

## STATUTES AND STATUETTES

By Marvin Green

“No, I do not care that you are a burglar.”

Siegel was virtually making a speech, laying out the conditions on which he would take Tolliver’s case.

Because of his severe astigmatism, he’d taken off his glasses to rest his eyes during the appointment. Tolliver was a red blur of sport shirt to him, a red blur over which his face hovered, warped by uneven pink shafts of light such as one might see in clouds at sunset.

Tolliver regretted not having dressed up, because Siegel was impressive, wasn’t at all what he’d expected him to be. All of the lawyers in the past were on the sleazy side, eager to take his cases, big fees and usually lots of publicity. The thing about them was that not one of them had ever used the word “burglar.”

They would say things like, “You are indicted for the crime of burglary” or “You are indicted under Section 207 of the Penal Code.”

Mr. Siegel had actually said the word “burglar,” and his tone made it seem like a title. This wasn’t precisely the title Tolliver wanted, but the idea of having a title, something comparable to “Senator” or “Vice Lord,” made him feel very important, at least very important to Siegel.

Another thing that Siegel could not see was the calfskin scrapbook on Tolliver’s lap. Tolliver had kept a neat record of the newspaper clippings from his arrests and acquittals, and he had brought it with him in case Siegel would want to look it over. Until Siegel said, “I do not care that you are a burglar,” Tolliver was grasping and

ungrasping the book, waiting for the right moment to put it to him. Now there were smudges of perspiration on it from his hands. This was so even though the window air conditioner was grinding out ripples of ice cold air that gave him goose bumps under his red shirt sleeves.

Siegel had never heard of Tolliver because he did not ever read any of the city newspapers or watch the evening news. It was more than he could do to keep up with the Times and the Journal.

“Do you understand about my fees?” he asked. “\$7,500 in advance, that’s win, lose or draw.” His practice had run to civil trials during the last ten years, and he wouldn’t be accepting a criminal case now except that his older daughter was starting college in the East.

When Tolliver stood up to get at the bankroll in his hip pocket, the scrapbook slid over his knees and onto the floor. He let it rest there momentarily as he counted out 75 crisp big ones. He could tell from the careful way Siegel re-counted them one by one that it was true that Siegel did not care that he was a burglar. The lawyers who wanted him to be a burglar took the money and quickly put it into the desk drawer and probably counted it later when he was gone. The ones who despised him for being a burglar just let the money sit there until he left the office, like it was filthy, too filthy to touch.

Tolliver was about to ask Siegel why he didn’t care about his being a burglar. However, as he was squatting to retrieve the scrapbook, he knocked over that large white marble statuette on Siegel’s desk. “Who’s that?” he asked about the statuette, setting it up straight and not thinking it was any actual person.

Siegel held it close to his eyes to inspect the elbow where there had long been a hairline crack. “That’s Louis Brandeis,” he said. There was an umbrella hanging from Brandeis’s wrist, and Siegel blew away a semi-circle of fuzzy dust which had gathered inside its folds. “Yes, sir,” he added, still exhaling, “Louis Brandeis.”

Tolliver knew from a documentary he'd seen on TV that Brandeis was a legendary lawyer and Supreme Court judge. He wanted to ask questions about him, but didn't think it would be fair unless he could also show Siegel the scrapbook—not the scrapbook that was still on the floor but the other one that he kept hidden between the roof and the imitation-leather ceiling liner of his car. It was divided by a green cardboard sheet into a front section and a back section. He had to keep it hidden because he'd never once been convicted. The newspaper clippings in the front section were what he called his "confessions." He'd inked onto the stories certain details, things only he knew, about the big burglaries he'd committed and nobody ever suspected him.

The back section, the part he really wanted to show Siegel, had his clippings and magazine articles about legendary burglars.

As he now forced himself to pay attention to what Siegel was saying, he suddenly realized one of the reasons his palms were sweating. In order to hear Siegel's soft voice over the air conditioner, he had to keep his whole body taut as though this effort would help to transmit the words to his ears through his bones and muscles. That same way the falling tumblers in combination locks would transmit numbers, or whatever else, through his fingers and then all the way up into his brain.

Some lawyers had soft voices because they were reluctant or afraid to let their words out. This guy Siegel knew what he was talking about, and Tolliver could picture an elderly lady who might be on a jury, gripping the handrail and holding herself way forward to hear better, wanting to straighten Siegel's necktie.

Now, as he said goodbye and left Siegel's office, he didn't try to picture any other jurors. The elderly woman was the toughest. If Siegel could get to her, he could get to them all.

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By nine o'clock that evening, Tolliver had returned to his earlier premonition that this time he was really in trouble. Instead of calling Siegel at his home just to discuss the case a little, he got in his car and drove, no special destination, only a ride to think things over, drove about fifty miles on the toll way toward Chicago.

Turning onto the shoulder of one of the country side roads, he shut off the radio and the ignition and sat there to contemplate. He was positioned in such a way that the quarter moon came through the tinted windshield and appeared to rest on the rearview mirror. With the right mind control, he could visualize the stem of the mirror as one of the bars of his prison cell.

Before he had gone to Siegel, he'd gone to MacKenzie, and MacKenzie had advised him, "You're dead. Only thing you can do is plea bargain." He'd charged him \$600 for that advice, not being sensitive enough to realize that no way would he admit guilt in this particular case.

Strictly for the purpose of comparison, he'd introduced the story to Siegel word for word the way he'd introduced it to MacKenzie. "I'd paused," he'd said, "paused just long enough to spit in the river because two plainclothes policemen were following me. Because I did that, I am under indictment for violating Section 207 of the Penal Code—burglary."

Siegel had asked him, MacKenzie had not, why had he spit.

"I spit to show my contempt, but don't get me wrong, Mr. Siegel, I respect cops. They have tough work and they do it. But these two guys were following me, and they had no reason to. This was one of the cleanest jobs I ever did. Shoot foam into the alarm, bust the toilet window, into the office, bingo."

He exhibited his right hand to Siegel, rotated it to the right and the left and then resumed. "These five fingers open the safe. I'm back out the window. The

whole thing is 20 minutes, start to finish.

“That all was five hours earlier. Then, like I usually do, just for relaxation after a job, I went to a movie. I was carrying all the stuff in my large Good Eats grocery bag, the way I usually do. I’m not a lawyer, Mr. Siegel, but I know my rights. They can’t arrest me without a warrant unless they actually see me doing the job. Am I correct? In this particular case they do not have a warrant, and neither do they see me doing it. They don’t even know there was a job. They’re following me strictly because of my reputation. Hence I show my contempt. Ordinarily I would wave the grocery bag at them. This particular time, since I am standing on the bridge over the river, I spit. Hence they arrest me for spitting and they search me. Sure enough, right in the bag are \$100,000 of fine gems.”

While Tolliver was repeating this speech to himself, he’d closed his eyes to the quarter moon and put himself back in Siegel’s office to relive the occasion and to form a more accurate impression of how Siegel had sized him up.

The effort was unsuccessful. He could see the framed law school diploma seemingly resting on Siegel’s gray head. He could see Siegel opening and closing his mouth to let out a few soft words. He could see the twin balls of light reflecting from Siegel’s glasses folded on the desk, and he could hear the racket from the air conditioner. Strange though, he couldn’t feel the goose bumps on his arms—maybe because he was already wearing the sharp blue blazer he’d bought for the forthcoming trial. Also he’d revised the speech quite a little, perfecting it to make it sound better.

When he now struggled to hear Siegel, the crickets were too noisy, and he had to scratch his face because there might be a mosquito on it. He didn’t like to kill anything that was living, so he opened a window, dragged in a branch from an overhanging tree, tore off a leaf and let the branch swish out. He used the leaf to brush away the possible mosquito and then inspected the leaf against the tiny light from the instruments on the dashboard. He wondered, what kind of leaf is this?

It would be a good idea to tell Siegel about the leaf, so that Siegel could tell the judge during the sentencing that he, Tolliver, the defendant, had been brought up in the city and had never had the advantages of country life; that he had never once been to camp; and that he could not tell, for example, whether this Exhibit A was a maple leaf or some other kind.

Tolliver sighed and turned on the ignition and backed onto the road toward home to get some rest. If he were going to handle the plea for probation instead of Siegel, he'd just tell the judge the truth. "Your Honor, this man is a burglar. He has reached the pinnacle of his profession in that he is knows gems backwards and forwards, works an 8 to 12 hour day, looking over various premises, studying up on burglar alarm systems, never carrying a weapon of any kind or character whatsoever. Do you realize, Your Honor, that this man lives on a budget? He earns 40 to 60 thousand a year and pulls off a job once a month like clockwork. He's had plenty of chances to get married but does not believe in subjecting women and children to the risks of his profession.

"Your Honor, you have probably known me for many years now, and I am proud to say that I call myself a lawyer the way this man calls himself a burglar."

Suddenly Tolliver panicked, jammed on the brakes and slid forward against the steering wheel. He'd been in jail for 36 hours before getting out on \$15,000 bond. During that time, the police must have searched this car. But he reached up and definitely could feel the scrapbook still there, still safe and sound.

He drove carefully the rest of the way. "Your Honor," he said aloud, "I have already told you that this man is a burglar. What he does is study the greatest jobs that have ever been pulled, and then he goes out and pulls them one better. I could prove that to you that in black and white, but first I will tell you something else that will amaze you. This man, not being married, does not need all that money per year. Would you believe it, Your Honor, this man is not Catholic but every year he gives

the sum of \$5,000, not one string attached to it, gives \$5,000 to Catholic Charities, except in 2000. 2000 was his one bad year. Your Honor, here are the receipts to prove it, each and every one of them.”

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It was now the day of the trial and Tolliver, walking to court, decided he had no choice. For \$600, MacKenzie was right, plea bargain. When he'd awakened, there were two inklings pointing to this decision. One was the fact that this was the first time they had ever gotten any direct evidence on him. The jewels were in the bag, the bag was in his hands. The newspapers were headlining the case, and there would be ignominy in the back and forth of a long drawn out trial with daily TV interviews of the prosecutors. The other clue was \$7,500. Siegel squinted at Brandeis, squinted at things he was reading, like the indictment, but Tolliver, who had paid him the \$7,500 in advance, win, lose or draw, couldn't remember him ever squinting at his client.

Somehow that didn't seem right. Tolliver had never physically attacked anyone, but now, as he was at a curb scraping chewing gum from his shoe, he toyed with the idea of going into the courtroom, grabbing Siegel's necktie with his left hand and battering Siegel's jaw and cheeks with roundhouse blows from his right hand. Siegel might just as well have said, "No, I do not care that you are Tolliver."

Although Tolliver practiced punching Siegel during the remainder of his walk to the courthouse, he was immediately intimidated by the security guard at the main entrance. "They got you this time, don't they?" the man said. Upstairs, in the courtroom, feeling that he was already convicted, Tolliver went to Siegel and said, "We've got to plea bargain. I can't find the charity receipts."

Siegel more or less nodded and said, "I told you they're not important. Just sit over there and wait."

When the judge entered, Siegel came and put his arm across Tolliver's shoulders and they both stood. Then Tolliver sat and watched Siegel go forward to the bench. He was amazed when Siegel's soft voice came booming out.

"If it please the court," Siegel was saying, this cause comes before you on a motion to suppress evidence in advance of a trial."

"I've read your motion, Mr. Siegel. Please proceed."

"On June 15 of this year, Your Honor, Mr. Moses Kaminsky, a pawnbroker, arrived at his place of business in the morning at his usual hour, approximately 8:30 o'clock. He conducted his business as usual until approximately noon when he had occasion to open his combination safe to remove an expensive pearl necklace which a customer had come to redeem. Upon opening the safe, Mr. Kaminsky discovered that the necklace was gone and that numerous other items of jewelry were also missing."

Siegel passed the judge an inventory of the items in the bag. "Your Honor will note the necklace in question and the pouch of uncut rubies and, in addition, thirty-three diamond rings, eight brooches, nineteen wristwatches, fourteen other necklaces and two presumably valuable antique pocket watches."

"All that stuff," the judge said. "How much is it worth?"

Siegel said, "Mr. Kaminsky estimates the overall value as upwards of \$90,000."

"So quite a haul," the judge said. "Please continue."

"Upon inspecting his premises, Mr. Kaminsky found that a lavatory window had been broken. He checked his alarm signal box and detected a white sticky substance coating it. At approximately 1:00 o'clock in the afternoon, the police arrived in response to his call. This was when Mr. Kaminsky first reported the apparent theft of the jewelry I have mentioned, the jewelry that was in the defendant's grocery sack.

"Your Honor, I now go back some seven hours in time. At 6:00 o'clock that

morning, Police Detective Harmon and Police Detective Ripley were having coffee in the Rialto All-Night Restaurant. They were assigned to the burglary detail and were just about to go off duty. As they left the restaurant, they observed the defendant leaving the Cross Roads Theater, also an all-night establishment. They knew the defendant personally from having arrested him on four earlier occasions. The defendant was carrying a brown paper Good Eats grocery sack. He approached them and said, 'Hello, boys. Do one of you gentlemen have a cigarette for an unemployed outlaw?' Police Detective Ripley gave the defendant a cigarette, lit it for him, and said, 'I suppose that's your lunch in there.' The defendant peeked into the sack. 'That's right,' he answered. He then chatted with the officers for a few moments, inquiring about their families. They all said goodbye and the defendant walked northward along First Avenue.

"Police Detective Harmon and Police Detective Ripley decided to follow the defendant. They give as their reason the fact that they had lost track of his home address. When the defendant reached Memorial Bridge, he looked back and appeared to note for the first time that he was being followed. He walked to the center of the bridge, rested his elbows on the metal rail and then, glancing at his pursuers and waving to them, spit into the Wapowoneck River. He waited until the police detectives reached him.

"Police Detective Ripley said to him, 'You should not have done that. That was a misdemeanor. If I was not going off duty, I would take you in.' Police Detective Harmon said, 'You go on home. I will take him in. Imagine that—spitting in violation of Section 23-4.' Police Detective Harmon thereupon seized the defendant's paper sack. The defendant unsuccessfully attempted to wrest it from him, but Police Detective Harmon opened it and discovered 'diamonds, watches and other jewelry.'

"The police detectives took the defendant to police headquarters, where he was booked at 6:59 o'clock in the morning and locked in a detention cell. Spitting was the

only charge filed against him until later on—3:12 o'clock in the afternoon—at which time, in his presence, Mr. Kaminsky signed a complaint and identified the personal property in the sack as the personal property which had been in his combination safe the night before, the loss of which property he had not discovered until more than six hours after the defendant's arrest.

"Your Honor," Siegel said, "we come now to the central issue in this case. I hope you will agree that I have taken great pains to make a careful recital of the underlying circumstances. May I now proceed with my argument?"

"Definitely proceed. You certainly have taken great pains. I hope you will now get directly to your point."

"Thank you. I will be assuming—and it will be solely for the purpose of the argument—I will be assuming that at the time of his arrest, the defendant unlawfully had in his possession all of the jewelry, watches and other items belonging to Mr. Kaminsky or his clients.

"On that assumption, Your Honor, there is only one question presented. That question is whether spitting into the Wapowoneck River is a misdemeanor within the meaning of Section 23-4 of the municipal statutes. If, under the laws of our city, the defendant had the right to spit with impunity into the Wapowoneck River, the police detectives had no right to arrest him and, *a fortiori*, they had no right to search him. It is simple constitutional law that a citizen abroad on the streets may not be searched unless a warrant has been issued on probable cause or unless he is lawfully apprehended during the commission of a crime or unless his conduct is such that police officers may reasonably believe he is actively connected with the commission of a crime.

"Your Honor, we have none of those elements in this case. No warrant, no suspicious behavior by the defendant, no knowledge that a crime has been committed. They arrested him for spitting and conducted the search as an incident to that arrest. I

deem that an outrageous procedure.”

“Outrageous?” the judge asked. “What’s outrageous?”

“If the circumstances of this case were different, I would argue to Your Honor that the misdemeanor of spitting is not such an arrest as would justify the search of an otherwise well-behaved citizen. I declare that I would love to make that argument, that it is desirable for the government to apprehend criminals but that, as Mr. Justice Holmes said in the Olmstead case, it is better that criminals go free than that the government resort to ignoble means to apprehend them.”

The judge said, “Your civil rights reputation is well-deserved, Mr. Siegel, but I confess I am wondering, just what is your point? A statute is a statute. In this particular case, what is this ignoble means you seem to fear?”

“Exactly, Your Honor, but in this particular case we don’t ever come to that question. Please indulge me while I read aloud Section 23-4 of the Municipal Statutes. ‘Whosoever shall spit, expectorate or otherwise discharge saliva or mucous from his mouth or nose onto any street, paved roadway, sidewalk, public building or structure, shall be guilty of a misdemeanor and shall be fined not more than five hundred dollars or shall be imprisoned for not more than 180 days.’

“Your Honor, it is conceded that the defendant spit or expectorated saliva from his mouth. It is clear, however, that the defendant deposited this saliva into the Wapowoneck River. He did not spit ‘onto any street, paved roadway, sidewalk, public building or structure.’ Therefore, he never violated any law or statute whatsoever. He had the unfettered right to spit into the river. I respectfully move that the defendant be discharged forthwith and that the property improperly taken from him be returned to Mr. Kaminsky or his clients.”

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Tolliver was sitting in Siegel's office in the afternoon later that day, waiting for Siegel to speak, wondering would his voice would be loud or soft. He understood that he was totally free, the case against him dismissed with prejudice on Siegel's motion.

While generally pleased with the result, he was trying to figure out how to deal with the crisis that would be upon him when the evening papers came out. Should he put the clippings in the scrapbook with his acquittals or in the other scrapbook with his confessions?

Now Siegel was handing him something, a check. "I asked you to come here," Siegel was saying, "because I think I owe you a refund." His voice was soft and very hard to hear. "When I first undertook this case, I had not yet read Section 23-4. I thought we were going to have a huge constitutional battle on our hands. What I didn't realize was that this was going to be just a spitting case."

As Tolliver took the check, which was made out to him for \$2,500, he became infuriated. "He yelled, "What do you mean 'just a spitting case'? It's not a spitting case. That's not what I hired you for."

Siegel quickly put on his glasses and examined Tolliver for the first time. He was a nice looking young man, collegiate appearing in his blue blazer. His hands were fiercely engaged in tearing up the check and then flinging the bits of it across the desk.

Tolliver wasn't satisfied with this gesture. He seized the statuette of Louis Brandeis and tried to wrench the umbrella from his wrist. When this didn't succeed, he stepped back and hurled Brandeis onto the floor.

Siegel heard it bounce on the carpet and then against the wall. He hoped it wasn't broken. It had cost \$80.