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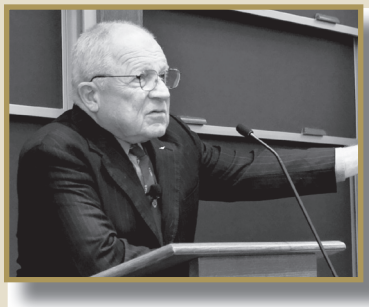
# NCDD Journal

National College for DUI Defense

Editors: Edward Fiandach and Paul Burglin

Summer 2011

## DODD AND BAILEY BRING POWERFUL CROSS-EXAM SKILLS TO SUMMER SESSION



*F. Lee Bailey delivers his "cross examination" lecture at Harvard Law School's Austin Hall.*

NCDD's 2011 Summer Session at Harvard Law School featured legendary trial lawyers Roger J. Dodd and F. Lee Bailey, and both delivered riveting lectures on cross-examination.

Displaying his extraordinary ability to control and entertain his audience, Dowd mentored this year's attendees on Day 2 with his methodology for cross-examination. Like Alec Baldwin beseeching the salesmen in Glengarry Glen Ross to "always be closing," Dowd commanded this year's attendees to "always be leading." Lead, and lead with just one new fact for each new question.

Day 3 of the seminar belonged to Bailey. For anyone who thought that age or disciplinary battles might have deterred or diminished him, Bailey showed unmistakably that the fire remains in his belly and he still has a tiger's instinct for trapping his prey. After digging out the good facts, counseled the 78-year-old trial warrior, the witness should be asked about all the things he didn't see, hear, or smell. "Never take your eyes off the witness," insisted Bailey, "and never formulate your question until you have heard the last answer. Then attack."

Bailey said there are four things to consider with a witness:

- What did the witness see (some things are directly seen, while others are observed only peripherally)?
- How good of a memory does the witness have? ("There are always flaws in memory!")
- How well can the witness articulate what he saw?
- Is the witness honest?

Boasting of his own memory ("I still remember my phone number from the 1940's, and I can recite my credit card numbers"), Bailey insisted that a good memory is essential for effective cross-examination, and it's something that can be enhanced with tools and practice.

Bailey's recommended reading? The Art of Trial Advocacy by Lloyd Paul Stryker (Cornerstone Library, 1965), and his own (soon to be published) Excellence In Cross Examination.

## DEAN'S MESSAGE

Greetings! Our theme for this year is "Teaching and lending a helping hand!" I encourage you to speak to your local Public Defenders and let them know that the NCDD has numerous scholarships at their disposal.

I also want to bring to your attention the NCDD "Closer's Club." Four NCDD members have been recruited to assist in this project: **Alan Bernstein** of Florida, who has studied the closing argument for years; **Jay Ruane** of Connecticut, who just finished writing a superb article on closing; **Joe St. Louis** of Arizona, who is a highly skilled and battle tested trial lawyer; and **"Big" John Webb** of Maine, whose accomplishments at trial are renowned. They will be available to critique closing arguments and otherwise assist new lawyers with drafting and delivering effective closings. The Closer's Club is not an exclusive club and I invite all NCDD members to participate.

Another item for our collective benefit is the upgraded NCDD Website. **Bill Kirk** and **Barry Simons** have spent countless hours on this project, and it now offers a wealth of information at your fingertips. I call upon our State Delegates and members to submit motions and briefs so that we can further populate the site with information and resources for our collective benefit. I encourage our scientists to participate on the site's new Forum.

Finally, major progress has been made with the U.S. Patent Office regarding the use of badges for our members. The Patent Office has given us a green light to proceed with the use of the badges. For more information on using and downloading the appropriate badge, please go to our website (www.ncdd.com).

I look forward to serving as your Dean, sharing our intellect, energy and resourcefulness, and continuing our tradition of taking in good lawyers and making them exceptional. I hope to see you in Las Vegas and Orlando!

- George A. Stein

## E.D.'S CORNER

We are coming away from a fantastic 2011 Summer Session. Kudos to George Bianchi and the Board for putting on a wonderful seminar! Next up is the NACDL/NCDD Vegas seminar ""Winning at Every Level" held September 15-17, 2011, and it has a great lineup!

From Vegas we go to another warm venue in Orlando, FL, for a great Winter Session, January 19-20, 2012, at the Hard Rock Hotel Universal Orlando. Dean Stein is putting the finishing touches on a program that will be very exciting. A brochure with registration form will be mailed to you very shortly.

The deadline to apply for the Board Certification Examination is August 31, 2011, but you may contact Fellow Steve Oberman for late filing consideration. The exam will take place on January 18, 2012, at the Hard Rock Hotel the day before the Winter Session begins.

Don't forget that you can add your picture and change your bio on our new website. Take a look at all of the changes and get in the habit of using this tremendous resource.

Hope to see you in Las Vegas and Orlando!

- Rhea Kirk

# Case Law Roundup

**Case Highlights from Illinois Attorney Donald Ramsell**

**Chemical Test Refusals – Foundational Challenges**

***State of New Jersey v. Burns*, Not Reported in A.3d, 2011 WL 1584364 (N.J.Super.A.D.)**
Court rejected a licensee's contention that the State must 'prove-up' the admissibility, accuracy, and reliability of the breath test equipment before finding a "refusal" to submit to it.
The Court noted that a similar contention concerning the qualifications of a breath test operator was previously rejected, citing *In the Matter of John Ferris*, 177 N.J.Super. 161 (App.Div.1981), certif. denied, 87 N.J. 392, (1981).

Editor's Comment: What if the driver could prove that the test that was requested by the police was in fact inadmissible? For example, what if a driver was asked to blow into an indisputably unapproved device? Would the outcome be different?

***State of Minnesota v. Hester*--- N.W.2d ----, 2011 WL 1563683 (Minn.)**
A person can commit a criminal test refusal in violation of Minn. Stat. § 169A.20, subd. 2 (2010), if he refuses a request to take a chemical test of the person's blood, breath, or urine made by a "peace officer," as defined in Minn.Stat. § 169A.03, subd. 18 (2010). The Minnesota Supreme Court held that because the Lower Sioux did not comply with Minn.Stat. § 626.91, subd. 2(a)(2), by failing to carry the required liability insurance limits at the time of appellant's arrest, the Lower Sioux police officer did not have the authority to request that appellant take a chemical test.

**Destroyed Or Lost Video Tape**

***People of Illinois v. Aronson*, --- N.E.2d ----, 2011 WL 941306 (Ill. App. 2 Dist.)**
A video tape was made on the very issue disputed by the parties (i.e., whether reasonable grounds existed for the officer to believe defendant was driving while intoxicated). Although the officer's testimony was deemed credible and no finding was made of intentional or willful destruction of the tape, the trial court's decision to rescind his license suspension was affirmed on the basis that the lost tape, coupled with the defendant's testimony, outweighed the evidence in the State's favor.

**Police Officer's Opinion Of Guilt**

***State v McLean* 205 N.J. 438 (N.J. 2011)**

The NJ Supreme Court reversed a drug conviction which had been partially based upon use of the so called "lay opinion rule" where the police officer testified based upon his training and experience as to what constituted intent to distribute.

"The Court has established the boundary line that separates factual testimony by police officers from permissible expert opinion testimony. On one side of that line is fact testimony, through which an officer is permitted to set forth what he or she perceived through one or more of the senses. On the other side, the Court has permitted experts with appropriate qualifications, to explain the implications of observed behaviors that would otherwise fall outside the understanding of ordinary people on the jury. In this appeal, the State suggests, and the appellate panel agreed, that there is a category of testimony that lies between those two spheres, governed by the lay opinion rule. The Court does not agree. To permit the lay opinion rule to operate in that fashion would be to authorize every arresting officer to opine on guilt in every case. The testimony of the police detective – because it was elicited by a question that referred to the officer's training, education and experience – in actuality called for an impermissible expert opinion. "

EDITOR'S NOTE: This issue is a hot topic in DWI law, since the New Jersey case of *State v Bealor* allowed officers to testify upon their training and experience as to marijuana intoxication.

**Open Container – No Chemical Test Required To Establish Alcohol**

***Derosiers v. District of Colombia*, --- A.3d ----, 2011 WL 1894854 (D.C.)**

Circumstantial evidence held sufficient to support a conviction for possession of an open container of alcohol in a vehicle, even in the absence of a chemical test of the liquid in glass jar that allegedly contained alcohol. Police officer observed and smelled liquid and recognized, based on his experience, distinctive smell of vodka emanating from clear liquid inside glass jar found next to defendant, smell of alcohol emanated from defendant and vehicle containing jar, and defendant, who was asleep in front seat of parked vehicle, appeared to be intoxicated at time jar was found next to her.

**Motor Vehicles – "Pocket Bike" vs. Battery Operated Wheel Chair**

***People v. Varela*, --- Cal.Rptr.3d ----, 2011 WL 1126036 (Cal.App. 2 Dist.), 11 Cal. Daily Op. Serv. 3771**

CVC 415 defines a " 'motor vehicle' [a]s a vehicle that is self-propelled."

CVC 473 defines a " 'pocket bike' [a]s a two-wheeled motorized device that has a seat or saddle for the use of the rider, and that is not designed or manufactured for highway use."

"A 'vehicle' is a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks."

A pocket bike comes squarely within the definition of motor vehicle. To hold otherwise would require that we ignore the plain meaning of sections 415 and 670.

Varela argues that legislative history refers to a pocket bike as a "device" and not a vehicle. (Citing Sen. Transportation & Housing Com., Analysis of Assem. Bill No. 1051 (June 7, 2005); Sen. Rules Com., Analysis of Assem. Bill No. 1051 (June 30, 2005).) but there is nothing inconsistent about referring to a motor vehicle as a device.

Because a pocket bike falls squarely within the statutory definition of a motor vehicle, it is a motor vehicle as a matter of law."

***State Of Minnesota v. Brown*, --- N.W.2d ----, 2011 WL 2302319 (Minn.App.)**

The Minnesota appellate court determined that a wheelchair used to assist a physically disabled person is simply a substitute device for walking, and as such does not constitute a vehicle, despite the statutory definition to the contrary:

"It is plain that for purposes of traffic regulations contained in Chapter 169, Brown's scooter is a wheelchair and is not a motor vehicle, and Brown, who uses the scooter as a substitute for walking, is, while operating his scooter, a pedestrian. See *Boschee v. Duevel*, 530 N.W.2d 834, 839 (Minn.App.1995)
("[T]he mere circumstance, that [a person] ... propels himself or herself along by means of a chair, or by some other mechanical device, does not clothe him or her, in a broad and general sense, with any other character than that of a pedestrian.").

**Denial of Independent Chemical Test Triggers Suppression of Breath-Alcohol Test Results**

***State of Georgia v. Davis*, --- S.E.2d ----, 2011 WL 1843166 (Ga. App.)**

The State's breath test results were suppressed on the basis of a failure to reasonably accommodate the defendant's request for an independent test.
In rejecting the State's argument that Defendant withdrew her request for an independent blood test after the officer advised her that she would have to pay for the test but failed to allow her the opportunity to make other payment arrangements, the Court noted:

"[t]he police cannot escape the duty to reasonably accommodate individuals who have invoked the right to an additional test simply because such individuals fail to insist on alternatives, especially when they have not been instructed of their responsibility to make such arrangements and that failure to do so results in a waiver. It must be remembered that such individuals are in police custody and do not have free reign to dictate their own actions. Because of the very nature of the arrest, their faculties are often impaired, and their actions are largely dictated by the instructions given to them by the police."

**Failure to Appear On Prior DUI Arrest May Constitute Prior Conviction For Sentencing Enhancement Purposes**

***State of Wisconsin v. Devries*, Slip Copy, 2011 WL 1844721 (Wis. App.)**

Defendant was found guilty of drunk driving and sentenced as a 5th timer based on the inclusion of Arizona and California drunk-driving matters as prior "convictions" under the Wisconsin statutes. WIS. STAT. § 340.01(9r) defines a "conviction" as including: a "fail[ure] to comply with the law in a court of original jurisdiction"; and a "violation of a condition of release without the deposit of property."

EDITOR'S NOTE: Under *Apprendi*, all matters that enhance a penalty (except prior convictions) must be proved during trial beyond a reasonable doubt. Plus, the defendant normally has the right of confrontation. How SCOTUS would treat this type of prior "conviction" remains to be seen.

**10-Second Pause At Green Light Insufficient Basis For Stop**

***State of New Jersey v. Brackin*, --- A.3d ----, 2011 WL 1661381 (N.J.Super.A.D.)**

Defendant was pulled over after he was stopped at a green light for 10 seconds and then pulled away without incident.

The Court held that the pause at the green light "was not of sufficient length to have raised community caretaking concerns, particularly in circumstances in which defendant's driving after commencing to proceed through the light was unexceptionable. Officer Tobin could not have had a reasonable belief that a traffic law had been violated…because as he testified, no cars followed defendant's, and thus there was indisputably no traffic to obstruct. Thus, we adhere to our conclusion that a reasonable, articulable suspicion that a motor vehicle violation had been committed was not established."

EDITORS NOTE: There are several state cases on both sides of the fence on this issue. For example, in Illinois it has been held that a delay of 3-5 seconds at a green light, while the officer is waiting behind the vehicle, is enough to stop the vehicle.

**Community Care Taking Claim Rejected**

***Alford v. State of Texas*, --- S.W.3d ----, 2011 WL 3505698 (Tex. App.-Dallas)**

Officers on bicycles observed a vehicle pull up and stop at a dead end street near an open Jack in the Box restaurant. The passenger door opened and the passenger "kind of turned sideways" as he said something to the driver. They were observed five to seven minutes and were allegedly talking very loudly, but the police could not discern what they were saying.

As the officers approached to "see what was going on," the passenger changed places with the driver. The defendant attempted to drive away but the officer said he wanted to talk to her for a second and asked if she would "mind putting it in park." Some brief conversation ensued before the officer observed a strong odor of alcohol and ultimately arrested the driver.

The officer testified to being concerned that there was a disturbance going on or that somebody was sick. In reversing the denial of defendant's motion to suppress evidence, the Court first noted that the nature and level of the distress exhibited was almost non-existent. It further concluded that the open restaurant provided defendant and her passenger with a place to get any assistance they might need, and that there was no evidence the defendant was either in danger or presented a danger.

**Mistrial Improperly Ordered – Double Jeopardy Triggered**

***Day v. Judge Bruce Haskell*, --- N.W.2d ----, 2011 WL 2505052 (N.D.), 2011 ND 125**

After jury empaneled and sworn, Defendant, bailiff, and jurors engaged in conversation about pheasants while judge and lawyers were in chambers. Court quickly ruled that any such conversation automatically required mistrial, but the North Dakota Supreme Court held that a mistrial was not manifestly necessary and that a retrial was constitutionally barred by the Double Jeopardy clause.

A mistrial is not automatically required when the jury is exposed to improper communication; rather, the court must consider the circumstances of each case and determine if there is a manifest necessity for a mistrial. See *United States v. Melius*, 123 F.3d 1134, 1138–39 (8th Cir.1997) (the trial court's decision to grant a mistrial when there is a claim of possible juror bias is entitled to deference but the court's decision is not beyond review and the court must act responsibly and deliberately considering the defendant's interests). The trial court's decision to terminate a criminal proceeding after jeopardy has attached should not be taken lightly. *Linghor*, 2004 ND 224, ¶ 22, 690 N.W.2d 201. In this case, the trial court did not consider any alternatives and the decision was made quickly and without sufficient reflection. The trial court did not engage in the "scrupulous exercise of judicial discretion" required before making its decision.

The Court noted that the trial court ordered the mistrial just seven minutes after a prosecutorial motion for it was made, and that inadequate consideration to alternative remedies was given.

**Out-of State Alcohol-Related Reckless Driving Conviction Considered A "Prior" OWI (DUI) In Wisconsin**

***State of Wisconsin v. Malsbury*, Slip Copy, 2011 WL 2201190 (Wis.App.)**

Defendant appealed a determination that he was a second offender, based upon his prior conviction in another state (Washington) where the original charged was amended/reduced from DUI to reckless driving.

The Court was guided by the fact that Washington State treats the offense as a prior as well.

**Colorado DWAI Conviction Constitutes a Prior In Texas**

***State of Texas v. Christensen*, Not Reported in S.W.3d, 2011 WL 2176656 (Tex.App.-Dallas)**

One may be charged in Colorado with DWAI (driving while ability impaired) or DUI. While the former is a less serious offense requiring a lesser showing of impairment, the element of impairment is defined much the same as what is required in Texas for a DUI conviction. Hence, a DWAI conviction in Colorado is considered a prior DUI in Texas.

Editor's Note: The key to assessing whether Colorado's DWAI

may be properly considered a prior DUI/DWI in another state, is to compare the elements of proof required for a Colorado DWAI conviction with what is required for a DUI/DWI conviction in the other state. California, for example, has found it insufficient for use as a prior in the criminal court but acceptable for use in administrative suspension actions by the Dept. of Motor Vehicles. See *McDonald v. Dept. of Motor Vehicles* (2000) 77 Cal.App.4th 677.

**Expert Testimony Concerning Physiological Variability Affecting Breath Testing Improperly Excluded**

***People v. Vangelder* (2011) ___Cal.App.4th___ (Fourth Dist. COA – Docket No. D059012 (Note: Petition For Review has been filed and the decision is not yet final)**

Defendant appealed the trial court's exclusion of physiologist Michael Hlastala's scientific criticisms concerning the reliability of the data produced by breath test machines which assume the breath samples measure only alveolar (deep lung breath) air. Defendant's offer of proof was that the assumption is not always valid due to a series of physiological factors (e.g., individual breathing patterns, body temperature, blood hematocrit, and breath temperature) that may affect the transmission of alcohol in gas form, from the bloodstream to the lower and upper portions of the lungs, to the trachea and mouth and back again, thereby making such breath measurements unreliable, and undermining, in turn, the application of the standardized partition ratio calculation for converting breath levels to blood-alcohol levels.

*Held*: The trial court prejudicially erred in refusing to allow scientific testimony to be presented that would have raised doubts about the reliability of the EC/IR and PAS breath testing devices, with respect to the physiological variables that can affect the sample of breath or air taken. Distinguishing the California Supreme's Court's prior decision in *People v. Bransford* (holding that evidence of partition ratio variability is irrelevant and inadmissible on the *per se* charge (i.e., driving with a .08 percent or higher alcohol content), the Court noted that this was not an attack on the partition ratio employed, but rather a critique on the assumed nature and quality of the breath samples.

## Trial Trip Treasures

by Donald J. Bartell

It was determined in a joint study conducted by the NCDD and the California DUI Lawyers Association (CDLA) that 90 per cent of jurors from virtually every demographic have a negative impression of drunk driving defendants. So what should defense counsel do to improve the defendant's lot?

It's not what you should do, but what you shouldn't do. **Here's my Golden Rule: Never ask a question that can expose a defense juror.** Since there are so few jurors that come to court with a sympathetic view of the drunk driving defendant, these jurors need to be protected like the grandeur of Yosemite Valley. They are a precious resource, but you can cause this resource to be swiftly strip-mined if you ask questions that expose defense minded jurors.

Questions like, "Have you ever had a negative experience with a police officer?" provide the government with an invitation to have the juror who answers that question in the affirmative struck by the prosecutor. Your strategy in jury selection should be to ferret out the pro-prosecution jurors and shroud the defense leaning jurors. Jury selection is the most important part of the case. Follow the Golden Rule!

*Editor's Note*: This edition's trial tip treasure comes from Donald J. Bartell, a partner in the Riverside, California law firm of Bartell & Hensel. Mr. Bartell is a co-author of *Attacking and Defending Drunk Driving Tests* (James Publishing).

## In Memoriam

### Harold Garfinkel, Ph.D.
1917– 2011

Few trial lawyers knew him, but Harold Garfinkel was a renowned sociologist whose seminal work evolved from his study of jury deliberations.

A professor at the University of California, Los Angeles, for more than 50 years, Garfinkel developed theories concerning social behavior, ultimately introducing ethnomethodology (a sociological discipline focused on how a group of people engaged in a particular activity take their shared knowledge and reasoning procedures to deal with the particular circumstances they confront).

Garfinkel observed that while jurors give due deference to jury instructions, the force that guides them more profoundly is "an assumed logic." This is expressed in phrases like "anyone could see" that such and such happened. According to Garfinkel, it is not so much society's rules that influence human behavior, but how members of society collectively interpret the rules to shape a social order.

His life work became focused on the common elements of knowledge and reasoning that citizens bring with them into the jury room. "A person is 95 percent juror before he ever comes near a courtroom," said Garfinkel. According to John Heritage, author of Garfinkel and Ethnomethodology, he believed that rules must be specified and interpreted in light of real-world situations, and how rules get applied is a matter of mutual negotiation.

The message to be distilled from Garfinkel's work is that jury instructions, while obviously important, do not dictate verdicts. Jurors use their shared knowledge and ability to interpret and apply the instructions to real life situations.

## LEARNING ABOUT GREAT CLOSING ARGUMENTS FROM HISTORICAL PRECEDENT

by George Stein

Closing argument is the stage of trial that allows a lawyer to invoke emotion, engage in the art of persuasion, and appeal to a juror's logic and better senses. If the practitioner has not given his or her best performance throughout trial, the closing argument can be the last opportunity for redemption.

In the history of American jurisprudence, literally hundreds of thousands of closing arguments have been given in the nation's courtrooms. During this same time period, numerous factors have changed which affect the conduct of a trial. Civil rights legislation has affected who can be a juror in a case; technological advances have altered what evidence gets before a jury and the weight to be given those items; and legal precedents have affected both content and delivery of closing argument to jurors. A question should arise in a person's mind: are the elements and delivery of a truly classic closing

argument the same today as they were a hundred and fifty years ago?

This article examines F. Lee Bailey's closing argument in one of the most notable cases of the 20th Century – the Patty Hearst trial. I thought it appropriate since Bailey recently spoke at the NCDD's Summer Session. Elements of the closing will be analyzed against legal resources to see exactly how recognized advocacy tactics were used by the defense to argue on Ms. Hearst's behalf. From this examination, I will categorize what material is essential to create a message that is powerful to the intended audience – your client's jury.

## I. How The Case Became Famous

America has a strange fascination with people who are related to money and power. These individuals may not be influential in their own right, but they are connected to those who hold sway over the government and greater public. Such was the case with Patty Hearst. She is the granddaughter of William Randolph Hearst, who gained money and influence through a publishing empire he built in New York City and San Francisco. Her great-grandfather, George Hearst, was a millionaire mining magnate and U.S. Senator who provided the seed money which eventually became the Hearst publishing empire.

A person coming from such wealth and power would attract the eye of many disparate groups. One such entity was the Symbionese Liberation Army ("SLA"), a leftist urban guerilla group active in the mid-70's. On February 4, 1974, the SLA kidnapped Ms. Hearst from her apartment in Berkeley, California. She was initially ransomed for the release of jailed SLA members; however, when the terms of this exchange were unsuccessful, the SLA demanded that the Hearst family feed all the poor and needy of California. After the Hearst family distributed approximately $6 million in resources to the Bay Area poor, the SLA did not release Patty, claiming the donated materials were of poor quality.

In April 1974, an audiotape surfaced wherein Ms. Hearst was heard pledging membership in the SLA and taking on the new name "Tania." Shortly thereafter, on April 15, 1974, she was photographed carrying a carbine rifle and helping the SLA rob a bank in San Francisco. A warrant issued shortly after Ms. Hearst was identified from the photo; however, she managed to evade capture along with other SLA members until September 1975.

## II. The Hearst Trial

Ms. Hearst's trial commenced on January 15, 1976. Her lead attorney was Bailey, who had already gained fame by defending numerous high-profile individuals, including the re-trial of Dr. Sam Sheppard (who was thought to be the inspiration for "The Fugitive" television series), the "Boston Strangler" Albert DeSalvo, and Army Captain Ernest Medina (associated with the My Lai Massacre in Vietnam).

The first task in getting ready for trial was establishing a credible defense for Ms. Hearst. The most obvious one was a "brainwashing" theory and, related to this, the Stockholm Syndrome, where captive individuals become sympathetic to and affiliate with the views of their kidnappers. However, the trial judge ruled that a strict "brainwashing" defense was not appropriate; instead, Ms. Hearst could proceed on a coercion theory and had to prove that the defendant was acting out of "immediate fear for her life." Mr. Bailey argued during trial that Ms. Hearst "had been blindfolded, imprisoned in a narrow closet and physically and sexually abused."[i] The prosecution countered this evidence by using expert witnesses who testified that key omissions from Ms. Hearst's statements made prior to trial revealed that no abusive captivity occurred. Instead, the state argued, Ms. Hearst freely let her "inner rebel" come forward and she voluntarily joined the SLA cause.

## III. The Closing Argument And Analysis

Bailey delivered the closing argument to the jurors in the Hearst case in March 1976:

> Ladies and gentlemen, those of us who do this for a living have a lot of questions about what our function really is when it comes to summing up. It is often called an argument, but I think it is inappropriate, because when you argue with someone, you exchange ideas in an effort to find out who is more persuasive. But in the setting of any trial the final remarks of counsel are not answered by the jury, and what the jury does is not recorded for the first time in this entire proceedings. You will see this gentleman and those who work with him disappear, as you talk together about what you believe you have heard and what you believe of what you heard. There are many concepts in the law. The SLA was so right about so many things that I, as a citizen, am a little bit ashamed that they could predict; so well what we would do. But I think an overview of this case is more appropriate than talking just about bank robbery. This is not a case about a bank robbery. The crime could have been any one of a number. It is a case about dying or surviving --that is all Patricio Campbell Hearst thought about. And the question is, what is the right to live? How far can you go to survive? We all know that it is a human impulse, a generic, irresistible human impulse to survive. People eat each other in the Andes to survive. The big question is, and we don't have it in this case, thank God, can you kill to survive? We do it in wartime, but that is a different set of rules. We allow ourselves all kinds of special privileges when we fight the enemy. G. Gordon Liddy would have been an international hero if it was only the Russians who caught him instead of the reporters and ultimately the Department of Justice.
>
> A novelist once wrote a most disturbing book -- you may have heard about it. It was a best seller and a movie. A man who was condemned to hang for killing his wife killed his executioner to survive, and then it was determined that he had not killed his wife. And a judge had to decide whether or not he could be tried for that second killing. Does one have an obligation at some point to die? It was called *A Covenant with Death*, and we all have covenant with death. We're all going to die and we know it. And we're all going to postpone that date as long as we can. And Patty Hearst did that, and that is why she is here and you are here. And the manner in which she did it is the subject of this trial, and one of the incidents that arose during that survival, which is the focus of the indictment. There has been so much contradictory evidence of peripheral matters that I could occupy your time, I suppose, to the full limit that I am allowed by this trial judge to address you. I don't propose to do that. I don't agree with Mr. Browning that we are in no better position to judge the truth than you are. We are skilled at this sort of thing. We have practiced it for a long time. There are specialists in deception and simulation, and you were privileged to hear from one of the very best, alive today, whose opinion you may accept or reject because, in the end, we come back to a non-person. The reason we don't try these cases, ladies and gentlemen, before one of you is because we don't and have not for hundreds of years trusted a single human being to be that kind of balance that can make this awesome judgment. But we do trust the collective. And we figure despite the fact that we have a transcript of everything that was uttered, and you don't know, and we knew all about this case before you were ever impaneled, that between you, you will remember what is important. That is the bet of the law now.
>
> What happened in this case? We all know what happened and we watched it happen. The news media kept us informed of every detail. The interest of the news media in this case has been so intense that it was necessary to protect you from it so that you might be able always to bear in mind what you heard in this courtroom and not the comments of someone else. When you return to your homes you may be very surprised as to what your neighbors thought this trial was all about. But at least you know, that the law provides. A young girl, who absolutely had no political motivations or history of activity of any kind, was rudely snatched from her home, clouted on the side of the face with a gun butt, and taken as a political prisoner. Now in many segments of this whole saga, you are either going to have to take what Patty Hearst says as the truth, or if you buy Mr. Browning's suggestion,

you are going to have to disregard it, in which case you have no access to what happened, because she is the only person surviving who is willing to talk about it. But I suggest to you that as to the initial parts of her story the corroboration is overwhelming, and I want you to remember, please, something Dr. Kozol and this morning even Mr. Browning, I think, forgot:

We played those tapes for you in the defense case. The prosecutor offered only the statement of Patricia Hearst, admitting that she had robbed the bank -- and she did rob the bank. You are not here to answer that question, we could answer that without you. The question you are here to answer is why? And would you have done the same thing to survive? Or was it her duty to die, to avoid committing a felony? That is all this case is about and all the muddling and stamping of exhibits and the little monkeys and everything else that has been thrown into morass don't answer that question.

There are some indicators of reliability that I think you are very privileged to have as a jury because juries are by definition a group of citizens with no knowledge -- and you are an exception, you know a lot about this case, as the record shows -- and no interest in the outcome, assembled to listen to people tell different stories and decide which one of them, if any, has told the truth. The regimen under which that function is cost protects against the one thing we don't want and can't stand, and that is a mistake by you that lands on her. The Government can well afford it. Somewhere when the only really important talk is given to you, and that will come from the bench and not the lawyers, you are going to hear that the Government, and this is a judgment of the Court, that the Government always wins when justice is done. And it would be nice to say we impaneled you to do justice, but please don't get those kinds of grandiose ideas. We know that it is normally beyond the capability of human function. We impaneled you for a very different reason: Patty Hearst has a lot going against her. The escape that Mr. Browning and Dr. Kozol think she should have welcomed, she said, "I had nowhere to go", as resulted in only a change of captors. But at least now, as long as society is her captor, she does not have to worry about being killed. Freedom may be a more awesome alternative -- you are not here to decide that. We have a framework, the SLA predicted this trial. They also predicted your verdict and persuaded her coming back would get her twenty-five years. And if we can't break the chain at some point in their predictions, there are going to be other Patricia Hearsts, the blueprint is plain, it works, get a political gathering by getting food for the people, say this is a political prisoner paying for the crimes of her parents.

Mr. Browning has asked you to convict this young girl. I suggest to you, ladies and gentlemen, that in order to bring yourselves to the state of mind where you could have what the Court is going to require you to have, on abiding satisfaction to a moral certainty that she is really guilty, before you are allowed to use that word, you have to resort to something besides the evidence in this case, it's riddled with doubt, and always will be. Perry Mason brings solutions to all of his cases, in open court usually from the ranks of his opponents' witnesses. Real life doesn't work that way. We can't bring home the bacon. We have given you all we have got. No one is ever going to be sure. They will be talking about the case for longer than I think I am going to have to talk about it, whether it occurs to me, or probably the only people in the courtroom I haven't had to talk about it so for with. But simple application of the rules, I think, will yield one decent result, and, that is, there is not anything close to proof beyond a reasonable doubt that Patty Hearst wanted to be a bank robber. What you know, and you know in your hearts to be true is beyond dispute. There was talk about her dying, and she wanted to survive.

Thank God so far she has. Thank you very much.[ii]

The first issue that strikes any observer is the length of Mr. Bailey's closing. The Hearst trial ran over two months long and this closing argument appears short for such a lengthy proceeding. Some critics have cited the length as a detriment to Ms. Hearst's defense.[iii] The question should be asked: should the closing have been longer?

Not necessarily. Some legal scholars have advocated the idea of keeping closing argument short. As one legal author stated, paraphrasing a clergy member: "no souls are saved after twenty minutes."[iv] [v] Instead, the driving element that should dictate length is the theme of the closing argument. This is the central idea around which an attorney organizes a case, and states the theory whereby his or her client should prevail in the litigation. In essence, the theme is analogous to the "moral of a story," and looking at closing argument as storytelling is not so far-fetched as one may think. As author Jim Perdue notes: "Accomplished storytellers hook the listener, set the tone of the story, suggest where it's going, and get across a mass of information without slowing the pace."[vi]

In the Hearst trial, Mr. Bailey's theme centered around the idea that Ms. Hearst was coerced out of fear into following the SLA and taking part in their crimes. Thus his use of imagery involving kidnapping, the desire to survive, and the impact that threats of violence can have on an individual's psyche. This helps explain why the argument was short in length. In essence, Mr. Bailey conceded the factual assertions made by the state, limiting what he could argue to the jury by heavily focusing on the coercion element.

The prosecution literally had Ms. Hearst on videotape, gun in hand, participating in a bank robbery. What options existed for the defense? This fact brings into focus another key element for practitioners to recognize with closing argument: weaknesses in one's case must be addressed, but it should not go to an extreme whereby the advocate focuses too much on the opposition's strengths.[vii] [viii] As one scholar notes, an attorney in closing may "acknowledge the evidence and its damaging effects while arguing that something else is determinative."[ix] This may involve having to concede a great deal of the case so that the jury stays focused on the elements where the defense wants attention paid.[x] [xi] Mr. Bailey's closing argument could not avoid the evidentiary weaknesses in the defense's case. But one can recognize how his efforts to show the coercion defense served a two-fold purpose of addressing the defense's uncertainties while showing the weakness in the state's case – the state may have had Ms. Hearst in photos committing crimes, but they could not show what thoughts were swirling in her head at that time.[xii]

The coercion element also raises another factor that trial attorneys must address. How much emotion should be invested into the closing argument by counsel? It has been observed that jurors recognize emotional appeals for what they are (i.e. - diverting the jurors' attention from the facts of the case), and usually they take seriously the boilerplate instruction read by the trial judge that they are not to allow emotion to govern their verdict.[xiii] Mr. Bailey had to walk a fine line on the emotionalism element in the Hearst case. He had to convince jurors that the coercion element was so great in Patty's case that she had no option but to commit crimes for the SLA if she was to survive. However, he had interesting and persuasive facts which may have generated negative emotionalism against his client. Ms. Hearst was a wealthy heiress to a family fortune. The prosecution also presented evidence about her potential affiliation with extreme, left-wing politics. How could an average juror relate to such a person? "(T)he advocate's persuasiveness is enhanced inasmuch as the universality of the theme resonates with the jury's life experiences and connects the advocate's position to some recognized truth."[xiv] Socio-economic variables, such as racial, ethnic, gender, and class, create biases in jurors which are both difficult and delicate. They not only exist but are frequently outcome determinative.[xv]

So how did Mr. Bailey try to handle these potential biases? He tried to incorporate them into the theme of his case. Part of his argument, in essence, postulated a "why would she do these crimes?" idea. Mr. Bailey implied that Ms. Hearst was a wealthy heiress, and it violated all common sense that she would take part in a bank robbery and associated crimes. Ms. Hearst lacked the economic incentive to involve herself in such high-risk activities.

We can also draw an inference from Mr. Bailey's heavy emphasis on the coercion element that reflects an important practice

pointer for defense counsel. The closing argument should not only encapsulate the attorney's theme, but it should direct the jurors in how to use the jury charge and the evidence in the case.[xvi] [xvii] The evidence against Patty Hearst was damning. The jury charges, combined with the evidence, would clearly direct a juror to vote for conviction. Mr. Bailey's heavy reliance on the coercion defense, in essence, asks the jurors to say: "yes, she did the crimes...but she had a reasonable excuse." He asks them to consider the evidence, consider the jury charges, especially consider the coercion jury charge, and then find her not guilty because she lacked free will.

The Hearst closing argument brings into focus a privilege that is specific to the defense; namely, that defense attorneys, unlike the prosecutor, must be allowed to argue any reasonable inference from the facts because of the unique position wherein the defendant is placed. [xviii] This phenomenon is evident in Bailey's closing argument. Ms. Hearst (the publishing heiress), it was argued, had no place to go for one and one-half years except to follow the SLA for fear of losing her life; that her impulse to survive was as great as someone who would cannibalize a corpse following a plane crash in the mountains; and that the SLA used Ms. Hearst to further their agenda and to intentionally force her into a criminal trial to disgrace the publishing family's name. Defense counsel are permitted to make such inferences, far beyond what the state is allowed, because of the unique proof burdens placed on the prosecution and because the defense is expected to zealously protect their clients' interests. Defense lawyers would be remiss – bordering on ineffective – if they did not take advantage of such leeway.

However, this strategy when used by defense lawyers must be tempered by not violating some core principles of closing argument. One of the most widespread and frequently recognized rules in closing argument is that counsel should not ask for the jury to stand in the plaintiff's or defendant's shoes. This technique is commonly referred to as a "golden rule" argument.[xix] Do we see a violation of the "golden rule" in the Hearst closing argument? Arguably, there are a few instances that may cross the line. Consider these comments: "And the question is, what is the right to live? How far can you go to survive?...The big question is, and we don't have it in this case, thank God, can you kill to survive?" The liberal use of the pronoun "you" bring the argument uncomfortably close to a "golden rule" violation. These excerpts, however, raise up another point: the prosecution did not object when they were made. Thus, they fall under the old adage of "no harm, no foul." Lawyers should still be aware of the "golden rule" and steer away from any inferences calling for jurors to stand in the defendant's place.

Finally, something should be said about when closing argument should be formulated by defense counsel. The post-trial history and editorializing of the Hearst criminal case has generally been critical of Bailey's closing argument.[xx] It is unknown whether the argument's content is a product of when it was prepared because only Bailey knows. Generally speaking, there are two schools of thought on when closing argument should be prepared. The first, and the predominate one, calls for advance preparation. A lawyer should have a theory of the case from the initial review, and this should assist the practitioner to formulate closing argument at that stage, as well.[xxi] [xxii] [xxiii]

There is a smaller school of thought that can be loosely characterized as "winging it." This model suggests not setting out a syllable by syllable piece of oratory. Instead, it calls for the advocate to cull key pieces of evidence from the record and, in a conversational-type format, show jurors how these items link up with important elements of the case.[xxiv] Related to this is the idea that closing should focus on a limited number of themes and not be a recitation of each piece of evidence or witness testimony.[xxv]

The Hearst closing argument can be classified under each school of thought by scholarly observers. As previously noted, it is short in length, focuses on a limited number of items from a two month trial, and appears conversational in tone. Note Bailey's reference to current events for that time (G. Gordon Liddy, the Andes plane crash involving the Uruguayan rugby team, etc.), and the singular focus on the coercion element. This would imply its construction somewhat spontaneous and extemporaneous.

However, there is also the observation that the argument's focus on coercion is consistent with the case theory from the initial defense review. The issue of Patty's free will was a focus in the media as soon as she was arrested in September 1975. The vast majority of legal scholars and observers agreed that Bailey's argument subscribed to the advance preparation model. Defense lawyers can take lessons from his final remarks as to which school of preparation appears more effective and suited to their style.

## IV. Conclusion

One legal scholar noted, and trial lawyers should use this as a guidepost in formulating closing arguments, that "(p)ersuasive closing arguments will generally contain three elements. First, they will capture the listener's attention. An attorney should not waste the initial opportunity to capture the jury's attention with 'boiler-plate pleasantries.' Second, after creating a lasting impression the litigator should reiterate the theme of the case, followed by information detailing why the jury should decide for his client. Finally, trials attorney should conclude their remarks with a reasonable demand in his favor, 'because that is the only verdict justice demands.'"[xxvi]

Can we see these elements in the Bailey closing argument? Arguably, we can make the case that all three elements were satisfied. Mr. Bailey certainly cannot be characterized as using "boilerplate language." This is evident by his use of visualizations to stress the coercion element. Furthermore, it is highly doubtful that an attorney of his experience would even consider using such amateur tactics in a high-profile matter. The second and third elements work in tandem in the Hearst case – Patty was coerced into following the SLA, the jury should see the coercion plain as day, and convicting her of the crimes would violate principles of justice and accountability. The fact that the jury convicted Ms. Hearst does not necessarily mean that Mr. Bailey did not honor the principles of good closing argument. It should be remembered that the prosecution had her in photographs robbing a bank and had a confession out of her as well. It could equally be argued that, in this case, bad facts assisted the State to gain an unjust result. (**Note**: Ms Hearst's sentence was later commuted by presidential act!)

Another author noted: "Remember that your opening statement is a promise to the jury of what you will prove through the evidence. Closing argument should show them that you kept your promise."[xxvii] We can also observe how Mr. Bailey started the Hearst case with the theory that Patty was not operating under her own free will after being abducted by the SLA. He made efforts in both direct and cross-examination to demonstrate this to jurors, and argued this same theory in closing. Effective practitioners should operate by the same model. It not only gives a defense focus to the case which jurors should carry into deliberations, but also helps to counteract the damaging portions of the state's case against your client.

In conclusion, a classic closing argument from American jurisprudence, such as the Hearst case, can reveal much to attorneys who take the time to read them and analyze their content. By doing so, lawyers can see what constitutes exceptional oratory, can contrast their style with the reviewed material, and can refine their own styles so as to more effectively represent their clients.

***Editor's Note***: This article is intended to kick off the Dean's newly launched "Closer's Club" (see "Dean's Message" for further info).

[i] http://en.wikipedia.org/wiki/Patty_Hearst
[ii] http://law2.umkc.edu/faculty/projects/ftrials/hearst/hearstranscriptexcerpts.html#Closing_Argument
[iii] "Guns 'n' Berets"; The Economist; Nov. 6, 2008.
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[vi] Perdue, James M.; "Winning With Stories: Using The Narrative To Persuade In Trials, Speeches & Lectures"; 69 Texas Bar Journal 984; November 2006; published by the State Bar of Texas.
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[viii] Notestein, Kerry; "Closing Arguments"; 29 The Brief 72, 74-

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[ix] Bright, Stephen B.; "Developing Themes In Closing Argument And Elsewhere: Lessons From The Capital Cases"; 27 Litigation 40, 58; Fall 2000; published by The American Bar Association.
[x] Bright at 40
[xi] Caldwell at 981.
[xii] Blackwell at 29
[xiii] Notestein at 76.
[xiv] Caldwell at 986
[xv] Bright at 59.
[xvi] Notestein at 73, 75.
[xvii] Caldwell at 1050-51.
[xviii] Nidiry, Rosemary, "Restraining Adversarial Excess In Closing Argument", 96 Colum. L. Rev. 1299, 1331; June 1996, published by The Columbia Law Review.
[xix] Blackwell at 28
[xx] Hearst, Patricia Campbell & Moscow, Alvin, *Patty Hearst: Her Own Story*, published by Corgi/Avon, 1988 (p. 442-443); previously published as *Every Secret Thing* (1982).
[xxi] Notestein at 74.
[xxii] Blackwell at 27
[xxiii] Caldwell at 984-90
[xxiv] Disner, Elliot G.; "Closing Argument: Winging It?" 10 Nevada Lawyer 23, 24; September 2002, published by the State Bar of Nevada.
[xxv] Alexander at 195-96.
[xxvi] Blackwell at 29.
[xxvii] Refo, Patricia Lee; "Closing Argument: A String Of Pearls"; 25 Litigation 37; Fall 1998; published by The American Bar Association.

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