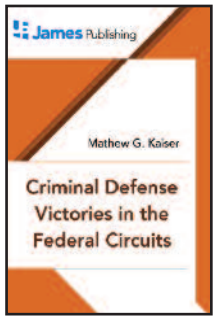
Book Reviews

Criminal Defense Victories In the Federal Circuits

By Matthew G. Kaiser
James Publishing (2014)
Reviewed by Barak Cohen



Criminal Defense Victories in the Federal Circuits by Matt Kaiser is a strange but worthwhile book.

The book is based on Kaiser's "Federal Criminal Appeals Blog," and is an edited anthology of the cases summarized there. In the blog, Kaiser set out on a unique task: to chronicle every defense win in a federal circuit by a criminal defendant that resulted in a published opinion. Most of the entries are roughly the length of a piece in *People* magazine, and are well-suited to being read out of order.

As a result, the book's focus is expressly federal and largely appellate (despite the name, there are a few district court opinions thrown in). The Supreme Court has already overturned some of the cases discussed in the book, and, by virtue of the selection of the cases, it is not a comprehensive statement of the law in any circuit. If a defendant lost, Kaiser doesn't care for this project, and it isn't in the book. One would not read it as a comprehensive study of the law.

That said, despite its limits, for at least three reasons the book is a very good read for people in the trenches representing people accused of federal crimes.

First, it is a fun read. Kaiser has a great way of taking the facts of these cases and making them come to life. He has a distinctive voice that captures the failures and foibles that lead people to be on the wrong side of the criminal justice system. He also brings out how absurd and stupid the system can be — which is particularly nice when he is celebrating how courts correct that absurdity. Kaiser sees the humor in these cases and in the broken system of justice, and he brings it out well.

A selection of the section titles gives a fair sample of the book's tone: "A Sad Bank Robber Attracts a Lower Sentence With Honey Than He Would Have With Vinegar"; "Why It Is Probably Better to Pick Up the Phone of Someone You've Shot, Than to Take Their Phone at Gunpoint, Then Shoot Them"; "How the Eighth Circuit Saved Christmas"; and, my favorite, "Why You Will Not Go to Jail for Using Comic Sans in a Pleading (Though Maybe You Should)."

Second, the book is written in plain language. After a long day of reading statutes and lawyer-speak, it is nice to be able to read something written for a layperson, even if it is about the law. Kaiser says his goal is to write in a way that his mother, who I assume is not a lawyer, can understand. For the most part, he succeeds, and the book is much better for it.

The book is an excellent and readable primer on much of the background law that matters in federal practice. It explains loss amounts under the Guidelines, many of the details of gun crimes, basic Fourth Amendment law, and many of the statutory tricks and traps that matter in federal court. Lawyers new to federal practice would be hard pressed to find a better introduction to the subject.

Third, it is good to realize that criminal defendants do win, even if only occasionally. For people who do this work, it can be demoralizing to run headfirst into the brick wall of the criminal justice system. Kaiser's book is an entertaining reminder that sometimes the wall crumbles. Those victories are not celebrated enough. *Criminal Defense Victories in the Federal Circuits* is a strong and readable step in the right direction. ■

About the Reviewer

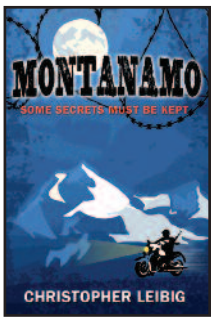
Barak Cohen is an attorney at Perkins Coie in Washington, D.C.

The opinions expressed in reviews are those of the reviewers and do not necessarily reflect the opinion of NACDL.

Montanamo

Some Secrets Must Be Kept

By Christopher Leibig
Artnik Books (2010)
Reviewed by Gail Gianasi Natale



Will the Guantanamo Bay Detention Center be closed? If so, where will the prisoners go? As long as the fate of the Gitmo prisoners is unknown, trial lawyer Christopher Leibig's second novel remains timely.

Montanamo, a portmanteau of

Montana and Guantanamo, is a page-turner set in Northwest Montana mostly in 2009. The novel was inspired by the real-life but unsuccessful quest by the impoverished small town of Hardin, in Southeast Montana, to house Gitmo prisoners in its unused Two Rivers Correctional Institution.

Most of the action in *Montanamo* takes place in the fictional town of Twin Rivers (formerly known as Weasel Junction) in fictional Caroline County.

The novel has two strands that soon intertwine. In one, *Montanamo* tells of the town that has kept a deep secret and is trying to stay afloat. The other is the journey of Ahmed Khan, a *mujahid* with a false identity and a nefarious assignment in Twin Rivers. The reader knows Ahmed's identity from the beginning. The locals never learn that the man they know as Jeremy Blain is a terrorist operative.

Twin Rivers had built an expensive, secure prison that stands empty. In anticipation of the closing of Gitmo, the new mayor, master manipulator Phoenix Eileen Jamborsky, wants the town to approve the contract for the prison to house 10 inmates from Guantanamo Bay.

Jamborsky, who once worked for Montana Sen. Beauregard Bryant in Washington, D.C., aspires to the State House. She enlists the aid of local lawyer Gabriel Lantagne to fight a lawsuit filed by her enemies challenging the prison contract. Gabe had given up a lucrative corporate practice in Seattle, quit drinking, and returned home to practice in Weasel Junction, er, Twin Rivers.

The well-developed — albeit improbable — main characters are Lantagne, Mayor Jamborsky, and especially Ahmed, the undercover Pakistani terrorist. Another pivotal player is Geno Pasquali, the wise, wizened 60-year-old sheriff whose only loyalty is to the town and its secrets.

Ahmed/Blain is on an undefined terror mission, presumably related to the prison. Along his journey he kills at least two people who get in his way. It is not clear how and why he was sent to Twin Rivers. Near the end of the book he reveals his identity to Gabe and the sheriff and seeks repatriation to save his brother.

Jamborsky, who always succeeds, is determined to save the town's bottom line — and to further her own ambitions — by getting the lucrative government contract to house Gitmo detainees.

Among the supporting cast are other keepers of secrets: Michael Terwilliger, the mayor's ex-husband, owner of the largest ranch and the wealthiest man in Caroline County; and Sen. Bryant, who does not want terrorists imprisoned in Montana.

Memories of late fathers haunt the plot. Lantagne's was once the state's Attorney General; Terwilliger's may — or may not — have committed suicide for mysterious reasons. Flashbacks reveal that corrupt Pakistani officials arrested (and presumably killed) Ahmed's father, inspiring Ahmed to train to be a *mujahid*. His handlers send him to Montana with a destructive mission that may be inferred but that Leibig never makes quite clear.

Other colorful townsfolk move the story. Myrlene, Gabe's secretary/paralegal/confident and occasional lover, does not like Phoenix and wants to go to law school. Gabe's perennial client Otis "Grizzly" Redford is a lifelong hunter who is regularly prosecuted for illegally shooting grizzly bears. Redford probably is the only local to see Ahmed in his topi (prayer cap) in the wilderness. Shannon, a nude dancer, strips at Pandora's Box where Ahmed/Blain got a job as a bouncer. Shannon's ex-husband frequently beats her.

Shannon and her violent ex are important to the plot. On the other hand, a gratuitous, unsolved murder of an investigator who appears all too briefly does little to advance the story.

The subtitle, "Some Secrets Must Be Kept," is a clue to the story. The novel reveals secrets — secrets held by Ahmed, of course, by the town and its ruling elite, and by Mayor Jamborsky. Gabe is the only character with no discernable secrets that affect the story. Why he quit drinking would have been good to know but Leibig does not develop that tidbit, except to have Gabe temporarily fall off the wagon under Jamborsky's hypnotic spell.

The book is easy to read, but the last few chapters seem to have been severely edited, leaving out crucial details. It isn't until the reader finishes the 247-page book and considers the plot that it seems absurd and unbelievable — or is it? ■

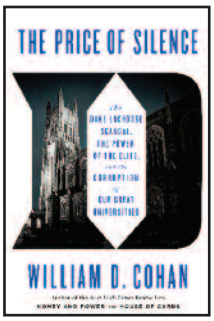
About the Reviewer

Gail Gianasi Natale reads mystery novels and represents convicted indigents in state and federal courts in Arizona.

The Price of Silence

The Duke Lacrosse Scandal, the Power of the Elite, and the Corruption Of Our Great Universities

By William D. Cohan
Scribner (2014)
Reviewed by Andrew George



William D. Cohan wants his new book to serve as the Duke Lacrosse Trial that never was. That's fine, as long as he is not on the jury.

The Price of Silence: The Duke Lacrosse Scandal, the Power of the Elite, and the Corruption of Our Great Universities presents, in 621 pages of mostly dispassionate detail, all the facts that should have stayed the hand (and mouth) of former District Attorney Mike Nifong. The case, most will remember, began with a party, strippers, and an accusation of rape. It saw three players indicted and exonerated, Nifong elected then disbarred and even jailed, and national passions stoked around narratives of race, sex, privilege, and college sports. All without a trial.

This bothers Cohan. As Cohan has revealed on his publicity tour, he believes that "something untoward did in fact happen in that bathroom" where the rape allegedly occurred, it is "total rubbish" that Nifong "just used this case to promote his political ambitions," and "Nifong was an honorable man trying to get to the bottom of what happened."[1]

Cohan's conclusions now are just as unreasonable as Nifong's were then. And it is doubtful that a single objective reader of *his book* will agree with him on any of these points, even as they find them previewed in his book.

For example, Cohan labels as a "red herring" Nifong's failure to voluntarily disclose that, in addition to not finding DNA from any lacrosse player in the alleged victim's rape kit, DNA from four unidentified males was found in or on the alleged victim. Cohan thinks this fact was insignificant because Nifong's case theory was based (after he had learned the results) solely on the alleged victim's word (though he had not yet interviewed her) and because an assault could still have happened (though not as the alleged victim initially described).

But it is also in Cohan's book that police justified team-wide DNA testing by saying the results would "immediately rule out any innocent persons" and provide "conclusive evidence" of the suspects' identity (because the alleged victim initially said that her rapist ejaculated inside of her). Nifong's claim that, had team members only voluntarily provided DNA samples, there would have been "no Duke lacrosse case," is in there too.

Cohan also writes at the end of the book, ominously, "What remains unresolved is, if in fact it was [former suspect] Dave Evans' DNA on [the alleged victim's] red plastic fingernails, how did it get there?" But again it is in the book that no skin or body tissue was found attached to the fingernail (undermining the claim that the fingernail was lost in a fight), that Evans passed a polygraph, and that the fingernail was found in Evans' *bathroom* trash can (an object often containing its owner's DNA).

Nifong offered a critique of North Carolina Attorney General Roy Cooper for saying, in dropping the charges, "We believe these three individuals are innocent of these charges." In Nifong (and Cohan's[2]) view, "every first year law student understands" that "the justice system, of which [Cooper] is an officer, does not have [declaring innocence] as an option." Rather, "a person can be declared guilty or not guilty."

Yes, a person can be declared guilty or not guilty by a *jury*. But it is well within the "purview of the criminal justice system" to declare innocence (see, for example, North Carolina's Innocence Inquiry Commission). And why shouldn't a prosecutor, who has inherited a highly publicized case in which the DA has made public statements presuming guilt (which *is* improper), opine that a suspect is innocent when dropping the charges?

But, like his subject Mr. Nifong, Cohan is after a bigger narrative. Cohan believes that "the elite" silenced "the truth" by preventing a trial. Here he exceeds even Nifong, who eventually came to believe that "there was not sufficient credible evidence to take the case to trial" (again, this is in the book).

Cohan thinks the indicted players' families, "of course, had a bottomless pit of money to spend on the defense."[3] (His book again says otherwise.[4]) Regardless, he speculates, "had it been … poor black players … they would not have had the money for this defense. And who knows what would have happened."

What's his point? That the "elite" defendants deserved to be railroaded because poor defendants would have been? As Katherine Jean, Bar Counsel for Nifong's disbarment, put it, "What is bothersome here is that in 95 percent of the criminal cases in North Carolina, there's a plea bargain." So, "for the defendants who don't have the means to fight, and haven't been shown there's no DNA evidence that's exculpatory and end up pleading guilty, no harm no foul. It's a scary concept."

That's a scary concept indeed, and Cohan's book captures it perfectly, even if Cohan does not know it.

Notes

1. The Diane Rehm Show (Apr. 14, 2014), *transcript and audio recording available at* http://thedianerehmshow.org/shows/2014-04-14/william-cohan-price-silence/transcript; Q&A with William D. Cohan, CSPAN (Apr. 14, 2014), *transcript and video recording available at* http://www.c-span.org/video/?318803-1/qa-william-cohan.

2. Q&A with William D. Cohan, *supra* note 1 ("[Cooper] found them innocent … which is basically not in the legal lexicon. In other words you get to a trial and somebody's either guilty or not guilty. The concept of innocent doesn't even work — doesn't even kind of exist in our justice system.").

3. Diane Rehm, *supra* note 1.

4. *See, e.g.*, page 266 (Reade Seligmann's family had to borrow his bail money from a friend); page 379 (recounting Seligmann's father's "impassioned plea" to the court to reduce his son's bail); page 483 (discussing extensive community efforts to raise money to support a legal defense fund for the players). ■

About the Reviewer

Andrew George is a white collar defense attorney at Baker Botts in Washington, D.C.

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defense will not want to advise the government of exculpatory evidence, let alone present it in a PowerPoint, before indictment. When the defense believes that the government will indict regardless of what the defense presents, going forward with a preindictment presentation would merely give the government a preview of the defense case and allow it to refine its prosecution theories. In other cases, the defense evidence may be subject to further development by the prosecution. For example, the defense evidence may be based on witnesses who, if approached by government agents, would alter their stories. In such a case the better part of valor would be to wait until trial to present the evidence.

The decision about whether to present exculpatory evidence before indictment can be a very difficult one because of the many factors involved. These factors include such things as the personalities of the prosecutors and their reputation for fairness, whether the case is part of an important government law enforcement priority and thus more likely to be indicted, whether the case is high profile, defense counsel's judgment on the strength of the government's evidence, the client's risk appetite, and the damage to the client from an indictment.

Conclusion

In the right case, a PowerPoint presentation might just make it into the grand jury room even when defense counsel cannot. If that occurs, the impact such a presentation will have on the grand jury is hard to predict. Nevertheless, demanding that prosecutors fulfill their obligations under USAM § 9-11.233 in a meaningful way could delay the indictment or even bring the government back to the negotiating table. Further, good prosecutors know that presenting exculpatory evidence to the grand jury will often give them useful feedback and a preview of how petit jurors will view that evidence at trial. From a defense perspective, even if the grand jury indicts anyway, it cannot hurt if the government hears some level of doubt about the case from grand jurors.

Notes

1. *United States v. Williams*, 504 U.S. 36 (1992). In *Williams*, the Supreme Court, over a vigorous dissent joined fully or partially by four justices, held that a district court cannot