NAPC
National Association of Prosecutor Coordinators

The Case of the Atlanta Courthouse Murders—A Drama in Five Acts

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Not since the Atlanta Child Murders of the early 1970s has Atlanta suffered a crime that caught the attention of the world as has the courthouse murders of 2005. Because the murders were so public and brutal, they dominated the attention of the press and the community in a way that made the matter personal to those here in Atlanta and to those who work in our courts across the country.

Act I—The Crime

The killer's savage beating of the jailer left her damaged for life. His trek through the large courthouse with the jailer's gun led into the judge's chambers, then through the door to the bench, and then to the shooting of Judge Barnes from behind as 54 spectators witnessed the slaughter. His turning to shoot the court reporter as she rushed to the judge's aid was caught on the security tape and was ultimately seen by all.

The killer then casually walked from the courthouse and murdered a deputy who came after him. To further his escape, he carjacked a car, and physically abused the driver. He changed vehicles every couple of blocks to throw the police off of his trail. All of this occurred in the very heart of the city and in the middle of the morning. The killer was known to everyone and his dramatic escape through the heart of the city caused life to come to an abrupt stop. Buildings were locked down and highways closed across the city.

The lights of the city and the homes of its residents remained on all night during the manhunt for Brian Nichols, the killer. His dramatic surrender the next day as the police closed in was telecast worldwide by CNN. The breaking story of his killing a federal agent at a distance from the courthouse was reported to the horror of all. It was clear that the trial of Brian Nichols would be played out on a large stage.

"All the world is a stage and all the men and women merely players," opines Jacques, Shakespeare's sourpuss of the Arden forest in *As You Like It*.

The notion that the case of *State v. Nichols* would be special, interesting and full of drama was contagious. Many expected this trial to be unique, perhaps groundbreaking. However, the script for this case could have been written by experienced court watchers and capital litigators complete with a predictable cast of characters and events.

Immediately upon the report of the arrest of the defendant, the director of the Capital Defenders for Georgia, a true believer, raced to meet the officers and the killer as they arrived at the jail. He, of course, demanded that no interview of the defendant be conducted by the authorities outside of his presence, thereby attempting to invoke the defendant's right to counsel. Predictably, the police ignored the defender and, just as predictably, the lawyer turned to the press to decry the alleged violation of the defendant's rights. He, of course, knew that he could not invoke someone else's rights, but the press did not and, consequently, the public did not. At this point recriminations of the authorities began and continue to this day.

The case was examined from every angle by the press who found fault with everyone involved in the security of the courthouse. Blame was apportioned to each official for the crime and much was discussed about how this could have been avoided. Not remarkably in today's climate, the press found that everyone was to blame and everyone was responsible for keeping this villain from carrying out his carefully premeditated plan.

Act II—Pre-Trial Hearings

Predictably, Act II began with the pre-trial hearings designed as much for public consumption and to disrupt the progress of the case as for real legal concerns. The defense immediately launched the attacks on the prosecutor and started the usual campaign to make the case as expensive as possible. The defendant's attorneys played their assigned roles perfectly so as not to disturb the pre-ordained theme of exposing the injustice of our criminal justice system, even where injustice does not exist. Defense attorneys' lines were met with eagerness by the press as the story from the other side of the courtroom was straight forward; "Let's play by the rules." The plot set by the defense for this part of the trial played well to the court who

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apparently relished his time in the limelight. Well cast for this role, the judge was a central player as Act II trudged to a crescendo and left the public at the edge of their seats with only minor deviations from the aged and familiar theme of capital defense. Other public officials were cast in bit parts as the unwitting officials pandered to the press for their own political gain.

The demands for more resources intensified when it became apparent that the request had fallen on fertile soil. There was nothing new in this tactic but here it caught the attention of the press and, as often occurs, the public followed. An expert here, another there given the key to the vault (how far can this go?), until someone tells them "no!" Further recriminations followed in the press reports when the defense and then the court accused the prosecution of running up the cost by having *too much evidence* against their client. The absurdity of the position was ignored by the public who was enchanted by the myth spun by the defense. As usual, with each new motion, the defense remarked that the case could be settled if the district attorney would withdraw his notice of intent to seek the death penalty.

As Act II came to its climax, the court committed a mistake by discussing the guilt of the defendant in an interview with *The New Yorker*. The question of why the judge submitted to an interview with the magazine in the first place gives rise to speculation that this may have been an act of self-recusal-by-press. As a result of the recusal, a new no-nonsense judge came on stage bent on bringing the matter to a conclusion. Theatrics aside, nothing particularly novel came from the pretrial maneuvers.

Act III—The Trial

The trial progressed normally with extensive questioning of prospective jurors. Several weeks were required to obtain the necessary number of qualified jurors to select the jury. The trial proper began with spectacular opening statements widely reported in the media. Witness by witness the case developed revealing an excellent investigation by the authorities not only of the events of March 11 but of the history and related acts of the defendant. The press covered every minute detail. Some of the details new to the public were startling in their violence. The evidence expertly presented by Paul Howard's office left no doubt not only of the defendant's guilt but the deliberateness of the act and the planning necessary to achieve the goals the defendant had set for himself.

Defense attorneys used the defense of last resort claiming that the defendant suffered from a delusional compulsion that overmastered his will. The expert witnesses believed that Nichols had the belief that he was a solider required by honor to fight against the enslavement of African Americans by attacking the power structure of a society intent upon victimizing his race. The defense clearly designed the facts for a diverse jury that was assured in Fulton County. The defense expert's testimony was decimated by the prosecution's effective cross-examination and by rebuttal with state experts. Many of the conclusions of the defense experts were rebutted by additional evidence that proved that the evidence was contrived.

The jury was unconvinced. A verdict of guilty on all counts followed excellent arguments by the prosecutors. The trial, while interesting and well handled by the State, was much the same as other long and interesting trials. There were no serious controversies during the trial.

Act IV—The Penalty Phase

In Act IV, the penalty phase finally began and the life of the defendant was explored. The 38-year-old computer technician had lived a relatively normal life while committing small violations of the law. To no avail, the defense vigorously protested the introduction of other threats of violence and comments by the defendant that made the case for "future dangerousness." While awaiting trial, the defendant constantly planned and enlisted conspirators to assist him in his plans that included further violence. He bribed guards to bring in contraband. A number of cell phones were taken from his cell during routine shakedowns. Evidence was presented that employees of the defense had smuggled phones and other items in the jail.

The press followed each detail and sought opinions from attorneys from all types of practice to fill the void as the jury deliberated. Again the use of discretion by the district attorney was called into question. Georgia's system provides that the district attorney must ask for the death penalty and that the jury can impose verdicts of life, life without parole, and death. In the event of a hung jury during the penalty phase, the court must sentence the defendant.

Many questions were asked and answered about what the cost of a capital case should be? The press again suggested that the prosecutor put the City of Atlanta and Fulton County to unnecessary expense by seeking the ultimate penalty. Editorials were written in newspapers across the state about the DA's decision. None of the pundits wondered if the cost of the defense was inflated. They accepted the assertions of defense-oriented speakers that claimed that the constitution required the elaborate defense cost. Very little was printed explaining the huge expenditures of the defense and little was shown in court to justify the final cost of more than two million dollars.

After several days of deliberation the jury reported that they were hung on the issue of penalty with several jurors refusing to deliberate further. The judge, as is required by law in Georgia, declared a mistrial and sentenced the defendant to life without the possibility of parole and to the maximum sentence in each charge to run consecutively. The court found that Nichols was an extreme escape risk and suggested that he be held in a federal "supermax" prison. The federal authorities

agreed and it appears that the remainder of his life will be spent in a maximum security prison.

Act V—Media Speculation

In Act V, the media outlets in the city went wild in their reports speculating and opining about the verdict. The verdict was immediately determined to be wrong by most of the citizens and as usual the press gave them someone to blame rather than a rational explanation of our process. Georgia's criminal system empowers the people to decide the fate of a defendant in a capital case. There is no wrong verdict. The prosecution represented the state well and gave the citizens all they needed to make the decision that they were chosen to make. In other words, the district attorney did exactly what he was supposed to do under the law.

Several jurors were later interviewed and related that one juror refused to deliberate at all and did crossword puzzles, thus appearing to have an agenda to get on the jury to make sure that no death penalty was instituted. Other jurors contradicted those claims. If jurors wished a political victory then they may have done their mission a disservice. Several ranking members of the majority party in the state have suggested legislation to change the statutory procedure for the implementation of capital punishment to remove the requirement of a unanimous verdict. The wisdom of such a change may be in question but wisdom rarely plays a part in lawmaking. Well-intended legislators may alter years of jurisprudence by a single seemingly small change to the scheme.

Who are the winners and losers? As usual the winner is decided by who makes it to the press first. The defense lawyers acted victorious; the prosecutors were disappointed, but their performance was far from disappointing. Paul Howard and his gifted assistants provided the state and the citizens of Atlanta excellent and ethical prosecution. Any complaints against them are political in nature and should be discarded with the rest of the refuse of this case.

Consider the place where Nichols finds himself. He is locked away in a cage 2,000 miles from anyone he knows and surrounded by people well trained to kill him if he makes an attempt to escape. Since capital punishment in no longer the issue, his case will fall in with the nondescript piles of criminal cases for appeal. Some will question the wisdom of an appeal. Would a mistrial foreclose the state from seeking death on a retrial? Should the federal system now try him for the murder of the federal officer in an effort to obtain a federal death penalty?

The fancy lawyers are gone as is the endless pot of money at his disposal for his cause. If Brian Nichols had been given the death penalty, chances are that he would have kept his lawyers and would continue to be the center of attention for some time to come. Death row in Georgia is no picnic, but it is not a "supermax" in Colorado where the only sunshine he sees is pumped in from Nebraska. Nichols wins nothing.

Perhaps the criminal justice system is the big loser. To attain their ends, the defense designed an attack to engender a lack of trust in the system that has inflicted a blow in Atlanta. The defense formed the chorus and celebrated what they perceived as a victory. How could that possibly be so? This case made clear that an agenda and a formula exist for a political change to repeal the public policy of the death penalty, although this policy is supported by a vast majority of Georgians.

There is, of course, a legal, constitutional way to change public policy. This method embodies the philosophy upon which our constitutional democracy is built. The opponents of capital punishment cannot affect the end they desire through these legitimate means, so they must adopt and employ this disruptive, undemocratic method to advance their cause. They are not ashamed as they slander the Constitution by demanding unreasonable concessions to the killer in its name while patently attempting to undermine the very reason for its existence.

The prosecution and the victims' families are cast as the losers destined to suffer the defeat. The facts tell the truth. Judge Rowland Barnes was a very well respected jurist known for fairness and evenhandedness. Lawyers who knew him, this one included, respected him for his honor. His legacy is greater than Nichols's infamy. Julie Brandau, beloved by her family and co-workers, will be remembered for generations in the Fulton County Courthouse. Her heroic conduct to give aid to the judge singled her out during the attack. The memory of her is in the place where legends are honored. Sergeant Hoyt Teasley was always a defender. As a young man he rushed to help in the search for a missing girl. A father of two, he was killed while pursuing Nichols as he left the courthouse. His legacy is his family. The memory of this fallen hero lives through them. Special Agent David Wilhelm was murdered while working on the house he was building for his family. He brightened every room he entered. He served his country and his fellow man. He is remembered for lightening the load of all who knew him.

The citizens of Atlanta feel that the system failed or is untrustworthy when, in fact, the criminal justice system is under attack by legal terrorists. Those who claim victory are confirmed in their belief that it is appropriate for jurors to impose a political verdict rather than a legal one. They are content in their foolish belief that society should act according to their free will, oblivious to the fact that they share that belief with the killer.

> "Americans seemed to confuse standard of living with quality of life, equal opportunity with institutionalized mediocrity, bravery with courage, machismo with manhood, liberty with freedom, wordiness with articulation, fun with pleasure—in short, all of the misconceptions common to those who assume that justice implies equality for all, rather than equality for equals."
> —Trevanian (*Shibumi: A Novel*)

eavesdropping and wiretap laws; non-applicability of public records disclosure laws; "safe harbor" for law enforcement officials in terms of potential suits for violation of civil rights; prospective length of time for effective date of a mandatory recording law; availability of funding for implementation of a mandatory recording law; interstate application of a mandatory recording law.

Our next meeting is March 27 - 29, 2009, at a location to be determined. Our reporter has committed to provide a draft of our Act by early March so that we can review it well in advance of the meeting and make substantial progress at that meeting—so that we can have a first reading of the act at the meeting in Santa Fe.

My main concern at this point is to have more stakeholders involved in the process. We had no representatives from the National Association of Attorneys General, the International Association of Chiefs of Police; the National Sheriffs Association; the National Criminal Justice Association; the National Legal Aid Defenders Association; or the Innocence Project—all of whom have been contacted previously.

Respectfully submitted, David A. Gibson

As noted the next meeting of the drafting committee is scheduled for March 27 - 29 in Chicago, Illinois. NDAA members who are interested in attending as observers should contact NDAA Headquarters for further information.

NDAA Resolutions / Correspondence (Fall 2008)

No resolutions were adopted by the board of directors during the association's fall board of directors meeting in Santa Fe, New Mexico. A motion to hire a legislative advocate for the purpose of obtaining the necessary appropriations for the National Advocacy Center and the student loan repayment assistance program was passed by the full board of directors.

Because of the generous contributions from various state associations, NDAA has been able to engage the firm of Cauthen, Forbes and Williams to assist the association in these and other endeavors.

Clinical Laboratory Improvement Amendments (CLIA) Certification

President Cassilly authorized the association's participation in the following sign–on letter to the administrator of the Centers for Medicare & Medicaid Services. This letter was prompted by the receipt of "cease and desist" letters at state drug testing facilities from the federal agency housed in the U.S. Department of Health and Human Services.

December 19, 2008

Kerry N. Weems, Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
200 Independence Ave., S.W.
Room 314G
Washington, DC 20201

Dear Administrator Weems

On behalf of the thousands of public servants our groups represent in the professions of law enforcement, substance abuse prevention and treatment, courts, and state and local government across the country, we write to ask your assistance in restoring how drug testing is treated under the Clinical Laboratory Improvement Amendments of 1988 (CLIA). The long-standing interpretation of the "forensic exception" has been put in question by recent actions of the [Dallas Regional office of the Centers for Medicare and Medicaid Services (CMS)]. This change in interpretation requires laboratories performing drugs of abuse testing for community corrections, courts and probation departments to obtain certification pursuant to the CLIA. We feel this is an unnecessary change that will disrupt operations in the field and potentially increase costs to community corrections programs by one hundred fold.

Requiring CLIA certification for all laboratories conducting drug screening tests will have severe implications for public safety across the nation. Tens of thousands of criminal offenders are subjected to drug testing on a daily, weekly or monthly basis to ensure compliance with court orders. These tests are used to supervise drug-involved felons. Disruptions and dramatically-increased costs will create chaos for the community corrections system and interfere with the supervision of these offenders.

The question of whether drug or alcohol testing falls within the forensic exemption to the CLIA turns on the distinction between referring a participant for treatment, and referring a participant for an assessment by clinicians to determine whether treatment is indicated (or should be modified.) The former may be a "clinical purpose" but the latter is clearly a "forensic purpose" according to the letter and spirit of the CLIA.

We strongly urge CMS to clarify that drug testing falls within the forensic exemption when it is performed to ensure compliance with court orders or similar legal requirements. Further, the exception should also cover testing that may result in a court-ordered referral to a treatment program for further assessment and perhaps, ultimately, to participation in treatment.

Thank you in advance for consideration of our request.

Sincerely,
American Probation and Parole Association