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MISCELLANY

BOOK REVIEW

AN OVERVIEW OF OTHER CRIMES EVIDENCE IN MARYLAND

By Michael O. Twigg*

On July 26, 1998, a museum in the town of Smithsville was the victim of a breaking and entering. The perpetrator stole only impressionist paintings. The sole clue was a single pink glove deliberately placed on the front security desk of the museum. For months local law enforcement tried desperately to catch the crook but to no avail. Sometime later the lead investigator, Detective Wilson, learned of a breaking and entering of a museum in the neighboring town of Jonesville. As with the Smithsville theft, only impressionist paintings were stolen and, more compelling, a single pink glove was also left on the front security desk of the establishment. However, through a stroke of misfortune for the perpetrator, he was apprehended as he was loading his van with the precious paintings in Jonesville. His name is I. Steele Monet.

Curious about the similarities in these crimes, Detective Wilson re-opens the case. Investigation reveals that Mr. Monet stayed in the Sleep and Dash motel in Smithsville the night of the theft. Convinced Monet also committed the Smithsville burglary, the detective closes the case and forwards it to the local prosecutor's office.

The following week Detective Wilson gets a call from the prosecutor assigned to the case. "Wilson! How do you expect me to win this case?" the prosecutor immediately barked. "There are no fingerprints, eyewitnesses, nothing!"

The detective, a bit shocked at first, calmly replied, "Look, winning the case is your job. I only collect evidence and interview people. There is nothing else I can do for you in this case. Besides, once you tell the jury about Mr. Monet ripping off the museum in Jonesville in the same way they will know it's the guy."

"Detective, I can't tell a jury about the Jonesville burglary... well, at least I don't think I can. I'll call you back later."

INTRODUCTION

For many lawyers, the admission of "other crimes" evidence in a trial setting is a complicated, daunting and rarely used procedure. In reality, however, this aspect of the law is no more difficult than any of its contemporary counterparts. Once a practitioner grasps a few fundamental concepts, the simplicity of its application is revealed.[1] This

[1] A word of caution is in order. This article may possess a prosecutorial "slant" in its approach to other crimes evidence. This is not based solely on any personal biases, but rather that the vast majority of instances where evidence of other crimes is sought to be introduced in a trial setting, it is at the hands of the prosecutor. However, in the interest of fairness to all practitioners, this article also outlines numerous ways to attack the soft underbelly of the prosecutor's attempt to admit evidence of other crimes evidence.

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article is designed primarily as an overview of the law concerning evidence of other crimes in a criminal trial setting. While the article will address the general law applied in determining the admission of other crimes evidence, its primary focus will be upon tactical and logistical considerations in its use.

OTHER CRIMES EVIDENCE AND ITS USES

In the hypothetical at the beginning, the prosecutor may wish to introduce evidence of other crimes evidence to show the identity of the perpetrator. Clearly a crime was committed in Smithsville; without the benefit of the knowledge of the crime in Jonesville, however, the case would be lost as there would be no suspect. If the prosecutor is permitted to introduce evidence concerning the Jonesville crime, he or she has a much better chance of securing a conviction. Indeed, the presentation of evidence of the crime that occurred in Jonesville will help to establish the identity of Monet as the perpetrator of the Smithsville crime. Without the evidence, it seems unlikely a trial would even be possible.

Apart from establishing identity, evidence of other crimes may be used for numerous other purposes. One immediately thinks of law school's pithy summary of this evidence: other crimes or bad acts may not be used to show action in conformity therewith. However, over time, many legitimate uses for other crimes evidence have developed. In an attempt to classify these uses the mnemonic device "MIMIC" was created. MIMIC reminds practitioners that other crimes evidence may be used to

establish motive,[2] intent,[3] absence of mistake,[4] identity,[5] and common scheme or plan.[6] In application, many of these exceptions overlap one another.

Additionally, legal evolution has created additional exceptions where evidence of other crimes evidence may be permitted.[7] As early as *Cross v. State, supra*, the Court of Appeals acknowledged some ten (10) situations where evidence of other crimes may be admitted to establish identity alone.[8] Moreover, Maryland courts have consistently held

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[2] *See generally, Martin v. State*, 40 Md.App., 389 A.2d. 1374 (1978); *Vincent v. State*, 82 Md.App. 344, 571 A.2d. 874 (1990).

[3] *See Simms v. State*, 39 Md.App. 658, 388 A.2d. 141 (1978); *Howard v. State*, 324 Md. 505, 597 A.2d. 964 (1991).

[4] *See Wynn v. State*, 351 Md. 307 (1998).

[5] *See Brafman v. State*, 38 Md.App. 465, 381 A.2d. 687 (1978); *Solomon v. State*, 101 Md.App. 331, 646 A.2d. 1064 (1994); *Govostis v. State*, 74 Md.App. 457, 538 A.2d. 338 (1988); *State v. Faulkner*, 314 Md. 630, 552 A.2d. 896 (1989).

[6] *See, e.g., Cross v. State*, 282 Md. 468, 386 A.2d. 757 (1978).

[7] In *Emory v. State*, 101 Md.App. 585, 647 A.2d. 1243 (1994), Judge Moylan identified the following in addition to ones listed previously: sexual propensity, close connection, opportunity, preparation, plan, knowledge.

[8] The exceptions are as follows:

(a) the defendant's presence at the scene or in the locality of the crime on trial;
(b) that the defendant was a member of an organization whose purpose was to commit crimes similar to the one on trial;
(c) the defendant's identity from a handwriting exemplar, "mug shot," or fingerprint record from a prior arrest, or his identity through a ballistics test;
(d) the defendant's identity from a remark made by him;
(e) the defendant's prior theft of a gun, car or other object used in the offense on trial;
(f) that the defendant was found in the possession of articles taken from the victim of the crime on trial;
(g) that the defendant had on another occasion used the same alias or the same confederate as was used by the perpetrator of the present crime;
(h) that a particular modus operandi used by the defendant on another occasion was used by the perpetrator of the crime on trial;
(i) that on another occasion the defendant was wearing the clothing worn by or was using certain objects used by the perpetrator of the crime at the time it was committed;
(j) that the witness' view of the defendant at the other crime enabled him to identify the defendant as the person who committed the crime on trial.

that there is no finite list of exceptions of when evidence of other crimes may be permissible.[9]

There are four rules of evidence to be considered in this area of law. Maryland Rules 5-401,[10] 5-402,[11] 5-403,[12] and 5-404[13] apply in every instance where evidence of other crimes is sought to be admitted. Over time the courts have created a three-step process which utilizes the previous rules in the determination of whether evidence of other crimes may be admitted.

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[9] *Solomon v. State*, 101 Md.App. 331, 646 A.2d. 1064 (1994); *Harris v. State*, 324 Md. 490, 597 A.2d. 956 (1991).

[10] Maryland Rule 5-401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

[11] Maryland Rule 5-402. Relevant evidence Generally Admissible, Irrelevant Evidence Inadmissible.

Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence which is not relevant is not admissible.

[12] Maryland Rule 5-403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[13] Maryland Rule 5-404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

(a) Character evidence generally -

(1) In General. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(A) Character of Accused. Evidence of a pertinent trait of character of an accused offered by the accused, or by the prosecution to rebut the same.

(B) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

(C) Character of Witness. Evidence of the character of a witness with regard to credibility, as provided in Rules 5-607, 5-608, and 5-609....

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

First, the party moving to have the evidence of other crimes admitted must establish to the trial court that (1) the evidence fits one of the recognized exceptions, and (2) that the evidence is relevant to a contested issue of the case.

Second, there must be a showing by clear and convincing evidence that the other crimes actually occurred.[14] Finally, the sitting court must apply the Rule 403 balancing test and determine whether the probative value of the evidence is outweighed by the potential prejudicial effect.

HISTORICAL BACKGROUND

Maryland Courts have wrestled with the proper application of other crimes evidence for years. Through time, Maryland has developed a position that evidence of other crimes is presumptively inadmissible.

Ross v. State – The Line Is Drawn

In 1976 the Maryland Court of Appeals handed down the seminal decision of *Ross v. State*.[15] Since that time, the law of other crimes evidence has been reviewed regularly by the appellate courts of Maryland.[16] The *Ross* decision created a strong presumption that other crimes evidence is highly prejudicial and should rarely be admitted, holding its admission should be subjected to "rigid scrutiny." The negative

[14] Recently, *Whittlesey v. State*, 340 Md. 30, 665 A.2d. 233 (1995), held that when "the probative value of the evidence does not depend upon proof that the misconduct actually took place" the court should not require a showing of clear and convincing evidence. *Id.* at 61, 665 A.2d. at 238.

[15] 276 Md. 664, 350 A.2d. 680 (1976).

[16] Since *Ross*, there have been over 50 written opinions that have dealt, either directly or indirectly, with 404(b) evidence.

language employed in *Ross* provided considerable ammunition for opponents of admission of other crimes evidence. Indeed, it created the attitude that evidence of other crimes should be considered presumptively inadmissible.

The Inclusionary v. Exclusionary Debate

Recently, throughout the country, there has been a movement to make other crimes evidence presumptively admissible in the trial setting. The basic argument surrounding the varying approaches of other crimes evidence is whether such evidence should be presumptively admissible or presumptively inadmissible. Maryland did not escape the arguments surrounding the law of other crimes evidence.

The decisive point on this question in Maryland began with *Harris v. State*.[17] Here the Court of Special Appeals, in a decision by Judge Moylan, attempted to dramatically change the law of other crimes evidence in Maryland by holding that such evidence should be presumptively admissible. The impulse behind this opinion was to achieve a clearer understanding of the rule. Judge Moylan argued that an inclusionary approach would simplify the application of the rule and thereby resolve much of the confusion surrounding it. Specifically, Judge Moylan pointed out the inherent difficulties in the "exceptions" to the admission of other crimes evidence.

For example, Judge Moylan argued that the use of an exclusionary rule meant that courts, and attorneys, spent far too much time searching to fit other crimes evidence into the pigeonholes of the various exceptions. More troubling, for Judge Moylan, is that an "exclusionary" attitude is overly suspicious of other crimes evidence, and "slants" the playing field unfairly away from admission of such evidence.

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[17] 81 Md.App. 247, 567 A.2d. 476 (1989)(hereinafter *Harris I*).

The Court of Appeals, however, did not agree with this opinion. In *Harris v. State*,[18] the Court of Appeals rejected Judge Moylan's approach and adhered to the status quo. The opinion only cursorily addresses the arguments made by the lower court and apparently based its decision on policy considerations as opposed to *stare decisis*. The Court placed considerable weight on the potential of improperly influencing the minds of the jury.

PROSECUTORIAL APPLICATIONS

Due to the existing Maryland case law, a prosecutor faces a considerable challenge when attempting to introduce evidence of other crimes. This should not, however, serve as a deterrent in seeking admission of such evidence in the proper case. Every effort should be made to persuade the trial court of its necessity if the case warrants it. While opinions have described a three-step process for the admission of other crimes evidence, prosecutors should take certain additional efforts to get the evidence admitted.

Step 1: Put the Defendant and the Court on Notice

While not disclosing the intention to admit other crimes evidence is not dispositive on the issue of admission, the better practice is to advise all parties involved as soon as possible. Prior notice not only prevents surprise from becoming an issue, but also serves to bolster professionalism among attorneys. Several cited authorities have

[18] 324 Md. 490, 597 A.2d. 956 (1991)(*hereinafter Harris II*).

acknowledged the importance of advance notice and, more importantly, how the failure to advise an opponent in advance may create prejudice.[19]

The most common, and perhaps most effective, way to notify all of the parties is via a Motion in Limine. This motion should outline the prevailing case law in the area of other crimes evidence, state in great detail what evidence is being sought to be introduced, and the purpose for its admission. As a practical matter, the moving party should also argue this point at any motions hearing rather than relying on the written motion itself.

There are inherent drawbacks in the use of the Motion in Limine, or other prior notification. At the outset, the prosecutor reveals an aspect of his or her case to the defendant, possibly divulging trial strategy. However, any benefit to "hiding" trial strategy will normally be outweighed by the prejudice of other crimes evidence being excluded due to little or no notice.

Cases may arise when a prosecutor has no way of knowing what will actually be a contested issue in a case, thereby making a Motion in Limine for the admission of other crimes evidence difficult to construct. This, however, should not deter a prosecutor from still filing the motion. The benefits of this are two-fold. First, the proper notice is maintained in accordance with case law and practice. Second, such a motion may "force" a defendant to display part of his *own* trial strategy at a motions hearing.

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[19] *See, MacEwen v. State*, 194 Md. 492, 71 A.2d. 464 (1950) *and* Wharton's Criminal Evidence, sec. 240 (Torcia Ed.1972); *but compare Bloodsworth v. State*, 76 Md.App. 23, 543 A.2d. 382 (1988)(holding curative instruction sufficient to overcome any prejudice that may have resulted by admission of other crimes evidence). Occasionally, the need for evidence of other crimes is not discovered until after the defendant presents evidence. In these circumstances, the prosecutor should still attempt to notify all interested parties as soon as practicable.

For example, returning to our hypothetical, the prosecutor has sound reason to believe that the defendant, Monet, will claim he is not responsible for the crime in Smithsville, thereby putting his identity at issue. Based on this belief, the prosecutor files an appropriate motion seeking the introduction of evidence concerning the Jonesville crime to establish Monet as the perpetrator. This action requires a response by the defense that will shed some light on its trial strategy (i.e., whether the defendant intends to use the SODDI[20] defense, etc.).

Step 2: Show That It Is Not Intended As Propensity Evidence

At the heart of the problem with the admission of other crimes evidence is the potential that the evidence would do nothing more than show a propensity of the defendant to commit crimes. Virtually every case concerning the admission of other crimes evidence focuses upon the prejudice from the propensity issue. Therefore, the prosecutor *must* be prepared to counter this inevitable argument.

Step 3: Establish the Legitimate Purpose for Its Admission

It is essential that the prosecutor provide the trial judge with the theory behind the State's intention to introduce evidence of other crimes. As a practical matter, exceptions to the rule routinely overlap one another, so it is not uncommon to provide multiple theories.[21] It is of utmost importance that the prosecutor use a recognized exception to the prohibition of evidence of other crimes as the trial court does not have discretion in

[20] Some Other Dude Did It.

[21] After *Wynn, supra*, it may be necessary. *Id.* at 319 (where State at trial only asserted absence-of-mistake exception, no other could be raised on appeal).

this area.[22] Absent the other crimes evidence falling into one of the recognized categories, the court will have no choice but to refuse admission of the evidence.

Step 4: Establish the Act by Clear and Convincing Evidence

The other crimes evidence that is being sought for admission must be demonstrated to the judge by clear and convincing evidence.[23] This is done outside the presence of the jury. This step presents little problem if the other crimes evidence is in the form of a certified court conviction. However, since 5-404(b) evidence is not limited to only other crimes, but also bad acts, wrongs, and uncharged offenses,[24] occasions will arise where sufficient evidence must be produced to establish the act. The prosecutor should prepare for the presentation of other crimes evidence as for trial.

Step 5: Strongly Stress the Need for the Evidence

This final step in the introduction of other crimes evidence is the most crucial, despite how powerful a presentation may have been made concerning the validity and application of the rule. The most problematic element of this final step is that it ultimately rests upon the discretion of the trial court.

Perhaps the most frustrating aspect of the use of other crimes evidence is the fact that it remains for the most part a discretionary matter with the presiding court. This

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[22] *Id.* at 318 ("we extend no deference to a trial court's decision" whether evidence fits within an exception). Compare the case law holding there is no finite list of exceptions to the general rule against the admissibility of other crimes evidence. *Harris II, supra* at 497. This begs the question of *how* new exceptions are created when appellate courts have indicated no discretion will be afforded trial courts in the decision as to which exception other crimes evidence falls under.

[23] *Lewdowski v. State*, 302 Md. 691, 490 A.2d. 1228 (1985).

[24] *See Whittlesey v. State*, 340 Md. 30, 665 A.2d. 223 (1995)(holding that while carrying knife is not per se illegal, it did constitute misconduct which may be approached via 5-404(b) analysis).

"back door" represents a safe and tidy way of handling motions for its admission. While I cannot in good faith offer any other standards of review that would not present increased logistical difficulties within the appeals courts; it remains frustrating that this valid and valuable tool is often brushed under the legal rug of obscurity.

When describing the nature of the need of the evidence the mindful prosecutor should focus upon two elements: (1) that the evidence passes the balancing tests of Maryland Rule 5-403 and (2) that without the evidence, the State will not be able to prove its case.

Maryland Rule 5-403 describes the appropriate balancing test applied in determining the admission of relevant evidence. Of all of the aspects of this issue, the danger of unfair prejudice is by far the most substantial in the use of other crimes evidence. Specifically, as described previously, the danger of the jury using such evidence to convict a defendant based on propensity is the paramount fear;[25] therefore, this fear must be addressed and dispelled by the prosecutor.

Rule 5-403 does not preclude the admission of relevant evidence simply because it has *some* prejudicial effect on the defendant. If that were the case, no evidence could ever be presented at trial because all evidence presented by the State will in some fashion prejudice the defendant. The focus point is described as *"unfair prejudice."*[26] Moreover,

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[25] *Cf. Ricketts v. State*, 291 Md. 701, 703, 436 A.2d 906 (1981)("the jury may conclude that because he did it *before*, he most likely has done it *again*")(discussing same-crime impeachment)(emphasis in original).

[26] *See, Dollar v. Long Mfg., N.C. Inc.*, 561 F.2d 613, 618 (5th Cir. 1977)("Of course, 'unfair prejudice' as used in Rule 403 is not equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it is not material. The prejudice must be 'unfair'"). *See also*, Committee Notes for Federal Rules of Evidence indicating that "unfair prejudice" refers to an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. *See also*, Black's Law Dictionary, 6th Ed (*citing Empire Gas Corp. v. American Bakeries Co.*, 646 F.Supp. 269 (holding that generally, danger of unfair prejudice in admission of evidence always exists where it is used for something other than its logical probative force) *and State v. Rice*, 48 Wash.App. 7, 737 P.2d. 726 (holding unfair prejudice caused by evidence likely to arouse emotional response rather than rational decision among jurors)).

the probative value of the evidence must be "substantially outweighed" by this potential of unfair prejudice. This balancing, as discussed above, is in the "unreviewable" discretion of the trial court.

Faced with the uncertainties of the balancing test, the State's need for the introduction of evidence of other crimes must be clearly and vigorously presented. The trial court must be made aware that without this evidence the State will not be able to prove its case. This does not apply only to the making of a *prima facia* case as the burden of production, but also to the burden of persuasion the State must overcome in the successful prosecution of a crime.[27] The stronger the State's case based on the other evidence, the less likely it is that the trial court will permit the introduction of other crimes evidence.[28] Never forgetting that the introduction of the evidence of other crimes is a discretionary decision by the trial court the prosecutor must be mindful of this judicial avoidance mechanism when arguing the need for the evidence.

The level of necessity that must be shown for the admission of other crimes evidence was judicially reviewed in *State v. Faulkner*.[29] In *Faulkner* the Court of Appeals analyzed the phrase "necessity for" the evidence, as used in *Cross* in the prejudicial impact versus probative value test. In *Faulkner*, the State sought for the phrase to be defined as simply relevant to a disputed issue. That is, if the evidence bore some relevance to the trial, it should be admitted. The defense argued for a much

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[27] *Anaweck v. State*, 63 Md.App. 239, 246, 492 A.2d 658 (1985).

[28] The prosecutor should also advise the trial court of the availability of a cautionary instruction when evidence of other crimes is used. The instruction states that: "You have heard evidence that the defendant committed the [crime][bad act] of [other crimes or bad acts], which is not a charge in this case. You may consider this evidence only on the question of _____." MPJI-Cr 3:23 (1995). This instruction should be given at the time the evidence is admitted. MPJI-Cr 3:23, Notes on Use (1995).

[29] 314 Md. 630, 552 A.2d. 896 (1989).

stronger approach in that the evidence should be admitted only in "extremely compelling circumstances" and where the lack of evidence would present an inability for the State to prosecute the case. The *Faulkner* Court opted for the middle ground, developing a standard requiring the evidence to be "reasonably necessary" and serve "appropriate probative purposes."[30] A prosecutor must be aware of this "middle ground" when creating arguments for the admission of other crimes evidence.

HYPOTHETICAL DEFENSE RESPONSES

Due to the lack of structure in this area of the law, criminal defense attorneys have devised many methods to attack this legal house of cards. Perhaps the best strategy to combat the admission of other crimes evidence is the cliched "shotgun approach," thereby hoping to disturb the State's foundation just enough to preclude admission. Of course, success with these approaches will vary on a case-by-case basis. The prosecutor should be prepared to counter the following common arguments, as well as others, presented to preclude the admission of 5-404(b) evidence.

Response 1: The Argument of Propensity

Perhaps the most powerful attack on the State's attempt to introduce other crimes evidence is to convince the trial court that the evidence is really being used by the State to establish the defendant's criminal propensity. The rule against propensity evidence is the central foundation for the general barring of other crimes evidence.

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[30] *Id.* at 642.

Part and parcel of this argument is that the intended use proposed by the prosecutor does not fit within a judicially recognized exception to the bar against evidence of other crimes. The trial court must first make the determination that the evidence fits one of the exceptions – this is not a discretionary decision.[31] Absent a "clean fit" into one of the known exceptions, it is doubtful that the trial court will permit its use.

Another problem the prosecutor will face is that there will never be an event that the prosecutor will try to admit that could not, in some fashion, be characterized as propensity by a defense attorney. Therefore it is of the utmost importance that the prosecutor is prepared to counter this inevitable argument.

Response 2: Take the Contested Matter out of Issue

Another way to combat the State's effort to introduce evidence of other crimes would be to attack the issue the State intends to offer the evidence for. For example, if the State intends to use evidence of other crimes in order to establish identity, a tactful stipulation may undermine the State's position. Obviously this approach has its pitfalls and would probably only be used in unique circumstances. Note that the mere fact that a defendant elects to plead not guilty to a charge does not automatically make every element of a crime an issue. In *Wynn, supra*, the Court of Appeals held that the defendant must *specifically* place a matter at issue prior to the prosecutor being permitted to introduce evidence of other crimes.[32] *Wynn* dealt with the absence-of-mistake exception to other crimes evidence.

[31] See supra at note 22.

[32] *See also State v. Emory*, 101 Md.App. 585, 647 A.2d. 1243 (1994).

Clever pre-trial tactics used by a defense attorney could make *Wynn* work in the favor of the defendant. Absent knowledge of the potential defense, the prosecutor will be hard-pressed to develop a theory on which to introduce evidence of other crimes. Once the defense is presented at trial the prosecutor will have to scramble to present the evidence during rebuttal. Under these circumstances, the defense may then claim that the prosecution should not even be permitted to introduce the evidence during rebuttal due to the lack of, or late, notice of the State's intention to introduce such evidence.[33]

Response 3: The Argument That the Introduction of the Evidence Will Only Generate Collateral Issues and Waste Time

Most trial courts will not look kindly upon the idea of having a long and drawn out hearing on the admission of other crimes evidence. This will especially be the case when the theory upon which the State is seeking admission of other crimes evidence is not very strong.

Additionally, Rule 5-403 permits the trial court to exclude evidence that would only serve to confuse the issues at trial or mislead the jury in some fashion. Arguing that the admission of the other crimes evidence would only create an undue delay or generate collateral issues may persuade the trial court to preclude its admission.

This would especially be true when the defense contests the "prior bad act." Therefore, a defendant could argue that the jury must now resolve two factual disputes:

[33] See supra at 7. The mindful prosecutor should be aware of this potential pitfall. If it appears that a genuine issue *may* arise at trial requiring the use of 5-404(b) evidence, file an "anticipatory" Motion in Limine to at least put the Court and the defendant on notice of its potential use if the issue arises. *Cf. Case v. State*, 117 Md.App. 279, 702 A.2d. 777 (1998)(where State was permitted to introduce evidence of prior acts of violence by defendant against victim in light of defendant's contention that shooting was "mistake").

not only did he do it now, but did he do it before? Arguing that other crimes evidence would inject collateral issues into the case could be effective.

Response 4: Dwell Upon the Discretion of the Trial Court

This is perhaps the most powerful of all arguments to be impressed upon a trial judge, especially in the close cases. Finally and ultimately, the decision to permit evidence of other crimes evidence is discretionary. If the court refuses to permit the evidence, nothing else happens. Perhaps the State will not be able to proceed against the defendant, but this presents no appealable issue. On the other hand, if the trial court elects to permit the introduction of other crimes evidence, appellate review on that issue is ensured if the State secures a conviction. Therefore, a trial court mindful of, or worried about, potential reversal on appeal may be inclined to preclude the admission of other crimes evidence in close cases.

Response 5: The Argument for "Sanitation" of the Evidence

A growing number of jurisdictions have taken additional steps to help reduce the potential prejudicial impact of admission of other crimes evidence. In addition to a proper jury instruction, sanitation of the evidence may be pursued thereby limiting the evidence that the State may present to establish its intended purpose. In *State v. Collier*,[34] the New Jersey Superior Court remanded a case for trial noting that the evidence of other crimes evidence *as presented* by the State was too prejudicial and could not be cured via a limiting instruction.

[34] NJ Super.Ct., AppDiv., No. A-2257-96T4, 12/1/98.

In *Collier*, the trial court permitted the State to present evidence that the defendant had killed the victim's dog shortly before trying to kill the victim. The trial court admitted the evidence to establish motive. However the appellate Court held that *too much* evidence was presented on the issue. Specifically, the Court felt the gruesome details as to the death of the dog were unnecessary and overly prejudicial, thereby likely improperly influencing the jury.

In the event that the trial court permits the prosecutor to use evidence of other crimes, the defense attorney may elect to argue the rationale of *Collier* to the court and attempt to reduce the impact of the admission of the evidence.[35]

CONCLUSION

While the law governing the admission of other crimes evidence does contain bright line rules, the final decision concerning its admission rests primarily with the discretion of the trial court. This being the case, both the prosecutor and the defense counsel will ultimately engage in a struggle over the balancing test in attempting to persuade the court. Hopefully, this article will offer some guidance to the practitioner when addressing this issue in the future.

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[35] *Cf.* Rozas, *Sanitization: Is it for Maryland?*, 1 W.Md.L.J. 110 (1998)(arguing for similar principle in "same-crime" impeachment).

NOTE

UNITED STATES v. SINGLETON: "WHAT'S GOOD FOR THE GOOSE..."

by Ramon Rozas III*

In *United States v. Singleton*,[1] the Tenth Circuit surprised defense attorneys and dismayed prosecutors by ruling that the common practice of offering leniency to government witnesses violates the federal witness anti-gratuity statute. The remedy, ruled a three-judge panel of the court, was suppression of the illegally obtained evidence.

This case has sent shock waves through the federal criminal defense bar and the Department of Justice (DOJ).[2] Federal district court judges have refused to follow Singleton,[3] and one federal district court judge within the Tenth Circuit immediately announced his intention not to follow the decision.[4] Of course, some district court judges embraced the decision,[5] and the federal criminal trial bar was abuzz with advice, opinions and strategies to take advantage of the situation.

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[1] *United States v. Sonya Evette Singleton*, 144 F.3d 1343 (10th Cir.1998).

[2] See "Federal Prosecutors Back in the Deal-Making Business," http://cnn.com/US/9901/09/leniency.01/index.html (January 9, 1999)(the Justice Department claimed "law enforcement would be paralyzed" under *Singleton*).

[3] "Prosecutor Cannot Trade Leniency for Witness Testimony;" 98 LWUSA 661 (August 24, 1998); *see, e.g., United States v. Eisenhardt*, No. Crim.S 95-0468 (D.Md.1998)(ruling that the "chances of either or both the Fourth Circuit and the Supreme Court [endorsing Singleton] are, in this court's judgment, about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns"). This might explain a great deal to disappointed Oriole fans, however.

[4] Barry Tarlow, "RICO Report," The Champion, (September/October 1998), at 76 (Judge Richard Matsch refused to dismiss charges based on *Singleton* at the request of the government and continued case until *Singleton* was final).

[5] *See United States v. Lowery*, No. 97-368-CR (S.D.Fla., August 4, 1998)("the application of Sec. 201(c)(2) to all persons, including the prosecution...would clearly preserve the integrity of the judicial process").

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The dangers of testimony by paid "snitches" are well-documented.[6] For years, however, courts had turned a deaf ear on defendant's complaints and attempts to stem the tide of informants' compromised testimony. In *Singleton*, however, a three-judge panel of the Tenth Circuit demonstrated it was willing to listen.

FACTS

The Wichita, Kansas, police began an investigation into possible cocaine distribution and related offenses. The investigation focused on wire transfers of large amounts of money from people in Wichita to persons on the West Coast. The authorities ultimately concluded that cocaine was being smuggled from California to Wichita, sold, and the proceeds were being wired back to California. Additionally, some monies were being wired from California to Wichita. Sonya Evette Singleton, the defendant, was the common-law wife of another defendant, and was named as the recipient or sender of a number of transfers. Handwriting analysis indicated that she had signed those wire transfers.

Singleton was indicted for conspiracy, and prior to trial moved to suppress the testimony of co-conspirator, Napoleon Douglas. Douglas had entered into a plea agreement with Douglas in return for his testimony against his conspirators. Singleton argued in her motion that the government had impermissibly promised something of

[6] *See, e.g., United States v. Bernal-Obeso*, 989 F.2d 331, 333-334 (9th Cir.1993)(California grand jury found hundreds of cases of admitted perjury by informers, forcing multiple re-trials).

value to Douglas in return for his testimony.[7] Unsurprisingly, the district court denied Singleton's motion.[8]

Douglas testified at trial as the government's principal witness,[9] and Singleton was convicted of one count of conspiracy to distribute cocaine, and seven counts of money laundering. She was sentenced to forty-six months imprisonment on each count, to be served concurrently.[10] Singleton appealed her convictions.

PAST CASES AND ARGUMENTS

18 U.S.C.S. 201(c) provides that

> (c) Whoever...(2) directly or indirectly gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom...shall be fined...or imprisoned for not more than two years, or both.

The suggestion that this provision should apply to prosecutors "buying" testimony from informants was floating around in various locations for a few years before it came to

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[7] The agreement with Douglas was in four parts. First, the government agreed not to prosecute Douglas for any other past violations of the drug laws. Second, the government would advise the Mississippi parole board (where Douglas was apparently serving a sentence) of his cooperation. Third, the government would advise the sentencing judge in the instant charges of his cooperation. Finally, the government agreed to possibly file a motion for a downward modification of his sentence if his testimony was of "substantial assistance." *Singleton*, supra at 1344.

[8] *Id.*

[9] *Id.* at 1361.

[10] *Singleton*, supra at 1343.

judicial fruition in *Singleton*.[11] The position was even argued by a former government prosecutor.[12]

The courts, however, had roundly rejected this analysis. In *United States v. Isaacs*,[13] the defense raised the application of the anti-gratuity statute. The government had intervened on behalf of a witness in a bribery case, asking state authorities to provide the witness with a business license she was seeking without an "embarrassing" hearing. The district court, however, characterized as "conjecture" any suggestion that the license was to influence the witness' testimony.[14] The district court further characterized the issue as merely creating a jury question. So long as the defense could attack the witness' credibility before the jury, then the requirements of a fair trial were met.[15]

In *United States v. Barrett*,[16] the clerk of Cook County, Chicago was on trial for bribery. The key witness against Barrett was the person who had allegedly bribed him. The witness received a number of breaks from the government for his testimony, including preferential housing while incarcerated, civil tax immunity and transactional immunity from state prosecution.[17] Barrett moved to suppress this testimony, arguing the

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[11] See, e.g., "Best Testimony Money Can Buy: Ethical Rules and Witness Payments," The Champion, April 1995.

[12] J. Richard Johnston, *Paying the Witness: Why Is It OK for the Prosecution, but Not the Defense?*, 12 WTR Crim. Just. 21 (1997).

[13] 347 F.Supp. 763 (N.D.Ill.1972).

[14] *Isaacs, supra* at 767.

[15] *Id. Isaacs* relied on *Giglio v. United States*, 405 U.S. 105, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972), where the Supreme Court ruled such leniency deals are *Brady* material which must be disclosed to the defendant. *Isaacs* reasoned that if such deals were impermissible, the *Giglio* Court would not have remanded Giglio's case for a new trial.

[16] 505 F.2d 1091 (7th Cir.1975).

[17] The witness, Meyers, would serve his sentence at Elgin Air Force Base in Florida and be immediately eligible for parole. *Barrett, supra* at 1101.

government had essentially paid Meyers one million dollars in tax immunity for testimony, in violation of then-section 201(h). In what may have been a tactical mistake, Barrett conceded the government could promise leniency and preferential sentencing, but latched onto the civil tax immunity as abhorrent to the statute.

The trial court denied the motion, but allowed Barrett to cross-examine Meyers with the details of the deal. On appeal the Seventh Circuit affirmed. It reasoned that since 26 U.S.C. 7122 authorized the Treasury Secretary to compromise tax cases, such an inducement was authorized by law and therefore not forbidden.[18] The court did mention an older case, *United States v. Haderlein*,[19] where the trial court directed a verdict of acquittal where a co-conspirator, and who had previously perjured himself, testified under threat of revocation of citizenship. The *Barrett* Court distinguished *Haderlein* as involving a witness being *coerced* by the government – apparently to be distinguished from a witness *merely offered* leniency. The *Barrett* Court also summed up the pre-*Singleton* law nicely by stating that

> "the trend in recent cases suggests that the court in *Haderlein* would have been justified in allowing the jury to hear all the evidence impugning the witness' motives and veracity and to decide his credibility for itself."[20]

The first court to suppress such testimony, though in a civil context and for other reasons than *Singleton*, was the District Court for the Southern District of Florida. In

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[18] *Id.* at 1101-1103. *Barrett* also recited the *Isaacs* rationale that *Giglio* must have rejected this thought by not mentioning it in the opinion. The lower federal courts continue, it seems, their sometimes absurd attempts to read Supreme Court "tea leaves."

[19] 118 F.Supp. 346 (N.D.Ill.1953).

[20] *Barrett, supra* at 1103 (citing, once again, to *Giglio, supra*).

Golden Door Jewelry Creations v. Lloyds Underwriters,[21] the defendant had insured gold shipments and inventory for the plaintiffs. The plaintiffs claimed they were robbed, and sought payment under the policy. Lloyds, suspecting fraud, began an investigation and ultimately located several persons who claimed to have participated in the robbery at the instigation of the plaintiffs.

These "participants," however, would not cooperate with Lloyds without some "incentive." Lloyds ultimately paid a total of $753,000 to various fact witnesses for their testimony in depositions and other cooperation.[22] The bulk, $493,000, went to one key witness. All of this was arranged with the assistance and knowledge of Lloyds' attorney.

The district court excluded this testimony, but under state law ethical principles. It was an ethical violation in Florida for a lawyer to offer a witness money in return for testimony. The payments to the witnesses by Lloyds, the district court reasoned, ran directly against the Florida rules. Therefore, the testimony from these witnesses was to be excluded.[23]

The district court specifically addressed an argument based on 18 U.S.C. sec. 201, but concluded the statute did not address payments for "truthful" testimony. Therefore, it rejected any application of 18 U.S.C. sec. 201(c)(2).

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[21] 865 F.Supp. 1516 (S.D.Fla.1994).

[22] *Id.* at 1520.

[23] *But see Goldstein v. Exxon Research & Engineering Co.*, 1997 WL 599612 (D.N.J.1997)(where sanction was disclosure of agreement to jury).

THE APPLICATION OF THE STATUTE

Against this judicial history, the Tenth Circuit panel addressed Singleton's argument. The panel first turned to the construction of 18 U.S.C. 201(c)(2). The *Singleton* Court set out the standard in the stark "textualist" terms that the Supreme Court had commanded: "we are bound to take Congress at its word."[24] The panel noted two recent criminal cases, *Salinas v. United States*[25] and *Brogan v. United States*,[26] where the Supreme Court had "emphasized the primacy of statutory plain language."[27]

With these principles in mind, the panel turned to sec. 201(c)(2), which "could not be more clear."[28] "Whoever" was a broad class of persons, and did not exclude an Assistant United States Attorney. While courts had excluded the government from

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[24] *Singleton*, *supra* at 1344 (quoting *Oubre v. Entergy Op., Inc.*, ___ U.S. ___, 139 L.Ed.2d 849, 118 S.Ct. 838, 841 (1998)).

[25] ___ U.S. ___, 139 L.Ed.2d 352, 118 S.Ct. 469 (1997).

[26] ___ U.S. ___, 139 L.Ed.2d 830, 118 S.Ct. 805 (1998).

[27] In *Salinas*, *supra*, the Court concluded a bribe to a federal officer need not affect federal funds under 18 U.S.C. sec. 666, because the plain language of the statute encompassed "any" transaction over $5,000. Since the statute did not reference federal funds, *Salinas* refused to read in such a restriction. In *Brogan*, the "long-standing" "exculpatory no" doctrine under 18 U.S.C. sec. 1001 was eliminated. The circuit courts had long held that a mere denial by a suspect was not a "false statement" under 18 U.S.C. 1001. *Brogan* stated "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *Brogan*, *supra*, at 840. Since there was no "exculpatory no" exclusion in the statute, courts could not include one.

Other "textualist" authorities have gone even further. In *Regions Hosp. v. Shalala*, 522 U.S. ___, 139 L.Ed.2d 895 (1998), the Court addressed a regulation which allowed the Secretary of Health and Human Services (HHS) to retroactively adjust Medicare reimbursement rates, even though the statute was ambiguous as to her power to this extent. The majority held HHS' regulation was plausible and allowable, in furtherance of Congress' purpose of accurate and reasonable reimbursement rates. In an interesting dissent, Justice Scalia argued asking what Congress intended was "the wrong question." Instead,

> "[w]e are not governed by legislators' 'overriding purposes,' however but by the laws that Congress enacts. If one of them is improvident or ill-conceived, it is not the province of this Court to distort its fair meaning... so that a *better* law will result."

Id. at 911 (emphasis in original).

[28] *Singleton*, *supra* at 1345.

certain statutes when they infringed on "sovereign prerogatives," the panel held that exclusion did not apply in the instant case. Such an exclusion only operated to benefit the sovereign itself, not its agents. Moreover, it did not apply when the purpose of the statute was to prevent "fraud, injury or wrong."[29] With this in mind, the court concluded that prosecutors were covered under "whoever." The court noted that

> "[o]ne of the oldest principles of our legal heritage is that the king is subject to the law...King John was taught this principle at Runnymede in A.D. 1215, when his barons forced him to submit to the Magna Charta..."[30]

The *Singleton* Court pointedly held that "[t]he judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money."[31] The idea that "the Government [should not] become[] a lawbreaker"[32] "will not give way to the expediency of the government's present practices without legislative authorization."[33]

The government argued other federal statutes empowered it to make these type of deals. It pointed to 18 U.S.C. secs 6001-6005, which are the immunity statutes, and the

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[29] *Id.* at 1346 (citing *Nardone v. United States*, 302 U.S. 379 (1937)).

[30] *Singleton*, supra at 1346 (*citing* Romans 13 *and* William Sharp McKechnie, *Magna Carta* (1914)).

[31] *Id.* at 1347. Additionally, the court noted "if assistant United States attorney[s] were not covered by the statutory term 'whoever,' then the statute would not prohibit [the prosecutor] from even bribing a witness with money in exchange for favorable testimony, which the government concedes the statute prohibits." *Id.* at 1348.

[32] *Olmstead v. United States*, 277 U.S. 438, 485 (1928)(Brandeis, J., dissenting).

[33] *Singleton*, *supra* at 1347. The panel also had no difficulty concluding that the various considerations offered to Napoleon Douglas fell within the "anything of value" requirement. *Id.* at 1350.

federal sentencing statutes, as evidence that such offers to witnesses were authorized. The *Singleton* panel rejected both of these arguments.[34]

As to the immunity statutes, the court viewed them as merely "allow[ing] the removal of a witness's Fifth Amendment privilege so that a silent witness may be forced to speak."[35] Under these provisions,

> "the government does not give immunity directly for the witness's testimony; the government may move the court to grant immunity, which in turn removes the witness's testimonial privilege so that the ordinary compulsion may be brought to bear to require the witness to testify. Both statutes [sec. 201 and the immunity provisions] can operate fully and independently..."[36]

In other words, the immunity sections exist to *force* testimony from a witness, while 18 U.S.C. sec. 201 prohibits *inducing* a witness to testify.

As to the sentencing guidelines,[37] which allow downward departures in sentencing because of a defendant's "substantial assistance" to the government, the *Singleton* Court viewed their existence as more troubling. The panel pointed out, however, that the guidelines "authorize[d] only that substantial assistance can be rewarded *after* it is rendered; none authorized the government to make a deal for testimony *before* it is given."[38]

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[34] It characterized the government as arguing for the implied amendment or repealer of sec. 201(c)(2) by these later statutes. As *Singleton* noted, implied repealer and implied amendments are widely disfavored. *Id.* at 1355 (citing *United States v. Estate of Romani*, ___ U.S. ___, 118 S.Ct. 1478 (1998)).

[35] *Singleton, supra* at 1348.

[36] *Id.*

[37] The federal sentencing guidelines are a comprehensive, and mandatory, set of sentencing instructions encompassing statutes, e.g., 18 U.S.C. sec. 3553(e), and regulations of the United States Sentencing Commission, e.g., USSG sec. 5K1.1 (allowing government's motion for downward departure for "substantial assistance").

[38] *Singleton, supra* at 1355.

Apparently finding this unconvincing, the court went on to harmonize the statutes by holding that when the sentencing guidelines speak of "substantial assistance," they mean everything other than testimony in court.[39] Thus, the government is free to continue to make deals with defendants for assistance, and to provide them leniency because of their cooperation in investigations, stings and other matters. The substance of these deals, however, in light of the anti-gratuity statute, cannot include testifying in court. Such a deal would then leave the area of things *authorized* by Congress and enter the area of things *forbidden* by Congress.

Singleton dismissed the reasoning of the previous cases, such as *Isaacs* and *Golden Door*. The *Singleton* Court rejected the *Golden Door* interpretation of 201(c) that required a bribe for "false testimony." Simply put, the requirement of "false" testimony judicially interjects an element not in the statute, a practice specifically abjured in *Brogan*. "Promising something of value to secure truthful testimony is as much prohibited as buying perjured testimony."[40]

Singleton similarly discounted *Isaacs*; it first noted that *Isaacs* had mischaracterized 201(c) by stating that it required "intent to influence testimony," which

[39] *Id* ("[w]e believe the statutes can be read together in this way: in light of sec. 201(c)(2), 'substantial assistance' does not include testimony").

[40] *Singleton, supra* at 1358. This rule has long been applied to defense attorneys. *See, e.g., In Re Kien*, 372 N.E.2d 376 (Ill.1977)(defense attorney suspended for 18 months for paying police $50 for truthful testimony). *In Re Kien* is an interesting case. Kien was representing Coleman, who was stopped for a speeding ticket and then arrested for possession of a handgun. At the suppression hearing, the issue was whether the officer had seen the gun in plain view, or had found it under the seat after an illegal rifling through Coleman's car. Kien met the officer in the hall and asked him what happened. The officer told him that he found it in plain view, even though his report stated it was found after a search. Kien asked him to explain the difference, and the officer told Kien that the gun would be wherever he testified it would be. Kien told him he wanted the truth, and the officer told Kien "you got to pay for the truth." *Id.* at 377. Reluctantly, Kien paid him. It turned out that the officer was wired, and the situation was a trap by an overzealous State's Attorney who had told the officer to commit perjury to set up defense lawyers. Kien was acquitted of bribery charges, *supra* at 377, but was suspended for 18 months by a deeply divided Supreme Court of Illinois who made their displeasure at the police and the State clear. *Id.* at 379.

it does not. Further, *Singleton* rejected *Isaacs'* inference from *Giglio* that this type of inducement was acceptable. As *Singleton* reasoned, *Giglio* and *Brady* merely indicated that Due Process required certain acts to be disclosed to the defendant. "But this does not prohibit Congress from also criminalizing certain conduct within this class [of acts]."[41]

Barrett's faulty premise was likewise exposed by *Singleton*. The *Barrett* Court had, again, read words into the statute by reading 201(c) to only prohibit the giving of "unauthorized" things of value, and thus not including civil tax immunity as it was authorized by statute. However, no such language existed then, or exists now, in 201(c). As the *Singleton* panel saw matters,

> [t]o read the section as prohibiting only the giving of unauthorized things (besides ignoring its plain language) is to read it right out of the code. It is a truism that the government may not do unauthorized things. And it is [201(c)] that makes gifts, offers and promises unauthorized in certain circumstances. If the section is to have any meaning it must be read to prohibit giving otherwise authorized things "for" or "because of" testimony. Otherwise, under *Barrett*'s reasoning, the government's authorization to expend money means the government may pay money to a witness for his testimony. We will not eviscerate the statute in this way.[42]

Applying the plain language of the statute, and finding previous judicial reasoning on the issue unpersuasive, the *Singleton* panel concluded that 201(c) applied to the government, and should bar this type of leniency-for-testimony deal.

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[41] *Singleton, supra* at 1356.

[42] *Id.* at 1357.

THE REMEDY AND THE ETHICAL RULE

Singleton briefly considered Kansas Rule of Professional Conduct 3.4(b), which provides that "a lawyer shall not...offer an inducement to a witness that is prohibited by law." The official Commentary to the Model Rules, which was adopted in Kansas, states that "[t]he common law rule...is that it is improper to pay an occurrence witness any fee for testifying." Because the government's promises violated 18 U.S.C. sec. 201(c)(2), Rule 3.4(b) was also violated.

When it came time for fashioning a remedy, however, it rested solely on the statutory violation.[43] The court also made abundantly clear that its decision rested on purely statutory grounds, without any constitutional basis.[44] Because of the widespread and pervasive practice of leniency-for-testimony, however,[45] the *Singleton* court felt compelled to apply a "constitution-like" remedy for the statutory violation: suppression. Only suppression of the testimony in question would properly deter future misconduct by the government.[46]

Suppression also protected "judicial integrity." By excluding such testimony, courts would avoid being made a party to the government's lawlessness. "When [tainted]

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[43] *Singleton, supra* at 1359, n.7 ("The suppression remedy we apply rests wholly on the government's statutory violation, not on the prosecutor's violation of [Rule 3.4(b)]"). There is some question whether state codes of professional conduct apply to federal prosecutors. DOJ's 1989 "Thornburgh Memorandum," which was turned into 28 C.F.R. pt. 77 (1997) by Janet Reno, purported to place prosecutors beyond the state professional codes. See, Singleton, supra at 1354. Federal courts reject such attempts. *See, e.g., United States ex rel. O'Keefe v. McDonnell Douglas*, 132 F.3d 1252, 1257 (8th Cir.1998).

[44] *Id.* at 1361 ("We emphasize that the rule we apply today rests in no way on the Constitution; it is a creature solely of statute").

[45] *Id.* at 1361.

[46] *Id.* at 1360 ("[t]his ingrained practice of buying testimony indicates that suppression is necessary to compel respect for the statutory protections Congress has placed around testimony in federal courts").

testimony is presented to the courts of the United States, judicial integrity is impugned..."[47] The *Singleton* panel noted that the Supreme Court had employed the suppression remedy for statutory violations when necessary to deter future misconduct.[48]

POTENTIAL EFFECTS IN MARYLAND

Maryland courts' attitude toward legislative history, legislative intent and "textualism" can best be described as mixed. While Maryland courts claim to follow the legislative intent, they also hold that "in ascertaining the legislative intent, normally one need only look to the plain language of the statute."[49] In the Court of Special Appeals view, while there "is no...prohibition against the use of external aids, interpreting legislative intent all but mandates total reliance on the words used."[50] This dilemma has been discussed in depth by at least one pair of commentators, who recognized that "[g]iven the nature of the General Assembly [of Maryland] as a part-time citizen-legislature, the court must be realistic about the frailties of the process."[51]

Assistant Attorney Generals Schwartz and Conn, however, illustrate with numerous examples the use of legislative history in Court of Appeals' decisions.[52] In

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[47] *Id.*

[48] *Id.* at 1359 (citing, e.g., *Sabbath v. United States*, 391 U.S. 585 (1968); *Nardone v. United States*, 302 U.S. 379 (1937)).

[49] *Sacchet v. Blan*, 120 Md.App. 154, 156, 706 A.2d 620 (1998), *aff'd* ___ Md. ___ (Court of Appeals, No. 57, Sept. 1998 Term, 2/22/99).

[50] *Id.* at 157.

[51] Schwartz and Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 Md.L.Rev. 432, 435 (1995).

[52] *See, e.g.*, Schwartz and Conn, *supra* at 450 ("[w]hen the court uses legislative history, it does so avidly").

their view, the "evidence...shows a Court of Appeals that loves legislative history not wisely but too well."[53] They feel the courts have treated equally material from a variety of sources – lobbyists, sponsors and average citizens – that should be discounted when determining what to use. Thus Schwartz and Conn contrast the Court of Appeals' search for legislative intent against textualism's "austere" scheme to read the legislative language and nothing else.[54]

Recently, however, Maryland courts have been adopting a principle that can be considered "forced textualism." They are focusing more upon the actual language used. The reason Maryland courts look only to this language is simple. Records are not kept of the legislative debates, purposes or consideration in passing bills:

> "In Maryland, there is no verbatim record of procedures. Only rarely are committee reports published; debate is often brief or non-existent in a legislature that meets only ninety days a year. We are usually left with no other means of interpreting statutes than the words themselves. Interpretation of Maryland statutes rests upon the proposition that the General Assembly *says what it means and means what it says*."[55]

To talk about the specific intent of the legislature in Maryland is often to engage in a form of speculation. Maryland courts are thus in the same position that English common law courts occupied early in their history – with no access to the intent of Parliament, they often ignored it.[56]

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[53] *Id.* at 454.

[54] *Id.* at 439.

[55] *Sacchet, supra* at 156 (emphasis added).

[56] *Id* ("In interpreting legislative intent, it is clear that Maryland usually follows what was the English Rule until *Pepper v. Hart*, House of Lords, A.C. 593 (1993), under which judges refused to utilize external aids, verbatim accounts of Parliament, committee reports, and the like. The reason this rule was relaxed was because Parliament has Hansard, which...is a verbatim account of parliamentary debates, and other external aids are readily available").

Clearly this new "textualist" interpretation theory fits well with the statutory construction theories applied in *Singleton*. Can it lead to a *Singleton*-like result? Maryland possesses no overarching anti-gratuity statute like Section 201. Art. 27, sec. 26 outlaws "obstruction of justice," but it has a "corrupt" purposes element which would likely exclude prosecutors from its reading.[57] Similarly, Art. 27, sec. 761(a)(1) forbids threats of harm to induce "false" testimony.

What of Maryland's Rules of Professional Conduct? While *Singleton* did not rely on this provision, it certainly has some effect. Maryland has adopted the Model Rules, and Maryland Rule of Professional Conduct 3.4(b) is identical to the ethical rule considered in *Singleton*: "a lawyer shall not...offer an inducement to a witness that is prohibited by law..."

Maryland has likewise adopted the official Commentary to the Rules, which encompasses the "common law" rule that "occurrence witnesses" can not be paid beyond expenses.[58] This does appear to be the "common law" rule in most jurisdictions.[59] To that extent, if the prosecution has provided a witness with inducements, either leniency or

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[57] See Md. Ann. Code of 1957, Art. 27, sec. 26. Corrupting or intimidating jurors – "If any person by *corrupt* means or by threats or force endeavors to influence, intimidate, or impede any juror, *witness*, or court officer of any court of this State in the discharge of his duty, or by corrupt means or by threats or force obstructs, impedes, or endeavors to obstruct or impede the due administration of justice therein, he is liable to be prosecuted, and on conviction to be punished by fine not exceeding $10,000, or by imprisonment not exceeding 5 years, or both, according to the nature and aggravation of the offense." (emphasis added).

[58] The author has been unable to locate any Maryland case which forbids payments to fact witnesses. Ann. Code of Md., Cts & Jud. Proc. Art., sec. 9-202 outlines mileage and appearance payments which can be made by *the court* to witnesses, but there appears to be no authority directly addressing parties paying witnesses. The author assumes Maryland would follow the near-universal rule of forbidding such payments, other than expenses.

[59] See, e.g., Elizabeth J. Cohen, "Witness the Distinction," ABA Journal (December 1998). Cohen points out there is some dispute over what constitutes "expenses."

otherwise, it might fall afoul of Rule 3.4(b). In that situation, *Golden Door's* exclusionary remedy might be employed by the trial court.[60]

CONCLUSION

> "The issue is not whether the *Singleton* panel decision is or ever will be the rule of law. The bottom line is that the *Singleton* decision set out a statement of fundamental fairness, which should be the rule of law."[61]

The eventual fate of *Singleton* is uncertain. The panel decision was vacated and reset for oral argument *en banc* by the Tenth Circuit soon after the decision was released.[62] Prosecutors across the nation made apocalyptic predictions as to *Singleton*'s possible results; effective and efficient police work no longer sufficed to prosecute crimes.

Ultimately, those predictions undoubtedly swayed the Tenth Circuit, *en banc*, to reverse *Singleton*.[63] The majority decision concluded that, when United States' Attorneys appear in court, they appear as the "alter ego" of the United States herself.[64] Unless Congress specifically identified the United States as subject to the statute, it was not: "it is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words…[t]he rule thus settled respecting the

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[60] The argument that ethical rules do not give rise to "causes of action," Scope of the Maryland Rules of Professional Conduct, and thus cannot form the basis of trial remedies has been weakened somewhat by *Post v. Bregman*, 349 Md. 142 (1998)(violation of Rule 1.5(e) formed basis of defense to breach of contract action).

[61] Kathryn Kennedy, "At a Loss for an Explanation," The Champion, at 29 (November 1998).

[62] *See Singleton, supra* at 1361.

[63] *United States v. Sonya Evette Singleton*, Case No. 97-3178 (Tenth Circuit, 1/8/99)(*en banc*).

[64] *Singleton, en banc* slip opinion at 3.

British Crown is equally applicable to [the federal] government."[65] Therefore, the majority decided, "whoever" in 18 U.S.C. sec. 201 (c)(2) does not apply to the United States and, by extension, her attorneys.

Singleton, however, has an importance beyond its existence as legal precedent. Its consideration of the interplay of Rule of Professional Conduct 3.4(b) and leniency-for-testimony agreements is an informative guide for anyone who wishes to file a more limited motion *in limine* based on 3.4(b). It demonstrates that more than one ox may be gored on the horns of "textualism."[66] *Singleton* also demonstrates that dissatisfaction with the "informer" system of justice pervades all levels and parts of the criminal justice system.

Ultimately, *Singleton* is a decision whose rightness seems obvious to those in the trenches. Defendants – and defense attorneys – cannot provide witnesses with money, leniency or other prizes; an attempt to do so would result in vigorous, and self-righteous, prosecution by the same people who do the same thing every day.[67] Even if these things were offered for "truthful" testimony, their corrupting influence would be clear. As *In Re Klein* reasoned in forbidding payments from defense attorneys to police officers for "truthful" testimony,

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[65] *Id.* at 4 (quoting *The Dollar Savings Bank v. United States*, 86 U.S. 227 (1873)).

[66] If *certiorari* is granted by the Supreme Court, perhaps we will discover how true to his textualist beliefs Justice Scalia is. See "Federal Prosecutors Back in the Deal-Making Business," supra (Singleton's attorney "will ask the Supreme Court to consider the case").

[67] For those prosecutors who object to the *Singleton* principle, perhaps an equalizing idea would be to allow defense attorneys to pay *their* witnesses, or provide other consideration, so long as it was for purely truthful testimony.

If this is still objectionable, a third alternative is to uniformly adopt a version of the Third Circuit's "judicial immunity" doctrine where a *trial court* can immunize *defense* witnesses, so they may testify, if (1) it finds prosecutorial misconduct or (2) the witness has clearly exculpatory evidence to offer. *Gov't of the V.I. v. Smith*, 615 F.2d 964, 974 (3rd Cir.1980).

> [A] policeman would be encouraged to change the "truth" if the lawyer is permitted to pay him for what the lawyer believes is the truth...Those policemen who are less resistant to corrupting influences will soon discover how to change the truth to their economic benefit. It is axiomatic, however, that such corruptible police officers could not thrive but for the existence of lawyers willing to corrupt them.[68]

Likewise, prosecutors, federal or otherwise, should not be able to pay for "truthful" testimony. If police are vulnerable to such corruption, what of felons and admitted criminals?[69] It would seem criminals succumbing to such "corrupting" influence would be even easier, and should be even more guarded against.

The panel opinion in *Singleton* did not last long against the assaults of the Department of Justice and more compliant federal judges. However, the idea of *Singleton*, as captured by Ms. Kennedy in her quote above, will stand for a long time as a guidepost to a more equitable and fair system of criminal justice.

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[68] *In Re Kien, supra* at 379.

[69] Even the Department of Justice considers them "outright conscienceless sociopaths to whom 'truth' is a wholly meaningless concept..." Barry Tarlow, "RICO Report," The Champion, 22 (April 1995)(quoting Stephen Trott, U.S. Department of Justice, *Prosecution of Public Corruption Cases*, at 117-118 (Feb.1988)).

POINTS AND AUTHORITIES

Michael J. Pappaconstantinou v. State:
Confessions Elicited by Private Persons
Are Not Analyzed for Voluntariness

Defendant Michael J. Pappaconstantinou was an employee of Auto Row Auto Parts for approximately three years. The defendant was ultimately fired by Auto Row because he was suspected of stealing. After his termination, Pappaconstantinou met with several employees of Auto Row and signed a written confession, admitting to the theft of money and inventory.[1] The defendant was ultimately charged with several counts of theft.

Pappaconstantinou moved to suppress his statement, arguing it was "extracted both by threats and by promises not to prosecute, and was therefore involuntary..."[2] The trial court denied the motion, ruling the statement was not inherently unreliable. Pappaconstantinou was convicted by a jury, and his conviction was affirmed by the Court of Special Appeals. Before the Court of Appeals, Pappaconstantinou conceded that neither Due Process nor the *Miranda*[3] rule applied, because no state actors were involved. However, Pappaconstantinou argued Maryland's common law voluntariness law applied

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[1] *Pappaconstantinou v. State*, 352 Md. 167, 170 (1998). Pappanconstantinou signed a document which stated, in part:

> "I...wrongfully took merchandise and money from Auto Row Auto Parts. I realize that I was correctly terminated from this establishment."

[2] *Id.*

[3] *See Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966).

equally to statements elicited by private persons as those produced by government agents.[4]

The Court of Appeals disagreed and affirmed Pappaconstantinou's convictions. It first noted that the states have split over whether "private" confessions "must be analyzed under a voluntariness standard."[5] The Court then reviewed the long line of Maryland cases addressing common law voluntariness:

> "[I]n every Maryland case applying the rule of exclusion...the incriminating statement in question has been made directly to an officer or sheriff, or in the presence and with at least the implicit sanction of legal authority."[6]

In *Biscoe v. State*,[7] the Court had quoted explicit language describing the requirements for exclusion: "[w]hen a prisoner has been told that he had better tell the truth, and these expressions are used by, or *in the presence of a person in authority*, I always reject the evidence."[8]

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[4] *Id.* at 171-172.

[5] *Id.* at 173, n.1; *Compare, e.g., Com. v. Cooper*, 899 S.W.2d 75 (Ky.1995)(rejecting common law or state constitutional suppression of "private" confession) *and Mirabal v. State*, 698 So.2d 360, 362 (Fla.Dist.Ct.App.1997)(suppressing confession to employer on state constitutional grounds).

[6] *Pappaconstantinou*, 352 Md. at 178.

[7] 67 Md. 6 (1887).

[8] *Biscoe, supra* at 8 (quoting *Regina v. Garnier*, 2 Carr. & K. 920)(emphasis in original). The Court rejected Pappaconstantinou's argument that private employers were "persons in authority," since the voluntariness test existed to prevent government overreaching. *Pappaconstantinou, supra* at 180.

The Court distinguished a case whose language seemed to support Pappaconstantinou's argument,[9] and made clear that statements elicited by private persons will not be analyzed under Maryland's common law voluntariness doctrine.

State of Maryland v. Carolyn Lynn Alexander and James Carlon Alexander: Probable Cause Does Not Apply to Police Acting Under Community Caretaking Function

On Thanksgiving Day, 1997, the Calvert County Sheriff's Department received a phone call indicating that a residence in the "Ranch Club" area had an open basement door. The caller, a neighbor, indicated that the residents were away. A sheriff's deputy on routine patrol responded to the scene.[10] The deputy noticed the basement door was open, but did not see any signs of a forced entry. He believed that a breaking and entering was in progress, however, because (1) the original call had been for a breaking and entering, (2) he observed the open basement door, (3) the homeowners were away, (4) no vehicles were in the driveway and (5) the neighborhood had seen a recent string of burglaries.[11]

The deputy and his backup entered the home, after ringing the doorbell and yelling inside. They "sweeped" for any intruders and, of course, found marijuana in the bedroom in "plain view" on a closet shelf. They subsequently executed a search warrant

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[9] The Court distinguished *Scott v. State*, 61 Md.App. 599 (1985), where a minor in police custody was threatened by his father during an interrogation. While holding that the threat did not induce the confession, the Court of Special Appeals noted father was no State agent, "[t]he mere fact that no agency relationship existed...would not necessarily preclude a finding that the confession was involuntary." *Id.* at 604.

The Court of Appeals dismissed this dicta by noting that Scott had been in police custody, and thus the threat had been made "in the presence of one with authority over the prisoner." *Pappaconstantinou*, *supra* at 180.

[10] *State v. Alexander*, 124 Md.App. 258, 262 (1998).

[11] *Id.* at 263.

and seized the marijuana, as well as cash and paraphernalia. The Alexanders, who were the residents of the home, were indicted for possession of marijuana and possession with intent to distribute.[12]

The Alexanders moved to suppress the evidence, on the grounds that the warrant was obtained with illegal information. The trial judge concluded there was insufficient cause for the officers to enter the home, and this suppressed the warrant's fruits. The State appealed.

The Court of Special Appeals reversed. It first stated that the "touchstone" of the Fourth Amendment is "reasonableness." It further remarked that "[t]he reasonableness of police behavior is necessarily a function of what the police are doing and why they are doing it."[13] It then turned to consider what the police were doing.

The Court distinguished between the "detection of crime" function and what it called the "community caretaking function."[14] Aiding persons in apparent need of assistance was a clear instance, in the Court's view, of this "caretaking" function.[15] Also part of this function is the protection of property.[16] When exercising this "caretaking" function, the Court ruled, probable cause was not the requirement; mere "reasonableness"

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[12] *Id.* at 264.

[13] *Id.* at 265.

[14] *Id.* at 266-268.

[15] *Id.* at 269-272 (*citing, e.g., Mincey v. Arizona*, 437 U.S. 385, 392, 57 L.Ed.2d 290, 300 (1978)(many cases "have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid")).

[16] *Id.* at 273-275.

was the question.[17] The Court had little trouble concluding the deputies acted reasonably.[18]

Apparently having little faith in its holding, the Court went on to articulate "A Contigent Alternative Holding:"

> "As a purely precautionary note, we add that our reversal of the suppression order in this case is not dependent on our conclusion that the officers....were engaged in a community caretaking function and that the appropriate [standard]...is that of general reasonableness. Even were we wrong with respect to the appropriate standard and even were probable cause...the standard that had to be satisfied, our decision in this case would be the same."[19]

Relying on *Carroll v. State*,[20] where the Court of Appeals sanctioned an entry similar to the instant one on probable cause grounds, the Court of Special Appeals ruled that the deputies had probable cause to believe a burglary was ongoing at the Alexander home and thus could enter.

Stephanie Schaefer v. Michael Cusack: Trial Court Cannot Order Furture Changes in Custody

Schaeffer and Cusack were divorced in a highly contentious proceeding from which both appealed on a number of issues.[21] Prior to dealing with the other issues, the

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[17] *Id.* at 277.

[18] *Id.* at 283 ("[w]hat the officers did...was the quintessence of the reasonable performance of their community caretaking function").

[19] *Id.* at 283.

[20] 335 Md. 723, 646 A.2d 376 (1994).

[21] *Schaefer v. Cusack*, 124 Md.App. 288, 722 A.2d 73 (1998). The parties raised, on appeal, issues involving dismissal of the appeals, child support, visitation, counsel fees, division of retirement plan, payment of a monetary award, relocation clauses in the order, a requirement by the trial judge that each party keep a diary, and other matters.

Court of Special Appeals turned to an unusual provision in the custody order: the trial judge ordered custody of the parties' year-old child with Schaefer until he completed the fifth grade, and then custody would go to Cusack until the child was eighteen. Schaefer argued the trial court abused its discretion.

The appellate court agreed. It reviewed the numerous cases holding that the "best interests of the child" controls.[22] It emphasized, however, that "in determining custody the courts look to the situation as it exists at the time."[23] As such, without any idea of what the child's needs or the parties circumstances would be in several years, no custody arrangement could be ordered. In short,

> "It is hard enough to look into the future and to determine what may be perceived as the best interests of the child on the basis of circumstances as they exist at the time of a custody hearing. We consider it to be an abuse of discretion to attempt to look ahead and to determine now that it will be in the best interests of a child who has not yet entered kindergarten to have his custody changed upon the completion of the fifth grade."[24]

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[22] *Id.* at 293-295.

[23] *Id.* at 295 (*citing Raible v. Raible*, 242 Md. 586 (1966)).

[24] *Id.* at 298.

GUILTY BY REASON OF INSANITY:
A Psychiatrist Explores the Minds of Killers
By Dorothy Otnow Lewis, M.D.
The Ballatine Publishing Group, 1998

REVIEWED BY James E. Malone*

> Ever since 1976, when the Supreme Court mandated separate sentencing phases in capital cases, juries have been obliged to consider the mitigating as well as the aggravating circumstances of a murder. Aggravating circumstances focus for the most part on the grotesqueness of the crime or crimes: Was the victim tortured or raped or mutilated? Was there more than one victim? Then there are mitigating circumstances. These often focus on the defendant's abusive childhood and on issues of mental health. Herein lies the contradiction. Another mathematical formula comes to mind: The gruesomeness of the murder is directly proportional to the craziness of the murderer. That's just the way it is. Now ask a jury to wrestle with that equation and come up with the right answer. It can't be done.[1]
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> Not only did the jury not believe me, they hated me.[2]

Dr. Dorothy Lewis, the author of this quick-reading book about observations she, along with Dr. Jonathan Pincus,[3] have made about the mental conditions of persons charged with murder, is perhaps a hero of modern psychiatry. Certainly, we as defense lawyers owe her and Dr. Pincus a debt of gratitude for their work with violent juveniles and adults.[4]

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1 Dorothy Otnow Lewis, *Guilty By Reason of Insanity: A Psychiatrist Explores the Minds of Killers* 1998, 293 (hereinafter *GBRI*).

2 *GBRI* at 248

3 Professor of Neurology at Georgetown University; author of *Behavioral Neurology*, (with Gary J. Tucker) Oxford University Press, 1985, 3rd Edition, amongst other publications.

4 A short list of Dr. Lewis' publications on the issue includes:
Lewis DO, Balla, DA, Sacks H, Jekil J: Psychotic symptomology in a juvenile court clinic population. J. Am. Child Psychiat. 12:660-785, 1973
Lewis DO, Sacks H, Balla D, Lewis M and Heald H: Introducing a child psychiatric service to a juvenile justice setting. J. Child Psychiat. Human Development., 4:98-114, 1973
Balla DA, Lewis DO, Shanok S, Snell L, Hering J: Subsequent psychiatric treatment and hospitalization in a delinquent population. Arch. Gen Psychiat. 30:243-5, 1975.
Lewis DO & Balla DA: Sociopathy and its synonyms: Inappropriate diagnosis in child psychiatry. Am J.

*Assistant Public Defender, Cumberland, Maryland; B.A., University of Maryland, 1978; J.D., University of Baltimore, 1982.

In 1986, Dr. Lewis, Dr. Pincus and others published the extremely influential *Psychiatric, Neurological and Psychoeducational Characteristic of 15 Death Row Inmates in the United States*, in the American Journal of Psychiatry.[5] In it, Lewis and Pincus report on the neurological and psychiatric status of 15 men sentenced to death between 1976, when the death penalty was

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Psychiat. 132: 720-2, 1975.

Lewis DO, Balla DA, Shanok S, Snell L: Delinquency, parental psychopathology and parental criminality: clinical and epidemiological findings. J. Am. Acad. Child Psychiat., 15:665-78, 1976.

Lewis DO, Shanok S: Medical histories of delinquent and nondelinquent children: an epidemiological study. Am Psychiat. 134:1020-5, 1977

Koenigsberg D, Balla DA, Lewis DO: Juvenile delinquency, adult criminality and adult psychopathology: a follow up of former delinquents. J. Child Psychiat. Human Development, 7:141-6, 1977.

Lewis DO, Shanok S: Delinquency and the schizophrenia spectrum of disorders. J. Am. Acad. Child Psychiat. 17:263-76, 1978.

Lewis DO, Shanok S: Medical histories of psychiatrically referred delinquent children: an epidemiological study. Am. J. Psychiat., 136: 231-3, 1979.

Lewis DO, Shanok S, Balla DA: Parental criminality and the medical histories of delinquent children. Am. J. Psychiat., 136: 419-423, 1979.

Lewis DO, Shanok S, Pincus J, Glaser G: Violent juvenile delinquents: psychiatric, neurological, psychological and abuse factors. J.Am. Acad. Child Psychiat., 18-307-319, 1979.

Lewis DO, Shanok S: A comparison of the medical histories of incarcerated delinquent children and a matched sample of non delinquent children. Child Psychiat. Human Developm., 9:210-4, 1979.

Pincus JH, Lewis DO, Shanok S, Glaser G: Neurological abnormalities in violent delinquents. Neurology, 29:536, 1979.

Lewis DO, Shanok S, Pincus J: Juvenile male sexual offenders. Am. J. Psychiat., 136: 1194-6, 1979.

Lewis DO, Shanok S, Pincus JH, Giammanio M: The medical assessment of seriously delinquent boys: a comparison of pediatric, psychiatric, neurological and hospital record data. J. Adol. Health Care, 3:160-4, 1982.

Lewis DO, Neuropsychiatric vulnerabilities and violent juvenile delinquency, Psychiatric Clinics of North American, New York: W.B. Saunders, 1983.

Monane M, Leichter D, Lewis DO: Physical abuse in psychiatrically hospitalized children and adolescents. J. Am Acad. Of Child Psychiat., 23: 653-8, 1984.

Lewis DO, Moy E, Jackson L, Aaronson R, Nicholas R, Serra S, Simos A: Biopsychosocial characteristics of children who later murder: a prospective study. Am. J. Psychiat., 142: 1161-7, 1985.

Feldman M, Lewis DO, Mallouh C: Fillicidal abuse in the histories of 15 condemned murderers, Bull. Amer. Acad. Psychiat. Law, Vol 14, 4:345-52 December 1986.

Lewis DO, Pincus JH, Bard D, Richardson E, Prichep L, Feldman M, Yeager C: Neuropsychiatric, psychoeducational and family characteristics of 14 juveniles condemned to death in the United States, Am. J. Psychiat., 145, 5:584-9 1988.

Lewis DO, Lovely R, Yeager C, Ferguson G, Friedman M, Sloane G, Friedman H, Pincus JH: Intrinsic and environmental characteristics of juvenile murderers. J. Am. Acad. Child Adol. Psychiat., 27, 5:582-7, 1988.

Lewis Do, Lovely R, Yeager C, Ferguson G, Della Femina D: Toward a theory of the genesis of violence: A follow up study of delinquents, J. Am. Acad. Child Adol. Psychiat., 28, 3:431-6, 1989.

Lewis DO: From Abuse to Violence: Psychosocial Consequences of Maltreatment. Journal of the American Academy of Child and Adolescent Psychiatry, 31, 3:383-91, 1992.

determined again to be constitutional,[6] until 1984, the date of the study. The subjects were not chosen because of noted psychopathology, but rather because of the imminence of their execution. Four had been executed by the time the article was published.

The study showed that all of the condemned men had suffered head trauma. Hospital records, histories obtained from family members and CAT scans verified these findings. Five of the men were found to have "major neurological impairments" including "seizures, paralysis and cortical atrophy." Seven had a history of "blackouts, dizziness, a variety of psychomotor epileptic symptoms" and minor neurological problems. Six were found to be chronically psychotic, suffering from "hallucinations and delusions."

These were fairly remarkable findings which raised serious questions:

> Given the existence of severe neuropsychiatric impairments in the condemned group, the question arises of why such serious disorders were not previously identified and presented in the original; trials, during sentencing, or in the course of subsequent appeals.[7]

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5 Am. J. Psychiat. 143:7, July, 1986. It is a superb article, surprisingly not hampered by a rather obtuse opening line: "Capital punishment is the most severe sentence imposed in the United States." Well, yes, but there are no sentences more severe. Even, say, being tortured to death in Iran is, in the final analysis, nothing greater than capital punishment (I mean no slur on Iran; we ourselves are not far removed from the hangman's noose, the cyanide pills in a dissolving liquid dropped into a sealed room, the electric chair, or the firing squad).

6 *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed2d 859 (1976)

7 There are, of course, manifold answers to this question. Even Samuel Guze, perhaps prior to Pincus and Lewis, the preeminent expert in the field, did not believe that criminals suffered from serious psychiatric or neurological problems. Pincus himself had the gravest doubts. Just on these bases, can the lack of psychiatric or neurological evidence at trial be said to be surprising? Similarly, the article points out that people with neurological impairment do not think of themselves as impaired; neither do they normally present themselves as impaired. Nevertheless, a mistrust of lawyers hinted at in the above quotation runs through the psychiatric/neurologic literature of those charged with serious crimes. The good doctors do not fail to pass harsh judgment even when they know little about which they speak. In the same article:

> Evidence of diagnostic bias can be deduced from the findings in case 4. The neurologist for the prosecution found "no evidence of organic impairment" in a man who had symptoms suggesting complex partial seizures and a history of generalized seizures, xanthochronic spinal fluid, an abnormal EEG, and atrophy of the frontal lobes on CAT scan. In that case the defense lawyer failed to obtain a second opinion.

They also raised some hope. Certainly, this sort of information was admissible at the separate sentencing hearing required by *Gregg*.

This article was followed by *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*.[8] At the time, 37 juveniles were facing the death penalty in the United States. Their study of these 14 concluded that 9 of the subjects had serious neurological problems; seven were psychotic; 4 had severe mood disorders; three suffered paranoid ideations; 12 had IQ scores below 90; 12 had been severely physically abused; five had been sodomized by relatives.

These articles ask a question that is highly important, both for society overall and for the administration of justice: What causes people to be murderers? Clearly, there is a psychiatric school of thought that believes murderers are simply people who choose evil over good. Indeed, it would not be surprising to discover this was the opinion of the general public. That opinion, though, seems conclusory and unexamined; more a short hand rationalization than an explanation. Why did these individuals, rather that others, rather than you and I, commit murder?

The debate, one might expect, will continue for a very long time on this subject, and if I were a betting man, my money would be on a neurological/biochemical answer, but the answers

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Without knowing a tad more about the defendant (did he present as impaired? Did he desire or not desire to put on a psychiatric/neurological defense?) and the defense attorney (was another defense stronger and more appropriate? Was it *even possible* to obtain any funds for psychiatric or neurological examination?), it would be difficult to jump to the conclusion that the attorney's performance was deficient, however unfortunate the outcome.

8 Am. J. Psychiatric, 145:5, May 1988.

proposed by these articles certainly have and will continue to serve as guideposts for all interested in this quite fascinating subject. The conclusions reached by Lewis and Pincus are not difficult to understand, as viewed within the hellish parameters of the lives of the subjects; complete refutation seems implausible. In violent homes, children learn violence; in extremely violent homes, children learn murder. Victims of abuse suffer injuries. Injuries to the head can cause brain dysfunction and result in poor judgement and lack of impulse control. Child victims of abuse are unable to express anger at the source of the abuse and store their rage until a later time when they are physically more mature and sometimes express this rage not on the original source of abuse but another.

Given this background, what can we expect from a book written by Dorothy Otnow Lewis, M.D. for the consumption of the general public? Both more and less than what we have here. It is fascinating to hear the tale of Dr. Lewis going to Dr. Pincus to discuss the possibility of their mutual examination of certain juvenile delinquents. He is not enthusiastic or impressed by the idea, expressing the opinion, still common, that criminals are not interesting from a psychiatric or neurological perspective; they had been studied, data had been gathered and analyzed and definite conclusions had been reached: brain syndromes are not related to criminality.[9] Criminals were not in any way sick. They freely chose to act in a criminal manner when given a knowing choice between acceptable and prohibited acts. Psychiatry and neurology were irrelevant to deviant behavior exhibited by the criminal class. What more was there to say?

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9 Specifically, he cites *Criminality and Psychiatric Disorder*, by Samuel Guze, for this proposition:

> Sociopathy, alcoholism, and drug dependence are the psychiatric disorders associated with serious crime. Schizophrenia, primary affective disorders, anxiety neurosis, obsessional neurosis, phobic neurosis and brain syndromes are not.
>
> *GBRI* at 124.

Dr. Lewis prevailed upon Dr. Pincus and, after he agreed and completed examinations of dozens of juveniles, he informed her, "I've never seen so many neurologically impaired kids together in one place at one time."[10]

Dr. Lewis recounts her meetings with numerous convicted murderers, each and every one fascinating. The book is filled with remarkable observations and pertinent insights, making it something very near a *must read.*

Unfortunately, along with the interesting, inflicted upon the reader are tales of the author's fascination with herself. It can be tough going. On one page,[11] there are 19 uses of the personal pronoun. Gems such as this stick out amid a sea of name dropping and, sigh, more personal pronouns:

> I never intended to work with violent patients. I expected to become a psychoanalyst. As a premed student in college, wrote my physics term paper on the influence of physics on Freud. I was flabbergasted when Professor LeCorbusier liked it. I'm sure he had never before had anyone turn in a paper quite like mine.[12]

Or this:

> But the good grades I received though they pleased my parents, did not endear me to my classmates. They were merciless. One day, as I came in from gym, a girl in my class spat on me.[13]

Hmm... One may ask, did the girl, the spitter, say something immediately prior, like

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10 *Id.* at 70.

11 *GBRI* at 13.

12 *Id.* at 14-15.

13 *Id.* at 16.

"Take this for making the Honor Roll, Grade Hog! Ptooie!" Perhaps this incident was the result of some other perceived slight. The author was in the fifth grade at the time. Certainly, this was an unfortunate incident, but not a surprising act for a fifth grader. Maybe the most unusual thing about this incident is that a world-renowned psychiatrist recalls this incident fully forty years later and deems it important enough to include in a brief summation of her life.

Then there are the statements which defy classification, explication, exegesis or explanation:

> I think I was the only one at school, if not on the face of the earth, who did not rejoice upon hearing of Hitler's suicide.[14]

Or the screwy non-sequitur which appears by itself as a paragraph, I suppose, for emphasis:

> I remember the Rosenbergs.[15]

The cumulative effect of Dr. Lewis' fascination with herself leads to unintentional humor and, well, invites reader interaction. "I did not intend to marry," says Lewis.[16] "No damn wonder," writes the reader in the margin. "Meeting my husband during my senior year at medical school was not just a surprise, it was a miracle," says Lewis.[17] "Truly," notes the reader.

There are other gems, all silly, sophomoric, and unintentional. But let me leave you with one more, for those of you familiar with the rough and tumble of juvenile court, where Dr. Lewis

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14 *Id.* at 17.

15 *Id.*

16 *Id.* at 18

17 *Id.* at 19.

practices first:

> However, I was not totally unprepared for juvenile court. I absorb information easily if I hear it. I was familiar with *Trial by Jury*, knew much of the *Mikado* by heart, and had almost perfect recall for the words of *West Side Story*.[18]

By the time readers reach this somewhat early point in the book, some readers must necessarily be thinking: *This stuff is funny. Really funny.* Other readers, of course, will be thinking

> As some day it may happen that a victim need be found
> I've got a little list, I've got a little list
> Of society offenders who might well be underground
> And who never would be missed– who never would be missed[19]

and that list would have but one name on it.

Having said all this, the manifold faults of the book should be disregarded, and those who have a criminal practice or a general practice which includes some criminal work should include this book on their summer reading list. Psychiatric and neurological problems can be difficult to recognize, but in the rare case may be determinative. In spite of all her silliness, Dr. Lewis is capable of keen observation.

How, then, do psychiatrists and neurologists approach evaluating those charged with very serious crimes? The nature of the killing can be important. Was the method used to inflict death excessive? Did it appear that wounds might have been inflicted continuously, furiously, way past the point of death? Physically, how does the suspect present? Can any neurological clues be

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18 *Id.* at 23.

19 As Dr. Lewis is apparently aware, this is in pertinent part the song of the Lord High Executioner in, well, the *Mikado*.

garnered from scars, lumps, unexplained marks, difficulty in moving limbs, partial paralysis or obvious injury to the eyes? Can the defendant perform simple neurological tests?

Take the case of Lucky Larson (to choose one case amongst numerous fascinating cases recounted in this book).[20] Lucky hacked two people to death. Having just gained his freedom after robbing a convenience store, Lucky, in need of money, walked into another convenience store. When the clerk's back was turned, Lucky plunged a knife into his back. Although the first blow was fatal, Lucky could not stop. He stabbed the clerk fifty three more times, then cut the clerk's throat. His second murder occurred within days. He stabbed a used car dealer 17 times and cut his throat. Once apprehended, his lack of reading skills inured to his detriment when he used a phone clearly marked "monitored," called an uncle and confessed to the crimes.

He presented as a large, jovial man with paralysis on the right side of his face. Indeed, his right eye was smaller than the left, sunk in its socket, and, as it turned out, was blind. It was learned that Lucky could not skip, no matter how diligently he attempted to learn this childhood skill. His left side would not do what he wanted it to. Dr. Pincus then ran a tongue depressor along the outside sole of Lucky's feet. His toes extended upward and fanned out. Dr. Pincus observed that although Lucky was right handed, his right hand was not as coordinated as his left. Lucky talked rapidly, but his thoughts were quite disorganized and, for a man sitting on death row, he was quite cheery.

These observations gave Pincus some suppositions. The smallness of the blind eye

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20 Pincus and Lewis were involved with Lucky Larson after he had been convicted of these murders. The purpose of the examination was to gather information which would win him a new trial. The court ultimately would not order a new trial but did order a new sentencing hearing.

indicated it was the result of an injury inflicted very early in life. His inability to skip because of the lack of cooperation of the limbs on the left side of his body revealed a later injury. The limbs were not malformed nor were they of an inappropriate size. The tongue depressor test (a test for what is called Babinski signs) revealed injury to both right and left cortico-spinal tracts. Simply enough, for a normal healthy person, running a tongue depressor around the sole of the foot always causes the same reaction: the toes curl under the foot. Those with central nervous system problems have other reactions.

Records largely bore out the observations. Lucky had been the result of a traumatic forceps delivery, accounting for the small, blind eye. Later, when Lucky was about 17, he was injured severely in an automobile accident in which he suffered numerous injuries. He had flown through the windshield. He had been in a coma for weeks. The right side of his brain had born the brunt of the incident. Nerves in his face were severed, thus accounting for his facial paralysis. The right side brain injury would account for the weakness of the left side of his body.[21] The fact that his dominant right side was not as coordinated as the left side would tend to show that there were brain lesions on the left side of the brain also, perhaps resulting from this accident.

Pursuant to these findings, an MRI and EEG were ordered, and at that point it became perfectly clear what Lucky's problem was. Although the EEG was not significantly helpful, the MRI showed evidence of severe brain injury: scarring of both frontal lobes. Lucky's automobile accident had left him with the equivalent of a full frontal lobotomy.[22]

21 The nerve pathways from the brain switch sides prior to reaching the spinal cord.

22 *GBRI* at 106.

Armed with this excellent mitigating evidence,[23] the matter went to re-sentencing. One might well excuse Dr. Lewis and Dr. Pincus for having high hopes. They could explain exactly why Lucky acted as he did. He was not, in some mystical way, evil; he was, in a particular medico-science way, ill. Take Dr. Pincus' testimony, as recounted by Dr. Lewis:

> Jonathan described for the jury how Lucky's devil-may-care attitude, so inappropriate to his current situation, reflected these neuroanatomical discontinuities. The lesions between the cortex of the frontal lobes and the rest of the central nervous system, between the self-reflective portions and the more instinctual portions of the brain, also contributed to Lucky's episodic violence. In some ways, his actions were like those of a decorticate cat. When the cortex of a cat is separated surgically from the rest of the brain, leaving only the lower centers of the brain intact, the cat may at first glance appear normal. In fact, it will purr and respond positively to affection. However, its response to stimuli that ordinarily would cause expressions of mild shock or annoyance are no longer moderated by the frontal cortex. The decorticate animal, when stimulated, becomes ferocious, directing its attack at anything it perceives as threatening or uncomfortable. The fifty four knife wounds that Lucky inflicted on the store clerk were the expression of the limbic system (that part of the brain we have in common with the denizens of Reptile Land) released from higher cortical control. Human beings, like other animals require the modulating influences of their frontal lobes if they are to function in a civilized way. Lucky, Jonathan argued, could not and should not be held completely accountable for behavior beyond his control.[24]

But the three-way collision of medicine, law and the opinion of twelve jurors good and true can be an ugly thing. Lucky again was sentenced to death.[25]

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23 Other mitigating evidence was developed as to the early life of Lucky Larson. It is too horrible to recount here.

24 *GRBI* at 110-111.

25 Later, she reflects on this all too common situation:

> We as a society of thinking and feeling human beings, struggle within ourselves to cope with competing interests and motivations: the need for protection from dangerous people, sane or insane; the desire for revenge; the knowledge of the psychobiological and environmental influences on violent behavior; and the wish to adapt to evolving standards of decency and morality. Guilt was a lot easier to measure before we realized that free will, like sanity and insanity, is a constantly fluctuating intellectual and emotional continuum and not a fixed, immutable capacity or state of mind. In response to our struggles to strike balances between what

In addition to Lucky Larson, she speaks about Marie Moore, a 36 year old female who became sexually and emotionally involved with a fourteen year old boy. Together they kidnap, enslave, torture and ultimately kill a teenage girl. Why such a brutal crime? Hired to examine Marie, Dr. Lewis finds a woman who occasionally speaks in a male voice, acts aggressive and complains of blackouts and memory loss, amongst many other interesting characteristics. She tells of Johnny Garrett, convicted of the unfathomable rape and murder of a seventy-six year old nun. Both tales are of patients which Dr. Lewis diagnoses as suffering from what was at one time called Multiple Personality Disorder and is now called Dissociative Identity Disorder.[26] Lewis finds in the unbelievably horrid history of these people some explanation for their acts. There are other tales also. The desire to avert one's eyes is occasionally great. Allow the desire for explanation, not excuse, to prevail.

But the terrific stuff often meshes with the downright peculiar. Her reflections on Arthur Shawcross are fascinating to the point of being fodder for the tabloids, but then again, the

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> we feel we'd like to do to people who commit grotesque acts of violence no matter what their mental state, and what we *think* perhaps we ought to do and ought not do, jurisdictions have swung back and forth, changing from one definition of insanity to another, then back to the first, often in response to a sensational case of the moment.... Surely health is more the province of doctors than lawyers.... Nonetheless, insanity has become a legal term. It feels as though lawyers and lawmakers whisked the term from our grasp, then batted it around and pummeled it until it took on an almost unrecognizable form. Now, those of us psychiatrists who are asked periodically to testify in court regarding a murderer's mental state are obliged to use the idiosyncratic legal meaning insanity has acquired.
>
> *GBRI* at 251-252.

26 "Dissociative Identity Disorder (formerly called Multiple Personality Disorder) is characterized by the presence of two or more distinct identities or personality states that recurrently take control of the individual's behavior accompanied by an inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness." *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. American Psychiatric Association, Pub., 1994, at 477.

A good, brief explanation of this phenomena occurs at *GBRI* at 171-172.

Shawcross murders were quite sensational themselves. Shawcross was ultimately convicted of 11 murders, all women. After committing the acts, he would occasionally mutilate the corpse. In one case, perhaps as a measure of his mental state, he cut the vagina from the victim and ate it.[27]

His records showed numerous brain related problems: an MRI showed a fluid filled cyst in his right temporal lobe, a likely cause of the seizures from which Shawcross suffered and scars on both frontal lobes, strange straight little scars, disconnecting the moderating influence of the temporal lobes from the more primitive areas of the brain. His medical records indicated that from an early age, he suffered bouts of hysterical paralysis, a disorder caused by trauma. Old school records depicted his mother as punishing and rejecting, and Shawcross often was said to engage in fantasies in which he believed he was someone else.

Shawcross was convicted of ten murders in the state of New York and another in a neighboring state. Dr. Lewis has an interesting reflection on this somewhat extreme crime:

> Everyone knows that a serial killer who eats his victim, even a teensy piece of his victim, is crazy. But somehow, by adopting purely moralistic and unmeasurable definitions of insanity and forcing psychiatrists to make use of them, the legal profession forces us to reach some pretty peculiar conclusions. Was Arthur Shawcross crazy when he murdered his victims and consumed their genitalia? Of course. He had to be. Insane? Not necessarily. Not according to some forensic psychiatrists. I wouldn't be a bit surprised if someday soon a state legislature develops a concept of crazy not insane or psychotic not insane.[28]

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27 Dr. Lewis has an interesting gloss on the prosecutor's argument as to this particular act:

> A highly regarded forensic psychiatrist, hired by the prosecution, ventured the opinion that he did this to remove traces of semen and thereby hide DNA evidence. I figure there must be an easier way to do that.
>
> *GBRI* at 241.

28 *Id.* at 252.

Dr. Lewis believes the result in the Shawcross case was due to poor lawyering, and not due to an eminent neurologist testifying for the State that there was little, if anything wrong with Shawcross, thereby contradicting Dr. Lewis. Dr. Lewis apparently also faced prolonged cross examination.[29]

Certainly, the small straight scars found on the frontal lobes, suggesting surgery, should give one pause, yet Lewis' reflection on the Shawcross case is wild:

> As I think about the Shawcross brain, I think what better way to make a murderer than with an irritable focus in the temporal lobe, and transection of the frontal lobe fibres? The person would be left with a limbic system gone haywire, disconnected from the modulating effects of the frontal lobes. If someone wanted to create a killer brain, that's probably the way to do it.[30]

Yes, of course. A killer brain...But who would want to create a killer brain?

Why the CIA, silly. Her evidence is that (1) clearly, the CIA was interested in mind control, (2) Shawcross had been in Viet Nam and had few recollections of it, but those which he had were quite violent and bizarre, (3) when she attempted to get his service records, she was told that most of them had been burnt in a fire, (4) after she met with Shawcross, her office was

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29 Dr. Lewis testified in *State vs. John Clifton Johnson*, 4500 Criminal Trials, before the Circuit Court for Allegany County, Maryland, in the sentencing phase of that death penalty case. The author along with Michael R. Burkey, District Public Defender for Allegany County represented the defendant. In spite of her extremely long list of credentials, Dr. Lewis was a disappointing witness. She seemed nervous, disorganized and not completely self-confident. She testified that the Johnson suffered from Dissociative Identity Disorder and was so suffering at the time of the murder. She was cross-examined with great effectiveness by Lawrence V. Kelly, State's Attorney for Allegany County, for whom she admitted, amongst other things, that it is difficult to distinguish the defendant's symptoms from malingering (Transcript of Sentencing, S1-172); that she could not say whether all of the Defendant's violent acts were committed while under the influence of his disorder (TOS, S1-172); that there is only one scientific test which may establish the presence of this disorder and that it was not used as a diagnostic device for the defendant (TOS, S1-169), that there is considerable controversy in psychiatry as to whether Dissociative Identity Disorder actually exists (TOS, S1-161)and other less-than-helpful things. The sentencing judge, the Honorable J. Frederick Sharer, obviously found her testimony considerably less than compelling as he sentenced Johnson to death. The matter was remanded for re-sentencing, pursuant to issues which did not concern Dr. Lewis. *See State vs. John Clifton Johnson*, 348 Md. 347 (1998).

30 *GBRI* at 255.

broken into and nothing was taken, (5) she believed that during this period of time her phone was being tapped. Hmm.

No review would be complete without at least a word on her meeting with Ted Bundy. Dr. Lewis apparently had known Mr. Bundy on a professional basis for years. As his execution drew very near, Dr. Lewis was contacted. Bundy wanted to see her. On the day before he died, they spoke face to face, at considerable length. At a later time, when execution was hours away, he was to receive a "contact visit" with a loved one, in this case, a female attorney who had become enamored of Mr. Bundy. Alas, the contact visit was not to be, leaving Dr. Lewis with a breathless revelation:

> The female attorney, dark hair parted down the center and flowing to her shoulders, was denied a final embrace. The warden had second thoughts about her as well and deemed such a visit too risky. I guess he was afraid that she might slip Mr. Bundy a cyanide pill. This particular change in plan - the warden's prohibition of a contact visit between Ted Bundy and his lady love– left me, to the best of my knowledge the last woman to kiss Ted Bundy before he died.[31]

If she had only revealed this in a more timely fashion, the cover of *People* magazine would have been hers.

In spite of, or perhaps because of, all this, the book should be read. Her reflections on the requirements of diagnosis[32] are well worth the read and suggest some interesting cross examination tactics. Her description of the Death Chamber at Huntsville, Florida and the execution chamber is memorable.[33] Her description of multiple personality disorder would make

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31 *Id.* at 84.

32 *Id.* at 64.

33 *Id.* at 94-95.

sense to anyone.[34] Her explanation of violent tendencies and how they are transmitted intergenerationally is powerful.[35] Her insight into the relative uselessness of the various legal definitions of insanity is on point.[36] Her interview with an executioner is itself worth the price of the book.[37]

34 *Id.* at 164, 172-173.

35 *Id.* at 188.

36 *Id.* at 251-252.

37 *Id.* at 257-285.