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NEW CACJ MEMBERS

Following is a list of persons who became members of CACJ from January 1 to February 28, 1985. In the coming months FORUM will continue to list persons who have joined CACJ since the previous issue.

If you have colleagues who may want to join CACJ please phone their names in to the CACJ office —(213) 627-0137—and they will be sent membership information.

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No Sanctuary From Government

In the Reagan Administration's decision to attack the sanctuary movement, which assists Central American refugees, we are seeing a frightening intrusion by the government on religious practice. Sixteen persons—ordained clerics and lay religious workers, all members of the movement providing succor to people fleeing the violence in Central America—were indicted in Phoenix earlier this month on charges of smuggling, transporting and harboring illegal aliens. If convicted they face prison terms of as much as 15 years. The indictments were obtained by a startling violation of the sanctity of places of worship: the use of undercover law enforcement agents to surreptitiously tape meetings held in churches.

The Justice Department has attempted to dismiss all concern over this potential threat to religious freedom with a wave of the hand. The defendants face charges unrelated to religious activity, the department says; the state must prosecute whenever a criminal infraction comes to its attention, and no one, however well-intentioned, may be permitted to put himself above the law. These assertions are factually incorrect, constitutionally flawed and politically disingenuous.

First, the defendants are being prosecuted for the exercise of their religious beliefs. They take the mandate to assist those in need—to feed the hungry, clothe the naked and counsel the distressed—from the Scripture and the ancient traditions of their faith.

In the first sanctuary case, last year Stacey Merkt, an employee of the Roman Catholic Diocese of Brownsville, Texas, was prosecuted for transporting two Salvadorans, Brenda Sanchez-Golen and Mauricio Valle, who wished to seek political asylum in this country. Sanchez-Golen had been a medical aide at a San Salvador clinic run by the Lutheran Church. The clinic's commitment to help the poor was deemed subversive by government forces. Sanchez-Golen (and others) told of an especially brutal murder of her friend at the clinic, a pregnant woman, by a government soldier. Valle said—and this was corroborated by other evidence—that he was arrested and beaten and was close to execution when soldiers realized that he was not the man they intended to arrest.

Obviously, assistance to refugees such as these is dictated by Christian principles. Thus the sanctuary prosecutions do involve an effort by the state to suppress quintessential religious activity.

Second, the prosecutions are not required by the scope of the relevant statute. When the law prohibiting the smuggling and transporting of illegal aliens was passed in 1952, Rep. Emmanuel Cellar (D-NY), made clear that it was directed at those who exploited aliens for financial gain, saying: "(W)e do not want to get after the good people. It is the bad at whom we aim our shafts." Thus the statute's framers included within it elements of illegal knowledge and purpose that preclude its application to humanitarian workers such as the sanctuary defendants.

The sanctuary movement arguably is protected by the free-exercise clause of the First Amendment. That clause offers no immunity from prosecution for criminal conduct that is in itself evil—rape, murder, theft—even if undertaken pursuant to the most pristine religious motives. But the right to free exercise can excuse noncompliance with essentially regulatory schemes, the violation of which is not inherently evil.

In a sanctuary case now under way in Corpus Christi, Texas, a federal judge held this week that "the entire national interest of an immigration policy" outweighed the defendant's right to the free exercise of religion. However, the issue—the constitutionality of religiously motivated assistance to those fleeing the bloodshed in Central America—is far from being fully resolved.

The Reagan Administration could simply have ignored the sanctuary movement, whatever its legal status. In several recent cases under the Ethics in Government Act, the Justice Department has asserted an absolute right to decline prosecution of criminal violations if in its opinion such prosecutions would not serve the public interest. Rather than exercising that option here, the Administration has decided that a hand extended in charity to one such as Brenda Sanchez will soon bear the brand "felon."

This dangerous conflict between the laws of God and the dictates of Caesar arises from a refusal of the State Department and the White House to grant either political asylum or "extended voluntary departure" status to Salvadorans who flee their country's civil war, although that latter status, permitting an indefinite stay, is available to those who flee Poland. Embarrassed to admit that misuse of the weapons that it provides to the Salvadoran military is a prime cause of civilian flight, the Administration maintains that the refugees are motivated solely by economic considerations, and therefore are illegal aliens. To posit that people fleeing death squads are nothing more than job hunters is as demeaning as would be an argument that an escapee from a Siberian Gulag simply was seeking a better climate.

Ronald Reagan's support of religious activism is thus, at best, selective. No doubt his heart is sincerely with the Catholic Church in its efforts to protect the rights of Polish workers from repression by a government that Reagan dislikes. A church's commitment to the Sermon on the Mount, however, is as likely to produce confrontation with the President's friends as his enemies. The Administration now has demonstrated that it will not hesitate in wielding its prosecutorial power to suppress claims of religious conscience that it finds politically discomfiting.

—Dennis Riordan

Dennis P. Riordan is a member of the CACJ Board of Governors. He represents Stacy Merkt on appeal.
The excellent results achieved in the Skid Row Stabber case would not have been obtained without the complete and innovative assistance of Mr. Whitmeyer and the posse from Ventura.

Fred H. Alschuler, Esq.
Defense Attorney
Skid Row Stabber Case

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6 / forum / March-April 1985
President’s Column

Member Participation in CACJ Crucial in 1985

By Robert Berke

Given the headlines of the past few months, the need for vigorous participation in CACJ this year could not be clearer.

Recently, legislation has been introduced to reduce the twelve person jury to six in misdemeanor cases, to eliminate voir dire by attorneys in non-capital cases, to require a study of the “rising costs” of civil jury trials to assure financial “restraints and incentives” for “cost effectiveness,” and to abolish the unanimous jury verdict in non-capital cases. These legislative proposals are, of course, topped by a series of bills which provide for video-taped testimony in place of direct confrontation of complainant witnesses in child abuse cases.

Attacks on Court

Supplementing this legislative activity are repeated attacks on the Supreme Court, with the crucial election day now barely 18 months away. The amassing of a large amount of money to attempt to topple the Court has obvious and dangerous implications for the separation of powers, best illustrated by a couple of recent developments. On February 20, Assemblyman Willie Brown observed that the Supreme Court could defuse the attacks by permitting the execution of some individuals on Death Row. Shortly before this statement, Governor Deukmejian had criticized the Court for being “bad for business,” a sin which presumably warrants rejection of the justices. When asked for specifics, the governor replied that he had a list of thirty-one cases, a tactic we have seen before in another political era, as supposed proof of his charges. Some of the justices subject to reelection did not even participate in some of the cases cited as “evidence” against them. Other cases listed by the governor did not concern business practices at all. One case cited as bad for business, for example, provided that an appellate court must provide an opportunity for a party to respond before a peremptory writ is issued. The Deukmejian approach poses the obvious danger that the courts and the legislature will be, in effect, one and the same body; that judges must consider the electoral repercussions of ruling, for example, for an unpopular party. Such decision-making is wholly antithetical to the role of the judiciary. The chance that the rights of minorities, unpopular groups, or those accused of crime will be protected by the courts diminishes with each new ideological electoral litmus test.

Fortunately, many individual CACJ members will be extremely active in this critical year. Board of Governors member Dennis Riordan has been invaluable, leading a corps of volunteer attorneys in a research project to assemble accurate information about the Supreme Court. That information will be indispensable in counteracting the irresponsible attacks which are sure to come. Board members Lou Katz and Tom Adler worked with the San Diego chapter of the American Civil Liberties Union in filing a suit to halt the unlawful expenditure of public funds by San Diego Sheriff John Duffy, who was using his deputies to distribute postcards critical of the Chief Justice. Duffy subsequently agreed to stop the practice.

Upcoming activities

In the Spring, CACJ will hold mini-seminars on the defense of sex abuse cases throughout the state. With the help of Tom Nolan and Jerry Uelmen, CACJ’s Annual retreat will be held at UC Santa Cruz, featuring improved residential housing, a creative and exciting program of workshops and plenty of opportunities to relax and exchange ideas.

CACJ Foundation is in the early stages of planning a conference for next year on the impact of California’s determinate sentencing laws. Recently, the Foundation sponsored a successful premiere of the play “Twelve Angry Men” at the opening of the Henry Fonda Theatre in Hollywood.
Legislature’s ’85-’86 Session Opens; New Committees Chosen

By Larry Briskin

The State Legislature began its 1985-86 session in earnest on January 7, amid more harmony between the Democrats and Republicans and Senate and Assembly than has prevailed since the passage of Proposition 13 in 1978. The first day seemed like a “love-in” on the Assembly and Senate floors, with the Republicans unanimously supporting the re-election of Assemblyman Willie Brown as speaker. From a public perspective, the cooperation has continued unabated into the middle of February (the date of this writing), although, as always, considerable tension prevails in behind-the-scenes maneuverings.

Committee make-up

Both the Assembly and Senate committees that hear most criminal law bills have new chairs, and the Assembly committee also has a new name. Assembly Speaker Brown, intent on naming Republican chairs to several committees, chose Assemblyman Larry Stirling to chair the renamed Public Safety Committee (I believe the last time we had a committee of that name was during the French Revolution!). Stirling, who as a committee member last session gained a well-deserved reputation for badgering and attempting to intimidate defense-oriented witnesses appearing before the committee, has publicly pledged to be fair and impartial in his treatment of all bills and witnesses this session. Stay tuned for updates on whether the La Mesa Republican is true to his word.

Joining Stirling on the seven-member committee are Democrats Burt Margolin and Gwen Moore, holdovers from last session, and newcomers Charles Calderon and Robert Campbell. Margolin, Moore, and Calderon are all from the Los Angeles area, while Campbell is from Richmond. Don Rogers from Bakersfield joins Stirling as the second committee Republican, while a third minority party member, probably Nolan Frizzelle from Huntington Beach, is expected to be named by the time you read this. The 1985 committee is clearly less defense-oriented than the Criminal Law and Public Safety Committee was during the 1983-84 session, making CACJ’s job even more difficult than usual. It will take only one Democrat to line up with the three Republicans to pass controversial bills.

On the Senate side, San Leandro Democrat Bill Lockyer became the first non-attorney to be named to chair the Senate Judiciary Committee. Lockyer, a night law student, replaces Senator Barry Keene, who won election among Senate Democrats as their Majority Floor Leader, the number two Senate post. Keene, who represents most of the northwestern part of the state, remains on the committee, along with Democrats Nicholas Petris from Oakland, Diane Watson and Art Torres from Los Angeles, and Robert Presley from Riverside. Committee Republicans are Milton Marks from San Francisco, Ed Davis from San Fernando Valley, and John Doolittle from Sacramento. First indications are that, as chair, Lockyer intends to ensure that both defense and prosecution perspectives are carefully considered by the committee. It is possible that a coalition of Lockyer, Keene, Petris, Watson and Marks will band together to kill controversial bills, relieving some of the pressure on Public Safety Committee Democrats.

Child abuse bills dominate agenda

The criminal law issue for 1985 is child sexual abuse, with 26 of the first 102 criminal law related bills introduced addressing that concern! Attention is currently riveted on SB 46 (Torres), which would authorize a court to order child witnesses in sexual abuse cases to testify by closed circuit television upon a finding of serious psychological harm to the child if s/he testifies in court. The bill passed the Senate Judiciary Committee with the minimum number of votes, passed the full Senate 28-8 (one more than the minimum 27 needed for this urgency bill), and was scheduled to have been heard by the Public Safety Committee on February 19. Torres, carrying the legislation at the request of the McMartin case parents, has hopes of passing SB 46 in time to have it apply to testimony at the preliminary hearing by some of the children in that case. CACJ, along with the California Public Defenders Association, has proposed several alternatives to SB 46, which appears to violate the confrontation clause of both the state and federal constitutions. These alternatives include:

- Having the public view allegedly abused children’s testimony by closed circuit TV at trial;
- Creating special courtrooms in which alleged child victims would testify or allowing judges to reconfigure existing courtrooms to make them less intimidating to child witnesses; and
- Allowing the court, after a warning, repeated conduct, and a hearing, to exclude a defendant whose conduct attempts to intimidate or coach an alleged child victim of sexual abuse.

SB 46 is one of the more difficult issues we will be facing this year. Unfortunately, it is also the first. I plan to report on the outcome in the next issue of Forum.
**Amicus Action**

The following summaries of recently filed CACJ amicus briefs or applications to file were provided by Ephraim Margolin, who chairs the CACJ Amicus Curiae Committee.

Caldwell v Mississippi, U.S. Supreme Court, 83-6607. Ephraim Margolin on the brief. The issue: constitutional requirement for state funding of defense experts and investigators. Filed.

*Press Enterprise v Superior Court*, Cal. S.Ct., 318176. Ephraim Margolin and Sandra Coliver on the brief. Ephraim Margolin argued. Closing of preliminary hearing at the request of the defense. The case was won with a decision declaring that there is no First Amendment right in the public to attend preliminary hearing when defense shows reasonable need for closure.


*Gilbert v Superior Court*, Cal. S.Ct., /Civ. A0274539. Ephraim Margolin and Nicholas Arguimbau. Letter in support of hearing on authority of trial court to reverse its order granting reasonable attorney fees after trial and due to public outcry.


*People v Anderson*, Cal.S.Ct.,

AO17390. Attorney letter brief opposing good faith exceptions to evidence rule in California on refusing depublication. Depublished.

*People v Aguiar*, Cal. S.Ct., A016273. Frank Winston of San Francisco in support of request to file late amicus where Pacific Foundation was allowed such filing.

**Cases Not Heretofore Reported**


*People v Volmer*, App. Dept. Kern Superior Court A-642. Michael Millman of San Francisco. Alleged violation of arbitrary prison rules by an attorney was decertified; jury was improperly instructed. Conduct involved loud argument and passive resistance resulting in a P.C. §198 charge.


*U.S.A. v Darrell Simpson* (Court of Appeals, 84-5301, 9th Circuit), amicus referred to Bob Berke of Los Angeles. Appeal from suppression of Judge Terry Hatter of authorized wiretaps after the court found that the application for the wiretaps contained artfully drawn misstatements which misled the magistrate. Further Judge Hatter granted dismissal for outrageous government misconduct.

"... while the cases and counsel talk about conduct raising to the level of governmental misconduct, the conduct here has lowered itself to that level." The factual finding is that the government acted as a pimp sending a known prostitute and heroin addict to get close to the defendant in order to entice him into a heroin transaction with his friends who were in fact government agents. This use of "sexual inducement," along with evasions and misrepresentation by the strike force, make this one of the more important potential defense cases in the nation.

*U.S. v Bayard Spector*, 8th Cir. 84-2493-EM. Ephraim Margolin and Linda DeMetrick. Right to bail pending appeal under new Bail Reform Act.

*Song v Smatko*, 2 Civ. 68870. Howard W. Gillingham, of Los Angeles, for CACJ. Amicus letter in support of a hearing. Exorbitant and unjustified sanctions against counsel, adequate notice, adequate time to prepare, adequate time to effectively represent the sanctioned lawyer, and adequate hearing are the issues.

*Castro v City of San Jose*, Court of Appeal (number still unknown). Tom Worthington, Tom Nolan, and Berndt Brauer in charge of determining what amicus response is justified. A civil case against the police raising significant issues of police misconduct.

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REPORT ON A RESPONSE TO PROSECUTOR'S MOTION TO TEMPORARILY RELEASE EXHIBITS PENDING APPEAL FOR USE IN INVESTIGATION OF ANOTHER CRIME

Clients are two death-row appellants. The People moved before the California Supreme Court for an order temporarily releasing bullets and bullet fragments from evidence for examination in investigation of another crime. Appellants objected on grounds that: (1) People's claim that evidence would be preserved was conclusory hearsay, (2) effects of laboratory examination of exhibits on the usefulness of the exhibits as evidence in subsequent proceedings is a matter to which parties and experts can legitimately disagree, (3) in light of probability that a new trial would eventually be granted, appellants should have the opportunity to consult experts, appointed if necessary, to review procedures anticipated to be performed, (4) appellants' counsel should have the right to cross-examine those persons to be involved in handling and examining the exhibits.

Results: An order from the Supreme Court, signed by Chief Justice Bird and Associate Justices Mosk, Kaus, Broussard, Reynoso, and Lucas, denying People's motion without prejudice and stating in relevant part: Respondent is invited to resubmit the motion, supported by a declaration setting forth the precise scientific procedures which are contemplated to be performed on the exhibits, and a showing that counsel for appellants have been given a reasonable opportunity (1) to consult with their own experts, and (2) to cross-examine persons involved in the scientific procedure proposed, in order to verify that the contemplated procedures will not consume or compromise the integrity of the exhibits . . .

Nothing in this order is intended to direct or obligate the . . . Police Department to divulge the details or nature of the pending investigation to the court or to appellants.

Perhaps this illustrates a useful approach for similar cases.

Nicholas C. Arguimbau San Francisco
Recent Developments in Defending D.U.I. Cases

By William M. Thornbury

The following summary of 1983 and 1984 decisions affecting the defense of driving under the influence cases focuses on the substantial developments in the elements and defenses to the charge and in pretrial motion practice.

Prior convictions

People v Sumstine (1984) 36 Cal3d 909 clarified the substantive and procedural uncertainties which had arisen since the advent of Boykin/Tahl requirements when a prior conviction is challenged as unconstitutional. It holds that the motion may be based upon any defect in the advice concerning each right lost by plea of guilt or any defect in the waiver of each right. Cases limiting the motion to allegations of the denial of counsel were specifically disapproved.

Specifying the procedure in moving to strike a prior, the Court adhered to the rules established in People v Coffey (1968) 67 Cal2d 204. Although a silent record is an appealable defect after Boykin/Tahl, a motion to strike is a collateral attack and requires more, specifically an allegation that advice or waiver was defective. Allegations of a silent record will not entitle the defendant to a hearing.

Once the existence of the prior conviction is established by the state, the defendant bears the burden of producing evidence that his constitutional rights were infringed in the obtaining of the conviction. It is in this area that Sumstine causes difficulty. Sumstine suggests that a docket sheet which fails to reflect advice or waiver is sufficient to meet that burden, at least when a reporter's transcript is unavailable. However, People v Zavala (1983) 147 CalApp3d 429 holds that the burden cannot be met by production of a docket sheet which reflects advice and waiver, albeit without sufficient Boykin/Tahl specificity, and which further indicates the existence of a more complete record. Such a docket sheet or minute order is not evidence of a constitutional defect. The burden is then met by defendant's production of a transcript showing a defect. It is also possible to introduce testimony contraverting advice or waiver. (See People v Hoffman (1984) 162 CalApp3d 376—"I don't remember" is not enough.)

A second development is more favorable. Prior convictions which are not charged have created strategic problems in the past. If not revealed to court and prosecutor, the D.M.V. may still use the prior to suspend the defendant's license upon a second conviction. The defendant who needs to have a license can only keep it through court-ordered diversion under SB 38, requiring revelation of the prior and acceptance of other adverse consequences. In Pollack v D.M.V. (1984) 153 CalApp 3d 535, the Court of Appeal held that the D.M.V. may not rely upon a prior conviction for suspension unless it has been pleaded and proved in the proceedings in which the second conviction occurred. A hearing has been granted, vacating the opinion, but leaving open the possibility that the California Supreme Court may reach the same result. That possibility must be weighed into any present decision to reveal an uncharged prior.

In a third area, decisions have opened a path to challenge prior convictions of persons with limited English speaking ability. People v Aguilar (1984) 35 Cal3d 785 holds that an express and personal waiver of a right to an interpreter is required for all critical stages in which the interpreter is not fully available to the defendant. Once the right to an interpreter attaches, it is infringed upon when an interpreter is borrowed to interpret for a witness, or used for other defendants in a mass arraignment. An allegation that a defendant was separated from an interpreter at any point and consequently failed to understand and intelligently waive a right can invalidate a prior. (15-People v Menchaca (1983) 146 CalApp3d 1019, approved in Aguilar.) The interpreter must have been an official court interpreter. (People v Chavez (1981) 124 CalApp3d 215.) In moving to strike on this ground, the entitlement to an interpreter must either be established in the record or alleged in the moving papers. (People v Durante (1984) 161 CalApp3d 438.)

In a fourth area, recent decisions suggest that a motion to strike a prior obtained from an unrepresented defendant may be challenged for failure of the rendering court to advise the defendant of the dangers of self-representation. In People v Joseph (1983) 34 Cal3d 936, a capital case, such advice was held to be required on the record as a constitutional matter. While previous cases had suggested that such advice was not required in misdemeanor matters, (See People v Paradise (1980) 108 CalApp 3d 364) more recent decisions have read Joseph to require advice in each case, including the court which authored Paradise (See People v Spencer (1984) 153 CalApp3d 931). Consistent with Sumstine, it must be alleged that such advice was not received, not that the record is silent.

Probable cause to arrest

In State v Carlser (Colo. 1984) 677 P2d 310, the Colorado Supreme Court held that field sobriety tests constitute a "search" within the meaning of the Fourth Amendment, requiring that a demand for performance be preceded by probable cause to arrest. It based its ruling on the degree of intrusion into a
suspect's privacy, which exceeded the limited actions which are permitted for cause less than probable. It also addressed the lack of constitutional "voluntariness" in rejecting a justification of consent. Since it is based upon the United States Constitution, it survives recent Proposition 8 developments.

The argument accepted in Carlsen has not been made in California, at least not in recent times. In Marvin v. D.M.V. (1984) 161 Cal.App.3d 717, an officer observed typical D.U.I. indicia—erratic driving, bloodshot eyes, odor of alcohol—and demanded the driver perform a field sobriety test. The driver refused. The Court of Appeal held that the refusal evidenced consciousness of guilt which, coupled with the other factors, amounted to probable cause. However, if the tests constitute searches, then a suspect is privileged to refuse them absent probable cause. (See People v. Redmond (1981) 29 Cal.3d 904; U.S. v. Prescott (9th Cir. 1978) 581 F.2d 1343.) In most cases, probable cause is established by the results of the test. A potentially fertile argument can be based upon Carlsen in a great number of cases.

Miranda

In Berkemer v. McCarty (1984) 468 U.S. ___, 82 L.Ed.2d 317, a weaving motorist was stopped and found incapable of passing field sobriety tests. The officer's questioning produced incriminating replies. The motorist was then formally arrested. Holding that the questioning did not take place during custodial interrogation, the Supreme Court dispensed with any need for Miranda advisements. The restraints applied to the motorist prior to his formal arrest were not sufficient to create the dangers against which Miranda guards. Surprisingly, the opinion was authored by Justice Marshall.

The motorist had argued that using formal arrest as a determinant of Miranda safeguards would invite manipulation of the timing of arrest and other abuses, and urged that Miranda should apply as soon as probable cause to arrest arose. California relies upon such a rule, (People v. Coccione (1968) 260 Cal.App.2d 886) which should now be argued under the California Constitution (See In re Ramona R. (1985) 37 Cal.3d ___). The Supreme Court suggested that any delay in formal arrest might be viewed as "custody."

Preservation of breath samples

California v. Trombetta (1984) 468 U.S. ___, 81 L.Ed.2d 413, resolved a major issue in thousands of pending cases in holding that the state has no duty to retain a sample of the breath of an arrested motorist which is used to obtain a blood alcohol reading from an Intoxilizer. California had already reacted to the problem by a statute (Vehicle Code §13353.5). Trombetta is based directly on the perceived accuracy of the Intoxilizer and the consequent low probability that the unpreserved breath sample would have exculpatory value. Should that perception change, the result could change also. The question of whether Trombetta has any substantial affect on People v. Hitch (1974) 12 Cal.3d 641, which involved an Intoximeter different in its technology, or the general due process right to preservation of potentially exculpatory evidence, is now pending in In re Michael L. in the California Supreme Court.

Trombetta specifically notes that states remain free to adopt stricter standards of due process. Proposition 8 eliminates exclusion of evidence as a sanction for denial of due process, but sanctions such as dismissal or adverse comment may still remain. At least one case has held that a different standard of materiality applies to lost evidence (a witness, by deportation) under the California Constitution than under the United States Constitution. (Cordova v. Superior Court (1983) 148 Cal.App.3d 177.)

Trombetta may be put to some good use despite its result. It specifically enumerates many of the challenges to the Intoxilizer which can be made without reliance on a breath sample, thereby validating them as legitimate defense tools. Included are faulty calibration, radio wave interference, and blood chemical interference, as well as a potential for operator error.

Elements and defenses

Vehicle Code section 23152(b), defining an offense of having a blood alcohol reading in excess of .10% while driving, has generated concerns that did not exist in under the influence prosecutions. People v. Campos (1982) 138 Cal.App.3d Supp. 1 held that the sufficiency of the evidence to support the charge must be tested by subtracting the recognized error factor from the test result. Thus, with a recognized error factor of 10%, a test result showing .11% blood alcohol would be insufficient to allow conviction.

People v. Pena (1983) 149 Cal.App.3d Supp. 14 recognizes defenses of duress and necessity in driving under the influence cases. The necessity defense had been applied implicitly in the earlier case of People v. Kelley (1937) 27 Cal.App.2d 771. In Pena, the defendant had felt compelled to drive in order to follow the officer who later arrested him, because the officer had virtually kidnapped his woman friend and appeared to be intending her harm. Under the facts of the case, he was entitled to instructions on necessity and duress as defenses.

Two out-of-state cases have redefined the radio frequency interference defense in a helpful manner. In Commonwealth v. Neal (Mass. 1984) 464 NE2d 1356 and Romano v. Kimmelman (N.J. 1984) 474 A2d 1, it was held that the prosecution has the burden of proving that radio frequency interference has not affected the operation or results of a breath testing device. The New Jersey Supreme Court was particularly concerned with testing error because that state, like California, premises liability on proof of a particular blood alcohol level. It made proof of reliability a prerequisite to the admissibility of the test result, making the court determine reliability in the first instance.

Proof of reliability was specified to include compliance with a number of rules analogous to those set forth in Cal. Administrative Code, Title 17. Similarly, the Massachusetts Supreme Court required the prosecution to make a foundational showing that the test results of the model 900A Breathalyzer were not "so susceptible to radio frequency interference as to create a significant risk that the result was inaccurate on that basis." (474 A2d 12-13, n. 6.)
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The following essay was inspired by the 300-year-old transcript of “The Arraignment, Tryal and Condemnation of Algernon Sidney, Esq., London, 1684,” which was presented to Gerald Uelmen by the CACJ Board of Governors in November 1983 on the completion of his term as CACJ president. It was chosen as the winning essay in the ABA’s 50th Annual Ross Essay Contest, for which Professor Uelmen was awarded $9,000. The essay was originally published in the ABA Journal.

In the Supreme Court
of the United States

No. 91-101

JOHN BANKHEAD, Petitioner

v.

UNITED STATES, Respondent

Argued August 10, 1991
Decided October 12, 1991

Chief Justice VERBUM delivered the opinion of the Court.

This case arises in the aftermath of the tragic assassination of the President of the United States and four members of her cabinet on July 4, 1991, during the opening ceremonies of the Bill of Rights Bicentennial Exposition in Philadelphia, Pennsylvania. The petitioner has publicly allied himself with the terrorist organization claiming responsibility for the murders. He acknowledged to three witnesses that he has personal knowledge of the assassination plot and its perpetrators. He now challenges the validity of a warrant issued by a United States District Judge in Philadelphia. The warrant authorizes a duly licensed physician to attach electrodes to the scalp of the petitioner, to monitor his thought patterns for a period of twenty-four hours. The sophisticated use of electrodes sensitive to electrical and chemical activity in the human brain has progressed to the point that mental images produced by recall can now be externally reproduced and recorded. See Strangelove, “Image Transduction by Ultraradiant Electroencephalograph,” 266 Science 363 (1989).

The warrant does not require the petitioner to cooperate in any way. He has been given a grant of immunity, precluding the use against him of any testimony he presents to the special grand jury investigating the presidential assassination. He is already confined for contempt of court in refusing to testify under that grant of immunity. The additional restraint necessary to execute this warrant is thus inconsequential. Nor will the petitioner be subjected to any form of interrogation. The extraction of brain images requires the total absence of external stimuli. The device will simply reproduce the images created by the petitioner’s self-induced recall for a twenty-four hour period. The order requires the physician executing it to record only those images which arc related to the inquiry being conducted, and specifies a list of other suspects for this purpose.

No infringement of any protection afforded by the Fifth Amendment privilege against self-incrimination is involved here. We have long since limited the reach of that clause to compelled communication, not disclosure of private information. Fisher v. United States, 425 U.S. 391, 401 (1976). Here, just as in Andresen v. Maryland, 427 U.S. 463, 473-74 (1976), “petitioner was not asked to say or do anything,” and “the individual against whom the search is directed is not required to aid in the recovery, production, or authentication of incriminating evidence.” In any event, the District Judge obviated any Fifth Amendment concerns in this case by ruling that the previous grant of use immunity will extend to any information gained by the execution of this warrant.

The only issue raised by these proceedings is whether an individual’s interest in the privacy of his thoughts is to be elevated to total immunity from governmental intrusion. The petitioner suggests that such protection is compelled by the Fourth Amendment prohibition of “unreasonable” searches and seizures. The government responds that this search is justified under the Fourth Amendment warrant clause, since there is ample showing of probable cause that evidence of a crime will be discovered, and the warrant describes the evidence to be seized with all the particularity possible under the circumstances. While the petitioner offers apocalyptic visions drawn from the futuristic novels read by every college sophomore generation ago, he can offer no controlling precedent to justify a holding that any expectation of privacy is totally immune from governmental intrusion under the Fourth Amendment.

The Fourth Amendment prohibits only “unreasonable” searches, and the only time this court has ever found any search conducted in compliance with the warrant clause’s requirements of probable cause and particularity to be unreasonable was in Gouled v. United States, 255 U.S. 298 (1921) and its progeny. There, the seizure of papers from a suspect pursuant to a warrant was invalidated because the government had no proprietary interest in the papers apart from their evidentiary value.
This “mere evidence” rule, which precluded the issuance of a search warrant for any items other than fruits and instrumentalities of a crime or contraband, was overruled by this Court in Warden v. Hayden, 387 U.S. 294 (1967), and we have no interest in resuscitating its discredited doctrine. Significantly, the Gouled rule was clearly premised on concepts of the protection of property interests, not privacy. 255 U.S. at 309. Moreover, the Gouled Court specifically recognized that a search pursuant to a valid warrant could not be unreasonable:

“... searches and seizures made under [warrants] are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter.”

255 U.S. at 308.

The warrant issued here, to permit the seizure of petitioner’s thoughts, meets all of the constitutional requisites for a valid warrant. Probable cause is practically conceded. The particularity of the description of the evidence to be seized is no less detailed than that contained in wiretap warrants we have upheld for the interception and seizure of telephone conversations. Scott v. United States, 436 U.S. 128 (1978). The intrusion permitted here closely parallels the seizure of oral communications allowed by wiretapping and eavesdropping warrants. The words being seized in that context are simply the physical embodiment of thoughts in a different form. The fact that their seizure here requires a painless process of extraction from the brain is of no constitutional significance.

The petitioner urges an analogy to a case in which the Fourth Amendment was held to preclude surgical removal of a bullet from the defendant’s body. Lee v. Winston, 717 F.2d 888 (4th Cir. 1983). That decision did not accord absolute protection against surgical intrusions into the body of the accused, however. The court emphasized the physical risks of general anesthesia, rather than the threat to any privacy interest of the accused, in holding that the surgery proposed there would be an unreasonable search. The intrusion proposed here more closely resembles the extraction of blood from a suspect’s blood vessels, or the use of an x-ray to reveal contraband in a suspect’s gastrointestinal tract. These procedures have been permitted pursuant to warrants based on a “clear indication” that evidence would be uncovered. Schmerber v. California, 384 U.S. 757 (1966); United States v. Couch, 688 F.2d 599 (9th Cir. 1982).

The warrant issued here, to permit the seizure of petitioner’s thoughts, meets all of the constitutional requisites for a valid warrant.

The petitioner also suggests that uncommunicated human thoughts should be accorded absolute protection for “freedom of thought” under the First Amendment. The First Amendment, however, is not designed to protect “freedom of thought,” but freedom to communicate. As Justice White observed in Wolff v. McDonnell, 418 U.S. 539, 576 (1974), “freedom from censorship is not equivalent to freedom from inspection or perusal.” The warrant issued here impinges the latter, not the former. Even if First Amendment interests were at stake, that would not elevate petitioner’s thoughts to absolute immunity from search. As this Court noted in Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978), “the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search.”

Finally, the petitioner compares uncommunicated thoughts to the musings of a private diary, suggesting that personal diaries are immune from seizure under the Fourth Amendment. We know of no case recognizing such immunity. To the contrary, courts have consistently permitted the seizure and use in evidence of private diaries, when a sufficient nexus to criminal activity has been established. DiGuiseppi v. Ward, 698 F.2d 602 (2nd Cir. 1983); People v. Miller, 131 Cal. Rptr. 863 (1976). We are not unsympathetic to the suggestion of commentators that private papers are entitled to greater Fourth Amendment protection than ordinary evidence. See McKenna, “The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment,” 53 Ind.L.J. 55 (1978). Perhaps uncommunicated thoughts should be placed at the pinnacle of such hierarchy. But nothing within the Fourth Amendment supports protection which is absolute. Commentators have also suggested that the gravity of the offense is a relevant consideration in determining whether a particular governmental intrusion is acceptable. “Surely there is a valid distinction between society’s interest in obtaining evidence relating to a conspiracy to assassinate the President of the United States and its interest in obtaining evidence concerning a simple trespass.” Comment, “The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations,” 6 Loy. (L.A.) L. Rev. 274, 304-05 (1973). We can leave for another day the question of whether a showing of ordinary probable cause of an ordinary offense would justify the extraordinary intrusion permitted by this warrant. In this case, we have no difficulty concluding that the warrant is valid, and therefore, the search which it permits is reasonable.

Justice VERITAS, dissenting:

Even in the frightening world of “Thought Police” conjured by George Orwell:

“With all their cleverness, they had never mastered the secret of finding out what another human being was thinking.”

George Orwell, 1984, p. 138 (New American Library, 1983). That secret has now been mastered, and this Court is finally presented with the profound question predicted by Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 474 (1928):

“Advances in the psychic and related sciences may bring means of exploring
unexpressed beliefs, thoughts and emotions... To Lord Camden a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?"

The majority finds a "relative" answer for that question in the "warrant clause" of the Fourth Amendment: such invasions of personal security must be "balanced" against the need for the security of the state. I believe the "reasonableness clause" of the Fourth Amendment provides an absolute answer: the invasion of personal security which the warrant in this case authorizes is unreasonable per se. If we truly seek the meaning the Fourth Amendment must have in the "brave new world" of twenty-first century America, we will find it in the precedents of the Seventeenth, Eighteenth and Nineteenth Centuries, not in those of the past twenty-five years. What Justice Brennan said of the Fifth Amendment is equally true of the Fourth: "History and principle, not the mechanical application of its wording, have been the life of the Amendment." Fisher v. United States, 425 U.S. 391, 417 (Brennan, J., concurring).

The history of the common law reveals a consistent struggle to create some impenetrable barriers to governmental intrusion, to protect the privacy even of thought which might be deemed a threat to the security of the state.

In 1683, Algernon Sidney was condemned to death for treason, for daring to write that kings who break their trust may be called to account by the people through their Parliament. The papers in which this writing appeared had been seized from Sidney's bedroom pursuant to a warrant. In pleading his own case before Lord Chief Justice Jeffreys, who later achieved infamy for the "Bloody Assizes," Algernon Sidney raised the same objection to that warrant which is raised by the petitioner in this case:

Col. Sidney: Then, my Lord, I think 'tis a Right of Mankind, and 'tis exercised by all studious men, that they write in their own Closets what they please for their Memory, and no man can be answerable for it, unless they publish it.

Lord Chief Justice: Pray don't go away with that right of mankind, that it is lawful for me to write what I will in my own Closet, unless I publish it; I have been told, Curse not the King, not in thy thoughts, not in thy Bed-Chamber, the Birds of the air will carry it. I took it to be the duty of mankind, to observe that.

Col. Sidney: I have lived under the Inquisition....

Lord Chief Justice: God be thanked, we are governed by Law.

Col. Sidney: I have lived under the Inquisition, and there is no man in Spain can be tried for Heresie....

Mr. Justice Withins: Draw no Presidents from the Inquisition here, I beseech you Sir.

Lord Chief Justice: We must not endure men to talk, that by the right of nature, every man may contrive mischief in his own Chamber, and he is not to be punished, till he thinks fit to be called to it.

(The Arraignment, Tryal & Condemnation of Algernon Sidney, Esq., pp. 34-35, London, 1684). Fifteen years after Sidney was drawn upon a hurdle to Tyburn Hill to be hanged, drawn, quartered and beheaded, his "treasonous" papers were published as Discourses Concerning Government, a treatise which inspired the American colonists who led a revolution against another English King a century later.

'Curse not the King, not in thy thoughts, not in thy Bed-Chamber, the Birds of the air will carry it.'

The American colonists also drew inspiration from the prosecution of another English dissenter whose case, eighty years later, ended more happily. On April 22, 1763, a newspaper called The North Briton appeared on the streets of London, labeling the King's Ministers "tools of despotism and corruption," and accusing King George III himself of complicity in dishonest negotiations for the recently concluded Treaty of Paris. The Secretary issued a warrant commanding four officers:

'to make strick and diligent search for the authors, printers and publishers of a seditious and treasonable paper entitled the North Briton Numb. 45, Saturday, April 22, 1763, printed for G. Kearsly in Ludgate-Street, London, and them, or any of them having found, to apprehend or seize together with their papers, and to bring in safe custody before me, to be examined concerning the premises and further dealt with according to law.'

In execution of this warrant, houses were entered, blacksmiths were called in to break open locked bureaus, papers were seized and nearly fifty suspects were rounded up. Among them was John Wilkes, a rakish member of Parliament who used his prosecution to rally opposition to the government. Wilkes' prosecutor was the Earl of Sandwich, later immortalized for lending his appellation to both Hawaii and Ham on Rye. Sandwich taunted Wilkes, saying he would die "either of the pox or on the gallows." Wilkes responded, "That depends, my lord, whether I embrace your mistress or your principles."

After gaining his release on a claim of parliamentary privilege, Wilkes brought suit against the Secretary of State for trespass. The government spared no expense in defending its action, spending the enormous sum of £100,000 on its legal defense. Wilkes won a judgment of £4,000 when the warrant was declared invalid because none of the suspects was named. Wilkes became London's idol, and its Lord Mayor as well.

Soon after the decision in Wilkes' case, the English courts were presented with the case of another political pamphleteer, John Entick. Entick had been named in the warrant under which his papers were seized, though. Thus, the question of the validity of any warrant purporting to justify the seizure of private papers was directly presented. The answer, provided by Lord Chief Justice Camden, was a resounding restatement of the sentiments expressed by Algernon Sidney a century before:

"If this point should be determined in favor of jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall see fit to charge, or even to suspect, a person to be the author, printer or publisher of a seditious libel. To enter mans house, by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition.—a law under which
Camden who later served as Lord achieved tremendous symbolic England mciv not enter all his force clarets mciv blow th rough it the storm mciv enter mciv he frail its roof may shake the wind mciv debate produced Pitts eloquent and Justice Camden The Parliamentary Pitt boyhood friend of Lord Chief championed in Parliament by William Entick Carrington 19 How State no English man ivoulcl wish to live an to seize private papers vere reminders of this courageous trio and Wilkes-Barre Pa are modern Camden New Jersey Pittsburgh Pa heroism was memorialized in the American colonies and in the American colonies and Tenement.

These events were widely reported in the American colonies, and achieved tremendous symbolic importance. Wilkes, Pitt and Lord Camden, who later served as Lord Chancellor, were among the loudest critics of the colonial policies which led to the American Revolution. Their heroism was memorialized in the names of colonial cities and towns. Camden, New Jersey, Pittsburgh, Pa. and Wilkes-Barre, Pa. are modern reminders of this courageous trio. Their attacks on the use of warrants to seize private papers were remembered when the former colonists fashioned a Bill of Rights. Those who drafted the Fourth Amendment in 1791:

"...vibrated in sympathy with the new libertarian trends in England. Colonial lawyers would naturally turn to the speeches of Pitt and the opinions of Mansfield and Camden—especially of the latter, whose pro-colonial speeches had won him high place in the hearts of American patriots—for eloquent exposition of English liberties and weighty examination of the common law of searches and warrants."


Thomas Jefferson kept a complete set of the "State Trials" in his personal library, so he was well-acquainted with the proceedings against Sydney, Wilkes and Entick. Catalogue of the Library of Thomas Jefferson, Vol. 5, p. 296.

This history breathes life into the command of the Fourth Amendment that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As the majority reads these words, they add absolutely nothing to the warrant clause. They can only serve to detract from the warrant clause, by allowing warrantless searches which are "reasonable." Yet the history of the Fourth Amendment convincingly demonstrates that the "reasonableness clause" was added because the warrant clause alone was deemed insufficient protection against the excesses of governmental intrusion. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, p. 103 (1937); Warden v. Hayden, 387 U.S. 294, 316-7 (1967) (Douglas, J., dissenting).

When the question whether the Fourth Amendment erected any absolute barriers to governmental intrusion was finally presented to this Court, the Justices quite naturally looked to "events which took place in England" and were "fresh in the memory of those who achieved our independence" to ascertain the meaning of the terms "unreasonable searches and seizures." In Boyd v. United States, 116 U.S. 616, 530 (1885), Mr. Justice Bradley quoted Lord Camden's opinion in Entick v. Carrington at great length, then summed up its meaning in words which once again echoed the "right of mankind" asserted by Algernon Sidney:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventurous circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacy of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other." Justice Bradley's opinion was praised as a landmark to be remembered "as
long as civil liberty lives in the United States," (Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 474 (1928), and condemned as "dangerous heresy" and "radical fallacy" (8 J. Wigmore, Evidence §2264 (3d Ed. 1940)). The barrier he erected was much too broad, and has since been largely dismantled. Fisher v. United States, 425 U.S. 391, 407-09 (1976). But the basic principle he espoused was an accurate reflection of one of the highest aspirations of the common law: to protect a private inner sanctum of individual feeling and thought which cannot be penetrated by the government. What is at stake in this case is the last remnant of that barrier, a sanctuary "where the law can never reach." Warden v. Hayden, 387 U.S. 294, 321 (1967) (Douglas, J., dissenting). Its preservation does not require the resuscitation of Boyd's discredited "mere evidence" doctrine, which required the government to establish a "property" interest in the items to be seized under a warrant. In discarding this doctrine in 1967, we left open the question whether the very nature of "testimonial" or "communicative" evidence may preclude it from being the object of a reasonable search and seizure.

The majority concludes that the question reserved in Warden v. Hayden was answered in Andresen v. Maryland, 427 U.S. 463 (1976), when we rejected an argument that seizure of business records from the defendant's offices could be opposed on self-incrimination grounds. Andresen addressed Fifth Amendment concerns which are not relevant here. What is objectionable with the warrant in this case is not that the petitioner is being compelled to divulge his thoughts. What is objectionable is the government's intrusion into those thoughts at all, even with a warrant.

Once we abandoned any role for the Fifth Amendment privilege against self-incrimination as an absolute protection of privacy interests, Fisher v. United States, 425 U.S. 391 and 401 (1976), we were left with the "reasonableness" clause of the Fourth Amendment as the only means of defining the limits of governmental intrusiveness. The majority has now eschewed any independent significance for that clause, in effect holding that all searches conducted pursuant to a valid warrant are, ipso facto, reasonable. That relegates the privacy of our thoughts to "relative" protection, depending upon how convincing the governmental need for the intrusion might be.

By purporting to "balance" the interest of the individual in the privacy of his thoughts against the interest of the state in effective law enforcement, the majority has stacked the scales. How can the intangible benefits of untrammeled thought, even thought which contemplates the destruction of society, be measured against the concrete cost imposed by the escape of those who have struck a mortal blow against the fabric of our society? While the majority purports to limit the breadth of their holding by the prospect that the balance may be struck in favor of the privacy of individual thought in future cases, with less egregious facts, history offers little reason to hope that this prospect will ever be borne out. Only the recognition of a sphere of absolute protection under the Fourth Amendment will give recognition to

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the absolute value we ascribe to privacy of thought. The cases in which the government seeks to intrude into this sphere will always be “hard” cases. The case of Algernon Sidney was a “hard” case. So were the cases of John Wilkes and John Entick. A willingness to pay the price of “hard” cases will not be apparent, “…so long as Fourth Amendment holdings must find justification in their ability to maximize protection of the “innocent” at a minimum “cost” to society. Hopefully, the demarcation of a sphere of absolute privilege as a right under the Fourth and Fifth Amendments will, by redirecting attention to the human rights of the accused, support efforts to provide greater protection for the similar values at stake in the nonprivileged area.”

Note, “Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments,” 90 Harv.L.Rev. 945, 991 (1977). Right now, the “balancing scale” of Fourth Amendment protection remains at sea with no anchor. There is literally no extreme beyond which governmental intrusion is absolutely forbidden. With the privacy of human thought left to the warrant clause of the Fourth Amendment for protection we have come full circle in our Fourth Amendment odyssey back to the position espoused by Lord Chief Justice Jeffreys in the trial of Algernon Sidney over three centuries ago:

“Curse not the King, not in thy thoughts, not in thy Bedchamber, the Birds of the air will carry it.”

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Murphy’s Law and the Trial of Criminal Cases: Antidotes and Prophylaxis

By James Jenner

Murphy’s Law has been defined in the world of industry and business as follows: “If anything can go wrong, it will in fact go wrong.” Although to my knowledge this proposition has never been applied formally to criminal cases, it should be, because in the judicial arena when anything can go wrong, it usually does.

The purpose of this brief treatise is to illustrate various untoward events that can happen during the course of an ordinary trial; in Murphy’s words, things that will go wrong. It is hoped that through a study of various embarrassing situations that arise, certain rules can be developed and therefore certain failsafe procedures developed to avoid the impact of the seemingly inexorable dictates of Murphy’s Law.

There are basically five antidotes to the application of Murphy’s Law.

1. The Graceful Denial: The untoward event or disastrous piece of evidence is dealt with as if it never happened. The event or physical evidence is ignored.

2. The Direct Attack Antidote: The untoward event is turned around and literally jammed clown the opponent’s throat.

3. The Adoption Response: The untoward event is considered as if it were your evidence and your idea rather than the opposition’s devastating evidence.

4. The fourth antidote is the Adaptation Technique: The untoward event is admitted and accepted, but
   a. its importance in total context is minimized or,
   b. the evidence is temporarily accepted and admitted but with retaliation or contradiction occurring at a later time in the trial, or at some other point in the judicial process.

5. A fifth and last antidote is more in the nature of a prophylactic rather than an antidote. Certain unpleasant and harmful situations (to the defense) are so regular in their occurrence and so capable of anticipation that efforts can be made before trial to avoid them entirely.

Ways of avoiding the deleterious occurrence depend primarily upon:
   a. getting evidence through adequate discovery and
   b. keeping evidence out through the sagacious use of objections, including the so-called anticipatory objection or motion in limine.

The obstreperous judge

Every attorney has at one time or another been confronted by the obstreperous judge, who having mounted the bench and donned the robe, still carries at his side the advocate’s lance. Unfortunately, often that lance is directed at the defendant and not the State. It will often be the defense attorney’s chore to deal with the obstreperous intervening judge who is either taking the sting out of your cross-examination or undermining the effect of defense evidence.

Example No. 1: A very typical situation is the following based on an actual case history. The defendant had been accused of molesting a 17 year old girl whose actual physical maturity appeared far in excess of her chronological age. Each time the prosecutor would ask a question to which the answer was highly damaging to the defense, the judge, a rather puritanical and easily offended sort, would crank her condor-like neck over to the witness and ask that each and every damaging detail be repeated as if she the judge had not heard the devastating testimony. This ritual occurred approximately 15 times during both the direct and cross-examination of the complaining witness. After an accumulation of such conduct on the part of the court, what is counsel to do: jump to his feet and cite the court for misconduct before the eyes of the jury? Certainly not. In the United States, where the usual juror has an almost obsequious or slavish regard for authority and adulates the judge if not so much for his talent and judicious temperament as for the fact of the office he represents, any such objections would appear inappropriate and perhaps lead to jury irritation. It appears that counsel is trapped, that there is no recourse. But, alas, such is not the case. The antidote here involves technique number 4b mentioned above (see the Adaptation Technique). The judge’s very conduct can be twisted around and applied against the state in the following way: in final argument counsel argues that even the judge had to ask the witness to repeat answers on 15 separate occasions. The witness spoke so low and so softly that the judge herself, veritably sitting in the lap of the witness, could not hear her. What does this indicate to you, members of the jury, other than a witness who is not telling the truth?

It might also be appropriate in such a situation to intimate that the judge had to keep requesting repetition of the answer because of the court’s own incredulity with regard to the veracity of the testimony itself. As can be seen, the devastating effect of the court’s untimely intervention in the case was not approached directly but was adapted and converted to counsel’s own use for later argument. It is not meant to be suggested here that such a tactic will in fact result in victory. It is merely to state that this type of judicial conduct can at least be neutralized to a degree later in final argument. The devastating effect is probably thereby diminished considerably.

On the counterpoint side of things, one must also remember that from the defense advantage standpoint there will often be instances where testimony is elicited that is highly favorable to the defense. A technique for underscoring this favorable evidence is to request the reporter to reproduce it for use by way of documentary presentation during final argument. Also, the reporter can...
be asked to read back such testimony. In this event, however, it must appear that you are “mockingly” surprised by the testimony (albeit pleasantly so) or that you “did not hear the testimony” and are thus asking to have it repeated. In either situation, of course, too many instances of asking for repetition become transparent and the jury may well lose faith in your sincerity.

Should the judge in question be notorious for his intervention as the second prosecutor in criminal cases, technique number 5 for avoiding the application of Murphy's Law is appropriate. That is, special preparations should be made to deal with the court's intervention before it in fact occurs. A peremptory challenge of the judge under §170.6 of the Penal Code may well be in order or a trial brief, Memorandum of Points & Authorities, stating the judicial obligation of impartiality produced and presented to the court in advance of trial. Too, a motion for a new trial accumulating in succinct and complete chronological detail all of the acts of the court showing partiality by way of intervention can be presented under §1181 of the Penal Code. Any court who has resisted counsel's objections and efforts to ensure impartiality, who later sees the total cumulative recitation of all its errors is likely to acquire a good case of the appellate jitters. Although the motion may well not be granted, it will have the therapeutic effect hopefully of tempering the judge's conduct in future cases. The motion for a new trial in this instance is not used so much for its intended purpose, i.e., the granting of a new trial based on statutory grounds, but rather as a device for correcting judicial bad behavior. Cross reference should be made at this point to other motions, such as Wade/Gilbert Identity Procedures and in some instances motions pursuant to §1538.5, where the motions are not really made for their intended purpose, but rather to elicit evidence that later can become the basis for defense tactics in the actual trial. (See The Unassailable Witness, infra.)

Also in keeping with technique number 5, i.e., avoiding the untoward event altogether as a prophylaxis rather than as an antidote to Murphy's Law, it is sometimes helpful to invite a representative of the local bar association to attend portions of any trial in which a judge is intervening and thusly devastating the defense case. The invitation to such a representative is initiated by way of a formal request asking the court to allow a bar representative to sit behind the rail in attendance during trial in order to take notes and observations concerning the conduct of the trial. What more chilling effect upon the conscience of the obstreperous judge? Sometimes it is also helpful, should it be impracticable to have a bar representative in attendance for portions of the trial, to invite a respected senior member of your firm or another firm to sit in attendance. The very presence of such an experienced attorney in a trial involving perhaps less experienced advocates will have the salubrious effect of requiring the court to pull in its wings and perhaps treat counsel with greater respect and more impartiality.

Sometimes the outrageous partiality and prejudice of the judge becomes quite evident to all. Fair-minded jurors resent such conduct, in which case the court becomes an unwitting ally of the defense. A recent case comes to mind. Counsel for the defendant had decided that it was essential for the jury to visit the scene. The point came up in open court during the hearing of testimony. Counsel made his request in front of the jury, which the court denied. Defendant's attorney then moved to repair to chambers in order to make an offer of proof as to why the scene visit was so necessary. Again the unyielding judge refused. As a last resort, counsel then undertook in front of the jury to list all of the reasons why a visit to the scene would be appropriate. At the conclusion of counsel's offer, the judge stated, “But can you make it rain?” It seems that the crime in question had been committed on a rainy day and that at the time of the request it was a bright, sunny day. Two jurors were so incensed at the pettiness of the judge's conduct that in spite of his instructions given at an earlier time, they repaired to the scene on their own.

Lastly, where the judge becomes a raving juridical lunatic, punctuating the entire trial with anti-defense invective and constant interruptions disparaging the defense, it may well again behoove counsel to do nothing but bank on the jury's own inherent sense of justice, although there are cases where it is frequently appropriate in such situations to meet the judge head-on. In fact, the jury may be your biggest cheering section. The old American adage that everybody loves an underdog comes into play and the jury itself may well rescue you. Such situations often arise in cases where experienced judges jump on, harass and generally humiliate beginning or new attorneys. In one such case where the defendant had actually been caught in flagrante delicto with a gallon jug of Dewar's Scotch between her legs attached to a special girdle, the jury hung six to six. At the conclusion of the trial the jury forelady approached counsel for the defendant and said, “Young man, I don't want you to get smart because you feel you have hung this jury; but we weren't going to let that mean judge deny your client, whom we know was guilty, a fair trial. If there's to be a conviction it should be in a courtroom where neither party is disadvantaged by such conduct.”

**Conduct of the defendant**

How many times have you heard the old saying that the defense had the case won until the defendant took the stand? It is true that more than one case has been lost by the defendant by his own testimony or demeanor or other conduct before the jury. I am reminded of a case that happened long ago in the County of

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1 No consideration will be made in this brief treatise of the pro per defendant and the tendency in such cases for the defendant to make serious mistakes. One example will serve to illustrate the pitfalls that confront the pro per defendant: Defendant was in the process of a ferocious cross-examination of the eye witness, when, placing his finger just a few feet from the nose of the victim he heatedly inquired, "Was this the face you saw when I robbed the store?"!!!
delicate planning in establishing subtle nuances through cross-examination and production of demonstrations and physical evidence is now destroyed and the case appears to be headed for the inexorable conviction that the defendant may well deserve for his own ineptitude. Often there is no direct antidote to cure the poisoned situation. Rather Murphy's Law can only be dealt with by anticipating that defendants are known to change their stories mid-stream, after hearing the testimony of other witnesses which they may well not have contemplated when they themselves were interviewed prior to trial. In such situations, antidote number 5 (prophyaxis) is the only practicable approach. The defendant must be constantly consulted during the course of the trial even though you have recited the evidence and prepped him many, many times before the outset of the trial. In this way, shifts and subtle variations in tactics can be fine-tuned so that the possibility of the defendant blurting out a totally new version for the first time on the stand can be minimized. Also, the defendant should be constantly reminded of the necessity of consistency in his tactical approach so that the defense thesis of the case can be facilely executed. The night before the defendant's testimony each and every detail as it has become affected by the testimony to that point should be reviewed in great detail. If subtle shifts in emphasis have to be made with respect to the defendant's testimony, they can be orchestrated at this point so the defendant does not make a wild deviation from his original version of the facts. This is not to suborn perjury but rather to present the truth in the most efficacious and lucid way. The defendant himself will not feel caught by surprise on cross-examination, and thus be better able to endure the vicissitudes and confusion of the adversarial arena.

Also, the defendant should be prepared psychologically. This requires subjecting him to severe stress before he takes the stand. All too often counsel interviews the defendant in the comfort of an office or in the security of a jail cell. The defendant gains a false sense of security. However once he enters the courtroom he is like the fighting bull, who from the darkness of the corral bursts into the bright, sunlit plaza de toros, where for the first time he sees strange objects moving about him.

The situation is totally different from that of the early interview process; the heart beats faster, the nerves are not quite so secure, and a high level of anxiety ensues. It is under these conditions rather than those of the privacy of your office or the jail cell that the defendant will be cross-examined. It therefore behooves counsel to set up as much confusion and stress as possible during the preparation of the defendant. He should be made as uncomfortable as possible, so that he will have some feeling for what it is to testify in the courtroom under stress. I often find it convenient to place a chair upon a table in the jail cell, for instance, and cross-examine the defendant while he is seated in that position. There he is subject to the ridicule and laughter of people on the other side of the window who see him in this awkward position. At least now he will be a little better prepared to deal with the discomfort of the courtroom.

Controlling the defendant's conduct for purposes of maximizing good impressions cannot, however, resolve itself into a trained seal act. Seemingly rehearsed and over-stilted reactions in the courtroom belie a basic defense insecurity. As said before, to err is human. Hopefully, those errors will be minimized and confined primarily to the insignificant and humorous. And remember: probably no area of the conduct of the trial is so fraught with the possibilities of egregious error.

The unassailable witness

Certain classes of witnesses often prove unassailable in cross-examination. Many an unsuspecting attorney has launched into a long liturgy of questions on cross only in the end to emphasize and underscore the opposition's case. Little or no favorable material for final argument is obtained. In such cases it may well be advisable to ask no questions whatsoever. A rather interesting example of such a "technique" comes to mind and constitutes one of the most succinct and eloquent cross-examinations this writer has ever witnessed. The officer in question took approximately two days for his direct testimony. He was a young, bright and seemingly impartial recent graduate of the police academy. His handsome good looks, mellifluous voice, and courteous demeanor to all parties naturally won him many votes on the jury. Unlike so many officers, he did not exaggerate his testimony.

Stop worrying about your alibi, Fred. We're calling the nuns, we're calling the priest. What could go wrong?
but only related it in as factual a manner as humanly possible. By the end of the second day, a virtual judicial halo hovered over his head. His credibility was unassailable. Having enough sense to anticipate this, when the judge turned to counsel for the defense and said, "You may cross-examine, counsel," counsel responded as follows: "Thank you very much, Officer Umschlag, you have been very, very helpful. I see no need whatsoever to cross-examine you at all. Thank you again." The reaction of the jury was something to behold. Almost every juror showed a look of incredulity and shock. Why, after such seemingly damaging testimony on direct would counsel for the defendant thank the opposition witness for all of his "help"? They would soon learn the answer. During final argument counsel selected bits and pieces, isolated as they were, throughout the course of the officer's testimony and adapted these points, few as they might be, to supporting his own theory of the case. By the time the jury began deliberations, according to one juror interviewed at the conclusion of the trial, the focal point of the jury's attention was on how the evidence was in fact favorable to the defense, and in so concentrating many of the damaging or devastating portions thereof were ignored or passed over.

Other situations come to mind with respect to the cross-examination of police officers. These techniques involve anticipating that such testimony is highly believable in the eyes of most jurors and must be dealt with in very subtle, non-direct ways. The technique here is not so much attack or adopt, but rather a process of anticipation and adaptation; i.e., setting the witness up on the basis of earlier testimony in order to extract favorable testimony. Two illustrative examples present themselves.

Often in narcotics cases there will have been an earlier §1538.5 motion to suppress what counsel feels was illegally seized evidence in contravention of the Fourth Amendment. During such hearings, although they may not successfully result in the suppression of evidence, successful anchoring of testimony can be achieved so that, later at trial, very damaging evidence by the same witness can be effectively neutralized. Let us assume for instance that in order to establish probable cause the officer is examined as follows: 1) that he has made many, many arrests in the area where the defendant was apprehended. Subsequently in the case in question the defendant was actually seen throwing the narcotics. Examining to establish fodder for later trial cross-examination rather than to achieve a suppression of evidence would go somewhat as follows: "Officer, is it true that you have made a lot of narcotics arrests at the very spot where the defendant was apprehended?" Answer: "Yes, that is true. We have made something like 300 arrests within a block of that very place." It should be noted at this point that such evidence is highly beneficial to the prosecutor for purposes of establishing probable cause. Question: "Officer, how many actual cases in this area involve the throwing of the narcotic?" Answer: "Well, I would say out of the 300 or so that we have made in that vicinity something like 60 or so involved the actual throwing of narcotics." Since the average juror from more affluent neighborhoods does not find heroin lying out in the street when he goes to pick up the morning newspaper, he may well find it unusual that heroin was found in the vicinity of the defendant. However, now that you have established at trial the §1538.5 evidence, that there is so much narcotics activity in that area and so many of the very cases in question involved the throwing of narcotics, it just might be explainable that the narcotics found near the defendant could well have been thrown by somebody else.

A similar situation involves making the defendant so drunk for purposes of establishing legitimate probable cause for arrest that in effect a counter-purpose of establishing a defense, i.e., diminished capacity to specific intent crimes is also achieved. Question: 'Officer, did you approach the defendant?' Answer: "Yes." Question: 'For what purpose?' Answer: "To ascertain whether or not he was under the influence of alcohol or some narcotic or other controlled substance." Question: "Well, he wasn't drunk, was he?" Answer: "Yes he was." Question: "Are you a medical expert?" Answer: "No." Question: "Well, how were you able to make any determination as to the condition of his sobriety?" Answer: "Well, he staggered, he smelled heavily of alcohol and urine, he fell down three or four times, was almost hit by a car, and had to be rescued by me and pulled to the side of the street." Question: "Well then, officer, you are thoroughly convinced then, are you not, that the defendant was not only drunk, but so drunk that his own safety was indeed endangered. Is that correct?" Answer: "Yes indeed, that is exactly my observation." End of examination. So, in attacking probable cause, counsel has been able to establish the basis for a possible defense to specific intent crimes.

Certain situations involving assaults against police officers also come to mind. Most jurors feel that the force necessary to apprehend a defendant is usually justified. The defense must produce evidence to show that the amount of force was excessive and that, therefore, the defendant was justified in reacting with force. The following is a rather comical example of how excessive force by the police
1985 Hawaii Seminar
Tentative Schedule

SATURDAY—May 11, 1985
CURRENT ADVANCED TOPICS IN CRIMINAL LAW
Plenary Session — 1:00-5:00
1:00—Preserving the Sixth Amendment—Albert Krieger
2:00—Competence of Counsel Problems—Charles Sevilla and
      Vince Aprile
3:00—The Press and a Fair Trial—John Williams, Tom Nolan
      and Gerry Chaleff
4:00—Cross Examination of the Unindicted Co-conspirator—
      Rikki Klieman
6:00-7:00 Welcoming Reception

MONDAY—MAY 13, 1985
SPECIAL EVIDENTIARY PROBLEMS
Plenary Session — 1:00-3:00
A presentation of videotaped vignettes which encourages
audience participation. Presenters—James Jenner, John
Cleary, Gene Iredale, and Edward Imwinkelried
Workshop Sessions — 3:00-5:00
Workshop A
Advanced Issues in the Trial of a Federal White Collar Crime
Case—Irwin Schwartz, John Williams, Rikki Klieman, Albert
Krieger
International Extradition—Jeff Weiner
Workshop B
Special Issues in the Trial of a Homicide—Leslie Abramson,
Gerry Chaleff, Guy Jinkerson, Vince Aprile, Charles Sevilla

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TUESDAY—MAY 14, 1985
FORENSIC SCIENCE UPDATE AND HANDLING THE
EXPERT
Plenary Session — 8:00-10:00 am
Presenters: Edward Imwinkelried and Gerry Chaleff
Workshop Sessions — 10:00-Noon
Workshop A
Federal Rules Update—James Hewitt and Michael Levine
Workshop B
Current Issues in the Trial of a Sexual Assault Case—Vince
Aprile and Edward Imwinkelried
Proposition Eight Update—Charles Sevilla and Leslie
Abramson

WEDNESDAY—MAY 15, 1985
The Haleakala Run
Hosted by James Jenner

THURSDAY—MAY 16, 1985
ADVANCED ADVOCACY IN THE 1980's
Plenary Session — 8:00 am-Noon
8:00—The Art of Sentencing Advocacy—Jerrold Ladar
9:00—Cross Examination of the Informant—Gene Iredale,
      John Williams and Jeff Weiner
10:30—Closing Argument with a Zip—Albert Krieger

Farewell Dinner — 6:30-9:00

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can be illustrated. In Los Angeles County, and many other jurisdictions within the State of California, there is a control hold referred to rather euphemistically as the approved police control hold. In common parlance, this is really in truth and fact the old so-called bar-arm strangle hold. When applied properly to a suspect’s throat, he can be rendered unconscious in seconds. Should the officer in question testify that he applied this so-called approved police control hold to the defendant it is often convenient and very illustrative to request that the officer in question demonstrate such a hold upon the district attorney. An acquaintance of mine indicates that when so requested the prosecutor will often rise to his feet screaming, “No, you’re not going to use that hold on me.” In those cases where the district attorney does in fact cooperate, the hold is so effective as to render the prosecutor speechless for several moments after its application. In either event, the jury is taught a useful lesson.

There are other types of witnesses in addition to the garden variety police officer who prove to be extremely difficult to cross-examine and fall within the general rubric of the “unassailable witness.” Often the victims of sex crimes fall into this category. They invoke a deep degree of sympathy on the part of the jury, and often are in fact decent, hard-working, everyday citizens with whom the average juror can personally identify. In an illustrative case, the victim of a rape appeared unimpeachable. Counsel was unable to bring a Ballard motion and had very little or no impeachment data. Rather then attack this unassailable witness directly, with a consequent double damage result, counsel merely requested the witness to repeat the exact position of the assailant and herself, during the course of the rape. As the witness described each position and the relative distance apart of the two bodies, counsel would deftly in the presence of the witness measure off the distances indicated with a yardstick. At the conclusion of the examination it occurred that over twelve measurements had been made. Reduced to transcript it would appear that in order to achieve the act in the fashion indicated by the victim, counsel argued, the defendant would have had to have had a three-foot penis with four universal joints.

In conclusion, the so-called unassailable witness is dealt with primarily by “anchoring” with previous hearings’ testimony that can be used later in a way the witness does not expect. Seldom is the witness taken on directly. The point being established is never really lucid until the moment of truth, i.e., during final argument.

**Deleterious conduct of courtroom attaches**

The last category for consideration involves the conduct of the various courtroom attaches that can prove devastating to the defense. Let us start with the court reporter. It amazes me that to this day the anachronism of court reporters still obtains in most jurisdictions. A court reporter need reduce to dictation but 200 words per minute to qualify as an officially certified court reporter. It is no wonder that court reporters are constantly interrupting and asking for repetition in the course of confusing and hotly contested trials. Not only are they required to only reduced 200 words per minute, but they are not required to dictate at that rate for more than 15 minutes at a time. In any event the court reporter is often a formidable obstacle to the successful defense of criminal cases. Most attorneys have been the victim of their ire, impatience and absolute consternation. It will always happen in the following manner. Your cross-examination has been well planned. It has been ingenious, and after setting up the witness in exactly the most effective manner, you are virtually poised to strike the jugular, when suddenly a small but firm voice echoes out resoundingly in the courtroom: “Stop, stop—he’s doing it again, your Honor. I can’t keep up with him; there’ll be no record in this case at all if he doesn’t slow down.” For the first time in your life you were about to destroy a witness; you had him virtually on a limb, when, of all people, the court reporter has devastated the effect of your examination. It is inappropriate to wage war with the court reporter for the jury will almost invariably sympathize with the reporter. “After all, they have a job to do and are always doing the best they can and it’s these loud-mouth, fast-talking lawyers that make it difficult for everybody.” In order to avoid the application of Murphy’s Law in this situation, the court reporter must be cultivated and pre-prepared for your techniques and style. It is advisable to approach the court reporter before trial, giving her your business card and indicating your general good will. You can sometimes state that it is advisable to set up a series of signals between you, so that if in fact you do begin to get hot and talk too fast, she/he can make a certain expression that will indicate to you, “slow down.” The court reporter will also be very appreciative if you give her the names of cases that you will be citing during argument. Nothing is more difficult to reduce to transcript than the citation of authority. The court reporter will be deeply indebted for your courtesy and consideration. Seldom if ever will a court reporter who has been dealt with in this manner interrupt counsel. The principle then, in the avoidance of Murphy’s Law, is that of anticipation and prophylaxis.

The court clerk is also a formidable opponent. Relig and often officious, such functionaries feel that the courtroom is theirs. They have the territorial imperative of a Chihuahua defending its nest. Not even a Great Dane dare tread there. The clerk is also an ally of the judge and you can be sure that any bad-mouthing of the judge or criticism will be duly reported to His Honor. Many an inexperienced attorney has made mild protestations of disfavor about that learned pundit only to have the message immediately communicated to the judge, to the later embarrassment of counsel.

The clerk should be dealt with in much the same way as the court reporter. Simple courtesy and consideration are in order. It always behooves counsel to give the clerk his business card, introduce himself, ask him what the ground rules are for that court and what the clerk expects of counsel. This is particularly true with respect to the handling of

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2 Many jurisdictions (such as Oregon, for example) have tape decks for purposes of recording the trial. Court stenographers are available but are not the primary source for the production of transcripts.
having the clerk appear friendly toward you and cordial in every instance creates an atmospheric condition within the courtroom that cannot help but increase your credibility in the eye of the jury and judge alike. You will also be a refreshing contrast to the average attorney, whose ostentatious and conceited conduct renders the clerk the defense’s worst enemy.

Much of the same common sense is applicable to relationships with the bailiff. Nothing is more devastating to the defense case than having the bailiff hover over the defendant as if he were some mad dog about to negotiate a violent escape. The proper relationship between the bailiff and the defendant can alleviate suspicions and anxieties and actually give the jury the impression that the bailiff has no fear of the defendant and that the defendant is not a dangerous individual. The bailiff is best primed by the same sort of introduction as you have given the clerk and the reporter, and by a personable, amiable style of relationship. I am reminded of a recent case involving a rather notorious political crime where the defendants were in effect considered enemies of the universe and every single person entering the courthouse, not just the courtroom, was subjected to a search for weapons. So effective were the defense attorneys in cultivating the favor of the constabulary that as the jury was deliberating the sheriffs in question took their own poll and acquitted the defendants.

Unfortunately, the jury was not so beneficent. The moral nevertheless is that another favorable atmospheric condition can shroud your case by the proper cultivation of the bailiff as well as the clerk and court reporter. Without their good will, another obstacle stands in the way of the successful accomplishment of defense objectives.

Avoiding Murphy’s Law

Murphy’s Law need not inevitably occur in the trial of criminal cases. Although it is true that if something can go wrong it doubtless will go wrong in a criminal case, measures can be taken to head off such events or to deal with them effectively when they in fact occur. Often the techniques for avoiding Murphy’s Law involve subtle adoption, adaptation and indirect means or methods, or advance prophylaxis. Seldom if ever does a direct, immediate attempt to rehabilitate or undo lead to success. Patience, the ability to roll with the punch, and constant vigilance with respect to innovative techniques of dilution are your best bet.

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**Warner Acquitted**

The “war against defense attorneys” was dealt a stunning setback when San Diego attorney James Warner was acquitted of all charges in United States District Court on March 29, Warner, who was represented by CACJ members Barry Tarlow and Mark Heaney, was initially accused of suborning perjury, obstruction of justice and misleading conduct in violation of 18 U.S.C. §1512 in the course of representing individuals accused of drug trafficking. The bizarre allegations that led to this indictment included monitoring a grand jury investigation, advising a witness to take the Fifth Amendment, advising a witness to seek immunity, and interviewing potential witnesses.

The case involved a classic confrontation between a Justice Department determined to intimidate the defense bar from vigorously representing clients and defense lawyers from throughout the country who rallied to Warner’s support. The San Diego U.S. Attorney’s Office, in a persistent pattern aimed at chilling effective advocacy by the defense bar, had targeted Warner long before he had allegedly committed any wrongful conduct or made any questionable statement. According to the government’s informant in the case, federal agents had contacted him as early as April 18, 1983 and said, “We want James Warner.”

The prosecution’s tactics involved degrees of outrageous misconduct. The original transcript of a key tape recording which was the basis of Warner’s indictment contained between 3,000 and 4,000 mistakes. Perhaps the most outrageous prosecution tactic related to its initial debriefing of the informant, who posed as a potential client. Warner had instructed the informant at their first meeting not to lie or withhold evidence. However, that information did not appear in the handwritten notes of two government agents or in their reports. Tarlow was able to obtain this deliberately suppressed information only through discovery of the notes of the informant’s defense lawyer, who also attended the meeting.

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Effective Date
Interview: Howard Weitzman & Donald Ré

By Michael R. Yamaki

Donald Ré and Howard Weitzman have been partners since 1979. Although they have gained significant fame mostly as a result of their successful representation of John Z. DeLorean on federal cocaine-trafficking charges, both have had noteworthy careers as criminal defense attorneys for several years. Mr. Ré is the co-author of Business Crime and has taught constitutional law at the University of West Los Angeles School of Law. He represented Andrew Dalton Lee in the famous “Falcon and Snowman” espionage case and won an acquittal in the Eddie Nash racketeering/arson case in federal court. Mr. Weitzman has specialized in criminal law for 18 years, representing Mary Brunner, the only “Manson girl” charged with but not convicted of murder, and serving as defense counsel in the “Grandma Mafia” case. He currently represents Cathy Evelyn Smith in the John Belushi case. Shortly after this interview was conducted, Mr. Ré and Mr. Weitzman announced that, although they remain friends, they have ended their partnership.

YAMAKI: One of the first questions I want to ask you both is how, when a client comes in, do you structure a fee in a big case such as DeLorean?

RE: Well you think big, hopefully. I think we’ve learned a lot from this case because this is a case that we originally thought would go on for a few months but instead went on for a year and a half. I think one of the things you have to consider is not only what fee you’re going to set in a given case, but what protection you have should the case go longer than you originally thought—in other words, some kind of security backing up additional fees you may require.

WEITZMAN: I think an important mistake a lot of lawyers make is to quote a fee that may seem high enough at the time without knowing what the case is about and then they end up getting involved in the case for a fee that doesn’t cover their time and expenses. Then they don’t have the proper motivation and don’t put the time into the case that they should.

YAMAKI: In this particular case, did you agree upon a set fee?

WEITZMAN: No we really didn’t. The first fee was arranged by one of the other law firms that referred the case to us, and it appeared to be more than adequate. Though it was the largest fee I’ve ever seen quoted in a criminal case, it did not turn out to be adequate.

YAMAKI: I take it that as the trial went along, you found you had more expenses. What expenses had you not anticipated and what ended up costing significantly more than you thought?

WEITZMAN: Our time, for one. Properly preparing for a case such as this takes a tremendous amount of time—you stop working on other cases.

RE: We got into this case in November of 1982. Normally you would expect a case like this, even in front of a judge who is going to let you prepare, to last perhaps six months. The case was continued because the government stonewalled and because of the release of the videotapes by Larry Flynt. As a result, we didn’t complete the case for a year and a half. There was no way for us to predict that at the beginning, and we found ourselves, because of the magnitude of the case, devoting all of our time to it.

Negotiating fees

YAMAKI: In the future what would you do to protect yourself? Did you have a written fee agreement?

WEITZMAN: Yes, we had a written agreement at one point, but we went way beyond the written agreement. One thing I would suggest, and it’s something we hope to do more than we have in the past, is that before you agree to represent somebody in a major case, take some time and attempt to look into their financial background. I know a lot of lawyers, including myself, are timid to do that. You feel like you are imposing, but it is something you really have to do because many of these people, make promises that many times they can’t keep.

RE: Also, I think it’s helpful that you tell the client that he doesn’t really want to have a lawyer who feels that he’s being short-changed, nor would he want to feel that his lawyer is short-changing him. So you have to make sure that the financial arrangement is secure for everybody’s benefit. I think one of the things that is helpful to do, particularly if you have what appears to be a very large case, is to make sure that the client understands that you really can’t set a definite fee; you can give him an approximation and you can try in your own mind to estimate as best you can, but it’s always very difficult.

YAMAKI: When you get a large retainer, are you working on an hourly basis?

WEITZMAN: It is usually not an hourly basis. Very rarely would we work on an hourly basis.

YAMAKI: The majority of clients are going to come to you and say, “Look you’re quoting $100,000, what am I going to get for $100,000?” What is your answer?

RE: You have to be honest with the client and simply indicate to him that you don’t know enough about the case at that point; you don’t know what twist the case is going to take. You indicate to him that you intend to represent him through trial but you also tell him that the fee you’re quoting may be insufficient to do that, and you want to make sure that you’re secure in the event that does happen. I think that you should be honest about indicating how long you think the case will take. Then, if it takes substantially longer, you can show the client the justification for the extension of fees.

YAMAKI: Okay, I’m a client and I walk in and say here’s $80,000; it’s every penny I’ve got. Now you’ve got $80,000 staring you in the face, but what you don’t know is how big a case this is. What do you do at that point to protect yourself, if the case extends longer than you anticipated?

WEITZMAN: I have been in both positions. I have been in the position
where I have taken a case and the case developed into a monstrosity; that's basically what happened in the Grandma Mafia case. I got what I thought was a real good fee in that case and it was a financial disaster. I've also been in a position where I've turned down a large amount of money because I could foresee another disaster.

RE: What you have to rely on is your experience. You’re positing a situation in which a client says “This is the maximum I have.” Every lawyer has to decide how long in his best estimation the case is going to take and whether he can afford to do it at that rate. I don’t think there's any magic number.

WEITZMAN: You know, a lot of it depends on the lawyer’s individual overhead and the volume of the practice. I mean some lawyers can do that case. The $80,000 you gave as an example is a lot of money and some lawyers can easily do a year and come out all right but others cannot. Each lawyer has to look at his own individual situation and take into account overhead, staff, and the support help he will need, if he is going to get involved in a major case.

Effects on law practice

YAMAKI: Did the DeLorean case have any effect on your staff and your overhead?

RE: Yes, it wore them out.

WEITZMAN: It sure did.

RE: After we got into the case, Mona Soo Hoo started working with us. Mona was an enormous help to us and I really don’t think we would have accomplished all the work we had to do in the case without her.

WEITZMAN: We have four lawyers in the firm. Three lawyers worked full-time on this case. And Scott Furstman handled almost all other calendar matters.

YAMAKI: Were you able to accept any other cases during this time period?

RE: A few, but not that many.

YAMAKI: So, what did you do with them? Did any other big cases come in where they had money and could afford to pay you?

WEITZMAN: We turned down what I would consider major cases.

RE: We did so because we were unavailable. I think that soon became obvious to people after the first few months. It is simply not fair to take on a case with the expectation that you’re not going to be able to do the case properly.

YAMAKI: With the benefit of hindsight, have you thought of other ways you might have handled the fee problem?

RE: One thing that we confronted on this case and some others is the problem of representing a businessman who is in some kind of criminal trouble. It’s often the case that he has some civil trouble behind him and that there are creditors out to put him into bankruptcy. I would advise any lawyer who is thinking about representing a person in that situation to familiarize himself with the rules of bankruptcy and the security of the fees that may be paid to the attorney. He should also assure himself that any property that he takes to secure his fees is free and clear and separate from any bankruptcy proceedings. Otherwise he may work full-time and find himself as a defendant in a bankruptcy case where they try to make him regurgitate the fees.

YAMAKI: You weren’t originally retained on this case, is that right?

WEITZMAN: That’s right. Originally John DeLorean retained the Hufstedler firm, basically a civil litigation firm.

YAMAKI: And how did you obtain the lead in this case?

WEITZMAN: Well, I think the client perceived that Donald and I were doing 99% of the motions work.

RE: The change was John’s choice.

YAMAKI: Do you know if the Hufstedler firm had a retainer agreement with DeLorean, and whether it was similar to the type of agreement that you would have done?

WEITZMAN: Yes, they had a retainer agreement, and I think it was perhaps similar, although they structured theirs more along the lines of how they would do retainers in civil cases.

RE: Civil lawyers have more experience in structuring retainer agreements. That’s probably an area that criminal lawyers are going to have to get more involved with, simply because of the fact that it’s becoming much more difficult, because of the size of the cases and because of the acts of the government, to insure that you get your fee.

Government reprisals

YAMAKI: Have you suffered any government reprisals over this case, or do you expect any?

WEITZMAN: Well, not yet. I can’t say that we don’t expect it, but we are hopeful that it won’t get to that stage.

YAMAKI: What type of things might you expect?

WEITZMAN: Well, its hard to say. The vindictiveness of some people in positions of authority and power is bizarre. But I think because of the profile of the case, we don’t have as much concern as some other people. You think about tax audits and that kind of thing, but I just really don’t believe we’re going to get any reprisals out of this case.

RE: I think the one thing we may have to look forward to is that some of the prosecutors who are familiar with the case or may have been associated with the case may be a little more difficult to deal with in the future. I would hope that wouldn’t be the case—I don’t particularly expect it, but I think it’s something that could happen.

Michael Yamaki is an attorney in private practice in Los Angeles and a member of the CACJ Board of Governors.

WEITZMAN: Also, I perceive that as time goes on clients will begin to sue lawyers more and more in the general field. They will sue them for refunds, for getting fees back depending on the outcome of the case. And I think lawyers in the criminal field for years have been winging it in those areas. The guy comes in and gives you the front money, whatever you think you’re going to need to go on and try your case. I don’t think you can do that any more. I think times are truly changing in the criminal law area.

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YAMAKI: Have you felt any prosecutorial backlash in defending any of your other cases in state or federal court now because of this case?

RE: Yes.

WEITZMAN: In two cases government prosecutors have taken the position that because of the notoriety of the client’s lawyer, the charge must be heavier than they thought originally. They’ve been less reluctant to dispose of the case because they want to try a case against us. Just recently when a client indicated in court, up in one of the northern districts of California, that he needed a continuance to talk to our offices, the prosecutor immediately asked for a Nebbia hearing to see how the client could come up with the kind of money to retain Weitzman and Re.

YAMAKI: What other negatives are there?

RE: I think it takes a lot of time. You have to be willing to commit all of your energy to it, the rest of your life basically could fall apart.

Impact of DeLorean case

YAMAKI: This was a one-of-a-kind case. It’s made history and is probably looked upon with envy by every defense lawyer. Big fees, lots of publicity, high profile and everything else. Do you have any response to that?

WEITZMAN: Michael, there were some negatives in this case, but it was a once-in-a-lifetime case. It was an experience neither one of us will forget, and the benefits greatly outweigh the downside or negatives.

YAMAKI: What are those benefits?

RE: There’s a lot of personal satisfaction in having taken a case which everybody thought was an absolute loser from the beginning and turning it around to the point where the jury came back and not only indicated that they were going to acquit the defendant, but were so outraged by the conduct of the government that they wanted to send a message to Washington to stop that kind of conduct. There’s satisfaction in knowing that the case, because of its notoriety, may stand for something or may cause a change in the attitude of the government with regard to undercover or sting operations. I hope it certainly does that. I’m happy to have been a part of that.

WEITZMAN: I think the case does mean more than just a win. I mean, the win was wonderful and satisfying because Donald and I really won the case in the courtroom based on our abilities. It’s very ego-gratifying. But I think the case has allowed us to speak out on issues that defense lawyers usually keep to themselves and talk about at cocktail parties. It allows Donald and me the opportunity to go out publicly and expose some of the problems in the criminal justice system.

YAMAKI: What did this case do to you both mentally and physically—working on one case day after day after day?

RE: Well, I have to say it was an enormous drain, but there was always the upside because it was a fascinating case. Physically, I think I lost somewhere between 10 and 12 pounds in the course of the trial, just because of the time that was being put in, working on the case and not eating. It was a strain. I don’t think either one of us has completely recovered physically from the results of the case.

WEITZMAN: It has tremendous impact on your personal and physical life. For me, it actually made my personal life easier and improved it, because my wife ended up coming to court everyday and so we got closer. Physically, I’m a runner, and I didn’t get to run as much, but when I ran during the trial the energy was great. We were up a lot, but the best part was definitely the trial. Boy, the year and a half leading up to the trial was very difficult.

Physical and mental preparation

YAMAKI: As you look back and reflect, are there things you could have done to prepare yourselves for the stress?

RE: It’s important to try to structure it in such a way that you do get some exercise, and also try to remember that, as we used to say during the course of the case, “there is life after DeLorean”; to try to put yourself in a frame of mind where you understand you can’t do the best for your client unless you feel as well as you possibly can. We had some problems in this case because we started at 8:30 in the morning and so there wasn’t very much time to do much of anything. I think if I were to go through this case again, I would try to make sure that I would be able to get out and exercise regularly. And I would try to make sure that from the point of view of eating and rest and things of that nature, I’d take a little better care of myself. Those are great intentions, but when you get in the heat of battle, you sometimes forget about it and you grab a sandwich, you go finish the motion, you go back to court.

WEITZMAN: In extended trials, I think a litigator who’s in court on his feet day in and day out, much the way an actor is or an athlete is, should consider himself in that vein and think about the physical and psychological advantages of getting himself in shape mentally and physically. It is important to get yourself in shape beforehand so that you are actually prepared for the ordeal of trial.

YAMAKI: Was there anything you found during the trial that kept you pumped up?

WEITZMAN: Espresso . . . I think the possibility of winning. We believed, and we may have been the only people in town who did, that we could win the case. And I have to say Donald was even more positive than I was. I didn’t think we would lose the case. I thought the jury might hang. I think Donald believed we would win the case.

RE: I believed actually before we started the trial that we would win the case because I could see that the evidence could be explained to the jury in a way that they would understand. We had some hurdles to get over but I thought we could do it. I was fairly confident that we would be able to do that and I have to say that going through the case was exciting. I don’t think that mentally, physically, psychologically, legally or any other way, I would want to go through this case alone. Having
Howard around was not only beneficial, it was a necessity. I wouldn’t want to do a case of that magnitude or a case of that length without having somebody around that you could talk to, work with and trust.

WEITZMAN: You talk about this lead-share concept and all that. There was no lead-share in this case. In a case of this magnitude, a lawyer could do himself a disservice if he tries to do the whole case himself. For a number of reasons, there are different jury appeals based upon the personality of the lawyer. Donald brought up points to me during my examination of witnesses, and I think I did the same for him, that I would not have thought of. If my head had been into the lead-share syndrome, I don’t know if I would have been as open. But this case was a wonderful example of how two lawyers and two friends and two partners can really work together, because it really was a joint effort.

Handling the media

YAMAKI: Everyone marvels at the way you both handled the media. Did you receive any training or instructions? Did you have to prepare a text that you wanted to get out?

RE: The media obviously wanted to talk to us. They were more than happy to have us come down, and as a matter of fact, they insisted on it. They agreed to do it in an orderly fashion by setting up the cameras in such a way that we could be interviewed by everyone at the same time. We saw that it was our obligation to try to set the record straight publicly. DeLorean is a public figure. Winning the case was part of the battle but his being able to resume his life was the rest of the battle. Everyday at the end of court, we talked briefly, sometimes it would only be a few seconds, about what was important that day and how we wanted to get that out.

YAMAKI: So there was discussion between you two, a strategy in flowing with the media.

RE: Yes

YAMAKI: Did it help that the prosecution was not making comments to the media daily?

WEITZMAN: In this case, the government couldn’t make any response. They would not have had any answers to the media’s questions.

RE: As one media representative said, “I have no idea what they could do to explain the way the witnesses testified in this case, so they were probably better off not coming out and talking.”

YAMAKI: Did you have any people from the media or a media specialist or anybody else preparing you? Did you ever consider that?

WEITZMAN: No, absolutely not. First of all, I don’t think either one of us needed it because we’re not exactly shy and bashful. Secondly, it wasn’t how to deal with the media, it was whether or not we wanted to undertake getting our message across on a regular basis.

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"Toward the end of the case . . . I think all of the media representatives believed DeLorean had been set up and should be acquitted.'

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YAMAKI: If you did not want to answer certain questions, how did you stall them without looking like you were stonewalling them?

RE: I’ll tell you something, Michael, I understand how that happens and I guess it happened to us a couple of times. The interesting thing about this case is that it was very understandable to us because we had lived with it for a year and a half and kept trying to explain different aspects of the case to the public and the media. There was some reluctance to accept our version. As we got more and more involved with the trial, it was like peeling the onion. We knew all the layers and it was simply a matter of responding to their more and more precise inquiries. There was one occasion in which a media representative asked a question which was off-the-wall and oddball, having nothing to do with anything that was going on in court, that we used a sarcastic response to try to deflect that. What he was really trying to do was to draw attention away from the important issues in the case.

WEITZMAN: One of the issues we were confronted with on a regular basis is, why did John meet with the people, why did John conduct himself in the way that he did? And it gave us the opportunity on a daily basis to emphasize that he was put in this position by the government. Of course, the media taped the interviews and ran the comments, but as the case developed their attitudes changed. Toward the end of the case, with one exception that I can think of in the print media and one exception in the television media, I think all of the media representatives believed DeLorean had been set up and should be acquitted.

To testify or not to testify

YAMAKI: When did you make the decision that DeLorean was not going to testify, early on or later as the trial developed?

RE: That was sort of an on-going discussion we had. I think really didn’t make the final decision until it was time to call on him.

YAMAKI: What was your inclination at the beginning of the trial?

WEITZMAN: I think we always felt that we were better off in not calling him.

RE: We felt that the case was either going to stand or fall on whether the government was credible or incredible. When it got down to the point of actually making the decision, we felt that we had presented such a strong attack on the government’s case and credibility that we would damage our case by having John up on the stand for two months, regardless of what he said.

YAMAKI: You knew the media was going to ask you why you made that decision. Did you discuss what your answer would be beforehand and how did you respond?

RE: We discussed the reasons for not putting him on before we made the decision and we simply told the media what we had talked about.

WEITZMAN: On one occasion I responded that we wanted to win the case. That got some laughs and I think some of the people understood it in this sense: if he took the stand and if he made a negative impression on the jury, no matter what the truth was, the jurors psychologically could react negatively and come back with a verdict that was not favorable.
Second, I think Donald was concerned about the length of cross-examination and the subject matter.

**RE:** We were in the best posture we could be in. The government promised two months of cross-examination. Two months of cross-examination would simply dilute in the jury's mind the bad impression which we felt they had of the government's case after that point. We tried to be really fair and honest with the media. We tried to tell them exactly what we were thinking. There were some limits, for example, we wouldn't talk about matters that didn't occur in court.

**WEITZMAN:** And we didn't talk prospectively about evidence or examination. Often after a witness would get done on direct, they would ask Donald and me what we were going to ask them on cross. We'd tell them they'd have to wait for that. And that never bothered them. Also with respect to John's not testifying, we told the media we didn't need him, and we didn't in this case. He really couldn't add anything. He would get up and deny that he did a dope deal, that he didn't want to get involved in this conspiracy, and the evidence clearly showed that he didn't want to get involved.

**Helping hands**

**YAMAKI:** There were some other people who helped you during this trial. Who were they?

**RE:** Mona Soo Hoo is probably the primary person who helped us. She put together the jury questionnaire, she was there everyday, and she helped us every night on the case.

**WEITZMAN:** We had a full time law clerk, Alan Ghaleb, who spent seven days a week organizing the tremendous amount of paperwork in this case and doing indexes and things such as that so documents could be easily found.

**RE:** We had an investigator, Jack Palladino, who was superb and did a very thorough job.

**YAMAKI:** Were you able to pay these people throughout the trial?

**WEITZMAN:** Well, most of them we did; I think Mr. Palladino may still be owed some money which he more than deserves. And there were tremendous financial burdens placed upon us during the trial. The creditors in Detroit tied up all of John's assets. Don and I both went
into our personal holdings and borrowed money to maintain overhead and continue to exist. It was through no fault of DeLorean that these things occurred.

**Yamaki:** If you hadn't reached into your own personal finances, do you think you would have been able to continue as you did?

**Weitzman:** We might have been able to continue, we just wouldn't have eaten and lived in the places we are living in now.

**Yamaki:** If the case hadn't turned out the way it did, would you have thought it was worth it?

**Weitzman:** Well, I think the experience, win or lose, in this particular case, would have been worthwhile. It was a tremendous opportunity to develop some lawyer skills and techniques that you don't get in a number of cases. I don't think we thought about losing so it's hard to put myself in that perspective. Our concern was that the jury would not arrive at a decision.

**Re:** To be honest with you, I didn't think much about losing in the course of this case. Regardless of what the jury would have said, I was convinced that what happened to John was wrong.

### Handling the big case

**Yamaki:** What should a lawyer be prepared for when he receives a case of this magnitude?

**Weitzman:** It is very important to keep in mind the presumption of innocence and the fact that it may not exist in the minds of most jurors. In jury selection, when a lawyer gets an opportunity, he really should explore that and inquire about hypothetical situations dealing with the facts in the case that are favorable to determine their state of mind.

**Re:** One thing that I suggest, regardless of the size of the case, is that people make use of motion practice. Without motion practice in this case, we would have been lost for a variety of reasons. Obviously, discovery motions are important and you have to push and you have to fight and you have to be creative. But the other motions are also important, because it makes the government respond and that gives you facts that they won't otherwise allow you to see until you get to trial. Those facts may give rise to other motions or give rise to other discovery. I think the most important thing in any criminal case is that you constantly look at what they are giving you, analyze what they are giving you and push for more because there is definitely going to be more and the government is going to hold it back. And that's not to say that every prosecutor is going to do it out of some vindicative or improper motive. That prosecutor doesn't understand your defense, neither does the judge. In that regard, during a federal case, and it's something I think you can pursue also in state court, let the judge know what your defense is. In federal court, you are entitled under Rule 16 to give him an in camera showing of materials for him to review in order to decide the relevancy of certain requests. We gave an extensive in camera declaration with exhibits to the judge and laid out our defense. That helped him understand where we were going when we were making our requests. I think that could also be done in state court. In camera proceedings can also be helpful in a variety of other areas. Remember, the judge is looking at this case based upon the charges which are public. He doesn't know those items in your defense which you don't want to reveal unless you tell him in camera. That's probably one of the things that went on in this case that was of utmost importance to us.

### Avoiding intimidation

**Yamaki:** You seem to be encouraging lawyers not to be intimidated by the government.

**Weitzman:** I think lawyers are very intimidated by the government and by judges and it surely works to their disadvantage. You must accept the fact that the government isn't going to give you information that is helpful for the most part: they want to win the case. If they thought they were going to lose, they wouldn't continue with the prosecution. And I think lawyers just presume they're getting what they are entitled to. It doesn't work that way. Judges don't understand. Judges attempt to push lawyers around a lot to control the proceedings. I think lawyers have to do their best, without being arrogant and obnoxious, to get a word in and make their record.

**Re:** You have to make sure if you're defending somebody that you're not intimidated by the judge or prosecutor. In my view the judge's role is to preserve order in the courtroom and the defense attorney's role is to control the courtroom. You can't control the proceedings, and by that I mean how the proceedings are going, where they are going to lead and what kind of evidence comes in, unless you're not afraid to tell the judge if you think the judge is wrong.

**Weitzman:** Even if he's the best judge in the world, and I think Judge Takasugi is probably one of the best judges sitting on the District Court anywhere, if he's wrong I think you have to tell him.

**Yamaki:** Have either one of you ever felt intimidated?

**Weitzman:** Well, I think on my first experience in federal court or just in the courtroom in general, I was awed; I don't know if 'intimidated' is the right word, but I was pushed around by some judges because I really didn't know quite how to handle or cope with it. I have seen lawyers intimidated by judges and some judges get off by pushing lawyers around or by attempting to intimidate them.

**Re:** I've been threatened with contempt and on occasion I've been intimidated if I thought a judge was going to hold me in contempt. I've been intimidated in the sense that I felt that threat. But the point is even if that happens, you still have to make sure that you make your record. If the judge is going to the point of actually threatening you with contempt, certainly you may not want to push him over the brink. But you certainly have to be sure that you're protecting your client's rights in the process. Even though you feel that intimidation, I think you have to get over it.

**Yamaki:** Any other tips?

**Re:** Get the money up front.

**Weitzman:** Get the money up front.

**Yamaki:** Thank you both. □

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**Proof**

Evidence having a shade more of plausibility than of unlikelihood. The testimony of two credible witnesses as opposed to that of only one.

—Ambrose Bierce

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CAPITAL DEFENSE
The Ritual of Execution
by Fred H. Alschuler

For eleven months spanning the years of 1983 and 1984, I had the privilege and responsibility of representing a young man named Bobby Joe Maxwell in a criminal trial conducted in the Los Angeles Superior Court. According to the district attorney, Mr. Maxwell is the Skid Row Stabber, a devil-worshipping black homosexual transvestite who, in an effort to collect souls for Satan, embarked upon a killing spree in the course of which eleven or more persons met their deaths in the Skid Row section of downtown Los Angeles. Originally charged with eleven counts of murder, Mr. Maxwell was eventually convicted of two. A number of counts were dismissed during the course of proceedings, and Mr. Maxwell was acquitted with respect to the balance.

From the outset of the case, the position of the prosecution was clear: Bobby Joe Maxwell is a mass murderer who must die in the California gas chamber. At the conclusion of eleven months of trial, and a unique defense presentation during the penalty phase of the proceedings, the jury declined to agree. Mr. Maxwell was given life. The centerpiece of the defense presentation during the penalty phase of the Maxwell trial consisted of the introduction of detailed and graphic evidence concerning the nature of an execution.

During the guilt phase of Mr. Maxwell’s trial, the defense presented significant evidence in support of the proposition that one other than Mr. Maxwell is the Skid Row Stabber.1 Additionally, the defense presented substantial evidence in support of the proposition that the investigation conducted by law enforcement agencies, and the presentation of the prosecution during trial, sought a conviction of a convenient suspect, rather than the truthful determination of the identity of the person or persons responsible for the crimes charged. On the basis of evidence presented to the jury in support of defense allegations regarding such conduct by law enforcement agencies, the conviction was argued that a reasonable inference could be drawn that there existed exculpatory evidence which was, and would remain, unknown to both the defense and the jury. During the penalty phase of Mr. Maxwell’s trial, it was argued that there must exist at least some degree of doubt concerning the guilt of the accused, not only with respect to those crimes for which he had been acquitted, but also those for which he had been convicted.

Linger ing doubt

“[A] jury which determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving defendant’s guilt beyond a reasonable doubt but that it may still demand a greater degree of certainty of guilt for the imposition of the death penalty. . . The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment.” (People v Terry (1964) 61 Cal2d 137, 145-46, 37 Cal. Rptr. 605, 390 P2d 381.) As noted by the California Supreme Court, “lingering doubt” is that area within the spectrum of doubt which lies beyond a reasonable doubt, and before complete certainty; the finality associated with an executed sentence of death may result in a finding that the imposition of such a sentence is inappropriate if there exists lingering doubt concerning the guilt of a convicted defendant.

Evidence in support of Mr. Maxwell’s claims of innocence was also offered during the penalty phase of the proceedings. Such evidence both controverted that which had been presented in support of the contentions of the prosecution and supported Mr. Maxwell’s affirmative defenses. This presentation brought refresh to the minds of the jury the other evidence presented in support of such claims during the months of litigation which preceded the penalty phase of the Maxwell trial. To the extent that the evidence was discovered subsequent to the conclusion of the guilt phase of the proceedings, it served as a factual basis upon which to argue that, given time, the defendant would continue to discover evidence in support of his claims of innocence, and eventually prove that he had not committed those crimes for which he had been convicted.2

Innocent persons convicted

The defense also presented expert testimony in support of the proposition that, given the existence of lingering doubt concerning the guilt of the convicted defendant, and given the finality of an executed sentence of death, the imposition of such a sentence would be improvident. The defense called an expert who has conducted numerous studies on the death penalty. One such study focuses upon innocent persons mistakenly convicted of capital crimes. The individuals who were the subject of the study were persons who were actually innocent of the crimes for which they had been convicted, as contrasted, for example, with persons who may be guilty of

1 A considerable amount of the defense evidence pointing toward the guilt of one other than Mr. Maxwell was held to be inadmissible by the trial court. It is the firm conviction of this writer that such evidence was erroneously excluded by the trial court. Accordingly an appeal has been taken from Mr. Maxwell’s convictions. The defense presented evidence which has become part of the record, to the effect that Mr. Maxwell would not have been convicted of any murder had the evidence in question been presented to the trier of fact.

2 Additionally, by presenting “guilt phase” type evidence during the penalty phase of Mr. Maxwell’s trial, the defense hoped to ensure that if he were given life, and if his convictions were later overturned and he was retried with respect there to, he could not then be subject to the penalty of death. Bullington v Missouri (1981) 451 U.S. 430, 437-447, 68 LEd2d 270, 101 S.Ct. 1852; People v Henderson (1963) 60 Cal2d 482, 495-97, 35 Cal.Rptr. 77, 386 P2d 677. c.f. People v Superior Court (Garcia) (1982) 131 CalApp3d 256, 259, 182 Cal.Rptr. 426.
crimes for which they were convicted, but who should not have been convicted due to some legal nuance. These were not cases in which there had been a wrongful conviction, that is a conviction not in accordance with the law; rather, these were cases in which a mistaken, though lawful, conviction had occurred. Numerous examples were presented of cases in which an innocent person had been duly tried and convicted of capital offenses; cases in which, after a conviction was had, evidence came to light which conclusively established the innocence of the accused. Although all of us have an intuitive appreciation of the fact that our judicial system sometimes mistakenly convicts an innocent person, such an understanding takes on qualitatively different significance when one is confronted with a hundred such cases. Suddenly the concept is not a mere abstraction; its impact on the lives of individual human beings begins to be appreciated.

As an adjunct to the expert testimony discussed above, the defense obtained numerous court documents in support of the contention that many of the individuals discussed by the expert had indeed been innocent of those capital offenses for which they had been convicted. By reading directly from court documents pronouncing the innocence of the once-convicted defendants, the credibility of the defense expert was greatly enhanced. His findings were not merely the conclusions of an academician, but were confirmed by the independent findings of a judicial system, which, at least upon occasion, explicitly recognizes its mistakes.

The defense also sought to breathe life into the notion that innocent persons are mistakenly convicted of capital crimes by actually calling to the stand one or more such persons. It is difficult to exaggerate the impact of confronting the jury with an individual who has been duly tried and convicted of murder, only to be vindicated after several years of incarceration. Such a witness personalizes the concept of lingering doubt and impresses upon the members of the jury the impact that their decisions have on the life of the accused, all the while focusing their attention not upon the defendant who they have found to be a murderer, but rather upon an individual who has been vindicated of a capital offense for which he had been found guilty beyond a reasonable doubt.

**Racial bias**

In that Mr. Maxwell is a black man, the defense also presented expert testimony in support of the proposition that the death penalty, as applied, is affected by racial bias. It was not the contention of the defense that juries purposefully, or even knowingly, allow racial bias to influence their decisions with respect to the imposition of the death penalty. The defense was not accusing the jurors of being racist. Rather, evidence was presented in support of the proposition that regardless of the best efforts of jurors not to be influenced by racial factors, and regardless of whether or not jurors believe they are influenced by such factors, racial bias does affect the actual decisions of jurors when deciding whether to impose the ultimate sanction. The racial bias may be unintentional and unconscious, but the best evidence indicates that it is present nonetheless. This evidence established yet another factual basis from which to infer the existence of lingering doubt—lingering doubt, not concerning the guilt or innocence of the accused, but concerning the ability of the individual jurors to fairly impose the death penalty given the racial factors in this case.

As discussed in detail below, during the penalty phase of the Maxwell trial the defense presented graphic evidence of the fate which awaits an individual sentenced to die in the California gas chamber. The evidence so presented made evident the retributive aspects of a sentence of death. A juxtapositioning of such retributive aspects of a death sentence against the lingering doubts of the jurors, both with respect to the guilt of the accused as well as the ability of the jurors to impose a death sentence without being affected by unconscious racial bias, serves as a factual basis for the argument that the retributive aspects of a death sentence are inappropriate to the case before the trier of fact.

**Mitigating evidence**

In addition to presenting evidence and argument directed toward those issues related to lingering doubt, the defense also presented evidence and argument during the penalty phase of the Maxwell trial which was designed to elicit sympathy for the accused, and result in an exercise of mercy by the members of the jury. Both federal and California case law provide ample legal authority for such an appeal. The defense argued that, notwithstanding any findings of the jury with respect to aggravating and mitigating factors or the relative balance between the two, a defendant convicted of murder has the right to appeal to the sympathy of the jury, and that the jury has the right to exercise mercy in favor of the accused. Should the jury find that mitigating factors outweigh aggravating factors, then the jury must spare the defendant's life; however, if the jury finds that aggravating factors outweigh mitigating factors, the jury may nonetheless exercise mercy toward the defendant and recommend a sentence of life imprisonment rather than death.3

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3 It is also important to emphasize to the jury the fact that they determine whether a factor is aggravating or mitigating in nature, as well as the weight to be given to such a factor. Further, the jury must be reminded that a mere numerical superiority of aggravating factors over mitigating factors is by no means determinative of the issue of the relative weight between aggravating and mitigating circumstances. (California Penal Code section 190.3; California Criminal Forms & Instructions (BW 1983) by Rucker & Overland section 43:24.)
Evidence concerning the background of the defendant may often serve as the basis for an appeal to a jury’s sense of sympathy and mercy. Similarly, circumstances surrounding the crime charged may likewise serve as a factual basis for such an appeal. However, in making an appeal to the jury based upon the defendant’s background and the circumstances surrounding the crime charged, in most instances it should be made clear to the jury that the evidence is being presented, not by way of excuse, but by way of explanation.

Those factors present in a case giving rise to lingering doubt concerning the guilt of the defendant, as well as any factors giving rise to doubts concerning the jurors’ ability to impose a sentence of death without being affected by racial prejudice, also serve as a factual basis upon which to request an exercise of mercy by the members of the jury. For it may be argued that given such lingering doubts, neither the finality associated with an executed sentence of death, nor the retributive aspects of such a sentence, are appropriate.

In the Maxwell case, the defense mounted an attack on the proposition that the death penalty has any social utility whatsoever. Such an attack is relevant to the defendant’s appeal to the jurors’ sense of mercy, because when deciding whether or not to exercise mercy one considers not only the consequences of one’s decision with respect to the supplicant, but also the consequences to the society. In this regard, the defense presented expert testimony to the effect that the death penalty has never been shown, in any empirically valid study, to have any deterrent value whatsoever. Further, some experts in the area of death penalty study believe that the fact that a society has a death penalty actually increases the occurrence of violence in the society. Finally, expert testimony was presented to the effect that studies have demonstrated that it is actually less expensive to incarcerate a convicted criminal for the duration of his natural life than to incur the expenses of litigation customarily associated with the imposition of the ultimate sanction.

**Fate of the condemned**
The center piece of the defense during the penalty phase of the Maxwell case consisted of detailed descriptive accounts of the fate which awaits a condemned man. Such evidence is legally relevant and material in that it serves as a factual basis upon which the jury may come to know the retributive aspects of the death penalty. As discussed above, if there exists lingering doubt concerning the guilt of the accused, or the ability of the jury to impose a penalty of death free from racial bias, then the defense should argue that the retributive aspects of a death sentence are inappropriate under the facts of the case. Further, and more directly, such evidence is relevant and material to the defendant’s appeal for sympathy and mercy.

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**‘What emerged from the testimony is . . . the seemingly mystical set of procedures known as the Death Ritual.’**

Another argument supporting the admission of evidence with respect to the experience of a condemned prisoner focuses on the jurors’ right to know. In a very real and practical sense, the jurors, more than anyone else, bear the greatest measure of responsibility for the fate of the accused. The lawyers play a vital role in the criminal justice system, but theirs is not the role of decision-maker. To some degree our judges bear this responsibility, but given the deference to decisions of the trier of fact, it is the jurors who bear the brunt of the responsibility for what occurs to a condemned prisoner. It is grossly unfair to jurors to ask them to condemn a man to the fate of one sentenced to death without fully educating them on the consequences of their action. For if jurors condemn a man in ignorance and later learn the full measure of their deeds, they may suffer disastrous personal consequences. A juror may decline to participate in the execution of another human being by the simple act of exercising mercy.

**The ‘Death Ritual’**
In an effort to educate the jury on the consequences of imposing a sentence of death, the defense presented the testimony of a former death watch officer, a former office in charge of executions, a former death row chaplain, as well as a new correspondent who has witnessed numerous executions both in civilian life and as a wartime correspondent. What emerged from the testimony is the story of previously condemned and executed prisoners who had been turned over to the keepers of a seemingly mystical set of procedures known amongst those who perform them as the “Death Ritual.” The Death Ritual is unwritten. As stated by one of the witnesses: “The procedures have just been handed down word-of-mouth, handed down from officer-in-charge to officer-in-charge.” These executions by our state are carried out by a small group of people who share a terrible and personal experience—participation in the execution of another human being. It is almost like some ancient brotherhood of keepers of a special knowledge. Even the nomenclature eerie: the Death Ritual; the Death Watch Officer; the Officer in Charge of Executions; Death Row; the Death Cell; the Execution Chamber.

The death ritual commences the day before a condemned prisoner is scheduled to be executed. The prisoner is allowed his final visit. Thereafter, he is marched across an empty prison yard, a prison yard which has been cleared for the prisoner’s final journey. The condemned man is accompanied by two guards, one in front and one behind. The prisoner is marched to the north block. There he is taken to the fifth floor, to Death Row. At 4:30 in the afternoon on the day before the execution, the condemned prisoner secured with handcuffs and a strap and taken downstairs to the death cell. From the death cell the condemned man may view the entrance to the cell in which the execution chamber is housed. The prisoner shares his cell with two other individuals: death watch officers. It is the duty of these offices to ensure that the prisoner remains safe and sane in order that he may properly appreciate his own impending execution. These officers: also attempt to comfort the prisoner through the night, staying with him until the day of the execution.
execution chamber. Periodically, both a medical doctor and a psychiatrist examine the prisoner. Again, he must be kept safe and sane until he is killed. The condemned man is fed his last meal, a meal of his own request. As stated by a former warden of San Quentin: “If we have to go down to San Rafael, that will be done. If we don’t have it there, we’ll provide it for him.” Throughout the night the condemned prisoner is allowed to play music on an old-fashioned wind-up phonograph—the same phonograph which has been used by those who went this way before him. On the morning of execution the condemned man is again examined by a doctor and psychiatrist “and the prisoner then is ready for going into the execution chamber.” The prisoner is again handcuffed and strapped and the receiving part of a stethoscope is fastened above his heart so that death can be pronounced. The stethoscope receiver is connected to two sets of earpieces, one for the chief medical officer and the other for the chief psychiatrist. The executions are scheduled at 10:00 a.m. “primarily because it allows three hours for communication to the Supreme Court in Washington, D.C., that gives them an opportunity to intervene if need be.” The telephone lines are kept open for incoming calls, and a telephone has been installed in the cell where the prisoner is executed. Despite all of the precautions taken, “there have, in fact, been a couple of occasions when the call came just a little bit too late.” The public gallery is filled. The

A Note of Caution

Counsel should be aware that the admissibility of the evidence referred to in this article is open to serious question.

Testimony regarding the nature and process of execution has been held inadmissible in People v Harris (1981) 28 Cal3d 935, 962; Harris v Pulley (9th Cir. 1982) 692 F2d 1188, 1203-04, rev’d on other grounds in Pulley v Harris (1984) 79 LEd2d 29; see also Shriner v Wainwright (11th Cir. 1983) 715 F2d 1452. However, an argument in support of the admissibility of this type of evidence is pending in several capital appeals, including People v Stankewitz, Crim. 22308. This argument suggests that the California Supreme Court’s holding in Harris should be re-examined because the Harris opinion failed to consider the effect of Penal Code section 190.3, §1, which specifically authorizes the introduction of evidence as to “any matter relevant to aggravation, mitigation, and sentence,” and, because one of the constitutional justifications for capital punishment is retribution, the jury must understand the nature of the penalty in order to determine if death is the appropriate punishment.

Admissibility of evidence on the deterrent effect of the death penalty has long been held inadmissible. (People v Love (1961) 56 Cal2d 720, 725-32.)

Admissibility of evidence or argument regarding other defendants erroneously executed is supported by People v Terry (1964) 61 Cal2d 137, 145-46, which the article cites, and People v Woodson (1964) 231 CalApp2d 10, 17-18 (error to preclude counsel from reading from an article discussing the pardon of a man who had been convicted of three robberies actually committed by another).

The admissibility of testimony of “moral experts” is supported by language in People v Haskell (1982) 30 Cal3d 841, 863 (“at the penalty phase, the jury decides a question the resolution of which turns not only on the facts, but on the jury’s moral assessment of those facts as they reflect on whether the defendant should be put to death”) and in Barclay v Florida (1983) 77 LEd2d 1134, 1144 (“It is entirely fitting for the moral ... judgment of judges and juries to play a meaningful role in sentencing”). See also, California v Ramos (1983) 77 LEd2d 1171, 1187. Testimony from clergy, philosophers, or other ‘ethical experts’ is more likely to be admissible if it is based upon the witness’ knowledge of the defendant and the circumstances of the offense, so that it is relevant to assisting the jury in making its moral assessment of the aggravating and mitigating factors in the particular case. See Moore v Commonwealth (Ky. 1982) 634 SW2d 426, 434-35 (testimony of a minister who had a “brief acquaintance” with the defendant regarding the statutory mitigating factors of defendant’s youth and lack of prior criminal history should be admitted at retrial); In re Anderson (1968) 69 Cal2d 613, 627 (evidence of the defendant’s potential for rehabilitation admissible).

The legal questions surrounding the admissibility of “death ritual” evidence were not resolved in the Maxwell case because, for tactical reasons, the district attorney chose not to object to the admission of any of this evidence. Thus although the evidence was admitted in Maxwell, Maxwell does little to establish its admissibility in other cases.

Counsel preparing such a defense should be prepared for the possibility that this evidence will not be admitted. If it is not, counsel should make a detailed offer of proof to preserve the issue for appeal. It is important that counsel not put all of the defendant’s eggs in this one basket. As the article recognizes, trial counsel should present a full trial for life at the penalty phase, presenting any aspects of the defendant’s background and character that may serve as mitigation. Such evidence is clearly admissible under Lockett v Ohio (1978) 438 U.S. 586, Eddings v Oklahoma (1982) 455 U.S. 104, and People v Lanphear (111) (1984) 75 Cal3d 163. The “death ritual” defense should be a complement to, not a substitute for, this traditional presentation of mitigating evidence.

—Gail Weinheimer
Michael Millman
California Appellate Project
prisoner is secured in one of the two chairs within the death chamber itself. The prisoner is strapped about his waist, both arms, and both legs. Poison rests in a cheesecloth beneath his chair. In a set of different "rituals," again commencing a day before the execution, the gas chamber, the poison and sulphuric acid have been prepared. After the prisoner is strapped into the chair, and the appointed time reached, the command is given to "throw the bar." Not a word is spoken. The final commands are given by gestures—"Nobody is talking. Everything is done by signal, primarily nod. The bar is thrown, exposing the poisonous pellets to the sulphuric acid solution, which "liberates the chlorine, and the chlorine gas enfills the chamber." Approximately ten minutes later the prisoner expires. The chief medical officer pronounces death, and procedures are commenced to clear the chamber of its deadly gases. When it is safe to open the chamber without harming the members of the prison staff or the guests in the gallery, the body is removed.

In the course of discussing the function of the death watch officers, the former warden testified that one of their purposes was to ensure that the prisoner did not attempt to commit suicide. "Often times that has been done [an attempt at suicide by a condemned prisoner], so you have to be free of any kind of contraband in the cell, which would mean a search before or some other way that might be used to, you might say cheat death."

**Expert testimony**

The warden also helped to establish the inequities of the death penalty as applied.

"Question: You have known several men on Death Row, have you not sir?

Answer: Yes, I have.

Question: And you have known several men who have been executed; is that correct?

Answer: Yes.

Question: Would you say that these men who have been executed are always, when they are executed, the worst people in the prison population?

Answer: Ordinarily people on Condemned Row, I always had a feeling—held themselves a little more manly than the other people, motivated by perhaps some relief coming in their way at sometime later.

Question: Did they seem like the worst people in the prison?

Answer: Oh, no. We had worse ones down in the yard."

Testimony was also elicited from the former warden of San Quentin concerning the effect that executions had upon the warden himself.

"Question Now, and you yourself, you've carried out executions despite your personal feelings [of opposition to the death penalty]; is that correct sir?

Answer: Right.

Question: Does that take toll on yourself also?

Answer: Well, naturally. I remember Harley Tett's, he was the first warden after Warden Duffey. I remember him telling me one time that he aged about five years after each one. I think he did about four or five.

One of the death watch officers, who had participated in approximately 126 executions, recalled an attempted suicide by a condemned prisoner.

"They had this Catholic preacher sitting right on the bed with him there, he was giving him the rites, and about the same time he—cut his jugular vein."

Question: Did that cause his execution to be postponed?

Answer: No, they just wrapped a shirt around it. The warden says, "Take him in."

Question: So you wrapped a shirt around it to slow the bleeding down?

Answer: Yes, so the spectators wouldn't see it, but there was plenty of blood around, it showed pretty bad."

A former chaplain from San Quentin provided testimony concerning the reactions of condemned men to their stay on Death Row, all the while awaiting their execution.

"Question: Would you say there are any psychological effects of waiting on Death Row, any emotional effects that you could observe?

Answer: Well, there were instances where inmates became psychotic, that would be attributed, I think, in large part to the tension and the status of being under death sentence and under the confinement of Death Row where there was no opportunity to be outdoors. They were inside all times. And other than a recreation period out in the corridor in front of their cells, it was a very limited existence. So, like I say, it's emotional. And in situations where inmates became despondent and committed suicide on the row before the execution. So you can certainly attribute that pressure to the tension of the row life."

The chaplain also provided testimony concerning the potential for human change, and accordingly, the inappropriate imposition of the death penalty upon reformed inmates.

"Question: Now, what is your personal opinion concerning the death penalty?

Answer: Personally I am opposed to the death penalty as being very inappropriate, very superstitious in keeping with reality as far as the human potential is concerned and the changes that happen in human beings.

Question: In what respect sir?

Answer: The people do grow and change and mature and develop. And once they have been immature, once they have done something rash or something far-out, it doesn't mean that they are condemned to repeat that all their lives. And I have seen men grow and develop in a prison experience and even while on Death Row... my feeling is you don't deal with the same man—after he has been on the row for a year, two years, twelve years in the case of Caryl Chessman. He grows, he changes, he becomes a different human being, and in many respects, I find him more enlightened, a more responsible and more effective and desirable person.

The chaplain also confirmed the testimony of the former warden to the effect that condemned killers are not the most antisocial persons within the criminal justice system.

"Question: Are there in your opinion persons who aren't on Death Row and who are more dangerous in our prison system than the persons on Death Row?"
The former chaplain of San Quentin also corroborated the testimony of the defense expert concerning the existence of innocent persons who have been convicted of homicide.

"Question: Are you personally familiar, sir, with any persons who were convicted of a homicide and were later determined to be the wrong person and released?"

Answer: Yes, I do know of circumstances in San Quentin where that was the case. That was the case of an inmate back in around 1960, John Frye was his name. And he was convicted or he pled guilty to a manslaughter charge rather than be charged with a capital offense and face the death penalty. He pled guilty. . . . One day I was in my office in San Quentin. I got a phone call from the captain's office. He said, "We have a man over here, a little disturbed, I think you ought to come over and talk to him." I went over and it was John Frye. And he had just been informed that another man had confessed to this killing and that he was not the responsible person. And I counseled him, which was a happy duty under those circumstances. John was later exonerated and paid a stipulated amount by the state for being falsely convicted or falsely imprisoned.

Witneses to execution

Some of the most powerful testimony came during the Maxwell trial from a national news artist for CBS. As far as can be determined, he is the only person ever permitted to create a visual record of an execution in the State of California.

"Question: And in the course of your occupation, you've covered four wars; is that correct, sir?"


"Question: And you have also had occasion to cover criminal trials of some significance. Is that correct?"

Answer: Yes. I perhaps have covered most of the major criminal trials of America, Manson, the mass murders, Sirhan. This is part of my job as a news artist to sketch our major criminal trials.

"Question: Now, in the course of your experience, have you viewed violence done by humans toward humans?"

Answer: Yes, I'm well experienced in violence. Although I only carried my pencils, I didn't carry weapons, but I did in the war experience combat and also was one of the first to come upon several hundred persons burned alive. It was a holocaust. Prisoners were burned in Belgium, I believe it was, and some of the bodies were still smoking. And I am also aware, having covered the mass murder trials and so forth, I have been aware of the details of most of our mass murders and profound murder trials.

The condemned man was lifted half in. He was wearing long sleeves that covered a suicide slash from the day before.

"Question: In the course of your experience, sir, what would you characterize as the most dehumanizing events which you have had the experience of viewing?"

Answer: Well, over the four wars that I covered, my most dehumanizing experience in a war was witnessing three enemy soldiers who had been posing as GIs during the Battle of the Bulge shot. Immediately after witnessing this—by the way, I could hear the thuds go in and so forth, I won't bother you with the details, but immediately afterwards, I came to the place where we were staying, we were bombed. The roof came in. People fell down. There were dead strewn about and a dismembered leg. But this did not have the same meaning to me as witnessing the execution in the morning of the three enemy soldiers because the earlier execution in the morning seemed calculated or designed death compared to the relatively random or chance death.

"Question: Have you also had occasion to witness executions that weren't carried out during wartime or under wartime circumstances?"

Answer: Yes, I have. I have witnessed a number of ours in America here. . . . And I found that these had been my most dehumanizing experiences in civil life. Not for a moment that I am involved with justifying the crime or whatever, but the experience of witnessing these things was—may I go on, I don't know whether I—

"Question: Yes, please."

Answer: The experience for me, capital punishment can seem personally not to be the answer to these sad questions of crime. . . . My experience has been that this, having been in all of these trials, I have often said there but for the grace of God go I, when I experience the causes and forces that have molded—I'm not justifying for the moment, but the causes and forces that have molded these persons have made me feel just that.

"Question: Did you personally view the last execution that was carried out in the State of California?"

Answer: Yes, I did. And it echoed very deeply in my mind. And I won't forget it.

"Question: Would you describe it, please."

Answer: Yes, I went into the—I did this with the State Department of Corrections, at least I went to them and they said—they didn't welcome me, but they agreed to let me do this. And I sat—I stood beside one of the windows. It was an octagonal chamber with windows around the room. And I thought this would be a brief and fairly simple humane experience. It was quite the contrary. If I may illustrate it. The man—my fellow reporters heard this loud scream, The condemned man was lifted half in. He was wearing a white shirt, I remember, that covered—long sleeves that covered a suicide slash from the day before. I believe. And he was strapped to the chair, and he did this, he turned around and looked out the window and said these four words, I am Jesus Christ.' That's all he said. And then the gas pellets were dropped, and he immediately went down, he immediately slumped. And I thought this is a very swift death. There was a stethoscope
strapped to his heart which extended outward. Instead, even though I thought he was dead, he lifted himself up like this and then turned—happened to turn looking out the window into which I was looking, and his chest was heaving and his mouth was going like this. His eyes looked up for several minutes. He was like this with his mouth moving, his thumbs gripped by his fingers, and looked up, and then as I say, several minutes later he slumped and went down and was pronounced dead, I believe, officially, something about twelve minutes. So I realized this from my point of view, officially, was not a rapid thing, and I never dreamed that a human who had immediately slumped would be getting up and still turn around and look with chest heaving and thumbs clenching for all that time.

Question: Did you, sir, do the only visual depiction that you are aware of an execution in the State of California? Were you permitted to make a drawing, sir?

Answer: I was permitted. That was my intent. I went there and said I feel that we should experience this, so I did, and yet I waited a period of time . . . to get the emotionalism out of it so that it

would not be—you know, it wasn’t just—this is tragedy to me, to all involved who were around there. I mean, it was a tragedy for me—I don’t wish to lighten any of the victims’ families and their feelings and so forth along that line. It was a tragedy for them and for all involved.”

Jury response
The Death Ritual evidence discussed above is stunning in nature. The courtroom was silent during its presentation. The jury was, in a word, spellbound. Post-verdict interviews with the jury confirmed the fact that the death penalty presentation in the case of Mr. Maxwell was responsible for his life being spared. Before the death penalty presentation, the jury deliberated approximately one day before unanimously deciding that the defendant should not be executed.’

‘After the defense presentation, the jury deliberated approximately one day before unanimously deciding that the defendant should not be executed.’

juror’s right to know. It is simply unfair to the members of the jury to request that they condemn a man to the fate of a prisoner sentenced to death without knowing the full measure of the consequences of their actions. This last argument may well be the most irresistible of all. For, during the recent taping of a CBS interview, the deputy district attorney who tried the Skid Row Stabber case, the man who had fought the defense tooth and nail through eleven months of jury trial, agreed that he could not personally quarrel with the proposition that the members of a jury have the right to know the consequences of their action when they condemn another human being to death. □

Mace
A staff of office signifying authority. Its form, that of a heavy club, indicates its original purpose and use in dissuading from dissent.

Politics
A strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage.

Reasonable
Accessible to the infection of our own opinions. Hospitable to persuasion, dissuasion and evasion.

—Ambrose Bierce
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Wilkesesworld

By Winston Schoonover

O that I were as great as my grief,
or lesser than my name!
Or that I could forget what I have been!
Or not remember what I must be now!
From Richard II, Act 3, Scene 3

“There was no longer the slightest doubt in my mind that intimidation was the key to winning.”

Robert Ringer

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Just one week after our release from the Tombs, the morning mail brought bad news. The Bar Association for the State of New York wrote:

“Dear Mr. Wilkes,

We have received information that on October 3, 1970, you were held in contempt by the Honorable Justice Joseph P. Blugeot as a result of your statement to him that he was, to wit, "a racist honky motherfucker."

We are informed that this profanity was stated on two occasions to the judge during the sentencing proceedings against a criminal named John Wadkins, alias ”Johnny Wad.”

Whereas these vulgar remarks are clearly contumacious, defamatory in the extreme, and an outrage to simple human decency, the Bar has determined it appropriate to hold a special expedited hearing to determine what discipline, if any, is appropriate under these circumstances.

The hearing has been scheduled for November 1, 1970 in the Bar offices in New York City. You have a right to appear with counsel and present evidence.

Wilkes was in court arguing motions in a particularly nasty rape case when the letter arrived. I decided there was not a minute to waste, what with the speed with which the bar hearing was approaching. I marched straight to the criminal courts building.

Wilkes had been in fine spirits that morning prior to leaving for court. Fresh out of the Tombs and busy doing what he loved best, defending the damned, he was as high as I had seen him in a long time. "Everyone should lead a prison riot," he had said to me that morning. "It's positively intoxicating."

Outlandish

I walked into the courtroom and found Wilkes in the middle of a heated argument with the prosecutor, Miles Landish. The DA was attempting to convince the court to order the defendant in this rape case to give a sperm sample. If he refused, Landish wanted the court to get the sample "by any means necessary.

"We need the sample for several reasons," said the chubby prosecutor. "First, it will shed light on the inevitable impotency defense which Mr. Wilkes likes to use in these cases. Second, with the sperm sample, our forensic people can do wonders in determining whether his blood type matches the evidence left at the scene of the rape."

Wilkes seemed amused by Landish's motion. "You have a fertile imagination. And just how do you propose to get this sample, sir?"

"By court order, of course." "Ridiculous!" said my friend. "The judge just can't say 'let there be sperm!'"

The two attorneys, ignoring the judge, were talking directly to one another. Miles Landish said to my friend, "All your client has to do is do what he does every night in his cell and put the results in a jar for us."

The judge evidently thought this a great idea and interjected, "Offhand, Mr. Wilkes, that's the way I see it being done."

Holy juices

My friend's amusement disappeared from his face. This was getting serious. The State had plenty of evidence to prosecute this case, he thought. He was damned if his own client would give them even more while he was defending. The bodily juices were to be protected at all costs.

Wilkes turned to his client. They huddled and whispered rapidly back and forth. After a few minutes, Wilkes turned to the bench and addressed the judge. "My client informs me that he

is a devout Catholic and that what you propose is forbidden by canon and biblical law—remember, your Honor, Genesis, Chapter 38, Verse 10 where for spilling his seed on the ground God slew Onan. Any order compelling a sperm specimen will violate the First Amendment to the United States Constitution and be an outrageous violation of this man's freedom of religion.

"If you like, your Honor, we can get the Bishop in here to discuss this with you this afternoon. I am sure the Church would be interested in any such order and would intervene amicus curiae."

Wilkes' eyes caught mine during this excellent speech. "Oh, I see my associate Mr. Schoonover is in the courtroom," he said. "I'll just ask him to call the Bishop . . . ."

The judge instantly put up a hand and said, "No, that won't be necessary."

"I have a solution," piped Miles Landish. "My office will hire a urologist to conduct a rectal prostrate massage so that we can get what we need without any action required of the defendant."

A what!

"A what!" said Wilkes' client. "A rectal what?" Wilkes' client didn't understand much of what was being said, but he understood that word alright.

"A simple, gentle massage of your prostate gland," said Landish. "It'll give us what we want without your assistance."

"Ain't that still gonna spill my seeds all over the place?" asked Wilkes' client to everyone.

There was a moment of silence as all of the principals pondered this weighty question. Then Wilkes spoke up. "Your Honor, this is an improper use of New York's long-arm statute."

Wilkes worried client looked to him and grabbed his sleeve. "Ain't nobody sticking his arm up my butt!"

The judge looked to Wilkes. "Do you have any other objection to this procedure?"

"Clean hands doctrine," said my friend. "Or not remember what must be now!"

"That was as great as my grief. Or that I could forget what I have been! Or not remember what I must be now!"

From Richard II, Act 3, Scene 3

1 Wilkes' representation of Johnny Wad is chronicled in Forum (Sept.-Oct. 1984), Vol. 11, No. 4.
religion, common sense, or our client’s bodily integrity. It had to do with ink—bad ink.

A call to Rome?

Wilkes said, “I must insist, if the court is seriously considering granting this silly motion, that I be allowed to fully brief the free exercise of religion and right of privacy issues. Further, I do want the opportunity to consult the Archdiocese so that I might as forcefully as possible present the religious underpinnings of my client’s rights. So if the court would set this down for a hearing date, I will be able to produce not only a brief, but representatives of the Church, perhaps from Rome itself, to address the court on the gravity of this violation of religious principle.”

You could see the wheels spin as the judge pondered the ramifications of such an order. He knew damn well my friend would make good on his threat to drag the Church into his courtroom to make Hizoner look like an anti-Catholic pervert.

The next two words the judge uttered were slow and difficult in coming. They were said softly so as to be almost inaudible and his milky face crimsoned as he spoke the words which would keep our client’s sperm in its rightful place: “Motion denied.”

Contradiction: judicial neutrality

Trial attorneys know the feeling when you enter a courtroom to face a tribunal more biased against your client than your adversary. One must fight through constant anger, frustration and despair and use one’s worldly wits to survive. It’s no fun appearing in front of judges who preside like coroners—with toxic sweetness!—over the death of your client’s rights. Before such judges, the merits of the case are largely irrelevant to the outcome. If the defense is to win, it will be because of matters other than the righteousness of the case. In the sperm case, Wilkes won, as he often did, through intimidation.

It was such an unbiased panel Wilkes encountered when he entered the hearing room of the New York City Bar Association to face his disciplinary hearing. Hearing officers for bar matters are volunteer lawyers who take on these assignments to better position themselves for advancement to the bench or, failing

that, to jockey for a well-exposed spot in the hierarchy of the various local, state or national bar associations.

Typically, bar discipline officials are WASP lawyers from the big downtown firms who have never set foot in a courtroom and are totally oblivious to the pressures of a real law practice which so often get practicing lawyers in trouble.

Wilkes knew in advance what kind of a hearing panel he would be facing. After all, he had been here before. So he prepared for the hearing as if he were a defendant in a murder trial. In a way, it was a capital case—Wilkes legal practice was hanging in the balance.

Bar preparation

Here’s what we were prepared to present the panel to defend Wilkes’ license. We reviewed all the sentencing records of Judge Joseph P. Bluegot and hired a mathematician to analyze the data. Reviewing cases involving similar facts and circumstances, the mathematician, using regression analysis, demonstrated that blacks fared far worse than whites in Bluegot’s sentencing and that race was the only variable which explained the difference.

Next, our investigator, Uriah Condo, discovered that Bluegot currently belonged to an exclusive “whites only” club. Condo found a couple of club members who were willing to testify to the judge’s frequent unflattering comments about minority groups. Condo also found a former Mrs. Judge Bluegot. She told him that Bluegot was deeply racist and often castigated her with racial slurs.

Most important, we hired an elderly forensic jargonologist, Professor Henry Bluefnozel, a semantics expert who spent his career studying ghetto language and who could explain the middle-class meaning of the words which triggered this disciplinary hearing. To make his point, the Professor prepared large posters with the offensive words painted in large letters. Underneath each was the intended meaning of the word translated from ghettoese.

Into the hearing room we marched, a small army of lawyers, mathematicians, investigators, and the old semanticist, Henry Bluefnozel, with his huge signs under each arm.

Crawley III

The head hearing officer, Malcolm Crawley, III, a silk-stocking lawyer from a Wall Street firm which specialized in municipal bond law, began the festivities. “We are gathered here to consider the serious charges against one John Wilkes of the New York Bar. The charges are in two counts. First, that Mr. Wilkes did by the foulest vulgarity, impugn the integrity of a member of the bench. Count Two stems from his repeating the outrageous insult of the Court.

“In this regard, we have received a certified transcript of the sentencing hearing of one Johnny Wadkins, alias Johnny Wad. This evidence appears to this panel irrefutable proof of misconduct warranting discipline and therefore we ask you, Mr. Wilkes, if you have any comments in this regard before we turn to the matter of the appropriate discipline.”

The two flunkies on either side of Crawley nodded in agreement. Before Wilkes rose to address the kangaroo tribunal, he whispered to me, “I think I know this jerk-off. But from where?”

Wilkes stood and looked at his accusers. They had mentally already passed that familiar evidentiary point of no return where the judicial eyes glaze over—they had sufficient evidence to convict. They had their man.

Defense case

“Hopefully, my innocence will be a factor which will be relevant to more than just the sentence in this matter,” said my friend. “If the transcript is the extent of the evidence against me then I wish to begin my case.”

Crawley looked puzzled. He turned to his two colleagues on either side but they had no words to guide him. “What could you possibly say in defense of this outrageous comment?”

Wilkes said, “First of all, the transcript reveals that the court ordered me to repeat a statement made in private to me by my client. I was merely the involuntary conduit of my client’s communication. How can this be contemptuous if I was ordered to repeat the comment by the court?”

“Is that your defense? Entrapment?” cracked Crawley.

“That being the alleged defense which is reflected in this transcript, we are now prepared to...”

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"I also have witnesses. I shall now call the former Mrs. Judge Joseph P. Blugeot to the stand." As the former Mrs. Blugeot approached the witness stand, Crawley asked Wilkes "What is your offer of proof? What could she say to shed any light on your statement to the court?"

Wilkes responded: "Let me put it to you this way. We have conclusive, unrebuttable evidence that Blugeot is a bigoted judge who discriminates against minority defendants. We have done a mathematical study of his sentencing practices to present the court demonstrating this fact. Mrs. Blugeot will corroborate it through her own lengthy association with the judge."

Irrelevant!

Crawley interrupted. "Absolutely irrelevant!" You will not be permitted to continue your defamation of Judge Blugeot in this proceeding. If you were sincere about this bigotry matter you would have made these charges in the appropriate forum. You cannot justify calling the judge a 'honky racist motherfucker' by such alleged evidence."

Crawley had just shot down two-thirds of our defense. Only Professor Bluefnozel remained. "Well if truth is no defense," said Wilkes, "I call to the stand Professor Henry Bluefnozel."

"For what?" snapped Crawley.

"Since the disputed words were not my own but those of a young ghetto youth, Professor Bluefnozel, a respected forensic jargonologist, will help this court by explaining the meaning of the words which were meant to be transmitted only to me and were relayed to the court at the judge's insistence;" As Wilkes spoke, Professor Bluefnozel ambled forward with his huge signs. Crawley looked at the first sign which said:

Honkie: caucasoid

"The Professor will demonstrate that the words, while perhaps vulgar to a middle-class white, were simply the truth's stark characterization as seen by a 19-year-old black ghetto youth who had just been sentenced to a year in jail for possessing one marijuana cigarette." As Wilkes spoke, the Professor revealed the second sign which said:

Racist: bigot

Crawley couldn't help comment on the visual arts display being given by the Professor. "Well, we've seen two of the signs already. I can't wait for the Professor to tell us what the work 'motherfucker' means."

At that, Professor Bluefnozel revealed his third sign which had the naughty twelve letter word on it and his definition underneath which read: "Jackass."

"Actually, the definition of the word," said the good Professor, "depends entirely on the context in which it is spoken."

Crawley huddled briefly with his two toadies and then announced that this evidence too was totally irrelevant and did not in any way undermine the offensive nature of the comments uttered at the sentencing hearing. With that, Crawley eliminated our entire defense. There was only one thing Wilkes could do to stop this juggernaut.

"I ask for a recess," he said.

Crawley looked at him sternly. "We have only been going 15 minutes Mr. Wilkes. Why do you wish a recess?"

When my friend needed time he always had a good reason to present. On this occasion, the actual reason was that we had absolutely no defense left and it was time to regroup and think of one. He then explained:

"Nature calls."

Crawley adjourned the proceedings for ten minutes.

Recess

Wilkes and I went to the nearest bathroom to confer on what to do. "Looks like we've had it," I offered as if to cushion the inevitable. "This is a railroad."

"A bullet train," said Wilkes. "Who is that guy? I know I know him from somewhere."

Wilkes began lifting a toilet lid with his toe and letting it fall and bounce back on the porcelain. He was lost in thought. When Uriah Condo came in to tell us it was time to go back, Wilkes was still within himself thinking.

As we reached the bathroom door he grabbed my arm and said, "I thi I remember!" With that he was out the door.

Wilkes quickly marched back into the hearing room and with a loud voice began his summation. He aimed his eyes and words solely on Crawley.

The Cribber

"You have denied me the right to present evidence. I have only my words left to reason with you now, am going to tell you a story which may seem strange and out of place but if you hear me out it will be clear.

"This is a story about a college student who was a cheat. During his academic career, he devised dozens of ways to dishonestly pass his tests. This is how he did it on one occasion. This person, who was known as Th Cribber, came into an economics exam as he did all his tests, totally unprepared. He opened one of his blue books and instead of answering the exam question in it he wrote a long, sad letter home to his parents: Into another booklet, The Cribber copied the five questions on the exam. When the time was up, he turned in the blue book with the letter home it, ran out of the class, and made for the library where he checked out books on economics to help him answer the questions.

"Naturally, with this aid, he was able to answer them magnificently. Th Cribber then put the answers in an envelope and mailed them hom n' dad.

"That night he received the expected phone call: 'Hello Cribber: This is Professor Klorrowitz... uh er, I must report something very strange in your exam booklet... er, uh, it appears to be a letter to your parents.'"

"With feigned horror, The Cribb told the prof that he'd made a horrible error. He mistakenly mail his folks his exam answers and tu the letter home into the professor. The Professor, dubious at this, ask for his folks' phone number. He ca
and instructed the puzzled parents to meet him and the Cribber at the local post office where they could release the as yet undelivered letter to the Professor.

"And, of course, it worked because the Cribber had indeed mailed the exam book to his folks after his visit to the library. The Cribber received a great grade in the class as he did in all his classes.

Moral

"Today the Cribber is a successful professional man who has undoubtedly made his way in life the same way he did in college. And what is the moral of this story, you ask?"

Actually, no one was asking Wilkes anything at the time. The two flunkies on Crawley's right and left were looking at Wilkes as if he'd lost his marbles. Crawley however was beet-red and looked like he was about to disappear behind the bench.

Wilkes continued, "The moral is you never need to know who you're dealing with. You never know what things a person's done until someone takes the time to investigate and expose a person's crimes. Only mercy met with mercy can wash the sins of the past away."

Wilkes sat down. Everyone was stunned by this oddly irrelevant summation. My friend noted the puzzlement on my face and whispered in my ear, "That sonovabitch is Cribber Crawley! I went to school with the bastard 35 years ago!"

Decision

When Wilkes sat down Crawley appeared visibly relieved. He quickly adjourned the hearing telling us the panel would deliberate and soon send its decision to us.

A few days later we received it. Here's what it said:

"Mr. Wilkes' statement was the unfortunate relaying to the court of a private communication from his client intended only for his ears. We find no contumacious intent in its accurate transmission upon court order."

I expressed my surprise that Wilkes' not-so-subtle extortionate threat to investigate Crawley had worked. "He must have a lot to hide," I said.

"Yes, indeed," smiled Wilkes. "We all do, thank God!"
Great Moments in Courtroom History

By Charles M. Sevilla

Charles Sevilla collects verbatim excerpts from courtroom transcripts destined to become Great Moments in Courtroom History. Submissions are welcome and may be sent to care of Cleary & Sevilla, 1010 Second Ave., Ste. 1601, San Diego CA 92101-4906.

This month's contributors are listed with each Great Moment.

1. Positive Eyewitness
   (Marjorie Madame, Martinez)
   DA: Do you know the defendant sitting at the end of this table?
     a. No, I don't.
     b. All right. I am referring to an individual who has long blond hair and a mustache. Can you recognize who I'm talking about?
     a. Yes, but I don't know him.
     b. Okay. Please point to the person that I'm talking about.
     a. On the end here.
   DA: May the record reflect that the witness has identified the defendant?
   THE COURT: She didn't identify him. She identified him as the person she didn't know.
   DA: All right. Do you know the defendant?
     a. No, I don't.

2. Immunity
   (Roger Patton, Oakland)
   COUNSEL: Mrs. W., at the Preliminary Hearing, do you remember testifying at the Preliminary Hearing in this matter?
   DA: No. I don't.
   COUNSEL: Mrs. W., that's because you took the 5th amendment; isn't that true; at the Preliminary Hearing in Oakland?
     a. I don't recall anything like that.
     b. You didn't have a lawyer at that time?
     a. No, I didn't have no lawyer.
     b. And you never had a lawyer come into court with you for the Preliminary Hearing?
     a. No. Would you tell me what his name was please.
     b. Michael D.
     a. Oh, yes, here in Oakland?
     b. That's what I am talking about?

3. Honest Cop
   (David Zimmerman, Santa Ana)
   Q. Have you had any discussions with Detective W. prior to coming to testify here today?
     a. No.
     b. If you didn't talk with the district attorney until this morning, why don't you tell the Court how you knew to bring that police report with you?
     a. I don't remember how I came into wondering which report to bring.
     b. Well, did you know what you were coming here to testify about?
     a. Yeah, there was a report number, I believe, on your subpoena.
     b. There was?
     a. Right.
   COUNSEL: Could I have the subpoena please? Thank you, your Honor.
   Q. All right. Why don't you show me that report number?
     a. (Witness pauses.) Well, I was obviously mistaken.

4. Money's Worth
   (Luke Hiken, Sacramento)
   COURT: Do you feel your attorney has advised you satisfactorily of your rights, defenses and the consequences of the plea of guilty?
   DEFENDANT: I think as best as he could, yes. He thought it would be a two-year to life thing, but I told him you said five, so I am sure you are right.
   COURT: Are you satisfied with your attorney's representation of you in this matter?
   DEFENDANT: I think if anybody pays that particular man anything for it, the state is taking a ride.

5. Voir Dire
   (Melissa Nappan, San Francisco)
   Q. If you sat as a juror, is there any situation where you feel you got to give the death penalty?
     a. That's right. What I meant, the death penalty. If they commit a crime, kill somebody, that's it. Death penalty.
     b. Automatic death?
     a. Automatic death.
     b. Lights out.
   THE COURT: Q. You wouldn't consider life?
     a. Hell no. What for?

6. Judicial Rust
   (Paul Fromson, Merced)
   THE COURT: It has been so many years since I dismissed a case, I don't remember the procedure. □
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