

CLOSING ARGUMENTS

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Part X: Closing Arguments

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JURY ARGUMENT

A defense lawyer's role in defending a citizen begins long before he or she ever steps foot in any courtroom, and often, unfortunately for the party-at-interest, continues long after the verdict has been rendered. However, nowhere in this process is the advocate's skill and talent so singularly on display as during the defense summation to the jury. Trial *is* theater, and closing argument of counsel is the advocate's consummate role. What follows is a brief catalogue of what my thirty years of practice have seen work in defense of the citizen accused.

WHAT LAUDABLE PRINCIPLES WILL A *NOT GUILTY* VERDICT VINDICATE?

You must convince jurors that they can go home to their spouses, their significant others, their friends and be proud of the verdict they have rendered.

The prosecutor will often argue, and all jurors intuit, that a guilty verdict will be seen as a positive step. It is generally perceived as having the salutary effect of removing a criminal from our streets, of making us feel safe in our homes, of making jurors feel they have done a public service.

For most, a not guilty verdict poses the more troublesome image of setting another criminal free to prey upon innocent citizens. It is difficult for many to see anything positive from such an act. You must give your jurors some reason to believe they can go home with their heads held up. You must imbue them with a sense that in *this case on this day* a "not guilty" verdict as to *this citizen* will be a positive step for good; that it will expose government abuse, overreaching or corruption; that it will right an unjust accusation or suspicion; that it will redress inept, unjustified or unsavory investigative or trial practices. You must be able to convince jurors that they can go home and look their family in the eye or themselves in the mirror and say "I've done right!"

Jurors wield an awesome power. And with that power comes responsibility. Tomorrow, after all is said and done, the lawyers and the judge will move on to another case. The jurors will go home; but their decision will stand, and will forever have changed the life of the fellow citizen whose fate they have decided.

CANDOR, HONESTY AND FAIRNESS

Jurors will respect candor and frankness. Often, when everyone else is oozing with concern that “all we want is for you to be fair-minded jurors,” counsel may want to insert a reality check:

“Quite frankly, I am not looking for fair jurors. First and foremost, I want jurors who will be able to see our side of this case. Juror’s who will identify with my citizen, sitting here today.”

This may be a good introduction to the difference between high sounding platitudes and what we all know to be human nature.

KNOW YOUR PLACE

This paper will not deal with wardrobe or health habits. Not because I have not conformed to the rules and/or superstitions such as wearing “sincere blue” for closing, but because I have watched compelling arguments come from advocates adorned with everything from ponytails to suede leather jackets with fringe. The point is that while substance, style and presentation are paramount, you must develop your own. What works for Tony Serra or Jerry Spence, may not fit Albert Krieger. Be yourself.

Self-deprecation can be appropriate. I find it gives *me* some comfort to denigrate the lawyer’s role in an effort to ease the tension inevitably created by some graphic confrontation

between counsel and the court, the prosecution or some witness during the trial.

“I know that I may have seemed at times overly zealous. I told you at the outset that I consider it my job to do everything humanly possible to vigorously defend [my client] and his or her rights in every legal and ethical way possible. I am sure that is what you would want if you or someone you loved found yourself in [my client’s] shoes. You may have noticed that on occasion I may have offended this prosecutor or our nice judge. If in my zeal I may have seemed to go too far; if for some reason I may have offended *you* in some way during this trial; then please, hold that against me after this trial is over, but don’t hold that against [my client].”

PROBLEM SOLVING

Often, you will need to deal with a juror’s natural tendency to feel that a “not guilty” verdict fails to solve the problem at hand. Generally, folks want their efforts to be meaningful. In some cases, you will need to counter a juror’s sense that a “not guilty” verdict would be tantamount to a failure to resolve the problem at hand. There may be a need to answer, were possible, the nagging question: “if your client did not commit this reprehensible offense, then who did?”

DON’T TAKE ON MORE THAN IS NECESSARY

If you do not need to dispute a particular point to obtain a favorable verdict, then do not take it on. Common sense tells us that we do not need to contradict everything that a prosecution witness says, and often the skill demonstrated in closing argument is how deftly counsel can distill the contradictions down to those salient issues that matter to his or her case. On the other hand, it is likewise true that it is often impossible to demonstrate the falsity of critical portions of a prosecution witness’ testimony, even though we may be able to demonstrate conclusively that some other portion of their story is false or totally implausible.

BRING HOME CONTRADICTIONS IN PROSECUTION’S CASE

From Edward Bennett Williams's closing in his defense of Secretary of State (and former Texas Governor) John Connally, when expounding upon the contradiction in Government snitch, Jake Jacobson's "story:"

"What I have to say about...this third version of Mr. Jacobson's story, it is **like the old grandfather's clock that strikes *thirteen*. It calls into question all that has come before.**"

Tennessee Williams' lexicon brings us another word for liar. Edward Bennet Williams used this turn of phrase to describe a witness' propensity to lie:

"Have you ever witnessed such **mendacity.**"

WHY WOULD THESE PROSECUTION WITNESSES BE TELLING THIS STORY?

The two questions you must answer in your closing are:

- 1. Why would they be telling such a story, if it were not the truth? and**
- 2. Why would they pick my client, out of the universe of people out there, to be saying such a things about him or her?**

EMPHASIZE WITNESS' MOTIVE FOR TELLING THIS STORY

Another masterful turn of phrase from William's close in the Connally case was his description of Jacobson's fear of prosecution for embezzling:

"He feared, members of the jury, the charge of embezzling his client's funds. He feared that with a passion. **And, so a case that was conceived in greed, was born in lies.**"

HOW CAN THEY CALL THIS SYSTEM FAIR?

Often the harder sell is to suggest a reason why the witness or witnesses would be saying such terrible things about the citizen you represent. Under the Federal Sentencing Guidelines, many witnesses are testifying in the hope of obtaining a reduction in their Guideline or Minimum Mandatory sentence, either under §5K1.1 or Rule 35 of the Federal Rules of Criminal Procedure [which as well provides for a prosecutor to seek a reduction in one's sentence, where they provide assistance *after* they have been sentenced].

“These days the government purchases the ‘truth’ from most cooperating witness, by paying them often large sums of cash, and by giving them something more valuable than lucre, their liberty. You can emphasize that under §5K1.1, it is not enough for such a thing to be ‘true.’ It is not enough even that the witness truly provides the prosecution with ‘substantial assistance.’ No, the witness must satisfy the whim of this particular prosecutor, because the decision of whether or not to file a 5K1.1 motion for downward departure is in his or her sole discretion. Neither his or her lawyer, I nor this Judge have any power to make them file such a motion. That is an awesome power.

The danger, gentlepersons of this jury, lies in the fact that under our current law, only one side of this dispute is allowed to pay for their testimony; only one side is permitted to purchase the ‘truth.’ How can we call an adversary system fair that allows only one side to buy testimony. What do you think they would do to you or to me, ladies and gentlemen of the jury, if you or I were to pay a witness, ten cents], much less thousands of dollars, for the truth that assisted a citizen like [my client? What do you think they would do to you or me, ladies and gentlemen of the jury if we promised a witness that we could get charges dropped or a judge to sentence them below the minimum mandatory sentence imposed by Congress if only their ‘truth’ would help out a citizen, like [my client].

Imagine the message such a one-sided law sends to those serving lengthy sentences in federal prisons across this land. Do those convicted felons learn that some ‘truth’ they may hold, a ‘truth’ that might assist a fellow citizen might in turn assist them in obtaining a reduction in *their* punishment. No, to the contrary, they learn providing assistance to the citizen will not do anything other than create additional problems for them. For it is *only* if their ‘truth’ assists the prosecution, *only* if their ‘truth’ meets with the prosecution’s theory of what happened that our system will reward what they come to you and say. What do you think that does to these respective parties ability to gather evidence, testimony and witnesses to support

their view.

Some day, some place good people will look back on us and wonder: ‘How could you call such a system fair?’”

In a case tried long before the advent of the Federal Sentencing Guidelines, able lawyer Edward Bennett Williams brought home the dangers inherent in prosecution purchased testimony, contrasting the distinction between “truth” and “testimony” as follows:

“I want to say to you just two last things.

You know, I think in life you can bargain for and buy almost everything. You can bargain for and buy mansions and villas and priceless works of art. You can bargain for and buy fine jewelry and all the creature comforts that you can conjure up in your mind.

But thank God there are some things you can’t buy and you can’t bargain for. You can’t buy and you can’t bargain for justice, because if you do, it’s injustice. You can’t buy or bargain for love, because if you do, it isn’t love that you get. And you can’t buy or bargain for truth, because it isn’t truth that you get, it’s the truth with a cloud of suspicion over it.

You can buy and bargain for testimony, and that is what the prosecution did in this case, and that is why their case is in the state it is in at the present time.

This case is styled United States...against John Connally, but I want to tell you something. The United States will win this case.

I saw one day on the wall of a courthouse, the oldest courthouse in England, the words, ‘In this hallowed place of justice the Crown never loses because when the liberty of an Englishman is preserved against false witness, the Crown wins.’

After tramping for thirty years across this country in federal courthouses all over the land, I tell you the United States never loses because when the liberty and reputation of one of its citizens are preserved against false witness, the United States wins, the United States wins the day.”

TESTIFYING FOR YOUR CLIENT

A number of years ago I watched fabled Texas trial lawyer, Warren Burnett defend Delia

Gonzales, a South Texas lawyer indicted for inducing illegal immigration. Delia was in practice with her husband and it was apparent to everyone familiar with the case that Delia would have to testify in her own behalf if she expected to avoid conviction. Because of her unfortunate familiarity with similar problems in the past, lawyer Burnett chose not to put his client on the stand. Instead Burnett successfully incorporated the following almost allegorical attorney-client conversation into his closing argument in order to give his client a voice and highlight the ludicrousness of the prosecution's charges:

“Come with me. Be with me as a lawyer.

‘What have you done, Delia?’ ‘I have been doing a lot of immigration work there in the office.’

‘What do you mean, a lot of immigration work? I know nothing of it.’ ‘Well, there was a new law passed in 1977, took effect the 1st of the year, and under it for the first time we recognized really the broken families in this hemisphere, and for the first time sons, daughters, husband, wives, brothers, sisters are given a preference about getting together and a right to get together and live in this great nation.’

‘Well, my God, Delia, what did you do? What was your part? What is it they claim is your crime?’ ‘They claim that I induced them illegally?’

‘Induced?’

How could anyone of us induce someone? How can you persuade or encourage a husband to join a beloved wife?

How can you persuade a father to want to live with his child?

How do you persuade a son to want to be with his father?

‘What have you done, woman?’

Do you understand that these men accused this woman of inducing children to want to be with their parents?

Do you understand that in this Court and before these people that this woman is accused in certain counts in this indictment of inducing a husband to want to live

with his wife?

In other counts, of inducing a wife to want to live with a husband?

So with me when the story was told to me. I said, ‘Delia, what is the law? What were you telling those people? I was telling them what anyone would tell them that knows anything about the law.’ ‘Well, what is it, for God’s sake, tell me. I don’t know, I never practiced immigration law, tell me.’ ‘Well, under the new law if the alien father, son, brother, sister, husband, wife crosses the border on the MICA – ‘What is a MICA?’ ‘-- a document that permits them to cross and remain for 72 hours and go no farther into the interior than 25 miles.’ ‘All right. ‘They cross on the MICA and then I file the I-130 for them.’ ‘What’s the I-130?’ ‘It is a petition to have the government recognize that the wife is the wife, that the husband is the husband, that the son is the son and that the daughter is the daughter, and when I file that they are permitted to remain in the United States of America to travel where they wish to, work if they want to, and they all do, pending the adjudication of that petition.’ ‘Who adjudicates it?’ ‘Immigration adjudicates it.’

And I am told, months ago, that this case that I am going to end up trying. This is the case that I am going to end up defending.”

USE OF TRILOGIES

Most world-class orators understand the importance of rhythm and cadence in creating memorable argument. Most also intuit the place that repeating or turning a phrase on three separate occasions has in enhancing the symmetry of their message. It is not that saying something once or twice cannot suffice, often once *is* enough. However, one has a hard time escaping the magnetism of Dr. Martin Luther King’s use of the trilogy in his famed “I HAVE A DREAM” speech. I can still see the verbal imagery of all God’s little creatures uniting. Notice above how on three separate, successive occasions Burnett turns the phrase “**How can you induce** a mother to want to be with her child?” And notice Burnett’s variation of that trilogy theme in the following portion of his closing in that same case:

“When this case began it was in some way suggested to you that this woman was getting rich out of what she was doing, that she was charging some sort of an

exorbitant fee.

You now know that to be false.

It was suggested to you that in some way because there had been advertising in a newspaper in Mexico, that that was in some way a violation of the law or behavior that was un-American.

You now know that to be false.

At the beginning of the trial it was suggested to you that these aliens were committing a crime, that is to say, that they were violating the criminal laws of the United States of America when they crossed the bridge with MICAs and filed the applications with this woman.

You now know that to be false.

It was suggested to you at the beginning of this trial that there was something wrong with a woman working in a law office, in this case for her husband, to do all the work on these cases.

We now know that that is false.”

**SYMPATHY FOR AND IDENTITY WITH YOUR CLIENT
THE “SCAPEGOAT” THEME**

A common theme is to analogize your client to some historical or biblical character who was accused in order to justify official action or deflect blame on some more culpable person.

“Now, always, in all times of the history of America and, for that matter, other nations, other parts of the world, the bureaucracy, whether it be the bureaucracy of the king, the bureaucracy of the queen, the bureaucracy of the chief, of the dictator or of what we still call the democracy – it has always spoken to it’s people through scapegoats.

Before the Germans could do as they would with the Jews, they prosecuted a handful in Court.

MR. BENNETT: Your Honor, I am going to object to that statement. There’s

nothing in the record anywhere approaching the analogy of that statement. For that reason, I ask the Court to instruct the jury that the remarks of counsel are not evidence and not to be considered as evidence.

MR. BURNETT: May I be heard, Your Honor?

THE COURT: Yes.

MR. BURNETT: There's no better piece of history known, and if the time should come, when an advocate cannot analogize on history, otherwise then of course, the role of the advocate would be meaningless.

THE COURT: Objection overruled.

MR. BURNETT: They tried a few in Court.... The king would find a scapegoat or two, and I am sad to say that this country, going into it a third century, cannot escape the fact, and we should not run from the notion that us, too, have been spoken to by our government through the use of the scapegoat.

We are not as a people that far advanced, but what out of the whole United States of America there happens to be only one indictment against a lawyer for declaring the law... You have a right to wonder from the evidence in this case, you have a right to speculate about that fact...

Now, I will not be permitted to answer any of the things Mr. Beck will have to say.

People who have helped the poor are not strangers to the iron bars ...rope ...stake ...fire ...or even the cross, and they have always had plenty of defenders long after the act. And it's true. Look back in history of this country: The scapegoats have had the great defenders a generation or two later, but at the time of the injustice they had the 'they' people.

Now, it is not going to do any good for you to defend Delia Gonzalez in five years or in ten years when finally they get around to the scandals coming out in the newspapers and find out what was really going on in the Immigration Service. You're seeing the tip of it. She needs to be defended now. The law defends her. If you execute it and carry it out, she will be defended."

As you can see from my closing in the "Brilab" prosecution of my fellow lawschool classmate, Randall "Buck" Wood, I stole Burnett's "scapegoat" theme, arguing for jurors to abide by their sincerely held concerns that the prosecution had not met their burden:

“I’m not going to pretend to defend the State of Texas, and I’m not going to pretend to defend the legislature. But I have never had a prouder day in my life than to stand here and ask you to return Buck Wood to the side of his fellow lawyers like myself who know him well. There have always been scapegoats from biblical times to the present, and there have always been their defenders the morning after. If you have a doubt in your heart, tomorrow morning at breakfast will be too late. Abide by it.”

ANTICIPATING THE PROSECUTOR’S REBUTTAL

Different lawyers and different facts may call for different approaches, but generally one needs to deal with the fact that after defense counsel retakes his or her seat, the prosecution will again have an opportunity to speak to the jury, an argument that, except in rare circumstances will go unanswered. A common approach is the following:

“Psychologists tell us that people find most believable those they hear from first, as well as those they hear from last. A sort of “FIFO” (or first in/first out) credibility gauge. Under our system, and because they have this heavy burden to prove their case beyond a reasonable doubt, the prosecutor over here gets to go first and last. We are sort of sandwiched in between.

So my client is going to have to rely upon you, when you go back to the jury room to deliberate, to respond as best you can to the arguments he or she is going to be making next. I will not be permitted to do so.”

In Delia Gonzalez’ defense Warren Burnette returned to the “scapegoat” theme in addressing the issue of rebutting the prosecutor’s closing argument as follows:

“Now, Bock is going to make you a speech. It will be what we call a steamwinder. That’s his purpose in the case.

Now, let me tell you, up in Salem every time they convicted a witch and every time they burned one, there was somebody making it easy for them to do it. That was the man that made the speech. That was the man that made the closing speech. That was the man who came along and did the hatchet job and who aroused you.

Oh, you see it’s always been known,... the Old Testament is full of it and they are still writing about it as though there’s something new about it in the psychology

textbooks of the day, but if ...if I want to bring out the worst that is in you towards your fellowman or woman, then I need to isolate that person. I need to get them apart. I need to get them to be something a little bit away from you, really need to get your attention sort of off of them, but I need, I need to get you separated.

Delia is not on the jury. She can't be in the jury room with you. That's the system we have. Maybe it won't always be that way, maybe there will come a time, a blessed time when you are all together when the judgments are made, but you owe her the obligation while you deliberate of thinking of her as a wife, the mother and the warm, human being that this evidence shows her to be and you owe her the obligation of saying that 'I will see no citizen branded a felon based upon the whooping and hollering of an ambitious prosecutor who will be somewhere else next week in court making the same speech.'"

WHERE THERE'S SMOKE, THERE'S FIRE

There is a legitimate concern for any defense attorney that the jury will fall into the "where there's smoke, there's fire" trap – that the police would not have arrested the defendant if he wasn't guilty, and the prosecutor certainly wouldn't have tried him if he wasn't guilty. Bobbie Lee Cook addressed this as, as well as mistrust of defense attorneys, in the following summation:

"I have a duty to perform which is just as significant and just as compelling as a soldier, a duty fixed by law, for which I offer no apologies and . . . which I am glad to perform.

The philosophy of what I speak is equally as important to you and your children in the country. Every man and every woman, irrespective of his race or creed or color, whether he is rich, whether he is poor, whether he is from Chattanooga or Meynardville or my little town of Summerville, is entitled to the same breath of fresh air in this country.

For over two hundred years ago, the founders of this Republic, meeting in Philadelphia, struck a Constitution which contained a Bill of Rights that has been with us for over two hundred years. And in that Bill of Rights, it says that in all criminal cases, the accused should enjoy the right to a speedy and public trial by an impartial jury, and to be informed of the charges, and to have the effective assistance of counsel for his defense, and the right to be confronted with the witnesses.

The jury under this system that was devised over two hundred years ago also had

the duty and the responsibility to weigh the guilt or the innocence of two fellow citizens. It is not important that they may be Democrat or Republicans or independents, that they may be white, that they may be Baptist or Presbyterians, it is the fact that they are entitled to these rights.

The difference between the rights of Mr. Butcher and Mr. Steiner in this case and all other American citizens as how it would differ if they were in some Communist country, it would be the fact that for these two hundred years, thank God, that you cannot brand them as a felon or take away a penny of their money except by a unanimous verdict of twelve citizens such as you.

And it has been fought for and preserved in the jungle of Iwo Jima and Guadalcanal and the beaches of Amaha and Anzio-Nettuno, the Central Highlands and the delta of Vietnam and the Argonne, consecrated by the blood of patriots and ordinary citizens to preserve the rights of C. H. Butcher and Jim Steiner and all of us throughout this great land.

When each defendant comes into this court, he is cloaked with a presumption of innocence in his behalf that remains with him throughout the entire course of the trial until the Government establishes guilt beyond a reasonable doubt.

It is a strong burden. It is a necessary burden. It is a burden that is there because when your Founding Fathers wrote the Constitution and took notice of the Bill of Rights, they understood more about liberty and justice and freedom than my generation or my children's generation, because these people had come here from England and France and Germany and the Highlands of Scotland and Ireland and the ghettos of Central Europe in order to escape the tyranny that they once had, the yoke of oppression that had been placed upon their heads and necks, and they understood it very well.

I speak to you of fairness, and I speak to you about justice. It is important that Mr. Butcher and Mr. Steiner get the same brand of justice that you would expect to receive. And it's necessary to speak up for what is decent, even though it might not be the popular thing to do.

The overwhelming evidence in this case does not establish beyond a reasonable doubt that C. H. Butcher possessed the requisite degree of specific intent to condemn him as a felon, and it's necessary for you to speak up, not only for his benefit but for your benefit and of your children and their children.

It reminds me of something that was said by a German pastor after World War II, a Protestant pastor, a man by the name of Martin Niemoller. He said, "When they came for the Jews, I wasn't a Jew, and I didn't speak up. And they came for the trade unionists and I wasn't a trade unionist, and I didn't speak up. Then they came

for the Catholics, and I wasn't a Catholic and I didn't speak up. And they came for me, and there wasn't anyone left to speak up."

I'm not asking you for any favors. I am not appealing for sympathy, I am appealing to you to do what is right and just.

Two hundred years ago, when these young men and women arrived at this great constitutional birth, this Bill of Rights, they emerged from the Constitution Hall, convention hall, and they were going down the steps. A young lady came up to Mr. Franklin and said, "Mr. Franklin, what kind of government have you given us?" And he said, "We have given you a republic, if you can keep it."

This jury, you bring together all of you from all walks of life, from all strata of society; you bring here a wealth of experience, a great background, a diversity, in many things: at least one veteran of World War II, a Vietnam Veteran, and others in many walks of life.

Use your common sense in this case. You don't have to throw your common sense out the window. Render a verdict in this case which speaks the truth of this transaction, and that is the verdict of not guilty."

HOW CAN I FACE MY FAMILY?

As I suggested at the outset, a typical juror faces the prospect of returning home and having to explain to his or her spouse why they have acquitted someone charged with a criminal offense.

What follows was Warren Burnett's explanation to the jury in Delia Gonzales' trial:

"Your lives have now touched that process and they are never going to be the same.

You are 'they'.

Now, let's just say that it's two weeks or a month from now and you have returned to your everyday lives, secure with your family, and some neighbor says, 'I heard you were up down in federal court, what kind of a case was it? Do you want to talk about it?' 'Yes. I will talk to you about it. They had a woman on trial, wife of a lawyer, worked in his office in Del Rio.' 'What did she do?' 'They claimed that she induced aliens to come into the United States.'

How in anybody's name can you induce an alien?

'Well, it was worse than that. They claimed that she was inducing wives to want to be with husbands, fathers with children.'

‘Good Lord?’”

DEFINITION OF REASONABLE DOUBT

“SUCH A DOUBT AS WOULD CAUSE YOU TO HESITATE”

One of the few things a defense lawyer has going for him or her during closing argument is the typical definition of “reasonable doubt” in federal criminal trials. The standard pattern jury charge is as follows:

“A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.” *See: Fifth Circuit Pattern Jury Charges; U.S. v. Alonzo*, 681 F.2d 997 (5th Cir. 1982), *cert. Denied*, 459 U.S. 1021 (1982).

Typically, defense counsel can forcefully argue such an instruction with respect to a discredited cooperating witnesses:

“I believe that His Honor will instruct you that a ‘reasonable doubt’ is such a doubt as would cause you to hesitate in matters of utmost importance to you or your loved ones. In our daily lives we all have to rely on the representations of others in all sorts of matters, from buying encyclopedias to used cars. If you wouldn’t hesitate before acting on the advice of the likes of [the prosecution witness] in matters of utmost import in your life or the life of a loved one, then my client never had a chance when he walked into this courtroom.”

After detailing all of the discrepancies and shortcomings of the prosecutions case against “Buck” Wood in the “Brilab” prosecution, I utilized this instruction in closing for the defense:

“I believe the court will instruct you that the definition of reasonable doubt is that it is such a doubt that would cause you to hesitate in matters of utmost importance in your life or in the life of your loved ones. I can only tell you that when you go back into that jury room and search in the place within you where you make those tough decisions about matters of importance to yourself or to your loved ones, that if that, if all of this doesn’t create a reasonable doubt, Buck Wood never had a chance when he walked into this courtroom. If that doesn’t cause you to hesitate

before you would act in matters of utmost importance to yourself or your loved ones, Buck Wood never had a chance when he came in these doors. And that's all we ask is a chance for him to return to his family and to return to the side of his lawyers on this side of the bar."

GOVERNMENTS DO NOT HAVE "FRIENDS"

Craig Washington, the former U.S. Congressman from Houston, who defended the Speaker of the Texas House in the "Brilab" prosecution, masterfully juxtaposed the delicate tact, cordiality and politeness of your average Texas politician to the cold amorphous legal fiction affectionately referred to as our "government," arguing that:

"Maybe the government can't understand how it is that a man like [the Texas Speaker] could have \$5,000 passed to him and not want to embarrass that person. **Maybe the government has never had a friend.** If you have had a friend, then you can understand how you could be finessed into a situation the [the Texas Speaker] was finessed into. Being polite is not a crime yet in Texas. You don't have to be rude to your constituents to demonstrate you do not want to break the law."

THIS CITIZEN HAS ALREADY BEEN PUNISHED ENOUGH A "NOT GUILTY" VERDICT DOES NOT CURE EVERYTHING

Continuing, lawyer Washington pointed out the stigma which attaches to an indictment for serious federal charges, particularly for an ambitious politician, with his eye on the Governor's Mansion:

"You know and I know that [the Texas Speaker] will never be Governor of this State because the most that he will ever get from all that he has been through is a not guilty verdict. There is a difference between not guilty and never having been charged, and for the rest of his life he will have to go around and try to explain to people that didn't hear your verdict – because you can be sure that it won't be played in the newspapers, in the media, for as many days running as was the charge that has been leveled against him."

TAPE RECORDED "STING" OPERATION

In the typical federal “sting” operation, a “converted” crook is wired and sent out to try to entice his family, friends and former associates to say something incriminating on his rolling recording device. The scenario usually involves a hustler-type, who knows he is recording an unwitting “victim.” Often, the government “snitch” will promptly interrupt when his prey attempt to make some self-serving, exculpatory statement and will invariably recycle their sales pitch repeatedly until the target grunts an unsuspecting “Uh, huh,” which appears on the printed text of the transcript as an affirmative assent or agreement, rather than the mere punctuation intended to politely get this offensive salesman off their back. Similarly, those working the “pro-active investigative team” often have their own discussions, outside the presence and hearing of their targeted citizens. In “Brilab” we argued that there were in fact two movies playing on the government’s tape recordings. One involving the “insiders,” the cop-shop and “cooperating individuals” who would describe their activities in the clear language of “crime speak.” Whereas whenever our clients, the “outsiders” were present or entered the room, the language would quickly be cleaned up, so as not to give notice of any criminal intent. Words like “bribery” were the vocabulary of the “insiders.” When the “outsiders” were privy to their discussions, the government operatives were careful to describe the payments as “political contributions,” which were legal under Texas law.

“There is something else that flows throughout this. That is what we talked about at the outset of this case, the insiders and outsiders. Throughout the tapes there is constant banter back and forth between L.G. Moore and Hauser. Is it all right to talk on this phone? Can we talk here? Is it cool to talk around all these people? If you will notice, there is never once not one instance where some of that kind of inside or outsider talk is mentioned in front of Buck Wood and Don Ray. You don’t hear any, “is it all right to talk on this phone? Is it all right to say something in front of these folks?” As a matter of fact, Buck Wood and Don Ray are never present at any of the meetings on the 19th of October or the 8th of November with the speaker.

After the second meeting with the speaker on November 8, Joseph Hauser comes back to the motel room to meet with other insiders, the folks that are always talking about is it cool to talk on these phones? Can we talk in front of these people? And what you got here, you got an acknowledgment, Joseph Hauser saying, "Wood and Ray have no idea what the speaker is about, with all due respect for Wood and Ray. Didn't I tell you about that yesterday?" Absolutely. By the way, this is October 19. Do you remember when yesterday was? October 18, the day the tape ran out.

I don't remember hearing this conversation. That was another time when Mr. Hauser told us from the witness stand nothing happened after that tape ran out. I will suggest to you something happened. They talked about Buck and Don not knowing about what was going on, like they did again on October 19. "Absolutely. Absolutely. I've got news for you Woods and Ray are sharp, but they don't have a handle on this." That's correct. They don't have a handle on it, and they never did have a handle on it.

The statement that was made on November 8 by Joseph Hauser when the individuals met, the insiders, Wacks, Montague, Hauser, and L.G., Hauser gives a little warning. "Okay. Wood and Ray are coming. If there is anything you want to talk about or discuss before they come, let's do it now." A little insider talk. We can talk among ourselves. L.G., Hauser, Wacks, Montague, the insiders. What are they talking about? They are talking about the meeting on November 8 with the speaker. They embellish a little bit. They don't talk about a \$5,000 political contribution. They talk about it in cash. They talk about something else other than a \$5,000 political contribution. They talk about \$600,000 per year that they are going to be giving to somebody. Not in one lump sum, but per year. And they talk about fee splitting. That's what the insiders talk about, when they meet with Wacks and Montague who hadn't been at the meeting.

Well, what do they talk to Don and Buck about when they get there? Remember Hauser, in hushed tones, "Wood and Ray are coming. Anything else we need to talk about?" What do they talk about when Buck and Don get there? I can tell you what they don't talk about. I'll tell you what they don't talk about. They don't talk about cash. They don't talk about \$600,000, and they don't talk about fee splitting. What you hear is exactly what Ed Windler told you should have heard. What you hear is a discussion about Joe Hauser and L.G. Moore.

L.G. says. "Joe, tell them what we did for the retirees, what the bottom line was, a hell of a deal for the retirees and a million dollars cheaper." He compares it to a metropolitan and gives them a little synopsis. That's all about the insurance program. That's what Mr. Windler says you were supposed to talk to them about first.

Then what happened? Well, then - - as a matter of fact, they used the word. First

they talked about what a hell of a deal the insurance contract is. A million dollars cheaper. Then a commitment. The speaker says, “all I want to do is save the State of Texas a million dollars. That’s all I want to do. I’ll get to work on it.” A commitment like Ed Windler says there should have been.

Then the transcript gets interesting. Then we wanted to talk to him about a political contribution. What did they do? L.G. says, “we gave him a nice political contribution.” Exactly the terms of 3601. That makes it lawful. That’s what makes it so confusing. That’s what makes it so deceptive.

What does Hauser say? “He’ll never report it.” Buck Wood chimes in, interrupts, “Ohio, he’ll report it. Maybe not in our name, L.G.” Well, we made a political contribution and whose name would it be reported in? But he will report it. That makes it lawful, a political contribution made and reported in accordance with the law.”

CIRCUMSTANTIAL EVIDENCE

Jerome Froelich, when representing a defendant in a corruption case based largely on circumstantial evidence used the following story to illustrate circumstantial evidence’s limited value:

“Now, [the government] talked about circumstantial evidence. Let me give you an example that happened to me. I’m one of eight kids. I have five brothers. It was a rough-and-tumble family, but there was one we did not fool with. I have a brother Brian who was a national heavyweight wrestling champion, and he played tackle at Boston College. He is as big an individual as you ever want to see, and he doesn’t have an ounce of fat. He’s been that way since he’s sixteen years old. And he does not have a very nice disposition at times.

When we were kids, we would come home from our various practices and my mother would leave food for us. We would come home at different hours. I had a brother Larry. Larry was tough, but he wasn’t a tough as Brian. I never thought Larry was very bright, but one day I learned he was. We came home, and we started eating dinner. We all had sandwiches, and we had a dish of pudding after dinner.

Brian was the last one home. He actually was running extra laps because of something he had done in practice. We had finished our pudding, and Larry decided he was going to have an extra pudding, and it was Brian’s. He sat at the table, and he started to eat that pudding. I heard the door open, and I knew that Larry was one of the dumbest people on earth, and I was leaving that kitchen because I

wanted no part of when Brian got home to find that Larry had eaten that pudding.

Larry than proved to me how smart he was. We had a boxer, a dog. The Boxer's name was Mo. Larry heard Brian coming through the door, too. Larry picked up Mo, picked up the side of the dish of pudding and stuck that dog's face in that pudding, and he put that dog back on the floor, and then he ran with me to our rooms to open books and start doing homework.

Why was Larry smart? Larry never got hurt on that. Mo had a tough week. He got kicked around, he didn't get fed real well for a while. But that's what circumstantial evidence can do to you, and that's what you got to be careful of. Don't let [Defendant] wind up like Mo. That's what [Prosecution witness] is trying to do to you. What my brother Larry did to that dog."

THE "SOFT ENTRAPMENT" ARGUMENT

It is hard enough to satisfy most federal courts that your facts will warrant an entrapment instruction, but it is usually even more difficult to get a jury to believe that the government made your client engage in conduct that most jurors want their fellow jurors to think they find abhorrent. In defending fellow lawyer "Buck" Wood in the "Brilab" case I argued that the recorded language used by FBI agents in their "sting" operation, aimed at the speaker of the Texas House of Representatives, were such as to make a knowledgeable attorney like my client (both FBI agents were forced to admit they had failed their respective states' bar exams) believe they were trying to make a "political contribution," rather than pay an illegal bribe.

These folks from California, Mr. Wacks and Mr. Hauser, never even bothered to read the bribery statute. The statute that's the foundation for many of these charges. They never even bothered to read that statute.

"Yet every single time they speak to my clients, every time they utter the term that has anything to do with the moving force in this whole transaction, what words do they use? The magic word from that statute, "political contribution." Political

contribution. Perhaps they were about as careful in reading the law in this case as they were in reading the law for the bar exams.

But there was one person – there was one person who read that statute. Agent Ligarde from Austin, Texas. Had those folks been as careful as he was – too bad he came very late in the proceeding – had they been as careful as he was, they would have understood that by definition a political contribution that is made and reported in accordance with law cannot be bribery by definition in Texas.

The court will instruct you that political contributions made and reported in accordance with law are not bribes under Texas law. Every time they spoke to my clients about this, they called it a political contribution. Every time they asked my clients a question with regard to it, he responded, ‘he will report. The speak will report it.’ A reasonable assumption based upon that magic word ‘political contribution’ that he will report it.

The Court will instruct you, I believe, that if you were convinced that someone had no previous intent to violate the law but they were induced into a course of conduct that the Government claims is illegal but which they reasonably believe that was legal, that under that kind of situation where the Government claims the conduct was illegal and the defendant claims that his activity was lawful, that public policy forbids a conviction. It’s entrapment.

Agent Ligarde did read the statute after his interview. He said he felt it was his duty to read the statute. Agent Ligarde asked my client some questions. But he never asked my client a specific question as to whether or not my client knew of a political contribution.

When I talked to Agent Ligarde after that, in the following question, I asked him if he had ever asked Buck Wood and if Buck Wood knew about a political contribution, and if that’s the only word that those individuals ever used with my client. That is, a political contribution, that might be an important distinction. That if every time the people talked to my clients they used hte word political contribution, it might have been an important distinction to have asked him about it. And Agent Ligarde said in response to that question, ‘you’re correct.’

Lastly, I discussed with Agent Ligarde what the significance of that was. Agent Ligarde acknowledged what the significance of that was. Agent Ligarde acknowledged that there was a big difference if my client had said that it was a political contribution that he believed would be reported. And if the agent had used political contribution on each occasion when they talked to my client, that would make a big difference. Why? Because under the penal code that would make the difference. That word that they used, that word of art, makes a significant difference.

The prosecution brought in their own expert. Remember Chip Holt? It's a shame they didn't talk to Chip Holt before they put him on the witness stand. We might not be here today. What Chip Holt told the Government was – and I think it very clear even with respect to Buck Wood, who held a job very similar to Chip Holt's in the Secretary of State's Office, was that in response to Mr. Woods' question a donor, which would have been L.G. or Mr. Hauser or the union or fidelity financial. You couldn't tell from the manner in which they spoke of it. The donor has no obligation to report it. More important, Buck Wood, who is the advisor to the donor, a third party, has no obligation to see that it is reported any more than a donor would have. And most important, that if the third party believed it was a political contribution, was told it was a political contribution, said it would be reported in accordance with the law, he has no obligation to report it. He has no obligation to see that it is reported. And anyone, and that would be in accordance with law, he would be complying with the law, he wouldn't be violating the law. And someone in Buck Wood's position, who had held the position he had, would be aware of that.

From Buck Wood's position, from his eyes, looking through his eyes, they had made it look like a political contribution. That's what they called it. That's what they told him it would be. That's the word they used every time they uttered anything even close to those circumstances.”

PROFESSIONAL WITNESSES

Regardless what prospective jurors may profess in their self-serving answers to questions during voir dire, most folks find it an easy credibility choice between the accused citizen and his or her badge-bearing accuser. It is usually important to try and put the police officer's interest and bias on the table and in perspective. For example:

“Sure, [my client] has an interest in this case. For sure, he or she is undoubtedly the most interested party to these proceedings. His very liberty, his very life literally depends on its outcome.

But don't kid yourself, these police officers have an interest in what happens here as well. Their very rank and grade depends upon how well they are perceived to do their job, and that includes not only their work on the streets but their performance in this courtroom, as well. Their testimony here before you is part of their job, they are paid for testifying, just like they are paid for their undercover police work in the field.

And if self-preservation is the first law of the jungle, then trust me, self-justification is the second. We all have a tendency to remember facts in a light most favorable to ourselves, most favorable to our position. In that respect, police officers really are just like anyone else with an interest in these proceedings.”

“JURY NULLIFICATION” BY ANY OTHER NAME

While arguing jury nullification straight-up will rarely be tolerated by either the prosecutor or the judge, and while a jury instruction is practically unheard of, there is nothing to prevent able counsel from reassuring the jury of its inviolate decision-making role in this process. Counsel would be remiss not to remind the jurors that:

“While His Honor is the Judge of the law, in our system of justice, you twelve citizens are the judges of the facts. And your decision as to the facts of this case, who to believe, what happened and why, is your decision and yours alone to make. No one will ever come and pry into your mind or to ask you to reconsider. You are here for one purpose and one purpose alone, to see that justice is done. Your only concern should be that after all is said and done, you can go home to your family, wake up in the morning, look yourself in the mirror and say to yourself: ‘I’ve done right.’”

THE STORY OF “BUSHELL’S CASE” AN HISTORICAL PERSPECTIVE OF THE RIGHT TO JURY TRIAL

I have found the story of “*Bushell’s Case*” to be a poignant reminder of the courage of those who sit in judgment upon their fellow citizen and the awesome power they have to do right.

“Some time ago I visited “Old Baileys,” which has stood for centuries as the criminal courts building in London, England. You know, the place where Rumpole practiced his art.

There is a cage-like dock in the center of the grand courtroom where the prisoners rise from the bowels of the building to confront their accuser and their fate.

And in “Old Baileys” there is but one plaque which adorns the walls. It commemorates “*Bushell’s Case*” from 1670. That plaque is a testament to the

courage and endurance of Edward Bushell and eleven other proud jurors who refused to return the verdict that the King awaited. Twelve jurors who withstood two nights without food or drink because they refused to return the verdict that the King awaited.

Bushell and his fellow jurors refused to convict two Quaker preachers who were charged with preaching to an unlawful assembly in violation of the British Conventicle Act, which established the Church of England as the “Official Church.”

For their effort these twelve brave souls were fined and imprisoned for nine weeks for refusing to return the verdict that the King awaited. That ancient right of a juror to act according to his or her conscience is expressed in the Magna Carta and dates back to ancient Greece and Rome.

That man, that preacher who those courageous jurors saved was none other than William Penn, who later came to the Americas and founded Pennsylvania and Philadelphia where our Declaration of Independence and Constitution were written. And the rights established in that case, freedom of religion, freedom of speech and the right to peaceably assemble, are now part of the 1st Amendment to our Constitution. As a consequence of these jurors’ imprisonment, Edward Bushell filed a writ of habeas corpus. He and the other recalcitrant jurors prevailed in the Court of Common Pleas, and the practice of punishing juries for verdicts unacceptable to the courts was abolished forever.

Jose Perales, who sits here before you today is no William Penn. But like that young Quaker preacher before him, Jose came to these shores to make a better life for himself and his young family.

But the hero of “*Bushell’s Case*” was not William Penn. The heroes of that historic case were those twelve earnest people, who like yourselves refused to return the verdict that the King awaited. You ladies and gentlemen, stand in the large shoes of those who came before.

For the jurors in “*Bushell’s Case*” were not Quakers. They did not take that courageous stand because they believed in the doctrine William Penn was preaching or because they had some stake in his cause. Those twelve jurors suffered mightily on a matter of principle, not their own but that of a lowly outcast who had gained disfavor with the Crown.

Like the jurors in “*Bushell’s Case*,” speak your conscience. Reunite Jose with his family and you, in a way you cannot yet understand, will be united with him as well.”

TIME HONORED HISTORICAL ANALOGIES

Courts are loath to restrict counsel from making literary and historical analogies in closing argument. Take for example Edward Bennett Williams' biblical references, or the reference to the inscription on the wall of "the oldest courthouse in England," set out above. Even more to the point, Warren Burnett analogizing his client, Delia Gonzalez, to the scapegoats of the Nazi Holocaust. One could hardly conjure up a more succinct description of a lawyer's role in closing argument than Burnett's retort to the prosecutor's objection:

"Before the Germans could do as they would with the Jews, they prosecuted a handful in Court.

MR. BENNETT: Your Honor, I am going to object to that statement. There's nothing in the record anywhere approaching the analogy of that statement. For that reason, I ask the Court to instruct the jury that the remarks of counsel are not evidence and not to be considered as evidence.

MR. BURNETT: May I be heard, Your Honor?

THE COURT: Yes.

MR. BURNETT: **There's no better piece of history known, and if the time should come, when an advocate cannot analogize on history, otherwise then of course, the role of the advocate would be meaningless.**

THE COURT: **Objection overruled."**

ASK THE JURY TO ARGUE YOUR CASE FOR YOU

When Michael Tigar, a giant among midgets in our profession, argued for the life of Terry Nichols, convicted in the Oklahoma City bombing trial, Tigar asked his jurors:

"I am done now, ladies and gentlemen of the jury. When I go home tonight my little daughter will ask me, 'what did you do today Daddy?'

I will tell her that I tried to save the life of one of God's creatures. And members

of the jury **what will you say when you go home?"**