THE LIFE OF A TRIAL LAWYER
Through the Prism of One Indelible Case

By
Peter H. Wolf

Monday, March 29, 1976:

You already know, ladies and gentlemen of the jury, something about this case from your selection this morning. I now can tell you in more detail what the plaintiff's evidence will show. That way, when you hear the evidence in bits and pieces from individual witnesses, you'll know how they fit together.

Plaintiff Marvin Vincent intends to prove the following:

Prior to June 6, 1968 -- two months after the tragic April riots in Washington, D.C. after the assassination of Dr. Martin Luther King, Jr. -- Marvin Vincent was a normal, healthy young man 32 years of age. He was a carpenter with the National Capital Housing Authority earning $264 every two weeks, or $6,864 per year. He had been working there since 1963. He had had no trouble with the law up to that time.

Then came the fateful night for Marvin Vincent of June 6. It was the same day Robert F. Kennedy died after being shot the day before, and at the time of the Poor Peoples Campaign in Washington.

After midnight Mr. Vincent was standing by his motorcycle at 49th Place and Hayes Street, N.E. He was talking to a friend, Olivia Richardson, just after they had finished a ride. A police scout car driven by Albert W. Folkman approached. His partner, William B. Caton, was in the passenger seat. They shined their light on Mr. Vincent and Miss Richardson and asked who owned the motorcycle? Mr. Vincent replied he was the owner. The officers stated it had no license tag. Mr. Vincent pointed east down Hayes Street to his residence about a block away and said his permit and registration were at his house.

They ordered him to get into the scout car to go to No. 14 Precinct with them. Mr. Vincent protested that his cycle would be left unprotected and could he wheel it home? They said no.

Then he asked if he could wheel it to Miss Richardson's house just down 49th Place? No. Instead they ordered him to ride the motorcycle to the precinct and they would follow behind. Miss Richardson went home and the procession started even though Mr. Vincent's proof of ownership was a block away. You will see the precise route Mr. Vincent followed and photographs of part of it.

At 49th and Deane Avenue, N.E., some even more alarming and unreasonable conduct by these officers occurred. Mr. Vincent stopped at a red light before turning left to go to the precinct. The scout car pulled up beside him and to his right, and the driver, Officer Folkman, pulled out his service revolver, laid it on the seat beside him, patted it, and said to Mr. Vincent, "You know what happens if you try something funny," or words to that effect.

You will hear testimony that never had either officer placed Mr. Vincent under arrest or told him he violated any law.

Mr. Vincent will tell you the precise thoughts and fears that went through his mind -- how he thought he'd never reach the precinct alive or what would happen to him if or when he got there. Place yourselves back to 1968 -- eight years ago -- to remember those days.

Mr. Vincent panicked. A few blocks later he made a sudden right turn and attempted to escape on his motorcycle. The scout car followed and shots immediately rang out. The chase continued with more shooting. At one point the scout car driver sought to run down Mr. Vincent on his speeding cycle and force him off the road.

Mr. Vincent headed back to his home, where he had lived with family all his life. On 50th Street between Dean Avenue and Hayes Street a bullet struck him in the left hip. He continued across some railroad tracks that run parallel to Hayes Street and turned along the street heading toward 5019 where he knew his brother Simon was. He turned across the railroad tracks, hit an old railroad tie on the other side, and lost control of his cycle. He struggled up, ran to his brother's house, and into a small entryway to a basement apartment. He pounded on his brother's door yelling for him to

let him in when Officer Caton pushed his way between the door and Mr. Vincent and hurled him against the wall of the entryway. Seconds later Officer Folkman came and shot Mr. Vincent in his right ankle. Mr. Vincent fell to the ground and Officer Caton then shot him in the stomach, kicked him in the mouth, and hit him on the head with his pistol. Officer Folkman also kicked Mr. Vincent in his head.

That final shot that hit Mr. Vincent in the stomach was seen by Simon Vincent from inside the door Marvin Vincent had been pounding on. He will testify to you about it.

Mr. Vincent was taken to D.C. General Hospital where he spent 18 days after surgery at a cost of $1,089. He was in excruciating pain and the medical records will be introduced into evidence. His stomach was punctured, his liver lacerated, his ankle broken by one bullet, and his hip broken by the first shot to hit him. One of those three shots that found their mark in Mr. Vincent's body was fired by a small derringer pistol Officer Folkman had bought during the April riots and was carrying in his pocket loaded with 22 magnum ammunition.

You will hear evidence of defendants Folkman and Caton themselves confirming much of this incident, but adding things like one was trying to signal the other by shooting his gun, they can't remember when the service revolver was removed from the holster, they didn't know whose gun it was that was going off, shooting Mr. Vincent was accidental, et cetera.

You will have before you the D.C. Police Manual regulation that states an officer may use his service revolver only to defend himself from death or serious injury; to defend another unlawfully attacked from death or serious injury; or to effect arrest or prevent escape for a felony.

You will hear that, to add insult to injury, Marvin Vincent was charged with two felony counts of assaulting each police officer, that those charges were dismissed at preliminary hearing on July 18, 1968 because no officer showed up to testify, and that the police immediately got a warrant for his re-arrest. This time Officer Caton testified on July 22 and Mr. Vincent was held for action of the grand jury because Officer Caton swore that Mr. Vincent attacked him in the entryway to 5019 Hayes Street, N.E. But the grand jury refused

to indict Mr. Vincent when the whole story of what happened was presented to them, including the testimony of Mr. Vincent himself. Forty-seven traffic violation charges from the incident were also eventually dropped.

Mr. Vincent has never been able to work since that fateful day and is on public welfare today for disability. His ankle required two more operations to remove bullet fragments in January 1969 and March 1970. Those bills totaled $1,719.

You will see Mr. Vincent's scars and disfigurements.

You will hear his friends and family state how he has changed since this incident -- become a bitter man, always has to use a cane, cannot enjoy the kinds of recreation he once knew and loved, still suffers pain, and still has bullet fragments in his body.

And yes, you will hear that in 1971 Mr. Vincent was convicted of armed robbery and spent four years at Lorton, released last October 30.

From the time of the incident in 1968 until he went to Lorton he lost over $20,000 in wages. His medical problems continue, and you will hear how his main recurrent problem is not Mr. Vincent's right ankle where he was shot, but nerve root atrophy of his left leg caused by inoperable bullet fragments still lodged in his spine. You will see how he uses his cane more for his left leg than his right, though both legs will never be the same again.

Within the last two months you will hear how, out of desperation, Mr. Vincent has sought and obtained acupuncture treatments for his pain and how they have helped and how much they have cost.

Finally, ladies and gentlemen, you may hear testimony of the dangerous propensities of these policemen and plaintiff's claim, therefore, that the defendant District of Columbia did not adequately train, supervise, discipline, and control these two defendants Folkman and Caton.

Because they did their damage to Mr. Vincent in the course of their duties as Metropolitan Police Officers, we shall ask

you to award Mr. Vincent a substantial sum of money against the D.C. Government and the individual officers in accordance with his Honor's instruction to you. We shall ask you to award punitive damages for their reckless, wanton, outrageous conduct. We shall ask you to award compensatory damages for Mr. Vincent's past injuries, pain, suffering, mental anguish, lost wages, crippling, and disfigurement; and we shall ask you to award him compensatory damages for his future pain, suffering, mental anguish, lost income, crippling, and disfigurement for a man with a life expectancy of 28½ years beyond today.

At the close of all the evidence, we shall ask you to (1) find in the plaintiff's favor against all defendants; (2) having done that, find for him and in his favor a substantial sum of money which will never restore his body or his mind, but will provide him with just compensation as the only means available to make him whole.

That was my opening statement to the jury of eight men and six women (two were alternates) at the beginning of what turned out to be a two-week trial in the Superior Court of the District of Columbia. While many lawyers have stories to tell, I hope my chronicling of this case will provide a perspective on the *real*, full-fledged, practical, human practice of law and litigation. After 55 years of legal experience as a lawyer and later as a judge, I still reflect on what happened to Marvin Vincent almost 50 years ago. Its aftermath also shows the long, simmering, justified origin of today's "Black Lives Matter" movement. Yes, Marvin was black; Folkman and Caton were white. Folkman was age 24 at the time of the shooting, Caton 28, Marvin 32.

The jury rendered a verdict in Marvin Vincent's favor against all three defendants -- Folkman, Caton, and the District of Columbia as their employer -- on Day 10 of the trial, Friday, April 9, after two hours and forty minutes of deliberation: $129,000 compensatory damages jointly and severally against all three, plus $500 punitive damages against each individual officer. That, in 2017 after inflation, would be almost $570,000, or 4.4 times as much. The ridiculously low 1960s medical bills and salary I recited as damages would also be comparably greater. Jury verdicts of this sort now are considerably higher, 40 years later.

As news of the trial and six-figure verdict spread, and was published in *The Washington Post* and the *Afro*-American, it was good to have colleagues and court personnel bump into me and say, "I hear you won a big one!" Trial lawyers often reflect there's the case you plan to try, the case you tried, and the case you wish you had tried. I had few regrets with this one. Lawyers also say, "Gimme the facts; I'll worry about the law later." The facts were clearly with us.

But why did it take eight years to get to trial? How did I, having only started my own law practice January 1, 1970, end up with a 1968 case? How did my partner and I prepare it and litigate it? Was there an appeal? Did we collect the judgment? If so, how? When? What happened to Marvin Vincent?

These questions are answered when I sort through Marvin's case files I retained all these years -- copies of court filings, letters, witness statements, exhibits, trial notes, legal research, log notes. They stack up seven inches high. There are a few gaps. Interestingly, there were several more cases beyond the 1968 police shooting; they'll be described, including even a case where Marvin sued *me*.

Try as I might, I cannot determine for certain how I got this 1968 shooting case. It appears that it was a referral in 1972 from a lawyer-friend and colleague, John Karr, who had an ethical conflict of interest with another client that prevented him from continuing to handle Marvin's cases. Suit had been filed in 1969 in the United States District Court for the District of Columbia (a federal court), but by still another attorney, James Porter.

Backing up a bit, after the June 1968 shooting incident itself, John Karr sent a letter in September to the then Corporation Counsel (the D.C. Government's lawyer, now called the Attorney General). That office served as prosecutor before the Police Trial Board, and the Chief of Police had charged Folkman and Caton with unauthorized use of their revolvers. John asked that other charges be included, namely, willfully maltreating and using unnecessary violence against Mr. Vincent, and with conduct unbecoming an officer -- assaults with deadly weapons and assaults with intent to kill.

I know little about that proceeding except that, not surprisingly, no charges were added and Folkman and Caton were cleared in February 1969. That is what we've come to expect, as we have learned from many recently publicized police shootings of suspects throughout the United States: Trial Boards, or similar adjudicatory bodies elsewhere, are comprised of -- you guessed it -- other police officers -- the proverbial fox guarding the chicken coop.

Two weeks later, John Karr delivered another letter to the Assistant United States Attorney prosecuting Marvin's trumped up felony charges of assault against the very police officers Folkman and Caton who had shot *him.* Marvin had eventually been held for action of a grand jury. John urged that Folkman and Caton be indicted if the grand jury found their shooting of Marvin was not justified. He said Marvin himself (he was released on bond) would be available to testify before the grand jury the next day.

That is a very unusual step -- to offer to have the accused testify before a grand jury. He thereby waives his Fifth Amendment right not to testify against himself. If the grand jury does indict, anything the defendant says before the grand jury can be used against him at a later trial.

The grand jury "ignored" (dropped) the criminal case against Marvin. And, not surprisingly, Folkman and Caton were not indicted. Prosecutors are just too frequently reliant upon police as investigators and witnesses to prosecute them except upon the most egregious circumstances. Quoting a 2017 *Washington Post* editorial[1] about another unarmed motorcyclist shot by police -- 49 years later -- "no District police officer has *ever* been the subject of criminal charges for a fatal shooting in the line of duty" (emphasis supplied).

In the spring of 1969 the suit about Marvin's shooting was filed in the United States District Court for the District of Columbia. Marvin, through his attorney, asked for compensatory damages of $1 million and punitive damages of $500,000. An attorney always asks for the maximum conceivable damages because, if a jury should return a verdict greater than what was asked for in the civil complaint, the attorney runs into a

[1] Aug. 12, 2017, p. A14.

legal hassle when the other side argues that that's all the plaintiff should get.

The grounds were that Folkman and Caton, as employees of the District of Columbia, had committed assault and battery against Marvin, willfully shot him without justification, and used excessive force; that the District of Columbia had not trained and supervised them properly; and that under federal law all had also deprived Marvin of his civil rights while they were acting under a "statute, ordinance, regulation, custom, or usage, of any State or Territory." This quoted statutory language from the 1871 Civil Rights Act gave the federal court jurisdiction over claims otherwise entertained only in a state (or District of Columbia) court.

What lawyers call "discovery" took place. This is very important in a civil trial, and cases are often won, lost, or settled by what goes on before trial. People had their depositions taken (answering questions before a notary public, a court reporter, and the lawyers, but with no judge present), and there were other discovery procedures. I don't have those details because it was still three years before I would even hear of Marvin Vincent.

The case had been assigned to U.S. District Judge Oliver Gasch. After most of the discovery had occurred, in 1971 he stayed Marvin's case to await the outcome of a case before the Supreme Court of the United States where the issue was whether the District of Columbia qualified as a "State or Territory" under the Civil Rights Act quoted above. He didn't want to risk trying the case based on a false premise.

It was during that stay (it lasted almost two years) that Marvin fired his attorney who had succeeded John Karr. He signed a contingent fee retainer agreement with me in September 1972 while he was serving his robbery sentence at the D.C. Department of Corrections facility in Lorton, Va.

In January 1973 the Supreme Court unanimously ruled that D.C. was not a qualifying "State or Territory."[2] There was no longer any federal court jurisdiction over Marvin's case.

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[2] *District of Columbia* v. *Carter,* 409 U.S. 418.

Accordingly, on February 12, 1973, Judge Gasch certified (transferred, as the law provided) Marvin's case to the Superior Court of the District of Columbia, where the whole case in the federal court, from its beginning through the certification, continued right on (it didn't have to start over) in the local District of Columbia court system. Civil rights violations were out of the case, but all the other aspects of the original complaint were quite alive.

That was not the end of the legal delays, however. In Superior Court, trial of Marvin's case was again stayed to await another pending appellate decision: whether the D.C. Government could be held responsible for the *intentional* torts (wrongful acts) of its police officers within the scope of their employment, as opposed to their mere negligent acts. It was decided the District *was* responsible,[3] but only after eight *more* months had passed.

Marvin's case, clearly alleging intentional torts, could proceed at last. A trial date had been set in January 1974. For various reasons, particularly conflicting availability dates of trial counsel, many further continuances occurred. We were willing to continue the case ourselves since Marvin was serving time for robbery at Lorton from 1971 until his release in October 1975. It wouldn't have looked good to the jury to have him guarded by U.S. Marshals or correctional officers, and we would have to pay considerable money for their cost.

There were my own cases and law firm situation that complicated that scheduling and added delay. In January 1974 I formed a partnership with my long-time employee, Donald Kolner (I've changed his name for reasons that will become apparent). I had hired him to be a secretary in April 1970 while he was a first-year law student. I told him I was not hiring him as a law clerk or in a legal capacity (paralegals didn't exist in those days), but I thought he'd learn a lot about the practice of law. I think he did.

Secretaries were very important -- there were no word processing computers in the 1970s. Now lawyers (and most judges too) do their writing themselves on a computer with its marvelous cut and paste functions; then cutting and pasting was

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[3] *Wade* v. *District of Columbia,* 310 A.2d 857 (D.C. Oct. 1973).

literal and one's secretary would type several drafts before the final product -- carbon paper, white-out, and all. After a year or so I made Don a law clerk. Then I hired him as a lawyer after he graduated from Georgetown University Law Center in 1972, passed the D.C. Bar exam, and some of his other job prospects didn't pan out. I paid him the grand sum of $300 twice a month. I tired of paying him a regular salary while my income went up and down like a yo-yo, so two years later we formed a partnership on a two (me) to one (him) profit basis.

Next we learned our office building was scheduled to be torn down. (The Securities and Exchange Commission is now located there.) I had an office on the top floor of the Century Building at 412 Fifth Street, N.W. since 1967 when I started as a Senior Research Attorney with the Ford Foundation-funded Institute of Criminal Law and Procedure at Georgetown University Law Center. It was directed by Samuel Dash, who became chief counsel for the Senate Watergate Committee in 1974. When I started my solo law practice in 1970 I simply stayed put in the same office by renting it (furniture included) for $50 a month from the then down-sizing Institute. I never figured out whether the Century Building was so named because it was built at the turn of the century, or was a century old. Practitioners who appeared almost daily in the D.C. courts were called "Fifth Streeters." I was one quite literally.

We had to move, and after hunting around, Wolf & Kolner relocated to a much more modern building in April 1974, but still within walking distance of the courts. The search and the move were time-consuming and not a small project.

And other legal matters and clients complicated my life, and therefore Marvin's case. Unlike the impression given by TV legal programs, lawyers work on many more than one or two cases at a time. In calendar 1973, the last year for which I have complete records, I had snippets of income to my practice from about 100 separate clients. I had to learn -- when a client called me on the phone, stated his or her name, and I hadn't the faintest idea who he or she was -- to wait and keep talking. Sooner or later I'd recognize the facts the call was about, who the client was, and retrieve the file from my file cabinet. Remember this the next time you telephone your lawyer or physician; give him or her an early clue who you are.

In August 1973 Superior Court Judge Leonard Braman appointed me one of ten counsel in the Hanafi Black Muslim murder case. A 23-count indictment charged that on January 18, 1973 seven co-defendants from the Black Muslim mosque in Philadelphia traveled to D.C. and brutally murdered seven members of the Hanafi Muslim sect living in a house donated to them by basketball player Kareem Abdul-Jabbar (formerly Lew Alcindor) on upper 16th Street, N.W. The murders included drowning a nine-day-old baby in a basement tub; two other victims survived, but were seriously wounded. Five defendants were apprehended for trial, and Judge Braman appointed two defense counsel for each defendant. I was appointed one of two counsel for John Clark, the ring leader.

I was thoroughly involved in this defense from then on. When evidentiary motions were argued and the trial took place I was in court almost every day, all day, from February 11 to May 17, 1974, more than three months,[4] with the office search and move in the middle of it. It was early 1974 that I told my partner, Don, that he would have to bear pretty much sole responsibility to prepare and try Marvin's case.

And he (with me, as I was able) did prepare. We interviewed witnesses, subpoenaed, and stroked them; we obtained and readied documentary evidence; we anticipated and did necessary legal research; we moved mountains for our doctor to review Marvin's medical records and to have him examined, all while he was incarcerated at Lorton Reformatory; we worked out continuances with the other lawyers' and our own trial schedules.

Friday, March 26, 1976 is seared on my brain. Trial was finally scheduled to begin. At about 5 a.m. that morning I was awakened by a phone call from Don.

“Peter,” he said, “I just can't do this.” His voice was quivering. “I’ve been up all night, couldn't sleep. I don’t think I’ll ever be able to try this case.”

Holy s**t! I thought to myself, wide awake by this time. I could tell there was nothing I could say to change things.

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[4] Upon conviction, my client eventually received seven consecutive life sentences, and it was affirmed on appeal. *See* n. 6 below.

Even though I had not prepared the case, I answered Don that I'd be there that morning and I'd take over with his help. Fortunately, when we appeared in the court Assignment Office, the Assistant Corporation Counsel representing the District of Columbia, Folkman's and Caton's lawyer, and the just-assigned Judge George Revercomb, were inclined to wait till the following Monday. Needless to say, I was too, though I never let on.

I had a weekend to prepare. That's when I wrote out and practiced the opening statement to the jury at the beginning of this memoir. The witnesses had been subpoenaed and everyone was ready to begin Monday.

Before getting to the trial after my opening statement, let me insert a few reflections.

There's an eternal question within the legal profession: Is a good trial lawyer born, or made? "Made" means becomes such by training, learning, and experience. Training, learning (the rules of evidence are foremost), and experience helps considerably. But trial judges (I became one in 1979) have seen many a lawyer with substantial amounts of these attributes who never comes close to being a "good," much less "great," trial lawyer.

Early in law school I felt that I would not be able to call myself a full-fledged lawyer until I had thoroughly set foot in the courtroom. There are many ways to practice law other than being a litigator, but that is how I felt.

I took the trial practice course in my third year in 1961. My section adjunct professor was later one of President Nixon's lawyers in his Watergate travails and impending impeachment.[5] I volunteered, or was asked, I can't remember which, to serve as one of two plaintiff's lawyers in a mock trial before the several sections at the end of the course. I got to show off what a beginner I was (with accompanying laughter) in Harvard's moot court room before an evening audience of a couple of hundred trial practice students and their guests.

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[5] James D. St. Clair, Esq. He subsequently recommended me to someone as one of the best lawyers in Washington. I don't know how or why, because I never had any contact with him after law school.

After graduation I clerked for a federal trial judge in the District of Columbia where I saw trials every day. And my first job after that was -- at the very pinnacle of the law -- as a prosecutor in Traffic Court. You really learn to think quickly on your feet in that work -- you had about ten minutes to prepare your case from the police notes and were lucky if you could confer with your witnesses ahead of time. You develop a virtual "switch" in the back of your head to change mode from direct examination to cross-examination; you acquire a sense of when to object, and when to hold back; you learn how to get your evidence in another way when an objection is sustained against you; you follow up on what is answered rather than blindly stick to planned questions.

I had only tried one other case before Judge Braman when he appointed me in the Hanafi case. My cross-examination of a prosecution witness in 1974 was sufficiently noteworthy to be quoted word-for-word in a *three-page* footnote in the much later appellate decision affirming the convictions.[6]

I constantly got referrals from other lawyers who knew or knew of me, so others apparently felt I was a decent trial lawyer. One time I counted the number of clients I had from the church my family and I belonged to -- it was 32. People used to ask me if I had a specialty. I usually replied, yes -- variety. Law is perhaps the last outpost of generality in our society, and trial work the most varied of all -- you become an expert-for-a-day in whatever you're trying. That makes it fun and interesting.

I had to wing it here and there the next two weeks of trial, but at the end I felt, at least in my own mind, I was closer to a natural trial lawyer.

I later learned that Don had a complicated personal life. I never had a clue he relied on alcohol to get through the day. In retrospect I also realize he was more of a "transactional" lawyer -- better at or more inclined toward estate planning, contracts, other office work -- as opposed to a courtroom lawyer. He gladly used to take wills and estate planning stuff I disliked. I should have realized all this sooner.

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[6] *Christian* v. *United States*, 394 A.2d 1, n.54 (D.C. 1978).

Furthermore, the two of us would have enjoyed earning a little more money to support ourselves. The pressure of a contingent fee trial is enormous -- if you lose, you get absolutely nothing for all your work; indeed, you may not even recover a lot of expenses incurred along the way during trial preparation. I think this had a lot to do with Don's 5 a.m. panic.

Continuing with Marvin's trial, the District of Columbia was represented by Assistant Corporation Counsel, Ted Murray (his name has been changed). Because the District had prosecuted Officers Folkman and Caton before the Police Trial board back in 1968-69, it was a legal conflict of interest to defend them at our trial. The officers (or their union) had to obtain and pay their own lawyer. Attorney Julian Tepper thus separately represented them. Don assisted me by taking notes. It's awfully hard to do when you're also questioning witnesses. He questioned one or two witnesses himself, and generally acted as "second chair."

On Monday, March 29, 1976 our assigned courtroom was at the west end of the cavernous Pension Building, now the National Building Museum, where Superior Court was located at the time during construction of its new courthouse. The first item of business was to select the jury. Then I gave my opening statement. The defendants reserved their right to make opening statements until the conclusion of my case and the beginning of their own cases. The witnesses we called to testify were for one or both of two purposes -- to say what they saw happen and prove liability (legal responsibility), and to prove damages (financial losses, including pain and suffering) -- past, present, and future -- to Marvin from what happened. We proved well, I think, what I said I would in my opening statement to the jury.

The most important witness was Marvin himself, hobbling to the witness stand with his cane. He would have been my last witness, but we had to interrupt his testimony twice with other witnesses. You usually call the plaintiff to the witness stand near the end of your case because he or she is present and hears all the other witnesses testify first. That way Marvin could account for any discrepancies or nuances from the previous testimony of the other witnesses. Ordinary non-party witnesses are usually excluded from the courtroom until they

testify -- it's called a "rule on witnesses." That way they must testify based on their own recollections, not having heard what anyone else has testified. But a party -- plaintiff or defendant -- has a right to be present throughout the trial, and has the advantage of having heard previous witnesses. That was true of Folkman and Caton as well -- they, too, were present for the whole trial.

Marvin was on the witness stand for my direct examination for one whole day beginning before lunch on Day 3. His testimony was interrupted after lunch to call his treating physician. Judges and lawyers always try to accommodate doctors' schedules; they dislike the legal system enough as it is. In addition, Marvin's friend Olivia Richardson had failed to show up pursuant to our subpoena. The judge honored our request to have her arrested and directed the marshal's warrant squad to pick her up at 7:00 a.m. on the morning of Day 4, and she began her brief testimony the morning of Day 5. That's what subpoenas are for. Lawyers can compel somebody to testify whether they want to or not, and there can be severe consequences for failure to appear.[7]

Marvin's testimony resumed the morning of Day 5, and he spent about three days on the stand into the next week including my direct examination, cross-examination by two lawyers, my redirect, and yes, some re-cross. He did well, as we expected after much preparation time with him over the months the trial had been pending and during overnight recesses in the trial itself.

A feature of a civil trial, as opposed to criminal, is that the Fifth Amendment privilege not to testify against oneself is treated differently. In a criminal trial, if a defendant "takes the Fifth," it can't even be mentioned and used against him. In a civil trial it *can* be used against him. Police officers who won't say what happened can be fired -- there's no Fifth Amendment privilege to retain one's law enforcement job; the Amendment only applies in a criminal prosecution. In a civil context such as Marvin's, the defendant officers Caton and Folkman had to testify to their versions of what happened -- to their superior officers, before the Police

[7] See the Sixth Amendment to the U.S. Constitution in the criminal context: "the accused shall...have compulsory process for obtaining witnesses in his favor."

Trial Board, in any depositions taken of them and in other discovery before the civil trial, and in the trial itself -- or suffer the consequence of being fired. That doesn't mean they told the truth, but sadly that's not unusual for many witnesses.

After all our witnesses had completed their testimony, we read both Folkman's and Caton's entire depositions to the jury. That means I read out loud to the jury the questions from the deposition transcript, and Don read the answers. We obviously thought their testimony of "accidental" shooting, shooting to "signal" each other, and other statements were conspicuously untruthful and helpful to our case; indeed, we hoped they'd visibly squirm before the jury. I think they did. We also read to the jury portions of the Police Manual on when use of a firearm was permissible. And we recited the stipulation (agreement among counsel) of Marvin's life expectancy.

At the end of the plaintiff's case in a civil trial (or the end of the government's case in a criminal trial) there are always motions made by the defendant or defendants to the judge arguing, among other (often technical) things, that the court should enter a "directed verdict" against the plaintiff. That means ruling that no reasonable juror could find in the plaintiff's favor based on the evidence. Our case was no different and these motions were argued by all counsel before lunch on Day 8, and denied, as expected, by Judge Revercomb after a brief recess.

After the luncheon recess, Julian Tepper made his opening statement and called Officer Caton as his first witness. My cross-examination began at the end of that Day 8, and Officer Folkman was called as Tepper's second witness after lunch the next day. I wish I had adequate notes, or a transcript to quote my -- hopefully devastating -- cross-examination, but I don't. Assistant Corporation Counsel Murray presented no additional testimony. More motions and rulings, and discussion of jury instructions continued until Day 10, the last day. My summation lasted about an hour, then Mr. Tepper argued, then Mr. Murray.

I argued in rebuttal about ten minutes. The plaintiff, who has the burden of proof by a preponderance of the evidence, always has the last word. I remember part of it well. Mr. Murray, the District's lawyer, had argued repeatedly Mr. Wolf

said this, Mr. Wolf said that. I reminded the jury the case wasn't about me, it was about Marvin Vincent -- what he did and why, what he experienced, how he suffered and would continue to suffer for the rest of his life.

Jury instructions take up a lot of time. Their content must be argued before summations (the attorneys have a right to know what the judge will instruct before they argue the case to the jury). Then the judge must deliver them orally to the jury; and finally, objections must be entertained afterward. The jury retired to deliberate at 3:42. The judge told them he'd let them deliberate until 5:00 before sending them home if necessary. At 5:00 he started to call the jury in, but they said they wanted five more minutes (a weekend was coming up). This wait turned out to be much more than five minutes. For us lawyers it was even more agonizing than usual -- you're too tense, worn out, anticipatory, to do anything substantive when the jury is deliberating. So you fiddle with your files, talk nervously, and pace about. At 6:23 the jury came in with the wonderful $130,000 plaintiff’s verdict.

After trial some important technical details had to be addressed. A winning litigant is entitled to court costs, but they're narrowly defined. They include witness fees ($20 per day per witness in 1976, plus two dollars for travel), costs of depositions, and court filing fees; they do not include attorney's fees or expert witness fees. Marvin's case had proceeded “*in forma pauperis*” -- that is, the court had earlier ruled he could not afford these expenses and we had subpoenaed witnesses without having to tender the one day's witness fee that would ordinarily have to accompany a subpoena. But now that he was the winner of a large judgment, that would no longer apply and his witnesses would eventually be entitled to payment.

Our costs totaled $471.40, a lot of money in those days. And then Judge Revercomb didn't allow them. He gave no reason.[8]

A deputy clerk of court prepares a vital piece of paper called the judgment that includes the verdict sum, the interest rate, and costs allowed. But court clerks are not lawyers, and

[8] If an appeal had been perfected, we would have cross-appealed this capricious denial.

we litigant lawyers had to be sure it was accurate. A judgment includes the date from which interest runs, and the judgment creditor (that's us) files it with the Recorder of Deeds. That's not so important against a governmental defendant like the District of Columbia, but we also had two private citizens with a judgment against them -- Folkman and Caton. If either owned real property in the District of Columbia (which we didn't know yet), that judgment (or any unpaid portion of it) would become a lien on the property and have to be paid to us if the land was ever sold.

Then the usual motions for new trial are filed by the losing litigants -- often *pro forma* -- but claiming the judge committed one or more legal errors during the trial so serious that a new trial is warranted. Such a motion must be filed within ten days of the verdict. They were filed in our case, we opposed, and Judge Revercomb denied their motions a month after the verdict.

That was not unexpected, since it's rare that a judge will admit that he or she committed such a serious error as to warrant a new trial. There are times, however, when a judge may feel perhaps something serious occurred -- a prejudicial witness outburst in front of the jury, for example, that could justify a mistrial -- a bell that could not be unrung. But what if there's a verdict for the defendant or defendants? Then the whole issue would be moot. That's why a judge will often let the trial go forward anyway, potentially to save the court system a lot of time even if a new trial might be warranted.

Many people -- even law students if they've ever thought about it -- assume you step up to a pay window somewhere and get paid the verdict sums you read about in the newspapers or in all your case studies. Not so. You often must *collect* a judgment, and they teach little about it in national law schools. It can be time consuming, arduous, expensive, technical, and sometimes impossible -- from the judgment-proof defendant who has no money. Much to follow in this memoir deals with collection on Marvin’s behalf. Settlement can, and must be considered at any point along the way, just as before a case even goes to trial. Marvin's case had no realistic possibility of settlement before the trial. He wanted the vindication of a trial, and too much was at stake for the defendants to offer anything reasonable as a settlement.

There are few technical collection problems with a governmental defendant such as the District of Columbia. It's not judgment proof; there's no need to levy on its property to get paid. It was the “deep pocket” in our case. We more or less assumed we would not be able to collect the rather large judgment against the individual defendants Folkman and Caton.

But a losing governmental defendant (or an insurance company, as is often the case in civil litigation) has a big weapon after judgment -- the threat of appeal. It can swallow additional years added to those already passed before trial. The government can offer a settlement significantly lower than the judgment, knowing it's probably worth the plaintiff's consideration in lieu of uncertainty and those additional years. A winning plaintiff is strongly forced to consider settlement for less than the verdict, and that's where we spent most of our time in the next few months.

Much of it was intense, because after those motions for new trial are denied, things become very time sensitive -- an appeal must be filed within 30 days, and matters must be accomplished on a short time line, some expensive, to perfect that appeal. That was true both for the District of Columbia and for the individual defendants, who hoped to ride along with the District in any appeal.

There are some things in a winning plaintiff's favor for an appeal. Interest runs on the judgment from the day the jury renders it, so the judgment amount grows. Appeals cost the appellant money in court fees and the cost of buying a transcript of the trial, in this case a long trial and therefore an expensive transcript. The appeal itself can be difficult as the appellant must convince at least two out of three Court of Appeals judges that serious *legal* error was committed by the trial judge in the way the trial was conducted; you can't reargue the *facts* that the jury may have explicitly or implicitly found in favor of the plaintiff and/or against a losing defendant.

On the other hand, the District of Columbia government as a defendant (as in Marvin's case) need not pay any appellate court fees and is subject to a lower rate of judgment interest than a non-government defendant (in our case 4 percent, as opposed to 6 percent for Folkman and Caton). It has a division

of lawyers in the office who handle nothing but appeals; time is not of the essence for them, as it may be for a long-ago-injured plaintiff.

There's another important factor from a winning plaintiff's viewpoint. Marvin had a standard contingent fee agreement with us. It specified that we were paid from any judgment we collected one-third of that amount, plus expenses. If we lost, Marvin owed us nothing -- our fee was contingent upon our winning and collecting what we won. But if there was an appeal, our portion went up to fifty percent, plus expenses incurred on the appeal. So an appeal could be costly to Marvin, and in time and effort by us, his lawyers, though that's why we're paid in the first place. And if we lost the appeal, once again, Marvin owed us nothing.

I used to say to potential clients several things about a contingent fee contract. First, I don't take a case on a contingent fee basis (as opposed to hourly billing) unless it's a sure winner. Reason: I'm a lawyer, not a gambler. Second, it enables you, the litigant, to go forward with your case rather than not pursuing it because of the expense. And third, the more I win for you, the more I win for me, and that incentive I'd like working for me if I were a client. In private practice you soon learn -- sometimes the hard way -- the cases *not* to take on a contingent fee basis. Occasionally you offer to prepare and file a civil complaint on an hourly fee basis but let the client file it *pro se* (on his own) -- when there's a statute of limitations problem looming, for example.

But still, an appeal is a tough delay and financial hit for the client, and we had no control over its happening or not even though we were confident of prevailing eventually.

Post-trial matters with the District of Columbia were further complicated by other cases Marvin had pending against D.C. The government wanted them dropped as a condition of any settlement of the 1968 police shooting case without an appeal. I'll describe them here by the year in which the precipitating incident occurred. Their nest of temporal relationships to each other, and to the 1968 Civil Case this memoir is primarily about, are depicted in the attached *Appendix*.

1970 Civil Case: In October 1970 police obtained a search warrant for Marvin's apartment at 5015 Hayes Street, N.E. It was based on an informant's police-supervised "buy" of marijuana from "Marvin the Grass Man." They executed the warrant at 6:30 or 7:00 a.m. on Saturday, October 10. Nine police officers were all dressed in plain clothes, even ratty clothes by some witnesses' accounts. There was a dispute among police witnesses and lay witness occupants, including children, elsewhere in the building whether the police announced their authority and purpose at Marvin's apartment door as they're required by law to do; after all, everyone had been asleep.

They eventually tried to force Marvin's door open with a sledge hammer. When that failed they sent outside for a battering ram and used it successfully. Marvin shot at the intruders, wounding one officer. As you can imagine, he was not too trustful after his June 6, 1968 shooting. The police retreated. They fired their pistols and shotguns elsewhere into the building, called for backup, lobbed teargas inside, and did considerable damage to the entire building owned by Marvin's mother. The Chief of Police even came on the scene.

Marvin was arrested, and 12 days later a grand jury returned an 11-count indictment against him charging various counts of assault on three police officers while armed, plus two counts of unlawful carrying a firearm (the 1970 Criminal Case in the *Appendix*). Marvin was acquitted by a jury of all charges on April 12, 1973.

I had still not even *met* Marvin at the time of this incident; we did meet in July 1972. In May 1973 we sued in the United States District Court for the District of Columbia on behalf of Marvin and seven other occupants of the building, against the District, the Chief of Police, and two individual officers. We claimed negligent supervision and execution of the search warrant including "the indiscriminate and careless use of firearms and teargas which rendered the entire premises uninhabitable and threatened the lives and/or property of all the plaintiffs." We sought damages of $25,000 for each of eight plaintiffs, total $200,000. This case, too, was eventually certified to the Superior Court of the District

of Columbia in 1974, and was pending after the verdict in the 1968 Civil Case this memoir is about.

This case may have been the reason Attorney Porter was ready to give up Marvin's cases. There is a one-year statute of limitations in D.C. for intentional misdeeds -- he missed it. There's a three-year limitation for negligence; our suit was solely for negligence, and therefore had to be filed before October 10, 1973.

1971 Civil Case: Recall from my opening statement that Marvin spent four years incarcerated for an armed robbery (1971 Robbery in the *Appendix*). It was allegedly committed on March 24, 1971. He was convicted by a jury after a four-day trial in September of that year and immediately incarcerated in D.C. Jail pending sentencing.

On November 5, 1971 there was a riot at the jail. Marvin claimed he was maliciously fire hosed, knocked down, and thrown down a flight of stairs, injuring his back. They then placed him in a cell in the "Penthouse" section (a form of solitary confinement) with another inmate, Abraham Wright. Officials knew, Marvin claimed, that Wright suffered from fits and attacks upon others (he had a history of epilepsy, we later found); yet they took away his medicine that prevented his seizures. Marvin claimed he was attacked that evening by Mr. Wright, injuring his knee. Marvin was kept in the Penthouse for 15 to 20 days and denied any medical treatment except to be given crutches on November 7.

In January 1972 he was examined at the Jail Hospital, told he had torn cartilage in his knee that might require surgery, and would be referred to an orthopedic surgeon later. He was sent to the Lorton Correctional Complex to serve his sentence. His condition there was so bad that in April and July 1972 he was sent by court order to D.C. General Hospital for examinations and treatment, but nothing was done.

Don and I sued on his behalf in November 1972 just before the one-year statute of limitations would expire, and without yet having a retainer agreement signed by Marvin. My recollection is that Marvin insisted we file this suit

if he was going to sign with us for the 1968 case. We demanded $200,000 compensatory damages and $100,000 punitive damages for Marvin against the defendants.

This case, too, was eventually certified to the Superior Court of the District of Columbia in February 1973. Again, it was because of lack of federal jurisdiction after the Supreme Court had held that the District of Columbia was not a state or territory within the meaning of the 1871 Civil Rights Act.[9] So this case, too, was pending after the 1976 verdict in the 1968 Civil Case.

I never represented Marvin in any of his criminal cases -- they arose before I met him. Neither the 1970 Civil Case nor the 1971 Civil Case were promising from our viewpoint of Marvin as plaintiff, unlike the strong 1968 Civil Case. There was evidence Marvin realized that it was police at his door in 1970 and he delayed answering to get and load his gun and fire away. Selling marijuana -- the reason for the search warrant -- would not look too good to a jury, to say the least. The case for his neighbors, however, remained strong.

In the 1971 Civil Case Don and I discovered evidence that Marvin had a lot to do with the jail riot in the first place -- setting fires, stopping up the plumbing, and so on. We also talked to Abraham Wright and he didn't back up Marvin's story at all. He said they had a fight, nothing to do with a seizure. Furthermore, it turned out to be difficult to differentiate these 1971 injuries from those that may have occurred in 1968. As said above, we had filed the case just within the statute of limitations, without time to investigate as much as we would have liked.

We knew Marvin had been disabled since June 6, 1968, was in pain, couldn't work, needed income, felt a profound sense of injustice, and was harassed by the police (his whole neighborhood was). Understandably, he had become a hostile man, and was well into “Black Power” and the hatred of anything to do with the law that comes with that mindset. While our sympathy was with him knowing what happened in 1968 and the changes it produced in his personality, that didn't mean a jury would have similar compassion, especially when they probably

[9] See pp. 8-9 above.

wouldn't have been allowed to hear in either of his later cases what befell Marvin in 1968.

There were discussions, discussions, discussions with the District of Columbia about settlement in lieu of appeal. I have 15 legal size, single spaced pages of log notes of various deliberations, offers, counteroffers -- among Marvin, Don, the Corporation Counsel's Office, with the seven other clients in the 1970 Civil Case, and with other lawyers Marvin consulted. They start June 16, 1976 and end December 7, 1976.

The back and forth is interminable. I'll try giving at least a flavor of these six months by merely listing factors that had to be considered by both sides, all in 1976:

- Notices of appeal were filed by the defendants on June 7, just within the required 30 days after Judge Revercomb denied their motions for a new trial. That meant they had time limits to comply with -- designation of the record on appeal, and showing they had purchased the transcript, chief among them.

- A new Corporation Counsel took office early in 1976. The Civil Division Chief said to me, "He hasn't been there and lost as often as his predecessors"; hence his low, hard-nosed settlement offers contrary to the Division Chief's own recommendations.

- An initial offer by that new official was $85,000 for *all three cases* for *all* plaintiffs, a mere two-thirds of our appealable verdict.

- Our feeling was the defendants wouldn't prevail on appeal. Even if they did, all the Court of Appeals could do was order a new trial, and we could win a still higher verdict upon retrial. I said I wouldn't recommend that settlement to my client, and he wouldn't take it if I did. He, Don, and I rejected the offer.

- A transcript of the two-week trial was an estimated 2,275 pages at a cost of $3,185 ($1.40 per page). The defendants had to shell out that expense to maintain their appeal and do it *soon* or their appeal would be dismissed.

●Interest on the $129,000 judgment against the District of Columbia was $14.14 *per day*, and $21.37 per day against the individual officers.

●Our client, Marvin, was from time to time unreasonable. At one point he wanted $200,000 and said, "I've waited eight years; a few more won't hurt." He later wanted $125,000 with future medical care for life. And to us at another time he said, "Why didn't *you* appeal?" He wanted vindication -- understandable, but unrealistic.

●All the neighbors except Marvin agreed to accept, if offered, $5,000 for their total share of the damages from the 1970 Civil Case, the police raid on Hayes Street, N.E.

●The case was assigned to a new Assistant Corporation Counsel for the appeal; he knew little about the case. Ted Murray had been hospitalized for exhaustion. (I remember one other lawyer who ended up in the hospital after a case with me. I hope *I* wasn't toxic, just the workload.)

●Should a settlement with the District encompass a settlement with the individual officers Folkman and Caton too? We concluded, "No way!"

●In the 1971 Jail riot case D.C. had moved to dismiss for technical failure to meet a six-month statutory notice to D.C. In August we suggested the judge stay his decision on that question because of the settlement discussions involving multiple cases. When they seemed broken down, we felt obligated to tell him to decide. He did, and dismissed Marvin's case on September 28. So now there were only two cases in the settlement mix.

●We were now racking up fees to our client (at $50 per hour; $250 per hour is low today) for the time appeal matters were taking, mainly opposing requests for more time the defendants were making to both the trial court and the appellate court. Marvin would be responsible because the case *had* been appealed, even if we didn't go all the way to 50 percent. But he wanted us to cut even our one-third contingent fee.

Finally, in October Marvin agreed to accept $114,000 and drop *his* claim in the remaining 1970 Civil Case; the other plaintiffs could still proceed. It took a while, but the Corporation Counsel came around, releases were signed, dismissals were filed in court, and we received the check on November 18 payable to Marvin.

But then Marvin wouldn't sign the check for us to deposit in our escrow account. He was consulting with other lawyers, which turned out to be a good thing, because they understood the situation after talking to us, and someone other than us ended up telling him the exact same things we were. Eventually he signed the check on December 7, 1976 and we deposited it. He lost about $300 bank interest from his delay.

We waived $1,485 in fees we had clearly spent on appellate matters, deducted our one-third contingent fee ($38,000), plus expenses of $542.83 over four years in three cases, and paid Marvin $75,157.17 on December 10. We kept $300 in escrow for future expenses in defending the appeal of Folkman and Caton and in trying to collect the balance of the judgment against them. $75,000 was a lot of money in 1976. You always wonder what the client will do with that amount of money; they seldom seek your advice. We did advise Marvin to report his changed circumstances to the welfare authorities (he'd been on welfare for some time) so he wouldn't be charged with welfare fraud.

Thus ends the District of Columbia's part in the saga of Marvin Vincent except for the 1970 Civil Case. We settled that for the seven remaining plaintiffs for $5,500 in May 1977.

There's one other hitch that should be mentioned. In late September 1976 I was asked by the District of Columbia Judicial Nomination Commission to apply for a judgeship on the D.C. Superior Court. The Commission recommended me in December to the President of the United States, along with two others for the vacancy, as the law requires. That's an entirely different story, but I mention it here because, while indeed an honor, it certainly does affect one's law practice. People treat you differently, you must tell each prospective client you might not be around to finish their case, yet you don't want to turn away business either. Other complications with Marvin occurred later when I became a judge, as you will see.

We were through with the deep pocketed District of Columbia. Did Folkman and Caton have anything in their pockets? They, too, had appeals underway. But there was nothing to prevent our going after them (no stay on collection had been asked for or granted) for the rest of the judgment and accumulating interest, now totaling over $20,000 above the $114,000 the District had settled for.

There's a nagging question here. How does a lawyer feel about legally going after an individual defendant to pay a judgment, potentially causing severe financial distress, even ruination?

In 1974 I won a $13,000 jury verdict for a client punched out by his boss in an elevator. I collected some of it from the company both worked for, but I gave up on the rest from the individual defendant boss. My client fired me, got another attorney, and collected all the rest of the judgment. I've never forgotten it.

The long and the short of it is you, as a lawyer, should do your damndest to collect every penny. You owe it to your client, and on a contingent fee case, you'd earn more too. If you weren't planning to be tenacious about it, perhaps you shouldn't have filed suit in the first place. And there's an ethical component: you *must* do your utmost to represent your client. If you don't, you can be in trouble with the attorney disciplinary system.

Folkman and Caton were still D.C. government employees, and you can't garnish their wages except for child support. We began discussions with Julian Tepper, their lawyer. It turns out he was representing them through the Police Association; it had been paying the officers' bills; it was ticked off at D.C. for abandoning them with its settlement; they'd pursue their appeal and pay Julian for it if we didn't settle. Julian didn't particularly want to appeal, but he'd have to satisfy the Association, a regular client of his firm. He was under the gun: the expensive transcript had to be ordered by December 16, or the appeal would be forfeited. It later was.

So we began -- as said above about the District of Columbia -- settlement and other discussions, discussions, discussions (23 more pages of notes). But we really couldn't

engage in them meaningfully without knowing Folkman's and Caton's assets, if any. We had learned that Folkman had a home address in Waldorf, Md. But the property was owned jointly with his wife, so we couldn’t touch it.

The law provides some assistance here. There's a procedure known as "oral examination" of a judgment debtor. The judgment creditor (plaintiff Marvin Vincent through us as his attorneys) may subpoena the debtor to appear before a judge, be put under oath, and required to answer questions about his assets.

We subpoenaed Caton for an oral examination on January 27, 1977. As is customary, the judge put Caton under oath and sent us to another room in the courthouse to conduct the examination; if he refused to answer something, we could march him back before the judge and compel him to answer on the witness stand. We had to do just that when Caton admitted owning land in Hampshire County, West Virginia, but refused to say who the two other owners were or what the fair market value was.

It turns out it was wooded land on the side of a mountain with no improvements except an old barn, chicken coop, and outhouse. He said he bought it in 1966 for $6,000, it was fully paid for, and he owned it jointly with his 11- and 9-year-old sons. A lawyer friend I bumped into the next day had a country place in Hampshire County. She said it would be worth three times what he paid for it in 1966. She offered to go to the county courthouse and look it up for me. My partner, Don, did it himself, though, a week later. And our current law clerk visited there too, and hired a lawyer on our behalf on March 28 in Romney, W.Va., the nearest big town to Caton's property. That law clerk later became a member of the Maryland House of Delegates; he was (still is) a savvy guy.[10]

The lawyer in West Virginia was Royce Saville. He would have to sue in the state court to get us a judgment in West Virginia based on giving “full faith and credit” (from the U.S. Constitution, Article IV) on our judgment in D.C. Then he'd file a creditor's suit to levy on the real property and sell it on the courthouse steps. We retained him for $50 an hour,

[10] Dana L. Dembrow, Esq.

promised to send him a "triple seal" of our judgment to sue on,[11] and agreed to provide him any legal briefing he might need.

Meanwhile we had arranged to see Folkman informally for oral examination in our office. Folkman appeared without counsel, as had Caton for his court oral examination. Julian told us he was no longer in the case as the Police Association constitution said they could pay attorneys to represent their police members but could not contribute to a settlement. Folkman had no assets we could touch.

Things continued regarding Caton in West Virginia, however, though they dragged. The judge was not too bright, said Saville, riding circuit in other counties so not always there, and inclined to let things schlep along. He said he'd gotten that judge reversed several times in the West Virginia Supreme Court. The judge would be impressed with a U.S. Code citation enforcing full faith and credit, but "nobody around here has a copy." Ah, the pre-internet travails of a country law practice. Finally judgment was granted, though, in June 1978. Now a second suit had to be filed to levy on the land.

In February 1978 I got a call from an attorney whom Folkman and Caton had consulted. He said he would file suit against Julian Tepper, their former attorney, and D.C. -- Tepper for legal malpractice for letting their appeal time run out and for not filing a claim for indemnity against D.C. He would sue D.C. for settling and leaving their employees, who he said had been acting within the scope of their employment, out on a limb. I told him I thought the latter was nonsense, and on the former pointed out he'd have to prove that the appeal would have succeeded. He also asked if we could hold off in West Virginia for a while. I said, no, Marvin wouldn't let us. I never heard from him again.

We were contacted by *another* attorney for Folkman and Caton, this time for more settlement discussions. But we were in the driver's seat, and the result was -- quite a surprise --

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[11] A triple seal is a certified true copy of the judgment with a raised court seal on it, then a certification from the Clerk of Court that it was authentic (another seal), and a certification from the Chief Judge that the Clerk of Court really was the Clerk of Court (the third seal).

that Caton walked into our office on September 28, 1978 with a bank check for $12,000. I think he got some of it from Folkman. We had to convince Marvin, who had moved to Louisiana in March, that a judgment debtor had a right to pay off even part of any judgment (Marvin wanted all or nothing), if only to reduce the accruing judgment interest. On October 26 we finally received the check back in the mail from Marvin, properly endorsed (though it needed my signature too), and we deposited it. We took our third and paid Marvin $7,739.26 on October 31 after deducting the expenses, including what we had had to pay Attorney Saville.

A *third* attorney got in the picture for Folkman and Caton in November 1978. He wanted to avoid the sale of Caton's land set for December 16; he and they were working diligently to come up with the final total owed. They did. On December 7 they presented Mr. Saville with two bank checks, payable to Royce Saville and Marvin Vincent, one for $6,000 and another for $4,723.85 -- the entire balance, with interest, owed by Caton. Mr. Saville mailed them to us, with his signed endorsements, his final bill, and a release of Caton for Marvin to sign.

Case over? Not so fast. We had a resentful Marvin still to deal with. With the difficulty we had been having with him, we were not about to mail him the checks -- he could endorse them, disappear, and we'd never be able to pay Saville or see our third. So we mailed him *copies* of the checks, a thorough explanation, and the release to be signed and notarized before the checks could be negotiated.

Sure enough, in a phone call on December 19, 1978 Marvin wanted just what we expected. It sounded like he was in a phone booth. He said he hadn't got any mailing from us -- Christmas time? I think Marvin was just somewhere other than Louisiana and hadn't picked up any mail. We should mail him the checks and he would send us what we and Saville were owed. I said, “No dice,” since we had promised Mr. Saville we would not negotiate the checks until the release was signed. “Trust is a two-way street,” Marvin said. I told him to call back tomorrow. We heard nothing, until...

January 9, 1979 was another memorable day. Marvin was in our office at 3:00 when I returned from a late lunch. He said he never got our mailing. I called Don into my office. We made

him copies of everything. He asked, “Why haven't you mailed the checks to me and then let me pay you?” I explained again our ethical obligation to be sure the release was signed and our cooperating attorney in West Virginia paid before the checks were negotiated. I handed him the original checks to show they were bank checks and good as gold. It was my sad mistake giving him actual physical custody!

He indicated his unhappiness at having to sign the release first, but I think the real reason he was unhappy was having to pay Saville, and Wolf & Kolner. He started to fold up the papers. I said warily, “Don't do that. Do you want to go next door to the notary with me?” He said he would and we started out our office door into the hallway, Marvin still carrying all the papers and the two checks. In the hall he lagged behind, stopped, and said, in that slow, measured, deep voice of his, “I tell you what I think I'm going to do. I'm going to cash these checks.”

Have you ever wondered what you would do in a real emergency? At least one where almost $4,100 of hard-earned fee and unreimbursed expenses you needed to help support your family seemed about to disappear? How quickly would you think? Would you do the right thing? What were you willing to risk? For myself, I found out that day.

In one big swoop, I snatched all the papers from Marvin's hand, including the checks, and ran for our office door. He grabbed me from behind and there was some scuffling; I managed to avoid his cane. I yelled for Don. Marvin let go and I ran into our office, into my office inside, slammed the checks into the bottom drawer of a file cabinet, and locked the cabinet. The papers had been a little ruffled, but nothing torn.

Marvin followed. I sat down at my desk and said, “You’re making me mad.” He replied, “You’re making *me* mad!” He picked up the remaining papers, said, “I’m going to do what I have to do,” and left. It had been a vigorous half hour.

I called Royce Saville the next day and explained what had happened. He understood and said, “I guess that happens in a big city practice.”

On January 11 Marvin telephoned to say he'd be by to sign those checks, but "that's all I'm signing" -- he wasn't signing the release until he had the cash in his hand. I said he wasn't signing the checks then, and hung up.

On February 26, 1979, having heard nothing for a month and a half, Don and I began drafting a civil complaint to sue Marvin.

His daughter, Stephanie Greene, came to our office on February 28. "Marvin has been calling me and calling me," she said. "He wants me to talk to you to see if some different arrangement about the checks can be made." I laboriously explained everything, showed her copies of previous statements proving how Marvin had received almost $83,000 from us, showed her our retainer agreement, said we no longer believed Marvin, and thought he was trying to avoid paying our one-third. I asked her, "What do you think his trouble is?" She said he kept saying he was "tired of Wolf & Kolner dealing with all the finances and his getting in on the tail end." I said if Marvin thought we were cheating him, he ought to tell us how or why, and he had no basis for it based on our past payments to him. I even showed her how we had waived our $1,485 fees for appeal time.

In March she told me she had written Marvin a rather bitter letter after seeing me. She got a letter back from him saying he was sorry he involved her in his affairs; he'll take care of it in his own way.

My notes end. I went on the bench on May 11, 1979 after the U.S. Senate required me to dissolve my law partnership. I don't know how Don handled it from there, though there's a clue in the next section below. I see a July 31, 1979 letter in my old files by Don to the Circuit Court in Hampshire County, W.Va. saying the judgment there had been "paid and satisfied in full."

Exactly three years later I received in chambers a summons and complaint titled "Marvin Vincent v. John Karr, Peter Wolf, and Donald Kolner." I'm sure the reader is interested in one more lawsuit; I promise it's the last. It was titled "Complaint to retrieve money owed, for money damages,

and other relief," had been filed in Superior Court (my own court). Don was listed, "address presently unknown."

It was filed by Attorney Morton Matthew (his name has been changed), one of the most colorfully inept attorneys ever to practice law in the District of Columbia. He passed on to his reward several years ago. (Sadly, John Karr, a marvelous lawyer, died in 2016 while I was writing this.) Mr. Matthew was an attorney who not only filed barely literate pleadings, but when asked his authority for this or that legal proposition would authoritatively state, "The United States Constitution, Your Honor." Yet we judges learned there was sometimes a kernel of substance buried deep in his scattered writing or rhetoric -- his very vagueness would preserve a point for appeal.

Since it was a conflict of interest for one of my own colleagues to handle the case, the Chief Judge of Superior Court had to arrange for it to be assigned to a judge of the District of Columbia Court of Appeals. A former judge of Superior Court, James Belson, got the case.

The complaint alleged (Count I) we had obtained $6,645.48 in monies that belonged to Marvin and refused to deliver it to him unless Marvin signed a release of liability form that would unethically excuse Don and me of any claims past, present or future that Marvin might assert against us. It further claimed (Count II) that I, not Marvin, had endorsed and deposited the two checks. Finally (Count III), it claimed I had settled and compromised the $130,000 verdict and two other suits without Marvin's permission. This was, allegedly, legal malpractice and done with malice. Mr. Matthew sought $1 million damages and $10 million punitive damages.

I realized that my former partner, Don, had signed Marvin's name and deposited the checks in his new (after our partnership had dissolved) escrow account. He tendered Marvin the $6,645.48 he was owed, but Marvin still refused to sign the West Virginia lawyer's (Mr. Saville's) required release. In September 1980, John Karr, representing Don in winding up his law practice (Don was hospitalized in Massachusetts) had tendered the money, but added to the release "all claims you assert, past, present or future against the law firm of Wolf & Kolner, or against Peter H. Wolf or Donald Kolner."

John notified the court that he represented us and moved to deposit the $6,645 with the court (that amount was never contested as owed to Marvin Vincent); Judge Belson granted it. The judge then entertained cross-motions for summary judgment.

Summary judgment can be granted when there is no dispute of material facts and one side is entitled to judgment on those facts as a matter of law -- there's no point in a fact-finding trial because there is nothing factual in dispute. Marvin and his attorney Matthew presented no sworn affidavits asserting their version of the facts; we asserted our version, and our facts were thus conceded to be true. Judge Belson granted our motion on December 2, 1982 in a careful, thorough, eight-page opinion. That was his nature, but I know he, too, was well acquainted with the diligence one needed to exercise when Mr. Matthew was counsel. Matthew filed a notice of appeal, but it went nowhere. I guess Marvin finally got his check, four years late, unless it was used up by any fees he owed Morton Matthew.

I've here recounted eight separate court cases where Marvin was a party, while describing one “indelible” case and its aftermath. They were in three court systems and two states (counting D.C. as a state), three were criminal. Only the big case and two of the criminal cases went to trial, where witnesses actually testified. That's not unusual; courts do many things short of trial. I think it all gives a flavor of the complexity of a trial lawyer's life.

What about Marvin himself, now in his eighties? We were both born in 1935. While writing about his case, I tried to contact him. I knew he had moved to Sulphur, Louisiana in 1978. I looked online and found a listing that appeared to be his. On March 20, 2016 I called the number listed, but it had been disconnected. So I wrote a letter to the address given. A month later I got a phone call from Marvin.

I asked, “What took you so long to call me?” He said he was busy. I asked, “Doing what?” He said, “Surviving.” He has 160 acres there, does some farming, is looking to lease the property. He has never married, and has several cousins living with him. He still has the bullet fragments in him, and says he got prostate cancer from Agent Orange in the military before these cases began.

He thought he should have gotten $2- or $2½-million for our 1968 case. To support that he recounted something he'd never told me before (why not?): Some time after the verdict a young black woman who had been on the jury visited him and apologized for not giving him more. Another female juror was a white racist, she said, and her husband owned several businesses in D.C. During deliberations, this woman had said Marvin "didn't deserve a dime," and that's why they only gave him $130,000.

It would have been an uphill legal battle to do anything about it. (First you must know about it, not learn 40 years later!) It's long been the case that you can't legally probe a jury's deliberations. This principle was only this year opened a crack by the U.S. Supreme Court in a criminal case where a juror expressed racial bias during deliberations.[12] Marvin's jury was selected before the days of jury consultants. Nevertheless, to repeat, holy s**t! If true, what we thought was a fantastic verdict might have been much more.

Marvin is still a bitter man. Maybe it's because of what the juror told him. That bitterness certainly showed itself toward me as his lawyer, but the phone conversation seemed to evidence some dissipation of that. It was rather cordial. He was interested in what I was writing about, I said I would send him a draft, and give him a chance to review it. He did; he made no changes. Later conversations we've had about this memoir demonstrate, however, that he basically does not trust me. What I've written here is a matter of public record, and any attorney-client privilege was long ago waived by Marvin's 1982 lawsuit against Karr, Wolf, and Kolner (pp. 32-34 above).

Our justice system is imperfect. We lawyers are often pushing the boundaries, hopefully to make it better. But don't give us credit for more than we deserve -- we're usually just trying to do our job for our client and earn a living. Eleven other jurors imperfectly went along with the angry racist forewoman (all hurrying to be done before the weekend). Marvin, and eventually I, would never even have known if that young woman hadn't sought Marvin out and told him.

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[12] *Peña-Rodriguez* v. *Colorado*, 137 S.Ct. 855 (March 2017) (5 to 3).

The imperfections became even more apparent to me recently. I was a losing legal "consumer" in two cases (one small, one large, both civil) in different states in January-February 2017. Sparing those details, our adversarial legal system depends on people -- litigants, lawyers, witnesses, experts, insurance adjusters, judges, politicians who write laws -- and on procedures and decided law, both statutory and decisional. People are very imperfect. They can forget, be lazy, mistaken, incompetent, slow, expensive, biased, and they often flat-out lie. The legal process and laws of evidence, heavily based upon the foundational right of cross-examination to expose the truth, are designed to cut through these constants, but it can be time consuming, difficult, expensive, and sometimes impossible for all but the crystal-clear cases. It often seems like a crap shoot.

And the TIME it all takes. Look at the *Appendix* where the years are marked off. Some delays were due to Marvin, some to us, his busy lawyers, some to equally busy lawyers on the other side, and some to the court system. But delay is frequent, and it seems interminable. The more complicated the case, the more likely there will be delay.

Marvin delayed payment of substantial sums to us and to him -- three times. It cost him real money in lost interest in his own funds. Bank account interest was significant in those days. This memoir repeatedly shows the difficulties lawyers sometimes have dealing with their own clients. It is one of the most frustrating experiences a lawyer has -- when a client won't do what is clearly in his or her own best interest, or doesn't communicate. Every lawyer has experienced it, but that makes it no less frustrating.

As a bit of more cerebral legal commentary, Marvin's case illustrates the importance of the "exclusionary rule" firmly imbedded in our nation's criminal law. His case described here was a civil case, not criminal. But it illuminates forcefully the necessity of that legal construct.

The rule[13] is that evidence obtained from a criminal suspect in violation of the U.S. Constitution must be excluded

[13] Established by the U.S. Supreme Court over a century ago for searches and seizures in federal courts, *(Continued next page…)*

("suppressed") in any trial of the defendant. Most often, the violations are an illegal or coerced confession, an unlawful arrest or search for evidence, or a suggestive identification.

The rule was justified by the Supreme Court, among several reasons, to counter arguments that civil remedies should apply, or discipline of police, instead of possibly letting the criminal defendant go free due to excluded evidence. These are ineffective deterrents, the court held, making the violated constitutional right an empty one.

That ineffectiveness is what Marvin's case confirms. Civil proceedings may have to be instituted by a difficult, even unsavory, plaintiff, himself accused of a crime or crimes, or even serving time in prison. Other factors include the reluctance of juries and prosecutors to hold police accountable; the "blue wall" of police supporting each other; the expense of a lawsuit, possibly including fees of a lawyer who may not gamble on such a case on a contingent fee basis; the unbelievable delay; the difficulty collecting any judgment. All are illustrated by Marvin's case even as the exception of a rare but long-in-coming victory.

Don Kolner and I worked hard to get the most we could for Marvin; we thought we had done well, and we believe we were fair in what we charged him. But what must it have looked like from his point of view? Money cannot make one whole; it is merely the only common denominator to do the next best thing, and Marvin believes he did not get enough, and he's probably right. That explains, perhaps, much of his conduct toward us after the verdict. There will always be bullet fragments in Marvin. Racism was the root of the troubles giving rise to his lawsuit in the first place, and racism played a part in the verdict. Assuming we can never eliminate it, we *can* do more, we *must* do more, at least to marginalize it.

Worse still, Marvin had essentially been shot and victimized, not for being a danger to anyone, but -- this is my theory -- for simply not following blue collar policemen's baseless orders almost 50 years ago (in lieu of a traffic

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(…Continued from previous page) Weeks v. *United States*, 232 U.S. 383 (1914), and held fully applicable to the States through the Fourteenth Amendment in 1961, M*app* v. *Ohio*, 367 U.S. 643.

ticket!). That (again, in my view) is the same trivial reason all those black lives have been snuffed out by police, as many of us have belatedly become aware of in this video and media age.

Why do black people so frequently flee the police, as Marvin fled on his motorcycle? A recent book answers this better than Marvin ever did. Benjamin Watson, a long-time pro football tight end who has played with the New England Patriots, Cleveland Browns, and New Orleans Saints, writes

> White people have no idea of the fear that black people feel toward the police. I cannot say that strongly enough, loudly enough, or forcefully enough. I believe it is a huge point of division between black people and white people. Black people have little expectation of being treated fairly by police in any situation. We have a high expectation of being demeaned, abused, and possibly treated violently in any encounter with law enforcement. We have a history that supports this, news headlines that shout this, and personal experiences that confirm this.[14]

It's a small step to understand that this fearful mistrust can readily carry over to anybody and everybody involved in the justice system, even one's own lawyers. It may seem misplaced to a white -- and if I may say so, conscientious -- justice participant like me. Yet passive delay by Marvin, and antipathy toward Don and me as his lawyers, may have been the only instruments at his disposal to assert an elusive, even subconscious, power to fight back.

On June 6, 2016, I got another phone call from Marvin. He asked me if the date meant anything to me. It didn't. After a painful silence, he reminded me it was the day he had been shot -- 48 years ago. I told him there were a lot of cases over the dam for me since then, both as a lawyer and as a judge, so please forgive me. I hope he did. I'm glad he thought of me.

I've here recounted a case and client indelible for me as a trial lawyer. I've described Marvin as prickly and troublesome from time to time, and probably no reader would accuse me of being modest. But how indelible it all was, and still is, for my client, Marvin Vincent. Little wonder. Thanks to him for stirring me to tell sagas of us both.

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[14] *Under Our Skin, Getting Real About* Race, with Ken Peterson (Paperback, Tyndale Momentum, 2015), p. 91.

APPENDIX

MARVIN VINCENT CASES CHRONOLOGY

Each case begins with the word ***Incident***

Further entries start at the case's column heading and may continue into other columns

"PW" refers to the author

Date	*1968 Civil Case & Miscellany*	*1968 Criminal Case*	*1970 Civil Case*	*1970 Criminal Case*	*1971 Robbery*	*1971 Civil Case*
6/6/68	***Incident***	***Incident*** – police shoot Marvin; he's arrested for assaulting *them*				
7/18/68		Dismissed at preliminary hearing because officers did not appear in court				
7/22/68		Marvin, after re-arrest, held for action of the grand jury				
7/?/68		Grand jury ignores case *-End-*				
9/13/68	Police Trial Board complaint v. Folkman & Caton					
11/18/68	Police Trial Board begins					
2/10/69	Folkman & Caton exonerated by Police Trial Board					
6/5/69	Suit filed by Attorney Porter in U.S. District Court for D.C					
1/1/70	PW opens solo law practice					
10/10/70			***Incident***	***Incident*** – raid at 5015 Hayes St., N.E.		
10/22/70			Marvin indicted			
3/24/71					***Incident*** -- robbery	
9/20/71					Marvin convicted, jailed	
11/5/71						***Incident*** at D.C. Jail
4/12/72				Marvin acquitted by jury of all charges *-End-*		
8/1/72	Don Kolner hired by PW as a lawyer					
9/19/72	Retainer agreement signed by Marvin					
9/21/72			Retainer agreements signed by neighbor-plaintiffs			
11/3/72						Suit filed by PW in U.S. District Court
11/28/72			Retainer agreement signed by Marvin			
1/10/73	U.S. Supreme Court decides D.C. is *not* a "State or Territory" under 1871 Civil Rights Act					
2/12/73	Case certified to Superior Court					
2/14/73						Case certified to Superior Court
5/17/73			Suit filed by PW in U.S. District Court for D.C.			
8/28/73	PW appointed by Judge Braman in Hanafi Black Muslim murder case					
10/17/73	D.C. Court of Appeals decides D.C. *can* be held liable for intentional torts of its police officers					
1/1/74	Wolf & Kolner partnership formed					
2/11/74	Hanafi murder trial begins, PW in court every day until 5/17/74					
4/?/74	Wolf & Kolner move from 412 Fifth St., N.W. to 400 First St., N.W.					
4/17/74			Certified to Superior Court			

Date	*1968 Civil Case & Miscellany*	*1968 Criminal Case*	*1970 Civil Case*	*1970 Criminal Case*	*1971 Robbery*	*1971 Civil Case*
10/30/75					Marvin's sentence completed, he's released	
					-End-	
3/29/76	Two-week trial begins					
4/8/76	Verdict for $130,000					
5/7/76	Motions for new trial denied by Judge Revercomb					
6/7/76	Notices of appeal filed by defendants					
9/20/76	PW submits, upon request, application to be recommended for a Superior Court judgeship					
9/28/76						Case dismissed by judge for failure to give required statutory notice
						-End?-
11/2/76	Appeal dismissed because case settled					
11/11/76			Dismissed by Marvin only, but not by the other seven plaintiffs			
11/18/76	Received check from D.C. for $114,000 payable to Marvin					Settled & dismissed "in consideration of settlement of this & other pending civil cases"
						-End-
11/19/76	Letter from Marvin that he's consulting additional counsel					
12/7/76	Marvin finally signs $114,000 check; we deposit it					
12/10/76	Paid Marvin $75,157.17					
1/27/77	Oral examination of Caton in court					
3/1/77	Informal oral examination of Folkman in our office					
3/28/77	We hire Attorney Saville in Romney, W.Va.					
5/24/77			Settled for $5,500 for remaining seven plaintiffs			
			-End-			
5/14/78	Marvin moves to Louisiana					
6/15/78	Full faith & credit on our judgment granted in West Virginia					
9/28/78	Caton brings to our office a bank check for $12,000					
10/26/78	Marvin mails us the endorsed check; we deposit it					
10/31/78	We deduct our one-third and pay Marvin $7,739.26 after expenses					
12/7/78	Attorney Saville receives two checks from Caton's attorney for entire balance of judgment, $10,723.85					
12/19/78	Marvin instructs us to send him the checks, he'll negotiate them, then sign release and pay us					
1/9/79	The great check snatching incident					
5/11/79	PW sworn in as an Associate Judge of the Superior Court of the District of Columbia					

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5/10/82 Lawsuit filed by Marvin, represented by Attorney Morton Matthew, against John Karr, PW, and Don Kolner, "address presently unknown," to "retrieve money owed, for money damages, and for other relief"

12/2/82 Judge Belson grants us summary judgment; appeal not perfected; the cases are over!

The End