



PRO BONO PUBLICO

IN THIS ISSUE:

Letter from the *Pro Bono*
Counsel and Director: Harlene
Katzman

Pro Bono Victories!

Simpson Thacher Represents
Morgan Stanley's
Environment, Social Finance &
Community Reinvestment
Group In Connection With
Secured Credit Facility for
Accion/Chicago

Palo Alto Office Files *Amicus*
Brief with 9th Circuit On
Behalf Of Latino Justice

Mark Cunha Testifies Before
the New York State Senate on
"IOLA and the Future of Civil
Legal Services in New York
State"

Special Hearing Set by Special
Master Appointed By Missouri
Supreme Court in Firm's
Representation of Death Row
Inmate

Spotlight: Litigation Partner
Roy Reardon, *Pro Bono*: A Life
Changing Experience

Awards

Community Service

New Projects

Upcoming *Pro Bono* Trainings/
CLE

A Quarterly Review of *Pro Bono* Activities

January 2010

LETTER FROM PRO BONO COUNSEL AND DIRECTOR HARLENE KATZMAN



Harlene Katzman

2009 was a tough year in many respects and I've heard people say they will be glad to leave it behind. But I have a different perspective from those of you who may share this sentiment. Simpson Thacher's Pro Bono Program had its BEST YEAR EVER in 2009. More lawyers in more offices dedicated more hours to more underserved clients than ever before. To those of you who participated, you have earned our pride and gratitude. But nowhere will your mark be felt more than on the tenants and parents you saved from homelessness, the men, women and children you saved from deportation, the women you helped stand up for themselves against abusive spouses or partners, and the countless others whose lives were forever bettered by your advice and representation. You have made a difference. **We have made a difference.**

What the numbers say:

In 2009, Simpson Thacher provided 73,588 hours of pro bono service compared to 61,184 in 2008, a more than 20% increase! Also, for the first time, there was pro bono service provided in all of the Firm's 9 Offices. For example, the Firm assisted at least:

- 67 nonprofits and 22 small businesses, helping them grow and thrive in a difficult economy;
- 12 children in foster care in Los Angeles with adoptions into welcoming families;
- 21 asylum seekers escape violence and persecution in their home countries;
- 34 families of Bushwick High School students with public benefits, immigration and housing issues in our monthly clinic, and represented 13 of them on an ongoing basis;
- 22 low income tenants in New York, and 2 in DC, avoid eviction and homelessness,

- 35 indigent defendants in their criminal trials, appeals and re-sentencing hearings, and
- 33 low income women in domestic violence and family law matters.

But that's not all. Many partners and associates gave generously of their time to the boards and leadership committees of all types of nonprofits—legal services organizations, charter schools, job training and mentoring programs, social service programs—and though technically not counted by surveyors as pro bono work, this service is integral to the functioning of nonprofits in a year where budgets and staff were being slashed at alarming rates.

Giving thanks...

I want to acknowledge the important contributions of some of the Firm's non-lawyers. **Oscar Orellana** has officially joined the staff of the *pro bono* program. Many of you know Oscar from his years coordinating events and projects for the Diversity Committee. He has already proved invaluable to the smooth and consistent functioning of the *pro bono* program. I hope you will join me in expressing our appreciation for his hard work.

Many of our in-house *pro bono* projects ride on the backs of our hardworking paralegals. We wouldn't be as efficient, organized or effective without them. Thanks to **Wendy Colon** (inMotion, Bushwick), **Aimee Sorbo** (Seedco), **Elizabeth Pantaleon** (Bushwick), **Dircia De Jesus** (Sheepshead Bay, Bushwick), **Christina Mauricio** and **Elizabeth Martinez** (Seedco Spanish clinic) and all the other paralegals who volunteer to work on our *pro bono* projects.

Finally, thanks to the members of the Pro Bono Committee for its direction and leadership, Co-chairs **Bill Russell** and **Libby McGarry**, and **Alexis Coll-Very**, **Bryce Bryce Friedman**, **Michael Garvey**, **Olga Gutman**, **Kevin Kennedy**, **Chet Kronenberg** and **David Shevlin**.

Harlene Katzman
Pro Bono Counsel and Director

Save the Date! First Annual Pro Bono Recognition Reception at STB: January 27, 2010

PRO BONO VICTORIES!

ASYLUM AND OTHER IMMIGRATION MATTERS

"KL"

New York associates **Thomas Ling** and **Jennifer Pepin** represented KL in her claim for asylum, which was granted in November 2009. KL is a transgender woman from Honduras who endured horrible abuses due to her perceived sexual orientation. While in her home country, she was repeatedly raped, beaten, and robbed by family members, neighbors, and strangers who believed that gay men deserve such abuse. While in Honduras, she was also trapped in a relationship with a violent gang member who regularly beat her and threatened to kill her if she left him.

Though KL failed to file her asylum petition within the statutorily-required one year of arriving in the United States, our attorneys argued that she suffered from post-traumatic stress disorder and social isolation, which prevented her from taking the basic steps necessary to file. In addition, she was recently diagnosed as HIV-positive and had begun hormone therapy, which made her more readily identifiable as a transgender woman. Both of these conditions would have subjected her to greater abuse in Honduras. Accordingly, the Asylum Office excused the untimely filing.

This matter was referred to the firm by Immigration Equality, the only national organization in the country fighting for equality for LGBT and HIV-positive immigrants. The matter was overseen by partner **Todd Crider** with invaluable assistance from associate **Valentina Casella**, summer associate, **Jeannie Chung**, and paralegal, **Manuel Fermin**.

"Mr. C"

The Firm represented Mr. C in his claim for asylum, which was granted in September 2009. Mr. C is a gay man from Jamaica who endured repeated public harassments, threats and violent attacks throughout his college years, often by gay-bashing groups, as a result of perceived sexual orientation. Once he became nationally recognized for his talent in music, he was blackmailed and abducted, and his and his family members' lives were threatened at

gunpoint. His sexual orientation was eventually made public, along with his personal information including his home address, telephone number and email address, effectively ending his music career and subjecting him to public outbursts of disgust, hatred, and threats to his life and the lives of his family and friends.

This matter was also referred to the firm by Immigration Equality. The Simpson Thacher team included New York associate **Jinghua Zou**, former associates **Harajeshwar Kohli** and **Patrick Geary**, and paralegal **Brendan Derr**. The matter was overseen by **Joe Tringali**.

"Ms. X."

New York associate **Parijat Sharma**, and Simpson Thacher Pro Bono Fellow, **Jonathan Taylor**, along with the Legal Aid Society's Immigrant's Rights Unit, represented Ms. X, an HIV-positive mother from Grenada, and her minor son, in their immigration removal proceedings. The attorneys argued that Ms. X should be granted asylum based on the severe stigma, discrimination and ostracism suffered by those with HIV in Grenada, and the lack of adequate medical care and treatment available to her in her home country.

The legal team faced an uphill battle which resulted in an unexpected result. Complicating the asylum claim, Ms. X failed to meet the technical requirements of asylum because she filed her application after the one-year filing deadline, as she was not aware that she was HIV-positive until her green card application was denied on this ground, which occurred almost a decade after her arrival in the United States. Complicating the withholding of removal claim, even if the Judge granted Ms. X withholding of removal, as opposed to asylum, her minor son would have to win his independent claim for withholding of removal based on his imputed membership in the HIV social group in order to remain with his mother.

Moments before the hearing in front of the Immigration Judge, the Assistant Chief Counsel for Immigration and Customs Enforcement and the Judge recommended that our clients consider requesting administrative closure of their cases on humanitarian grounds. After our lawyers presented the option to the clients, and made the formal

request, the Judge granted the request for administrative closure in August 2009. As a result, Ms. X and her son will not be deported to Grenada and can remain in the United States. Although Ms. X and her son were not granted any legal status, they are eligible for certain health benefits, which was most important to our clients.

This matter was referred to the Firm through its Removal Defense Project with The Legal Aid Society and was overseen by partner **Paul Gluckow**. Simpson Thacher Pro Bono Fellow **Christina Quintero** and paralegals **Christina Mauricio** and **Michelle Diamond** also provided valuable support.

"AE"

New York associates **Natalie Shimmel Drucker** and **Valentina Casella**, London associate **Wim de Vlieger**, STB Fellow **Camille Boulanger**, and retired partner **David Massingill**, represented AE in his claim for asylum, which was granted in December 2009 by the Immigration Court. AE is a Cameroonian male who was beaten, tortured, arrested twice and almost killed by the ruling party in Cameroon due to his political beliefs and involvement with one of the country's most active opposition parties. AE is a well-educated, outspoken young man, with a natural gift for communication and leadership. These predispositions, coupled with matching responsibilities with which his party entrusted him, caused AE to be specifically targeted by the ruling party in Cameroon and eventually forced him to flee his country and seek refuge in the United States.

To the surprise and disappointment of his attorneys, AE's application for asylum, which was filed within one year of his arrival in the United States, was rejected with no explanation by the Immigration Office. At a merits hearing held on December 7, 2009, Judge Douglas Schoppert granted AE asylum after hearing his direct testimony.

This matter was referred to the firm by the City Bar Justice Center's Refugee Assistance Program and benefited from the invaluable assistance of associate **Thomas Ling** and paralegals **Carole Tingling** and **Alexandra Schneider**.

FAMILY LAW

New York associates **Jodie Sopher** and **Yi Wang**, supervised by partners **Lynn Neuner** and **Libby McGarry**, successfully represented Lakshmi Korrapati in her child support case, which was referred by Sakhi for South Asian Women. Ms. Korrapati fled a violent relationship when she was four months pregnant. On April 21, 2009, Ms. Korrapati filed an action for child support in Family Court in New York County, where she obtained a temporary order that the father of the child pay \$261.5 per week. Jodie and Yi began representing Ms. Korrapati in October 2009 and they attended two court hearings on Ms. Korrapati's behalf, arguing that the child support order should take into account the father's potential capacity to earn, rather than his current income, and that he should contribute to child care expenses. On November 2, 2009, Support Magistrate Karen Kolomechuk agreed with Ms. Korrapati's position and ordered that the father of the child pay \$702 per week to Ms. Korrapati and \$11,880 in retroactive payments. Ms. Korrapati was thrilled with the outcome.

HOUSING COURT

The Firm successfully represented David Chin, whose landlord sought to evict him from the rent controlled apartment in Chinatown that he and his siblings had lived in since they were children and in which he had resided continuously with his father since approximately 1993. The Firm took the case in 2006 after the landlord filed an eviction notice which had been prompted by the death of David's father. The "tenant of record" had been the father, and as soon as the father passed away the landlord claimed that our client had no right to remain in the apartment. The STB team answered by asserting David's "succession rights" as an affirmative defense, which required that the team prove David had been living in the apartment with his father for at least two years before his father passed away.

The case culminated in a 4-day jury trial, which the firm won in the fall of 2009. Documentary evidence was sparse and the most important evidence was in the form of witness testimony. The landlord himself testified against our client stating that he knew David did not move into the

apartment until just some months before his father passed away. The jury, in order to reach a verdict in our client's favor, was required to discredit the landlord's testimony and to credit the testimony of witnesses testifying on David's behalf. These included David himself, his brother, his sister, and two neighbors.

The STB team included New York associates **Ihsan Dogramaci** and **Andrea Griswold**, paralegal **Stephanie Crosskey**, and partner **Bill Russell**.

SUPREME COURT

On November 2, 2009, the United States Supreme Court granted *certiorari* in *Norwood v. United States*, No. 09-69, vacated the adverse decision by the U.S. Court of Appeals for the Ninth Circuit affirming Robert Norwood's criminal conviction, and remanded the case to the Ninth Circuit for further proceedings in light of *Melendez-Diaz v. Massachusetts*, an intervening Supreme Court decision. Earlier this year the Ninth Circuit affirmed Mr. Norwood's conviction, holding that the trial court properly admitted a Government affidavit concerning Mr. Norwood's wage history—notwithstanding defense counsel's timely Sixth Amendment objection to the Government's failure to make the affiant available for cross-examination. The Firm petitioned for *certiorari* on Mr. Norwood's behalf following the Ninth Circuit's ruling. In response to our petition, the Solicitor General conceded that Mr. Norwood's rights under the Sixth Amendment were violated, and supported our request for vacatur and remand to the Ninth Circuit. The case now returns to the appellate court, where the Firm will continue to represent Mr. Norwood.

The Los Angeles-based Simpson Thacher team included associates **Rob Pfister**, **Andrew Brettler** and **Peter Jordan**, with guidance from partners **Chet Kronenberg** and **Mike Kibler**. Summer associates **Josh Pollick** and **Michelle Kallen** provided invaluable assistance.

SIMPSON THACHER REPRESENTS MORGAN STANLEY'S ENVIRONMENT, SOCIAL FINANCE & COMMUNITY REINVESTMENT GROUP IN CONNECTION WITH SECURED CREDIT FACILITY FOR ACCION/CHICAGO

Simpson Thacher represented Morgan Stanley's Environment, Social Finance & Community Reinvestment Group on a pro bono basis in connection with a \$400,000 secured credit warehouse facility provided by Morgan Stanley Bank, N.A. to microfinance lender ACCION/Chicago, Inc.

The facility is being provided by Morgan Stanley in connection with a \$750,000 grant from the City of Chicago's Small Business Development Fund program. The new credit facility, along with the grant proceeds, will form a key source of funds for ACCION/Chicago to extend credit to low and middle income micro-entrepreneurs in the Chicago area.

ACCION/Chicago is an alternative lending organization dedicated to providing credit and other business services to small business owners who do not have access to traditional sources of financing. By encouraging the economic self-reliance of micro-entrepreneurs throughout the Chicago area, ACCION/Chicago strives to help businesses and communities grow.

The Simpson Thacher team, which logged over 300 hours on the ACCION/Chicago transaction, included partners **Art Robinson**, **Patrick Ryan** and **Rob Holo**, Senior Counsel **Mike Isby**, Counsel **Jennifer Franklin**, and associates **Justin Lungstrum**, **Matt Einbinder**, **Jackie Kahng**, **Jim Cross**, **Jason Vollbracht**, and **Erik Hepler**.

PALO ALTO OFFICE FILED AMICUS BRIEF WITH 9TH CIRCUIT ON BEHALF OF LATINO JUSTICE

In the Spring of 2009, Simpson Thacher was asked by Latino Justice (formerly the Puerto Rican Legal Defense Fund) to partner with them to file an amicus brief to the California Supreme Court in the case of *Martinez v. Regents of the University of California*. The case involves a challenge to California Education Code Section 68130.5. Under Section 68130.5, students who have attended at least three

years of high school in California, graduated from a California high school, and met certain other requirements are allowed to pay in-state tuition rates. Students who fall within the parameters of Section 68130.5 include undocumented immigrants living in California, as well as US citizens and permanent residents who attended high school in California but do not have state residence. The plaintiffs/appellants in **Martinez** are U.S. citizens/non-residents of California who are being represented by the Immigration Reform Law Institute—the legal arm of the notoriously anti-immigrant group known as the Federation for American Immigration Reform ("FAIR"), and Kris Kobach, who contend that Section 68130.5 violates federal law by providing undocumented immigrants the opportunity to pay in-state tuition. The defendants/respondents are the Regents of the University of California ("Regents") and the Board of Governors of the California Community Colleges.

Although there were various amicus briefs filed in the Court of Appeal on behalf of a number of immigrant students and organizations, Latino Justice wanted to file an amicus brief to the Supreme Court on behalf of similar student groups and organizations in New York and other Eastern states. The brief argued that the Court of Appeal incorrectly determined that Section 68130.5 was preempted by federal law because a plain reading of the unambiguous, plain language of the federal statutes makes clear that undocumented immigrants are permitted to receive post-secondary education benefits as long as certain conditions are met, and Section 68130.5 meets these conditions. The brief further argued that plaintiffs' Privilege and Immunities argument, evaluated under the correct rational basis analysis, fails because California has a substantial interest in providing in-state tuition for all of its high school graduates, including undocumented immigrants, and Section 68130.5 is rationally related to this interest. Finally, using nationwide data including data from New York, the brief argued that while Section 68130.5 was not aimed specifically at benefiting undocumented immigrants, Section 68130.5 does in fact benefit these students, which in turn benefits the state as a whole.

By the time the brief was filed in October 2009, 21 amici had signed on to the brief. The amici are

organizations and individuals that, among other things, serve to foster awareness and support for the education and integration of immigrants in their respective communities. All of the briefing has been completed and the parties are awaiting oral argument. The Palo Alto Office team includes associates **George Morris** and **Deanne Cevasco**, and partner **Alexis Coll-Verly**.

MARK CUNHA TESTIFIES BEFORE THE NEW YORK STATE SENATE ON "IOLA AND THE FUTURE OF CIVIL LEGAL SERVICES IN NEW YORK STATE"



Mark Cunha

On December 9th, **Mark Cunha**, current Chair of the Board of Legal Services-NYC, the largest provider of civil legal services to low income people in the country, testified in a public hearing before the New York State Senate on "IOLA and the Future of Civil Legal Services in New York State." Legal service providers in New York rely in part on

funding by IOLA (Interest on Lawyers Accounts), which has plummeted from a high of \$31 million in 2008 to a mere \$6.5 million projected for 2010. Mark spoke on a panel of business community leaders including Allen Waxman, Kaye Scholer partner and former general Counsel of Pfizer, and Lisa Philp, Global Head of Philanthropic Services at JP Morgan Private Bank. The group urged the Senate to maintain and increase funding to civil legal service providers. Written testimony was also submitted on behalf of Jack Rosenthal, President of the New York Times Company Foundation.

The panel was coordinated by the Firm's Pro Bono Counsel, **Harlene Katzman**, and the testimony for all four members of the group was drafted by litigation associates **Lexie Pitney**, **Zara Ohiorhenuan**, and **Michael Warner**, with assistance from **Linton Mann**.

SPECIAL HEARING SET BY SPECIAL MASTER APPOINTED BY MISSOURI SUPREME COURT IN FIRM'S REPRESENTATION OF DEATH ROW INMATE

Sixteen years after a troubling investigation and trial resulted in a sentence of death for firm client Reginald Clemons, a Missouri judge serving as a special master has set a date for a hearing to independently assess the proportionality of Mr. Clemmons' sentence and take evidence never before considered by any single court. On June 30, 2009, in response to a writ of habeas corpus arguing that new evidence undermined the verdict and the proportionality of Mr. Clemmons' sentence, the Missouri Supreme Court, which little more than a month before had set Mr. Clemmons' execution date, invoked a rarely-used procedure and appointed Judge Michael W. Manners to serve as a special master—a kind of independent adjunct judge—in Mr. Clemmons' case. Judge Manners will have the "full power and authority to issue subpoenas" and "compel production of books, papers and documents and the attendance of witness." The proceedings before the special master will include an 8-month discovery and briefing period, culminating in the hearing set for May 10, 2010 in St. Louis. The special master will then make findings of fact and conclusions of law, which the Missouri Supreme Court will ultimately either accept or deny.

This development represents a surprising and important turn of events in Mr. Clemmons' case. Since 1995, STB has represented Mr. Clemmons on his appeal from a 1993 first-degree murder conviction. Mr. Clemmons was denied effective assistance of counsel at every stage of the trial. Although Mr. Clemmons was indigent and could not afford legal counsel, the St. Louis Public Defender's Office would not represent him because the office had already been retained by one of his co-defendants. Mr. Clemmons' family was forced to use credit card advances in order to hire two private attorneys, a husband-and-wife team who, unbeknownst to Mr. Clemmons and his family, had just undergone a contentious divorce and were unwilling or unable to put aside their personal differences and work cooperatively on the case. Six months before the trial, and without informing Mr. Clemmons or his family, the wife

moved to California and started a full-time job at a corporation doing tax work. Mr. Clemmons' remaining lawyer, who had a lengthy record of both disciplinary actions and sanctions as a result of ineffective assistance to clients, failed to interview a single witness prior to trial and did not even read the police reports. He was so ill-prepared, in fact, that he asked *Mr. Clemmons' mother*, who had no legal training whatsoever, to prepare written questions for him to ask witnesses.

Prosecutorial misconduct further contributed to the fundamental unfairness of Mr. Clemmons' trial. The prosecutor in the case has been criticized throughout his career by both federal and state courts for unethical and unprofessional conduct. In the course of prosecuting Mr. Clemmons, the prosecutor tampered with witnesses and documentary evidence; intentionally suppressed information tending to show Mr. Clemmons' innocence; used threats and intimidation to prevent witnesses from giving testimony damaging to the prosecution's case; deliberately put inadmissible and false evidence before the jury; and made inflammatory and improper arguments to the jury. His misconduct at Mr. Clemmons' trial was so pronounced, in fact, that the trial judge found that he was guilty of criminal contempt, and that his conduct was "willfully and intentionally committed in disobedience of the court."

The evidence produced at trial to obtain Mr. Clemmons' conviction was also highly problematic. The State conceded that Mr. Clemmons neither committed nor planned the murders of two young women in St. Louis. He was prosecuted instead as being an accomplice, on the basis of testimony by two individuals: one of his codefendants who received a reduced sentence in return for favorable testimony and is now free, and another witness who was the victims' cousin and *initially confessed to having committed the murders and was charged with the crimes*. The cousin later recanted, the charges against him were dropped, and he thereafter received \$150,000 from the St. Louis Police Department to settle claims of police brutality that he brought against the officers who interrogated him. Notably, neither witness was able to testify that he actually saw Mr. Clemmons plan or take part in the murders. The State also introduced a statement made by Mr. Clemmons dur-

ing the course of his interrogation, after having been beaten by police for five hours, which implicated him in certain crimes leading up to the murders (he has always maintained his innocence of the murders themselves). Mr. Clemmons' conviction was thus obtained through the weak testimony of two highly questionable witnesses and Mr. Clemmons' own coerced statement.

Adding to the injustice, the co-defendant whom the State itself contended was the one responsible for the women's deaths was sentenced to life in prison, while Mr. Clemmons sits on death row. These problems led one of the jurors at Mr. Clemmons' trial who had voted to convict him of first-degree murder and impose the death penalty to subsequently swear under oath that if she had known this information at the time, she would not have voted in favor of a death sentence.

The hearing before the special master will allow Mr. Clemmons to raise many of these important issues, several of which have never been considered by any court because they were not adequately preserved by Mr. Clemmons' trial counsel.

The STB team includes partner **Josh Levine**, associates **Gabriel Torres, Andrew Lacy, Kimberly Hamm, Allyson Rothberg, Donald Conklin, George Morris, Rebecca Mermelstein, Thomas Ling, Meredith Duffy, Bashiri Wilson, Noah Stern, Gabriel Rottman, Michael Johnson**, and paralegals **Stephanie Crosskey** and **Ashley Lohr**.

SPOTLIGHT: LITIGATION PARTNER ROY REARDON, PRO BONO—A LIFE CHANGING EXPERIENCE



Roy Reardon

Ten years ago I was asked by the Litigation Section of the ABA to contribute an article to the 25th Anniversary issue of its publication, *Litigation*. I decided to write on cross-examination. I dedicated the article to Professor Irving Younger, the most influential teacher of trial lawyers in the last 60 years, using as the theme his monograph entitled

the "Ten Commandments of Cross-Examination." I selected several "Commandments" and wove them into cases I had been involved here at the Firm.

One was a pro bono case that was a life-changing experience for me from which I continue to profit. It came to me as a second-year associate from Whitney North ("Mike") Seymour, Jr., currently a retired Partner of the Firm, who had just returned from a stint as an AUSA in the Southern District of New York, where he earned an excellent reputation. Years later he became U.S. Attorney in the Southern District.

Mike called me and said that Judge Bicks in the Southern District had a case for which he needed counsel for two indigent defendants. He asked if I could represent one of the defendants, and estimated that the case would probably last several weeks.

The case lasted three months to verdict, went up to the Second Circuit and then the Supreme Court. I lost all the way. I was in the case for three years, loved it and learned more every step of the way. I didn't handle a case of that size for years thereafter, and in the interim it made every other case I had look small.

Here's the excerpt on the case from my article. To me, it is the kind of stuff you find in the movies. Pro bono gave me the opportunity.

Roy Reardon

CROSS EXAMINATION—"TO SIN OR NOT TO SIN"

1. The First Commandment: Be Brief. No Cross-Examination Can Sometimes Be the Best.

United States vs. Aviles was known from its very beginning as the Vito Genovese case. Within its 7,000-page trial record can be found one of the most dramatic illustrations of how obedience to Younger's First Commandment can pay dividends to the trial lawyer.

Genovese was reputed to be the leader of a Mafia family of the same name. Genovese and 36 other defendants of lesser notoriety were indicted in the Southern District of New York for an alleged narcotics conspiracy. Prior to trial, many of the indicted defendants were severed out of the

case. The trial of the remaining 17 defendants proceeded before Judge Alexander Bicks.

The prosecutor was Arthur Christie, acting United States Attorney at the time. He continues to practice in New York City at a firm that bears his name. Christie was a very effective prosecutor. More than that, he was precisely what central casting would provide in response to a call for an elegant, attractive, able young prosecutor with great jury appeal.

Prior to going on the bench, Judge Bicks had been a successful corporate and real estate lawyer. But lack of litigation experience did not prevent him from quickly learning how to run a trial with 17 defendants and as many as 25 defense lawyers in the well of the courtroom.

Room 110 at Foley Square was the ceremonial courtroom. It has been the historic site of many prominent cases, but none more significant than the prosecution of Vito Genovese.

The case itself could be described as a garden-variety narcotics conspiracy trial. The government's chosen array of defendants had at least three things in common: all had prior run-ins with the law, none would do well on cross-examination should they take the stand in their own defense, and none would take the opportunity to do so.

I represented an indigent defendant. Counsel for the defense included some of the leading criminal lawyers of the day. They were led by the fiery Maurice Edelbaum, Abe Brodsky, and Albert Krieger, more recently the lawyer for John Gotti. Krieger, although quite young at the time, was already a formidable lawyer.

All of the lawyers for the defense were friends, but my "pal" in the case was Marty Carmichael. Like me, Marty was from a big New York law firm and had been appointed to represent one of the defendants who could not afford counsel. We were kindred spirits; we each had a house with a big mortgage, a wife, a bunch of kids, and some promise—but no money. Marty and I had lunch every day in Chinatown. I marveled how every day for three months Marty ordered egg foo yung and devoured it with gusto.

Marty had some solid criminal trial experience. He had been an assistant United States attorney in the Southern District in the legendary office of J. Edward Lumbard,

who thereafter went on to the Second Circuit where he still sits. Marty also had a theatrical bent; he could have been a Shakespearean actor if he had chosen that route.

Marty represented defendant Louis Fiano. My read of Fiano was that he was less than innocent. His home town was Las Vegas and, at the time of the Genovese trial, he was serving time for a prior narcotics conviction. His girlfriend—an attractive blonde lady in a mink coat—attended the entire trial. Every day, she brought Fiano his lunch from Gasner's Restaurant, a famous courthouse watering hole. It was always carried by a waiter in a white coat on a tray covered in linen to be served in the holding pen behind the courtroom.

The government had one principal witness—Nelson Silva Cantelopes. The defendants had several nicknames for Cantelopes, but their favorite was “stool pigeon.” After opening statements, Christie promptly put Cantelopes on the stand. His direct examination ran for 10 days, during which he built the conspiracy by testifying to one or more “overt acts” by each of the defendants.

It was during this trial that I learned why Justice Jackson referred to “conspiracy” as “that darling of the prosecutor's nursery.” Corroboration was not required in federal court for accomplice testimony, and all of Cantelopes's testimony was received in evidence “subject to connection.” In fact, at some mystical moment, Judge Bicks would simply decide whether a conspiracy had been proven. If it had, all of Cantelopes's testimony as to each defendant would come tumbling in on top of everyone else's (to the extent it had not done so already).

Cantelopes's direct spun a fascinating yarn. He implicated all of the defendants as well as some unindicted co-conspirators. Christie's procedure for getting Cantelopes to identify the individual defendants was simplicity itself:

Mr. Christie: Mr. Cantelopes, do you see that person in the courtroom?

At that point Cantelopes would begin to move his eyes from left to right around the well of the courtroom until he spotted the appropriate defendant and pointed to him. Judge Bicks would then direct that defendant to stand, and Christie would say:

Mr. Christie: Your Honor, let the record show that Mr.

Cantelopes has identified the defendant X [whomever that might be].

After several days on direct, Cantelopes had implicated a dozen defendants; his performance was almost flawless—but not quite. What follows is my reconstructed, but vivid, recollection of how one lawyer adhered to Younger's First Commandment—to be brief, and, in fact, ask no questions at all, when it is impossible to improve upon the direct testimony.

The next name in Christie's litany was Louis Fiano.

Mr. Christie: Now Mr. Cantelopes, do you see Louis Fiano in the courtroom?

Mr. Cantelopes: [The witness proceeds to make his search around the well of the courtroom, and finally points to the defendant Joseph DiPalermo, a/k/a Joe Beck.]

Fiano was in his early thirties and a powerfully built man. Joe Beck, on the other hand, was in his early fifties, about 5'2", and 120 pounds soaking wet. He was almost totally bald and wore big, dark, horn-rimmed glasses that gave him an owl-like look. When Cantelopes identified Joe Beck as Louis Fiano, the judge directed Joe Beck to stand. He was on his feet in an instant, hardly able to contain his joy. In fact, he was the second happiest guy in the courtroom—Louis Fiano took first place.

There was a hush in the courtroom. You could hear the ticking of watches in the silence. You could sense the wheels turning in the minds of all of the legal muscle on the defense side. You knew that each attorney was trying to figure out how to take the next step for his client. Because this development seriously reflected on the credibility of Cantelopes, it was good not only for Joe Beck and Louis Fiano, but for all of the defendants.

Even Christie, ever poised, was showing by his body language that he was alarmed. Judge Bicks, on the other hand, had certainly not connected the names of the defendants with their faces. He had no clue that Cantelopes had picked the wrong defendant.

Christie made the first move:

Mr. Christie: Mr. Cantelopes, will you look again and see if you can identify Louis Fiano in the courtroom?

What followed was bedlam. At least a dozen lawyers were simultaneously on their feet:

Chorus of Defense Counsel: Objection asked and answered! I move for the withdrawal of a juror and the declaration of a mistrial! This is outrageous! ...

Only Marty Carmichael sat silent.

Judge Bicks, realizing that something had happened, quickly removed the jury and Cantelopes and called all the lawyers into his robing room: After 25 minutes of heated argument, the judge ruled that Christie could ask Cantelopes again to identify Fiano. After making the appropriate motions to protect the record, the defense lawyers grumpily returned to the courtroom. The jury and Cantelopes soon followed.

Christie began:

Mr. Christie: Mr. Cantelopes, will you look again and see if you can identify Louis Fiano in the courtroom?

Mr. Cantelopes: [Resumes his visual trip around the well of the courtroom, quickly passing Joe Beck and pointing his finger at Louis Fiano.]

The Court: Will you stand, please, sir? [Fiano stands]

Mr. Christie: Your Honor, let the record reflect the witness has identified the defendant Louis Fiano.

Finally, Marty had his moment. He quickly stood, pulling out his pocket watch as he did so. Facing the jury, he said

Mr. Carmichael: Your Honor, the record should reflect that 34 minutes have elapsed since the prior identification of my client.

He sat down. Christie said nothing, but Louis Fiano quickly filled the void with almost perfect timing. He stood and shouted at the top of his lungs in the King's English that this was a "frame-up." He had to be restrained by the marshals under threat from Judge Bicks of being removed until he could control himself.

When the tumult subsided, Christie resumed his direct of Cantelopes. Over the next several days, Cantelopes succeeded in putting all the remaining defendants into the conspiracy.

Christie finished his direct, and the cross-examination of Cantelopes began. It continued for 19 straight days. Cantelopes had an impressive "rap sheet"—he had committed many small-time crimes and had a narcotics conviction for which he was then serving time in a state prison. He was a

wonderful candidate for collateral cross-examination going to his credibility.

Every lawyer, but one, took his turn trying to beat up Cantelopes on cross. Cantelopes was a tough witness; he freely admitted his criminal background and everything else that he knew the defense lawyers could prove. But he held fast to his story.

The order of cross-examination proceeded around the table. When it came time for Marty Carmichael to cross-examine, he stood, hesitated for what was probably no more than 20 seconds but seemed like a lot longer, and said:

Mr. Carmichael: Your Honor, the defendant Louis Fiano has no questions of this witness.

The case went on for two months after the misidentification of Louis Fiano. It was a long trial. All of the 17 defendants were held in by Judge Bicks at the end of the Government's case; each had his case go to the jury. At the end of almost five days of deliberations the jury returned a unanimous verdict of guilty against all defendants, except one. They acquitted Louis Fiano.

Marty Carmichael could have cross-examined Cantelopes. Cantelopes's rap sheet provided plenty of material to work with; his other character flaws provided even more. I am sure Marty hated to give up the opportunity to cross-examine, but his judgment was that there was no way he could improve his client's position by doing so. He was right.

In my experience with significant witnesses, I have used that technique on two occasions. In the first, I declined to exercise the opportunity to cross-examine the widow in a wrongful death action. In the second, I declined to cross-examine a paraplegic who was courageously living with his disability and was as likable as a person could be.

A cross-examination cannot be briefer than Marty Carmichael's in *Aviles*. Although a trial lawyer rarely gets as dramatic an opportunity to apply Younger's First Commandment as did Marty in the Genovese case, there are occasions when the best cross-examination is none at all.

The Genovese case was an electrifying trial to be part of; after it was over everything else I was doing seemed small by comparison. For me, it had also been an

opportunity to see Younger's First Commandment in action. It was outcome determinative, and the impression it made was indelible.

AWARDS

VOLUNTEERS OF LEGAL SERVICE (VOLS) HONORS STB AT ITS 25TH ANNIVERSARY RECEPTION



Pictured L to R: John M. Aerni (VOLS Board President); Chief Judge Jonathan Lippman; William Russell (STB); John S. Kiernan (VOLS Board Chair); Harlene Katzman (STB); William J. Dean (VOLS Executive Director), and Lisa Freeman (STB).

On October 6, 2009, Volunteers of Legal Service (VOLS) honored Simpson Thacher at its 25th Anniversary reception at the headquarters of JP Morgan Chase. Chief Judge of the New York State Court of Appeals, Jonathan Lippman, presented the award to the Firm in recognition of its commitment to pro bono service and for meeting the VOLS Pro Bono Pledge (requiring firms to provide at least an average of 30 hours of pro bono service per lawyer in their New York Offices.) Accepting the award on behalf of the Firm was Bill Russell, co-chair of the Firm's Pro Bono Committee,



Pictured: Harlene Katzman with Mark Rush, principal of Bushwick High School.

Harlene Katzman, Pro Bono Counsel and Director, and former litigation associate Lisa Freeman, who participated extensively in the VOLS project with Bushwick High School.

LITIGATION ASSOCIATE WINS THE JOHN K. GEIGER AWARD FOR COMMITMENT TO PRO BONO LEGAL SERVICES

Litigation associate **Amiad Kushner** has been awarded the John K. Geiger Award as part of inMotion, Inc.'s 2010 Commitment to Justice Awards. Amiad is being honored for his representation of low income women in family law matters through the Firm's pro bono program with inMotion. He also oversees the program and provides guidance and advice to many associates who represent inMotion clients, now with the assistance of Rawia Ashraf. Amiad has been a dedicated and skilled advocate and we congratulate him for this recognition of his *pro bono* work. The award will be presented on February 9th at the Walter Reade Theater at Lincoln Center along with a short profile of his work with inMotion. Some of his colleagues will be there to support him.

STB WINS PRO BONO VISIONARY AWARD FROM LEGAL SERVICES-NYC

Simpson Thacher was honored with a Pro Bono Visionaries Award from Legal Services NYC at the 2009 Pro Bono Recognition Awards Breakfast on December 4, 2009. Legal Services NYC is the country's largest provider of free civil legal services to low income individuals and families, and Simpson Thacher litigation partner **Mark Cunha** is Chairman of its Board of Directors. STB lawyers **Gustavo Benchimol, William Freiberg, Agnes Dunogue, Michelle Hertz, Linton Mann, Jacob Press, Samuel Rubin** and **Bill Russell** were specifically recognized for their generous *pro bono* contributions.

STB HONORED FOR ITS 2008 ELECTION PROTECTION PROGRAM

The Firm was awarded special recognition at the Lawyers Committee for Civil Rights 2009 Annual Awards reception for its 2008 Election Protection program. The recognition was given only to 12 out of the over 100 law firms and corporate legal departments that participated in the program. Partner **Victoria Bjorklund**, who spearheaded the program, accepted the award on behalf of the Firm. The program was supported by the leadership of associate

"Directors" **John Bennett, Lisa A. Freeman, Drew Rabe** and **Yaneris Rosa**, and "Captains" **Karen Alinauskas, Tamala Boyd, Michelle Hertz, Jennifer Klein, Berta Matos, Justus Morris, Rosa Pizzi, and Bryan Tollin**, who oversaw the more than 350 volunteers who staffed the hot-lines. The operation also could not have happened without the incredible effort and dedication of **Joan Joseph** and her staff, and the amazing IT department.

COMMUNITY SERVICE

NEW YORK

For the second year in a row, STB participated in the New York Cares program, Winter Wishes, providing gifts to 32,000 underserved children, teenagers and families in the New York City area. The Office sponsored over 180 children and teens, collecting and shipping the gifts in time for the holidays. Simpson Thacher was one of the largest donors to the program this year and our impact will be felt across the city. The program was entirely coordinated by associates **Rebecca Mancuso** and **Shannon Torres**. Thanks to the many legal and non-legal personnel who participated!

LONDON

On 6th November, STB's London Office joined over 100 members of the private equity industry to participate in the Private Equity Foundation's latest challenge, taking up tools at its 2009 Annual Day of Community Engagement. The volunteers were involved in developing an outdoor activities site in Newham, London, run by Private Equity Foundation portfolio charity, Community Links, for local disadvantaged children and young people. The borough, which has the youngest population in the UK, also has a child poverty rate of 58 per cent.

The STB team worked at a community center clearing a large area of earth (using spades, hoes and shovels) in order to replace the earth with shingle around a rock climbing wall installation. Thus if anyone falls, he or she will have a much softer landing on the 8 inches of shingle, verses the hard packed ground. The work helped to make the community center a better place for the kids, and the

team enjoyed working together toward a common goal with other private equity groups, law firms and organizations outside of the office.



Pictured L to R: Lee Oakley (Community Links), Anand Tejani (TPG Capital LLP), Seojung Park (STB), Meredith Jones (STB), Nathan Hagerman (STB), Katherine Thompson (Private Equity Foundation)

NEW PROJECTS:

NEW YORK

The Legal Aid Society of New York (LAS) has invited STB to participate in its Rockefeller Re-Sentencing Pro Bono Project. New York State passed Rockefeller Re-Sentencing legislation that goes into effect on October 7th. This statute will enable prisoners who were Class B Felons under the Rockefeller Drug Laws to petition the court for resentencing. LAS anticipates that many, if not most of these cases, will be looking at a potential "time served" outcome. Therefore, they want to begin filing as soon as possible.

This will be a great opportunity for associates to develop expertise and skills in the criminal practice area. LAS anticipates that representation on these cases, involving preparation and presentation of a sentence mitigation argument based upon the original trial/plea and sentencing records, appeal record, prison record and defendant's prospects for release, will require approximately three court appearances in New York Supreme Court over a span of three to four months. The new law goes into effect in

early October, 2009, and many of the inmates will be eligible for immediate release if their petitions are granted. The court appearances will involve few evidentiary issues and will feel more like motion practice and appellate argument. STB will join LAS, and several other firms in representing this new group of prisoners who can request resentencing.

PALO ALTO AND LOS ANGELES

The Violence Against Women Act (VAWA) created three forms of immigration benefits designed to help immigrant victims of domestic violence, sexual assault, human trafficking and other mostly violent crimes. Unfortunately, for many immigrant victims, VAWA's promise is an unrealized legal right due to lack of access to legal assistance needed to help victims file for VAWA immigration benefits. The PA and LA Offices will partner with Legal Momentum (formerly NOW Legal Defense) to pilot a project representing immigrant crime victims filing for VAWA related immigration benefits (U-visas, T-visas, and VAWA self-petitions) in California. Legal Momentum will provide training and expertise. The project is expected to launch this spring and is being coordinated by partner **Alexis Coll-Verly** in PA and associate **Jennifer Levitt** in LA.

UPCOMING IN-HOUSE PRO BONO TRAININGS AND CLE PROGRAMS (NY OFFICE)

- Representing Asylum Seekers in Immigration Court, New York City Bar Association's Refugee Assistance Program, January 6, 12:30pm
- Bushwick High School Clinic Presentation, VOLS, February 4, 12:30pm
- Immigration Removal Defense, Legal Aid Society, February 9, 9:30am
- Order of Protection, Custody and Support, inMotion, March 9, 6:00pm

QUESTIONS OR NEWSLETTER IDEAS?

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