

## Interview with David Zapp

**TTP:** Mr. Zapp, it's been a long time.

**David Zapp:** It has indeed.

**TTP:** I'd like to ask you some questions about some past cases that made the news and then ask you about a more recent case.

**David Zapp:** I'm all ears.

**TTP:** First off, did you read the article about that huge marijuana distribution ring that was prosecuted in the Eastern District of New York some months ago? It appeared in the Times. They gave the head guy 27 years for marijuana! I was wondering what you thought of that?

**David Zapp:** I was surprised. Obviously the sentence was way too steep. I don't know what's wrong with these judges and prosecutors. They throw out numbers like their just digits. They are years of a life. You are taking 27 years of a man's life. It's a killing as far as I'm concerned. But my surprise is also because I know both the judge and prosecutor and they are very reasonable and good guys. The government surely could have offered a lighter plea deal, and the judge would surely have gone along with it. I assume the government would say there's more here than meets the eye. There was violence involved. That's their standard defense. As if a dope dealer has some other way to seek redress like sue in federal court. "Your honor, the defendant stole my cocaine. Make him give it back to me." Listen, violence comes with this territory. You assume the risk. My advice to those in the game: don't piss people off.

**TTP:** But getting back to the case, how could

the government have offered a better plea deal?

**David Zapp:** Well, different drug charges have different maximums. They could have offered him a charge that had a max of 20 years with no mandatory minimum, or even an agreed upon sentence under Rule 11 (c) (1)(c), (a way to plea bargain strongly recommended by Judge Gleeson in the Eastern District of New York). The judge would have had the option of rejecting the deal, but the defendant would have the corresponding option of withdrawing his plea of guilty.

**TTP:** Anything else caught your eye in the article?

**David Zapp:** The reference to one of the investigating agents receiving \$94,000 in drug proceeds and not arresting the courier.

**TTP:** Why is that so interesting?

**David Zapp:** Because it illustrates a reason why a conspirator is not arrested immediately. Defendants often think that they have a constitutional right to be arrested immediately and that not arresting them at the time of the commission of the crime somehow undermines the case against them. It doesn't. If they had arrested the guy at the moment of the transfer that would have opened up the discovery process, and it would have compromised the whole investigation. So that's why they let the guy go.

**TTP:** Anything else?

**David Zapp:** No, not really. Just the whole depressing feeling you get reading an article like that, conspirators never realizing how significant increased police interaction is. A lot of defendants think it's all coincidences: a traffic violation stop; a search and seizure; a stop-and-frisk. Coincidences, all coincidence. There are no coincidences in criminal law. Everything happens for a reason, and people are doing some serious time because they just didn't pick up on it.

75 per cent, maybe more, of people arrested know they are going to be arrested. I remember a client telling me once that he knew he was going to be arrested as he was walking into the Burger King to deliver the drugs and he still went ahead and did it. Someone sees cars following him and chalks it up to paranoia. It is not paranoia!

Or the guys and gals who are stopped, their money seized, they're brought to the DEA office, photographed, printed, and questioned and they chalk it all up to bad luck never realizing that the reason all this is being done is so that when they get arrested months later they can't deny that they were the people who possessed the money. Then to add injury to insult they stick around and get arrested in the very apartment whose address they gave to law enforcement when they were interviewed.

**TTP:** G-d that does sound depressing. How about the couple from the New Jersey Housewives reality show accused of income tax evasion who got sentenced to extra jail time for withholding information? What did you think?

**David Zapp:** I vaguely remember that case. But it was no surprise either. When you try to get over on the government, you're inevitably going to get caught and you are going to pay for it. I think the judge even told the wife that she was thinking of giving her less time but gave her more time for withholding information. You can't beat the government. They have all the time and the money to beat you, unless, of course, you're working with them. It's why Mexican drug dealers have been so successful. You can win if you play with the "house." But playing against the house, especially the "American" house is a losing proposition. I can tell you this, If you start dealing drugs in the U.S., you are going to appear on some government's radar screen, State or Federal or both, in less than 180 days. Guaranteed.

**TTP:** Let's go to a more recent case. What did you think about the government's recommendation of 22 years for the paramilitary leader in Washington in DC and his subsequent sentence of 15 years 10 months?

**David Zapp:** Neither surprised me. Full disclosure, I took over from that lawyer on a different

paramilitary case so I was privy to correspondence that he had with the government. He knew that higher ups were going to be calling the shots and that could not have pleased him given his cordial relationship with the line prosecutors. On the other hand given who the judge was, I figured she would not give the government all it wanted, and I was right.

But I think the government treated the defendant poorly. The defendant should not have been penalized for his paramilitary activities especially since they were not going to credit him with his cooperation related to those activities.

**TTP:** But how do you know it did that? The judge certainly went out of her way to dispel that impression.

**David Zapp:** She had to. She was protecting her record, [a "record" is what goes on in the court taken down by a stenographer], in case the defendant appealed. But the government definitely did factor his role and paramilitary activities.

**TTP:** But, again, how do you know that?

**David Zapp:** They said as much in their papers to the court. They said that their recommendation of the co-defendant was significantly lower because he was really a drug dealer posing as a paramilitary leader whereas the defendant was an honest-to-goodness-paramilitary leader. This was particularly shabby because I am sure they didn't warn him that they would be considering his role when making their recommendation. I remember a judge in New York telling a pedophile defendant who was deciding whether to plead guilty or go to trial that he should know that either way she was going to give him the same sentence. I thought that was particularly classy. The defendant here did not receive that consideration. But in the end what makes it particularly inappropriate is that this defendant had already made peace with Colombia. So to be penalized again without warning was shabby.

**TTP:** So what do you think the judge should have done?

**David Zapp:** Sentence the defendant as a co-

operating drug dealer.

**TTP:** But isn't that what she did?

**David Zapp:** No. She split the baby. If this were just a drug case the defendant would not have gotten anything more than ten years, the going rate for a high profile drug cooperator in most federal districts including the DC district. The co-defendant drug dealer got seven years. But here the government wanted 12 more no doubt for his being a paramilitary leader like it clearly conceded. That's where she split the baby. She gave him six. Lucky for the defendant though. I know judges down there and elsewhere that would have given him 22 years in a New York minute.

**TTP:** Well thanks for your time, Mr. Zapp. Always interesting.

## Constitutional Violations are not Transferrable

*United States v. Anderson,*  
No. 13-4152-CR (2d Cir. Nov. 24, 2013)  
(Parker, Lynch, and Carney)

Following a traffic stop of defendant's car, state troopers arrested defendant's wife Crystal, a passenger, believing that she had drugs hidden on her person. The troopers brought Crystal to the state police barracks, handcuffed her to a chair, and told her that they were applying for a warrant for a body cavity search. A state judge denied the application, but the troopers concealed this fact from Crystal. Instead, over several hours of detention and interrogation, the troopers falsely told Crystal that she would be taken to a hospital where the body search would be performed, falsely told her that her husband had incriminated her in drug trafficking, and refused her repeated requests to see a signed warrant. Ultimately, Crystal signed a *Miranda* waiver, admitted that there were drugs hidden in her vagina, removed the drugs, and surrendered them to the troopers.

Prior to defendant's (husband) trial in D.

Vt. (Crystal pleaded guilty), the district court (Reiss, C.J.) granted defendant's motion to suppress the drugs, ruling that their admission would violate defendant's substantive due process rights because they were obtained by law enforcement conduct that shocked the conscience.

On appeal, the government conceded that the troopers' conduct violated Crystal's Fifth Amendment substantive due process rights, but argued that defendant could not base a substantive due process claim for suppression on what happened to his wife. Relying on *United States v. Payner*, "The limitations of the Due Process Clause ... come into play only when the Government activity in question violates some protected right of the *defendant*." The appeals court agreed and reversed. In the Circuit's view, the case of *Payner* "precludes suppression, on substantive due process grounds, of physical evidence obtained through a flagrantly illegal search directed at someone other than the defendant."

The Court left open the possibility that substantive due process might sometimes require suppression of physical evidence obtained through outrageous government conduct against a third party. Such conduct, however, would have to be "torture" or otherwise "so beyond the pale of civilized society that no court could countenance it."

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