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MY OPINION – A CRITIQUE:

The injustice of a rush to judgment – The Central Park Jogger Case

On December 19, 2002 a colossal injustice occurred when then Manhattan District Attorney Morgenthau consented to the Central Park jogger five defendants' motion to vacate their convictions. During the trials of these five defendants, the Manhattan D.A. was well aware and presented evidence to the trial jurors that a sixth unknown assailant participated in the rape of the female jogger. The D.A. revealed at the defendants' 1990 trials that with respect to the female jogger, semen was recovered at the crime scene not attributable to any of the five defendants, but to an unknown culpable participant. The defendants were also convicted for beating and robbing and attacking some of the eight other innocent defenseless victims during their vicious nighttime rampage through Central Park on April 19, 1989.

Thirteen years later, with the statute of limitations having run, convicted and sentenced to serve a life term of imprisonment for rape and murder, the sixth assailant, Matias Reyes, whose DNA was found at the crime scene, has come forward to say he raped the jogger and he did it alone. With no hearing held, no testimony taken, no cross examination, and no corroboration of Reyes' statement, Manhattan D.A. Morgenthau moved to set aside these jury verdicts. As a further reflection of the Manhattan D.A.'s abrogation of his duties and responsibilities, the vacatur was in violation of established legal precedent.

By so acting, the Manhattan D.A. has destabilized and delegitimized the credibility of our justice system and placed in jeopardy law enforcement practices, methods, procedures and techniques utilized in solving crime, to wit:

(1) Vacated legitimately obtained guilty verdicts of defendants who committed vicious unimaginable outrages against several innocent individuals;

(2) fractured the moral high ground and credibility of key and essential crime solving methods;

(3) turned the justice system upside down by illegitimately providing the defendants grounds to sue the City and law enforcement (police and assistant D.A.'s who investigated and tried the cases) for substantial money damages in the amount of $250 million!

Based upon the vacaturs, and baselessly concluding interrogation irregularities, law enforcement critics have crucified police and prosecutors for improperly obtaining confessions from the five defendants. In his recently released theatrical film, "The Central Park Five," Ken Burns participates in this frenzied denunciation. The film lamentably lacks the essence of a veritable documentary: it is not a factual, authoritative and truthful presentation of an event. Much more to the point, it presents a false narrative of the defendants' claimed innocence and rails against faux police abuse and prosecutorial misconduct. In so doing, it creates and disseminates false and defamatory impressions of, about and pertaining to, those in law

enforcement seeking to do justice. It is more rank opinion than authentic, prudent analysis based upon painstaking research of a serious justice matter.[1]

The purpose of this critique is to present relevant facts and law central to understanding what the Central Park jogger case is and is not about. In that regard, let's take a look at what happened and analyze the facts and applicable law.

Justice Thomas Galligan Opinion

During the course of conducting a six week Huntley hearing to determine the voluntariness/admissibility of the defendants' confessions and other evidence, the Court took testimony from 29 prosecution witnesses and heard from defendants Wise, Richardson, Santana, Salaam and their family and friends who were present or involved in the initial encounters with police at the time oral, written, and videotaped statements were made. The Court rendered a 116 page opinion and concluded that the statements were properly and legally obtained and that no improper methods were employed to secure them. All of the claims made by these defendants in their current civil law suit were heard at the pre-trial hearings and trials. The Court's rulings were also upheld through every stage of appeal.

Interesting to note, then Manhattan D.A. Morgenthau and senior staffers presently agree with Justice Galligan's findings. They are on record stating that they found no evidence of police coercion in the questioning of the defendants or others involved in the bloody evening events of April 19, 1989. Also, they offered no criticism of the police interrogations, methods, practices or procedures employed.

Of significant importance with respect to the admissibility of the statements and the fairness of the process utilized in obtaining them, no defendant, who the police were aware was under 16, was questioned without a parent, relative or guardian present. That process applied directly to the defendants Santana, Richardson, and McCray. A brief summary follows:

(1) Defendant Raymond Santana[2] – gave a written statement and a videotaped interview. His grandmother was present at the former, his father the latter. At the 24th precinct, after being questioned and making admissions, Santana

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[1] "Ken Burns has represented that the theatrical release of 'The Central Park Five' is to 'amplify pressure on the City to settle' and that the purpose of the film was 'first and foremost . . . the settlement of the civil suit,'" the City says. (*New York Post*, December 7, 2012 – p.9)

[2] At a parole hearing in 1994, Raymond Santana admitted that he and his friends went to Central Park that night to rob and assault whoever they encountered. The defendant Antron McCray, also at a 1994 parole hearing, admitted to all of his crimes except the rape. In 2002, defendant Raymond Santana and defendant Kevin Richardson admitted to police their participation in the assaults that did not involve the rape. Most notable of the assaults and robberies committed upon several individuals that night were the following: (1) Antonio Diaz, a homeless man, was beaten and left unconscious on the roadway; and (2) John Loughlin, a school teacher, who was jogging that night, was knocked to the ground, kicked, punched and beaten with a stick and a pipe resulting in serious physical injury.

engaged in raucous behavior with other defendants uttering lewd comments and boisterous laughter; as Justice Galligan noted, hardly behavior characteristics of frightened vulnerable individuals.

(2) Defendant Kevin Richardson – made incriminating written, oral, and videotaped statements in the presence of his mother initially, then his adult sister. The defendant's father joined the interviews in time to review and sign the first written statement prepared by defendant and remained with his son during the videotaped confession. Again, the defendant was not questioned for several hours awaiting family to arrive at the precinct.

(3) Defendant Antron McCray – admitted to the rape during initial statement and in a videotaped interview with his father present. His mother was also present, but, after a discussion with her husband, withdrew from the interview process believing her son would be unwilling to be truthful about raping the jogger in the presence of his mother.

(Note: The defendant Salaam lied about his age and had a false I.D. to back it up. Once the police learned his true age questioning stopped.)

Corroboration of Defendants' Guilt

Beyond the incriminating confessions made by defendants, they also made incriminating admissions to investigators and third parties. Among the most damning were admissions, spontaneous utterances, wisecracks and statements to third parties. When viewed within the factual totality of the case, one readily comes to understand the overwhelming nature of the evidence that inexorably establishes the guilt of the defendants. Again, a brief glimpse at some of the corroborative evidence:

(1) In the afternoon of April 20, 1989, prior to his arrest, the defendant Kharey Wise at 110th Street and 5th Avenue saw Ronald Williams and Shabazz Head (two friends of Kharey Wise, later interviewed by the police), and told them to get away from him because the cops were after him. A short time later, Wise saw them again and they asked why the cops were after him. Wise responded, "You heard about that woman that was beat up and raped in the Park last night? That was us!"

(2) The defendant Wise was escorted to Central Park by Assistant D.A. Linda Fairstein and Det. Michael Sheehan. While the defendant was walking toward the spot where the rape occurred, Wise muttered, "Damn, damn, that's a lot of blood. . . I knew she was bleeding, but I didn't know how bad she was. It was dark. Couldn't see how much blood there was at night."

(3) After the pre-trial hearing, the defendant Wise made a telephone call from Rikers Island to his friend Corey Jackson. Jackson's 27 year old sister, Melody, answered the phone and after Wise identified himself, she asked him in substance how he could have committed those vicious acts for which he was charged. Wise responded by denying that he raped anyone stating that he "only held her legs down while Kevin fucked her."

(4) In the morning of April 20, Det. Sheehan escorted the defendant Kevin Richardson to Central Park. At the crime scene, the defendant Richardson

said, "This is where we got her. . . where the raping occurred." On Richardson's face was a scratch mark. Initially, he said he obtained it from a fall; then, he indicated he received it from the police. When asked who the police officers were who scratched him, he said he received the scratch from the female jogger while protecting her from the other defendants. Finally, he said that he received the scratch from the female jogger while he was taking her down to the ground.

(5) During the course of a videotaped statement taken from one Clarence Thomas, Thomas stated that he heard the defendant Raymond Santana laughing with Steven Lopez and talking about how they "made a woman bleed."

(6) While a police officer Powers was processing defendant Santana at the Central Park precinct, Powers indicated that the group should be home with their girlfriends and not beating people. In response Santana looked at Lopez, smiled and said, "I already got mines." Santana and Lopez both proceeded to laugh.

(7) Lamont McCall – advised a senior Assistant District Attorney (ADA) present at the precinct on April 20, 1989 that he witnessed the five defendants attacking the female jogger. He was later killed by gunshot (unrelated to this case).

(8) Forensic Evidence: blood stains were found on defendant Santana's right sneaker and on defendant Salaam's jacket; semen was present on the underwear of defendants McCray and Richardson and on the sweatshirt of defendant Santana. Also, the clothing the defendant Antron McCray wore on the night of the occurrence was caked with mud and dirt.

Reyes' Credibility: An Uncorroborated Statement

Matias Reyes has led a life of documented merciless self-indulgent crime evincing a deviant and twisted mind. The juries that convicted the five defendants accepted that the defendants together with an unknown assailant committed the rape. The only additional fact not before the convicting juries is the uncorroborated statement that Reyes alone committed the rape. A former inmate acquaintance of Reyes claims that Reyes told him that the attack on the jogger was already in progress when Reyes joined in attracted by the jogger's screams. Reyes' former attorney reportedly has stated that Reyes is "a classic psychopath who cannot separate fact from fancy." (*Newsday*, December 20, 2002 – p.4; *New York Daily News*, December 21, 2002 – p.4.) Reyes' defense psychologist was also on record stating that "Reyes could not tell a consistent childhood history. . . and that Reyes had a need for attention." (*Newsday*, December 20, 2002 – p. 4; *New York Daily News*, December 21, 2002 – p.4.) Justice Thomas Galligan who presided during Reyes' rape/murder trial in 1991 which resulted in conviction, stated that "If Reyes is a credible witness, then credibility has a new meaning." (*Newsday*, December 20, 2002 – p.4; *New York Daily News*, December 21, 2002. – p.4.) Reyes is a self-confessed serial rapist, robber and murderer. He has admitted to sexually assaulting his mother and to a host of other crimes for which he was not convicted. In law derived from logic, common sense and experience, there is a time honored view that calls into question one's credibility when that individual commits these outrageous types of crimes and suffers from a nightmarishly deranged mentality.

Vacatur in Legal Non-Compliance

A.

One of the most pernicious aspects of the jogger case is the position taken by the Manhattan D.A. in securing what must be viewed as the improper vacatur of the convictions of the defendants, obtained in complete disregard of relevant New York precedent. The Manhattan D.A. offered the purely hearsay revelations of Reyes, unsworn and completely undocumented. The fact that Reyes, confirmed by the DNA evidence, was one of the assailants does not answer whether the five defendants were also participants. The identity of a sixth assailant had always been conceded by the Manhattan D.A. when the cases were tried in 1990. Certainly, the DNA proof in no way justifies vacating the convictions here, see People v. Smith, 245 A.D. 2d 79 (1st Dept. 1997). As the foregoing citation makes clear, that the five defendants' semen was not found in the jogger does not mean that they did not commit the rape, or, at the least, aid in the commission of this crime.

Also, of utmost significance, Manhattan D.A. Morgenthau conceded that there was no police misconduct in obtaining the defendants' confessions; yet, incredibly the Manhattan D.A. avers in his moving papers to set aside the convictions: "Perhaps the most persuasive fact about the defendants' confessions is that they exist at all," suggesting that the confessions, though not in any way coerced, were nonetheless untrue:

a) because they were inconsistent on certain points and

b) attempted to "minimize" the role of each confessor.

Clearly, these two circumstances supported, rather than detracted from, the veracity of the confessions, a point that has been universally and consistently recognized among even the most inexperienced law enforcement investigators. Without doubt, therefore, the Manhattan D.A.'s attempt to undermine the five defendants' guilt, based upon an unarticulated and unexplained attack upon precisely the same evidence that the Manhattan D.A. himself endorsed and presented to the convicting juries, is simply disingenuous.

B.

Most disturbing here is the Manhattan D.A.'s position that the Reyes allegations warranted an outright dismissal of the convictions, which is prohibited under relevant New York legal precedent – Section 440.10 of the Criminal Procedure Law, as construed by the courts. It is with the utmost astonishment that we view the decision of the court before whom this proceeding was pending, granting such remedy of dismissal.

It is undisputed that the law does not permit an otherwise valid conviction to be set aside, merely on the basis of a third party's (Reyes') claim of guilt of a crime for which other defendants have been previously convicted.

At best, such a claim mandates only that the court conduct a full evidentiary hearing to test the veracity of the third party's allegations that he/she, rather than the convicted defendants, is the guilty party. People v. Fields, 66 N.Y. 2d 876 (1985); People v. Taylor, 246 A.D. 2d 410 (1st Dept. 1998); People v. Ferrara, 238 A.D. 2d 353 (2nd Dept. 1997); People v. Staton, 224 A.D. 2d 984 (4th Dept. 1996); People v. Nicholson, 222 A.D. 2d 1055 (4th Dept. 1995).

The foregoing decisions mandate that, at such a hearing the court must determine whether such third party (Reyes) has presented a sufficiently trustworthy account to justify a new trial – and not whether a conviction should be set aside without trial.

Beyond this, the courts have admonished trial judges to view claims such as those made by Reyes here with great caution, if not with disfavor – it is only after careful scrutiny of the Reyes type allegations that a court should take what may be regarded as a most extreme step of ordering a new trial, see, e.g. People v. Suarez, 98 A.D. 2d 678 (1st Dept. 1983); People v. Robinson, 211 A.D. 2d 733 (2nd Dept. 1995).

Recognizing this, the D.A. himself stated that, apart from whether the law permits a dismissal, such dismissal was appropriate in this case in that the defendants have completed service of their sentences, an untenable legal position for the chief law enforcement law officer to make. It is significant to note that never before the instant case, and never since this action, has the Manhattan DA followed the procedure it did in this case.

Clearly, as can be observed from the above, the Manhattan D.A. improperly sought to short circuit the process established to scrutinize post-conviction attacks upon legitimately obtained prior convictions.

Further, the Manhattan D.A.'s attempted "consent" to the dismissal of the defendants' convictions does not legitimize his action. The supposed "consent" is no more than a fiction, legally inoperative and of no consequence here. Such "consent" would allow the outright granting of a post-conviction petition only when the prosecutor has "consented" to a defendant's allegations offered in support of a post-conviction petition. See Criminal Procedure Law, Section 440.10(3)(c). At bar, however, the Manhattan D.A. disputed the claims of the defendants that the respective confessions had been coerced. In truth, the Manhattan D.A.'s so-called consent was non-existent. The Manhattan D.A. simply disregarded the post-conviction claims of the defendants and merely substituted his own "claims" instead, a most peculiar device, obviously undertaken to evade judicial review of the particular claims tendered by defendants – a ploy which proved successful, owing to the failure of the court to whom the claims were presented to undertake an examination of the allegations at issue.

Conclusion

Serious questions abound about the propriety of the entire Reyes investigation, including:

(1) Reyes, at times, was questioned by an ADA who did not record the interviews. On one such occasion, prior to the taped portion of the Reyes interview, the ADA indicated that she had already questioned Reyes for approximately two hours without recording the questioning. Then, for unknown reasons, five to ten minutes into the tape, the tape recorder was turned off.

(2) According to NYPD investigators, police access to Reyes, his prison inmate acquaintances and other potential prison witnesses was blocked by the Manhattan D.A. Certain individuals whom the Manhattan D.A. had reason to believe possessed relevant information contradicting Reyes and his account of this case were advised by the Manhattan D.A. not to cooperate with the NYPD.

(3) The assistant DA who conducted the 2002 reinvestigation neglected to interview many participants in the original case and investigation, including eyewitnesses to events during the interrogation period, even though those witnesses made themselves available to her.

(4) Painstaking inquiry need be conducted to determine why Reyes came forward with his uncorroborated version of the case. For example, did Reyes come forward as the Manhattan D.A. believes because of Reyes' "positive prison experience?!" (At the time D.A. Morgenthau made that observation, Reyes' prison experience had included 19 substantial conflicts or infractions ranging from arson to fighting.) Or, was Reyes moved by venal motives consistent with his vile character? In this regard, it becomes significant to note that from on or about August 2001 to on or about January 2002, Reyes, a loner, found himself situated in Auburn State Prison with the defendant Wise. Reyes then came forward in November 2001. Would it offend common sense to suggest that Reyes, to save his own skin, while locked up, sought to exonerate the five defendants which would not only remove an immediate intimidating threat, but also, according to prison practices, grant him special privileges in a different and more protected prison environment?

Justice cries out for an official inquiry into the methods and motives engaged in by the Manhattan D.A. and, to the extent possible, officially determine the actual participation and alleged exoneration motivations of Matias Reyes. Moreover, in my judgment, Ken Burns owes an apology not only to the public but also to all the law enforcement people who worked so diligently to gather the necessary evidence to bring these rampaging defendants to justice.

Lest anyone doubt the assailants' character and cruelty on that night in Central Park, pay particular attention to Det. McKenna's memo book entry of statements made to him by the defendant Yusef Salaam: "Hit her with pipe/she went down and hit her again/. . . Kevin fucked her. . . To me it was something to do. It was fun."

Respectfully Submitted,

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