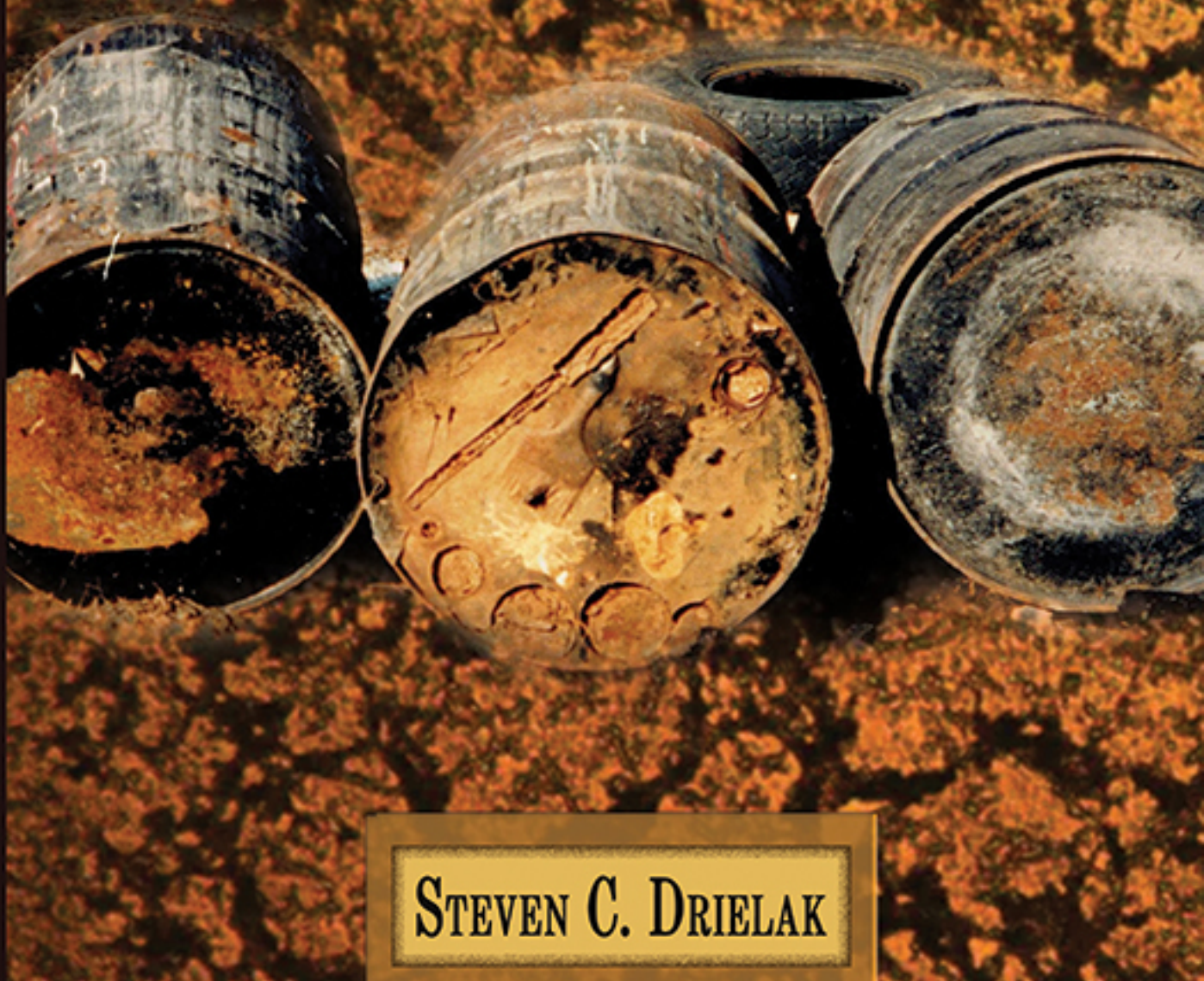
ENVIRONMENTAL CRIME TRIALS

The Road to Reasonable Doubt



Steven C. Drielak

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What's past is prologue.
–The Tempest

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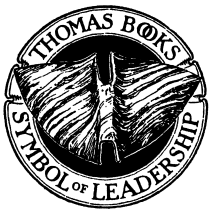
By

STEVEN C. DRIELAK



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This book is dedicated to my grandson, Chase.

FOREWORD

If you are an investigator or a prosecutor (new or a veteran), and you want to conduct a successful environmental criminal investigation and prosecution, you will want to own this book. Actually, you need to own this book. If you do not get this book, and you face a defense attorney who has read it, you will be very sad. Moreover, your agency may be very angry with the case's final disposition.

Steve Drielak was already an experienced criminal investigator with the Suffolk County District Attorney's office in Long Island when he was assigned to the DA's office newly formed Environmental Crime Unit in 1984. Steve helped turn that unit into one of the most highly regarded environmental crime units in the United States. By the time he published his first book, on evidence gathering in environmental criminal cases in 1998, he was nationally recognized for his achievements and was serving as an instructor for the U.S. Environmental Protection Agency's National Academy, where he trained dozens of environmental crime investigators.

When I was a prosecutor in New York in the 1980s, I was fortunate to attend a training that Steve and his unit had put together for environmental investigators and prosecutors. During the training, Steve showed a video he had made of a mock search warrant execution. We watched as investigators in Level B hazmat suits (think spacesuit) walked through a site and sampled the contents of various drums for the presence of hazardous waste. We took notes as the on-screen investigators removed samples from the drums and placed the samples into labeled containers for later analysis.

The video ended and Steve stood up in front of us, with a calm, quiet expression. Then he looked at us quizzically. He asked if we had questions about what we'd just watched. The room of forty or more investigators and prosecutors was quiet. Steve then asked if we had any evidentiary questions. We all sat quietly. Gee, I thought, it had looked pretty good.

Steve sighed. None of the samples, he told us, were likely to be admitted into evidence. He asked if we could come up with just one of the mistakes that had been made. The silence continued until someone gamely ventured

a question about chain of custody. Steve then patiently went through the video and showed the numerous errors (that now seemed obvious) that could either call into question the integrity of the samples or create cross-examination ammunition for the defense.

One moment in the video (also covered in this book) showed an environmental search warrant issue that, knowing Steve, may be one of his biggest irritants. As the spacesuit-clad investigators are taking the samples, the camera pulls back slightly and we could see someone watching the sampling event. The person is standing just a few feet away and is wearing khakis, sneakers and a polo shirt. No protective clothing.

Steve described how just such an image of a person in the background of a search was used by a defense attorney to call into question whether the material being sampled was really hazardous. He also described how a defense attorney could force a government witness to admit that the government itself had probably violated OSHA personnel safety standards by having the unprotected person so close to the sampling effort.

The above illustrates how Steve's many years of experience can provide important insights into environmental crime investigations. As he points out throughout the book, these investigations (and subsequent prosecutions) require investigators and prosecutors to bring together both the skills of an experienced criminal investigator (regarding how to handle any crime scene or review books and records), with the unique challenges presented by evidence gathering, analysis and legal issues raised in environmental enforcement.

To illustrate this challenge, imagine the following scenario. You investigate a case. The defendant is indicted for the illegal disposal of drums containing hazardous waste in a small patch of woods behind a public high school. At trial, the government's first witness testifies about the execution of the search warrant. On direct examination the witness speaks in a calm, authoritative voice. He explains to the jury how the search was conducted. He describes how samples were taken from the drums and then how the samples were tested and determined to be hazardous. The witness is turned over to the defense attorney for cross examination. So far so good and then this happens:

Defense: I'm showing the witness the government's Exhibit #12, which is a photograph that the witness just testified is a picture of the woods where they allege that my client disposed of hazardous waste. (To the witness), so this is how the area looked when you arrived?

Witness: Yes.

Defense: And these are tire tracks that are visible in the center of the picture?

Witness: Yes.

Defense: And these tire tracks are not from your vehicle or any government vehicle?

Witness: No.

Defense: You didn't take any impressions of these tire tracks did you?

Witness: No, but, they look like truck tracks.

Defense: Do you know how to take tire track impressions?

Witness: I, not me, personally, but people in my office.

Defense: Were the people who work in your office, and who know how to take tire track impressions, participating in the search warrant?

Well, by now you know there's no good answer to that last question. If the answer is yes, then the next questions will relate to how the government failed to take impressions of the tires even though it had the ability to do so. If the answer is no, then the next questions will relate to how the government failed to undertake a thorough crime scene examination. Now the jury may wonder whether perhaps someone else was responsible for the disposal of hazardous waste.

And there you are. Six questions into cross examination and (per Steve Drielak's warning in this book) those tire tracks are putting you on the sad and well-traveled "road to reasonable doubt."

There's no such detail too small for Steve, and now you can have the benefit of Steve's intense focus on how to develop a concrete foundation for a criminal case and avoid the pitfalls that can undermine an otherwise righteous case. After decades of involvement in the investigation and prosecution of environmental criminal cases, Steve perfectly captures the unique requirements of such cases. This book is the only source I know of that describes how to meet those requirements in a clearly organized and accessible format.

Steve wants investigators and prosecutors to be able to develop a sound case, though you can sense his worry that he's arming defense attorneys with the tools to undercut an otherwise righteous criminal case. But he also believes that the justice system should not convict someone if the government cannot prove its case beyond a reasonable doubt. Fortunately, Steve Drielak has created a tool that will help investigators and prosecutors meet that burden of proof. So it's up to you. The case you save may be your own.

Steve Solow
Washington DC
April, 2017

PREFACE

Obtaining an environmental crime conviction can be a daunting task for any prosecutor. There are many challenges that must be met and overcome when attempting to prosecute an individual for an environmental crime. These challenges may include difficult to interpret environmental criminal statutes, confounding supporting regulations, obscure technical definitions, baffling legislative intent and ambiguous appellate court rulings. All of which may impact upon the success or failure of the criminal environmental prosecution. However, this text's focus will be primarily on those issues associated with the collection and analysis of scientific evidence and other types of physical evidence that are normally associated with an environmental crime trial. Specifically, this text will examine the environmental crime scene evidence collection issues normally associated with criminal prosecutions involving hazardous wastes and hazardous substances and their subsequent release to the environment. The myriad of evidence collection and analysis issues raised here will focus on the equipment, procedures, protocols, training and documentation required in order to properly collect this unique type of criminal evidence. Errors made during the early evidence collection stage of a criminal environmental investigation will become glaringly apparent during an environmental crime trial and may have a devastating effect upon the final jury verdict. Armed with the knowledge provided in this text, the environmental crimes prosecutor will be able to provide initial guidance to the environmental investigative team which may minimize or eliminate many of these issues at the earliest stages of the criminal investigation.

For the defense attorney, this text provides a *consequence analysis* of the potential criminal evidence collection errors which may be made by well-meaning and dedicated regulatory personnel and private contractors who are often utilized by the prosecution in lieu of properly trained law enforcement personnel. In many instances, these evidence collection errors are committed by regulatory--trained individuals and contractors who have little or no criminal evidence collection or crime scene investigation training.

Additionally, this text provides a detailed description of the documentation that should be requested for examination by defense experts prior to the commencement of an environmental criminal trial and provides complete explanations as to their evidentiary and potentially exculpatory significance. This text will also provide the environmental defense attorney with a viable alternative to the *all-too-common environmental scientific evidence stipulations* and will provide a detailed analysis of the commonly *self-induced* vulnerabilities found in many criminal environmental prosecutions involving hazardous wastes and substances. This text will also include numerous and specific cross-examinations questions and follow-up questions for the government's technical witnesses–questions, that in many instances the prosecution would rather have left unasked.

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Chapter 1

INTRODUCTION

It has been said that a criminal trial is like a staged theater production. On the center of that stage will rest a single prop. It is a simple glass that has 50% of its capacity taken up by water. The water represents all of the facts of the criminal case as presented to the jury. All throughout the production, the prosecuting attorney will make every effort to convince the audience that the glass is half full, while defense attorney will make every effort to convince that same audience that the glass is half empty. The side that makes the most convincing argument will normally persevere.

As you read this text, it is essential that you view the issues raised not from the perception of a prosecutor, defense attorney, scientist, technician or law enforcement officer. It is essential that you view these issues from the perspective of a sitting juror in a criminal environmental trial. You should evaluate each raised issue objectively and make your own determination as to its potential impact upon a deliberating jury. It is a well-known adage that the defense attorney does not need to convince 12 jurors that the government failed in its efforts to put forth a convincing case. The defense attorney only needs to convince one.

When approaching an environmental crime prosecution that is based on a body of physical evidence, both the prosecutor and defense counsel will need ask themselves a simple question. That simple question being: *If this were a homicide prosecution, would the procedures and protocols utilized in the collection of the physical evidence be sufficient to obtain a criminal conviction?* There is a specific reason why this is a critically important question to ask in a criminal environmental prosecution. It

is based upon the simple truth that evidence found and collected at an environmental crime scene is normally subjected to a lesser overall standard by the prosecution than crime scene evidence found and collected in other forms of criminal prosecutions (e.g., homicide, arson, sexual assault, narcotics). An example of this can be shown by continuing the homicide prosecution analogy with two additional simple questions: *Do proper homicide investigations routinely use non-law enforcement trained government employees to collect evidence at homicide crime scenes?* and *Do proper homicide investigations routinely use private contractors, with no law enforcement experience, to collect evidence at homicide crime scenes?* The answer to these questions is clearly "no." Yet environmental crime prosecutors, on local, state and federal levels have routinely utilized non-law enforcement trained regulatory personnel and private environmental contractors to collect and analyze criminal evidence. Even when evidence collection activities are conducted under the direct supervision of law enforcement personnel you will still find questionable practices that may impact upon the thoroughness of the investigation and consequentially undermine the foundation of the prosecution's case. In many instances, even the law enforcement officers themselves will lack the necessary training, skills and mind-set needed to execute quality evidence recognition and evidence collection protocols at an environmental crime scene. In addition to the issues surrounding the improper collection of specific types of evidence, there is also the issue of the *failure to collect* evidence that is clearly present at many environmental crime scenes. A very good example of this is a criminal environmental investigation that occurred in Suffolk County, New York. In that instance, a chemical repackaging company was loading its hazardous waste into used 55-gallon drums and then unlawfully disposing of those drums in a specific isolated wooded area of that county. This had occurred on several occasions over a one-year period. Each scene had been examined by regulatory personnel and uniformed police officers. At one of the very first crime scenes, a trained police crime scene technician photographed a wooden wedge and hammer that was believed to have been used in the commission of the crime (see Figures 1.1 & 1.2). During the follow-up criminal investigation, an effort was made to physically inspect these items for any possible forensic evidence. The investigator assigned to the case was informed that the items had been photographed, but not seized as

evidence. In addition, there was no record of any physical examination of the items taking place at the crime scene. From the prosecution's perspective, valuable evidence may have been lost. The hammer depicted in the photograph "may" have had fingerprints on the handle. Additionally, it may have contained a company logo or "property of" label on the other side with the owner's name clearly visible. From the defense counsel's perspective, had a proper forensic examination of the hammer occurred, it may have resulted in the production of exculpatory evidence that would tend to have exonerated his or her client. In addition, the potential "property of" label on the unexamined item may have contained the name of the true criminal in this case. Although this is a minor environmental crime case, it exemplifies the systemic problems that occur during the evidence collection process at environmental crime scenes. It makes no difference if the crime scene involves a few drums of abandoned hazardous waste or if it involves a sprawling manufacturing facility with dozens of environmental sampling points. The same question arises regardless of the scope and scale of the evidence collection event. That question being: *If this were a homicide crime scene, as opposed to an environmental crime scene, would the items depicted in Figure 1.2 been seized as evidence and subjected to a forensic examination?*

Unfortunately, this example also exemplifies the point that even when environmental crime scenes are approached by "trained" law enforcement personnel, both the prosecutor and the defense counsel should be prepared for the possibility of a diminished level of appropriate crime scene management and evidence collection protocols. This event also illustrates that simply because regulatory or contract personnel are accompanied by law enforcement officers, there is no guarantee that proper crime scene management and evidence collection protocols will be followed.

The following chapters are designed to expose the vulnerabilities associated with a criminal environmental prosecution. In most instances, these vulnerabilities occur due to a lack of proper training and resources. Local, state, federal and tribal criminal environmental enforcement personnel have received very little support in the form of personnel, training and resources over the past several decades. This has forced many well-meaning and dedicated environmental prosecutors to rely almost exclusively on regulatory personnel and civilian