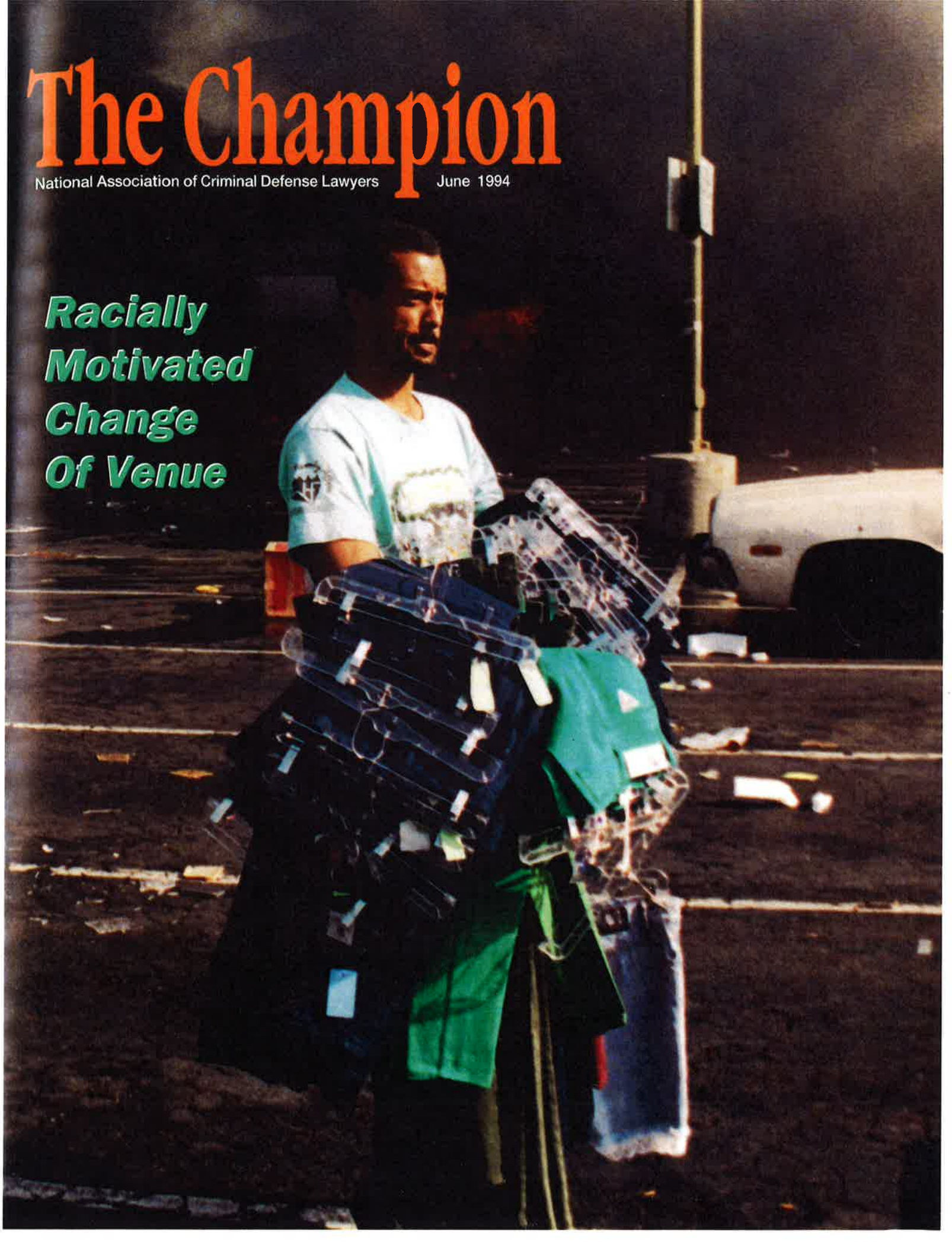
The Champion

National Association of Criminal Defense Lawyers June 1994

Racially Motivated Change Of Venue



FOURTH AMENDMENT FORUM

Over The Wall: Protecting A Detainee's Private Papers

By Howard M. Srebnick and Scott A. Srebnick

HOWARD M. SREBNICK, formerly a law clerk to United States Circuit Judge Irving L. Goldberg and United States District Judge Edward B. Davis, is a trial and appellate attorney with the Federal Public Defender's Office in Miami, Florida.

SCOTT A. SREBNICK, formerly a law clerk to United States District Judge Sidney M. Aronovitz, has a private trial, appellate, and post-conviction practice in Miami, Florida.

Your client is a pretrial detainee, detained either because he was deemed a risk of flight, danger to the community, or simply too poor to post the exorbitant corporate surety bond set by the magistrate. Although presumed innocent, your client is confined at the local detention center along with other pretrial detainees and with convicted prisoners, as well. He must abide by many of the Bureau of Prisons' rules and regulations governing convicted prisoners. Institutional security concerns do not differentiate between those presumed innocent and those who have been convicted of serious crimes.

Just retained, you are not familiar with the facts of your client's case. Your client, however, is. He is intelligent and articulate. He knows which witnesses are cooperating with the government, who will testify against him at trial, who can offer favorable testimony on facts material to the defense and can be called as defense witnesses. He has a sense for the fertile areas of cross-examination of government witnesses, knows which defense theories will be consistent with the facts, and, is therefore an invaluable and indispensable asset to the preparation of the defense.

The discovery provided by the government is voluminous: audio tapes, photographs, thousands of documents. You meet with your client regularly, hoping to make sense of the discovery and to prepare for a lengthy trial. Together, you and your client discuss the facts of the case and possible defenses. You ask your client to make notes, hoping to integrate his knowledge of the facts with your knowledge of the law. So, your client prepares notes detailing defense strategies, theories of the defense, possible areas of cross-examination, and names of potentially favorable witnesses. His notes and lists are contained on several legal pads.

Your client keeps his legal materials stored safely, he thinks, in his prison cell. He also maintains many legal memoranda and reports prepared by you for his review and consultation. Those legal materials are clearly protected by the attorney-client and work product privileges. To be certain, he stamps the words "ATTORNEY-CLIENT" all over the notes and keeps them neatly in a corner of his prison cell.

One morning, prison officials conduct what is purported to be a routine inventory search of your client's cell. The purpose of the inventory search is presumably to look for contraband of some sort, e.g., drugs, a weapon, etc. In connection with their inventory search, prison officials look through the notes and legal materials prepared by your client during his meetings with you, despite the fact that those materials are clearly marked "ATTORNEY-CLIENT."

Finding no drugs, no weapons, and absolutely no threat to institutional security during their search, the prison officials hand over your client's legal materials to law enforcement officials and the prosecutor's office. Now the prosecution team is in possession of the heart of your client's intended defense at trial.

You file a motion with the district court seeking the return of all legal materials (originals and copies) seized from your client's prison cell. You ask the district court to prohibit the prosecutors and agents from reviewing those legal materials. At least one basis for your motion is your client's right under the Fourth Amendment to be free from an unreasonable search and seizure. (You also raise a challenge under the due process clause of the Fifth Amendment and the counsel clause of the Sixth Amendment.)

The government opposes your motion. The government argues that your Fourth Amendment claim fails under *Hudson v. Palmer*, 468 U.S. 517 (1984), because your client does not have a reasonable expectation of privacy in his prison cell. In the government's view, the materials are subject to review by the prosecutor's office because the detainee maintains no legitimate

expectation of privacy in *anything* within his prison cell. If the materials turn out to be attorney-client privileged, after all, the government will propose the erection of a "Chinese Wall" to safeguard the defendant's Fifth and Sixth Amendment rights to a fair trial and counsel. Satisfied?

Fourth Amendment Claim

In *Hudson v. Palmer*, two prison officials at a correctional center in Virginia conducted a "shakedown" search of convicted inmate Palmer's prison locker and cell, looking for contraband. During this shakedown, they discovered a ripped pillowcase in a trash can near Palmer's bunk. The officials instituted charges against Palmer under the prison disciplinary procedures for destroying state property. After a hearing, Palmer was found guilty, reprimanded, and ordered to reimburse the state for the cost of the material destroyed.

Palmer brought a Section1983 action against the prison officials alleging a violation of his rights under the Fourth and Fourteenth Amendments. Addressing Palmer's Fourth Amendment argument, the Supreme Court held "that society was not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Hudson*, 468 U.S. at 525-26. The Court reasoned that because prisons are, by definition, places of involuntary confinement for "persons who have demonstrated antisocial criminal, and often violent conduct," prison administrators must be able to take "all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors." *Hudson*, 468 U.S. at 526.

Hudson involved a search of a convicted inmate's cell for contraband by prison officials. The evidence of criminality found was used by the prison officials in a prison disciplinary proceeding. *Hudson* did not involve a search of a *pretrial detainee's* cell, much less legal materials protected by the attorney-client and attorney work-product privileges. Nor did *Hudson* involve prison officials handing the evidence found in the cell over to the local prosecutor's office.

Yet, *Hudson*'s broad pronouncement that prisoners do not have a legitimate expectation of privacy in their cells does not appear to distinguish between security searches for contraband and investigatory searches for attorney-client legal materials. Nor did *Hudson* specifically carve out an exception for pretrial detainees. *See also Bell v. Wolfish*, 441 U.S. 520, 547 (1979). ("This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.") Indeed, the Supreme Court has stated that concerns of institutional security require that security measures apply with equal force to all inmates, whether presumed innocent or convicted. *Id.*

In *United States v. Cohen*, 796 F.2d 20 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 932 (1987), the Second Circuit carved out an exception to *Hudson*'s apparent blanket rule regarding prison cell searches. In *Cohen*, a corrections officer, at the direction of a prosecutor assigned to the case, searched a pre-trial detainee's cell under the guise of an administrative contraband search. The search lasted over an hour and consisted entirely of an examination of Barr's papers. The corrections officer was looking for documents containing names of co-conspirators and witnesses who Barr had contacted or was attempting to contact. He found what he (and the prosecutor) were looking for, so the prosecutor obtained a search warrant authorizing the seizure of those written materials. *Cohen*, 796 F.2d at 21.

On Fourth Amendment grounds, the defendant moved to suppress the direct and derivative evidence obtained as a result of the search. The district court denied the motion to suppress, Barr was convicted, and he appealed. The Second Circuit reversed. The court reasoned that because the search of Barr's cell was undisputedly initiated by the prosecution, not by prison officials, the search could not have colorably been motivated by institutional security concerns. Distinguishing *Hudson*, the court wrote:

> The door on prisoner's rights against unreasonable searches has not been slammed shut and locked. We take seriously the [Supreme] Court's statement that no iron curtain separates prisoners from the Constitution, and that the loss of such rights is occasioned only by the legitimate needs of institutional security.

Cohen, 796 F.2d at 23. The Second Circuit remanded the case for a taint hearing on the evidence seized from the defendant's cell.

The *Cohen* decision turned on the fact that the prosecutor initiated the search. The court commented that it would be a different case had prison officials initiated the search, for it would then "not be subject to constitutional challenge, regardless of whether security needs could justify it. " *Cohen*, 796 F.2d at 24. The court's focus is much too narrow.

The Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). What a person seeks to preserve as private, even in an area accessible to the public or to prison officials, maintains constitutional protection. And surely the reasonableness of the expectation of privacy cannot depend on which government actor invades it.

Although *Hudson* may have held that an inmate does not have an expectation of privacy in his prison cell, he may still retain a legitimate expectation of privacy in the *content* of the items stored in the cell, especially legal materials. Papers and notes do not pose the institutional security risks that drugs and weapons do. Prison officials, no less than prosecutors, have no business reviewing the private papers of a detainee, particularly when the detainee has clearly labeled those materials as "ATTORNEY-CLIENT" or otherwise provide indicia of their privacy.

Thus, the legitimacy of the privacy expectation should not turn on the location of those materials nor on the identity of the government intruder, but should focus instead on the nature and content of the items searched in the cell. The reasonableness of a detainee's expectation of privacy in the content of his legal materials is legitimized by various regulations adopted by the Bureau of Prisons which prohibit prison staff from reviewing inmate correspondence that is labeled as "LEGAL MAIL."

Fortunately, the Fourth Amendment has little tolerance for pretext searches. For example, the Supreme Court has warned that an inventory search must not depart from its underlying justification and become a pretext for purposeful means of discovering evidence of crime. *Colorado v. Bertine*, 479 U.S. 367 (1987). When a warrantless investigatory search follows a valid inventory search, the Fourth Amendment is violated. *United States v. Khoury*, 901 F.2d 948, 958 *modified on other grds. on reh.*, 910 F.2d 713 (11th Cir. 1990). Prosecutors and prison officials work for the government. A pretrial detainee has a reasonable expectation that the government will not use "institutional security" as a pretext for an investigatory search. *See Khoury*, 901 F.2d at 958. When a routine inventory search

of a prisoner's cell is used as a pretext, or "surrogate," to discover evidence of a crime, the Fourth Amendment rights of the pretrial detainee are violated.

Finally, finding that an inmate does not have Fourth Amendment protection against the search and seizure of legal materials kept by the inmate in his jail cell would seem to make little or no sense in the context of a pretrial detainee who, to be truly free from punishment under the due process clause, must be afforded, to the extent practicable, the same opportunity to prepare for trial as one who has made bail. If prison officials can, on a whim, seize a pretrial detainee's legal materials — containing attorney-client confidences and attorney work-product — and hand them over to the prosecution, then surely the pretrial detainee cannot effectively prepare for trial.

A "Chinese Wall" is no answer. Prosecutors routinely propose that those who have gained access to the private materials can be prevented from disclosing the content of the materials to the prosecutors and/or agents involved in the trial and investigation of the case. By keeping the prosecution team outside the loop, the defendant's right to counsel and a fair trial are safeguarded. Or so the argument goes. But as U.S. District Judge Brieant summed it up:

> [I]mplementation of a Chinese Wall, especially in the context of a criminal prosecution, is highly questionable, and should be discouraged. The appearance of justice must be served, as well as the interests of justice. It is a great leap of faith to expect that members of the general public believe any such Chinese Wall would be impenetrable; this notwithstanding our own trust in the honor of an AUSA. Furthermore, in a case such as this, the Chinese Wall attorney, to perform the search, required the physical assistance of the agents, laborers, truckmen and others not bound by ethical considerations which affect a lawyer. Those on the Mongol side of the Wall may well access the same information from other sources, and have difficulty convincing a defendant or the public that the information did not pass over or through the Wall.

In Re Search Warrant for Law Offices, ___ F.Supp. ___, 1994 WL 28830 (S.D.N.Y. Jan. 24, 1994). ■