling for Judge Baer's resignation. *See id.* at 157.

“When asked about the letter at a White House press conference, President Clinton's spokesperson Mike McCurry said that the President would defer deciding whether to call for Judge Baer's resignation until the Judge ruled on the government's motion for reconsideration, adding that, while the President would evaluate Judge Baer's record “on the full breadth of his cases," the White House was “interested in seeing how he rules" in response to the motion. *Id.* The press interpreted McCurry's comment as a veiled warning. For example, the *New York Times* reported that “[t]he White House put [Judge Baer] on public notice today that if he did not reverse a widely criticized
decision throwing out drug evidence, the President might ask for his resignation."


Subsequently, in a written response to Rep. McCollum, the White House disavowed any intent to ask for Judge Baer's resignation, saying that the issues should be resolved in the courts. *See* Newman, *The Judge Baer Controversy, supra*, at 160. Then-Senate Majority Leader and Presidential candidate Bob Dole joined the fracas by saying that if Judge Baer did not resign, he should be impeached. *See id.*

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32 Judge Spatt stated, "I don't know how the government is going to prove their case. That's up to them." *United States v. Vella*, CR-05-717, Transcript, May 3, 2007, p. 18, l. 22 *et seq.*


36 *Ibid*, at 1332.


40 *United States v. Gil*, supra at fn.34.
41 *Ibid*, at 250.


45 The fall of Mr. Perlmutter and its impact on certain cases is recorded in *United States v. Venuti*, 625 F.Supp. 1460, at FN 11 (S.D.N.Y.,1986).
