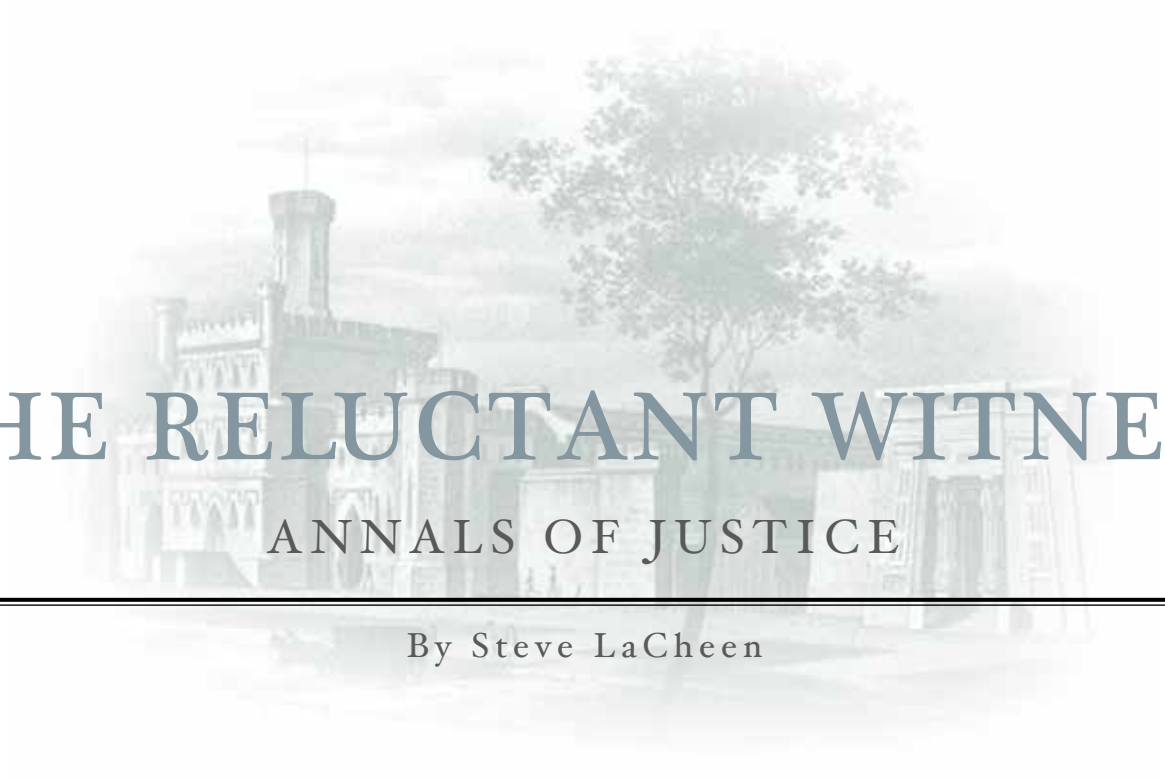

THE RELUCTANT WITNESS

ANNALS OF JUSTICE

By Steve LaCheen

Sometime in early 1968, I received a letter mailed from Moyamensing Prison, also known as "Moko," the Philadelphia County prison then located at Passyunk Avenue and Reed Street. The writer identified himself as Anthony Marshall. Unlike most letters from "behind the wall," this one did not begin and end with protestations of innocence. The writer's plea, compelling in its simplicity, read: "Please come see me. I need your help."

I felt compelled to respond, and I arranged a visit for the following day.

I cannot even begin to describe "Moko." I doubt that it had changed in the 150 years since it was built. Every time I visited an inmate behind its castellated Gothic towers and battlements, I felt as if I had traveled in time back to the day in 1835 it opened as "New County Prison." Research indicates that each cell was nine feet by 13 feet, with an arched opening, oak plank flooring, a wooden door with iron plating on the interior side; and a water closet with hydrant. I admit doubt about the accuracy of my memory, but it is my recollection that I actually visited Marshall inside his cell, which I had to bend down to enter through a low door.

In person, Marshall was as different from my usual visitee as his letter had been different from my usual prison correspondent. He was younger, apparently well brought up, neat and clean in appearance, and reasonably well spoken for someone with the limited formal education he had received.

At the remove of more than 45 years, I no longer remember the offense for which he was incarcerated - whether it was a pending charge, or violation of probation, or some other of the many infractions for which people were more readily locked up (or locked down) back then. Whatever it was, however, was not the reason he had sought my help. It was for an entirely different and, for me, a totally unexpected problem.

Marshall had, during his stay at Moko, been interviewed by county detectives, during which he had given a statement involving an accusation against another inmate. What Marshall remembered telling the detectives was that the fellow inmate, who was accused of committing a murder for hire, had promised Marshall $10,000 to confess to committing the murder. The apparent purpose, of course, was to parade before the jury Marshall's confession; that, even though false, would confuse the jury, or at least one juror, that there was a reasonable doubt, that would prevent juror unanimity needed to support a guilty verdict.

The prosecution, on the other hand, having somehow discovered the plot, had interviewed Marshall and now wanted to have him testify for the Commonwealth about the proposed

plan, as evidence of guilt on the part of the defendant in the murder case.

Marshall had placed himself squarely on the proverbial horns of a dilemma. He did not want to testify for the Commonwealth against someone who was not only already accused of murder, but whose brother had a reputation for uncontrollable violence such that he was known far and wide by the nickname "Mad Dog." Marshall was no less reluctant to deny that he had participated in a plan to commit perjury, because testimony so disappointing to the district attorney would undoubtedly be rewarded with a charge of perjury; and, even without such testimony, with a charge of obstruction of justice.

The solution to Marshall's quandary seemed simple enough: He could refuse to testify by invoking his privilege against self-incrimination, and thereby avoid the precipice on either side of the narrow road on which he had stranded himself.

The only problem, which I had failed to grasp at the beginning of our conversation, was that the trial of the murder case was already in progress, and Marshall expected to be called as a witness within the next day or two.

I returned to my office and immediately did the research necessary to find support for the position I was going to espouse on my client's behalf. Then, comfortable that I had that aspect of the matter under control, I dictated a letter to the assistant district attorney trying the case, advising of my representation of the witness who was now a non-witness. Because of the time constraints, I had the letter hand-delivered.

Within the hour, I received a telephone call - actually my secretary took the call - leaving me a directive to appear "forthwith" at the office of the first assistant district attorney, a person regarded in equal parts for the strength of his legal ability and courtroom command as for the relentlessness with which he exercised those strengths.

Such summons from the first assistant could not be ignored; and I hastened to comply. Within the quarter-hour, I presented myself at the designated office and was assigned a seat in the waiting room, where I was made to wait long enough for me to realize that being put "on hold" so long was part of the intimidation I expected to encounter.

My belief in that regard was borne out by the fact that, when I was finally ushered into the inner sanctum, I was confronted not only by the first assistant, standing behind his enormous desk, but by the assistant district attorney actually trying the case, and several other assistant district attorneys holding supervisory positions in the office.

"Just what do you think you're doing!?" was the greeting I received. And that was probably the most polite remark directed to me during an excruciating hour of diatribe directed at my "obstruction of justice," spiced at several stations along the way with threats of disciplinary action and sanctions falling only a little short of being drawn and quartered. The "interview" ended with a command that my client had better testify, and testify fully, "or else." I was told the meeting was over, and that I should give serious consideration to what I had been told. I left with the admonition to ponder exactly what was encompassed by the alternative "or else."

I was a single practitioner at the time, and did not feel comfortable discussing the matter with anyone else, for fear of making some disclosure that would somehow constitute a waiver of my client's confidences. It did not occur to me that I could myself seek advice by availing myself of the attorney-client privilege. I felt I was on my own.

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So, I retreated to basics. I reviewed again, and again, exactly what I had been told, both by my client, and by the first assistant, and pondered whether I was over-dramatizing my situation (because I really did not know exactly what "or else" meant). I felt this was the first real test of my commitment to the principles which made me choose the law as my profession in the first place. If this was my Rubicon, I intended to cross it, no matter how scared I was of what the consequences might be.

I showed up in court the next morning after seeing my client in the sheriff's cell room on the seventh floor of City Hall, and confirmed his commitment to silence. The case was being tried in one of the larger courtrooms, in the center of the building, resplendent with the fixtures and furnishings of what was even then a bygone era, the bar of the court a half-block away from the elevated bench from which the judge presided over the proceedings.

I sat there, throughout the morning proceedings. No one spoke to me; neither the two attorneys representing the defendant, who were both among the most well-known and highly respected members of the defense bar; nor the assistant district attorney trying the case, who did, however, manage to glare at me from time to time; nor the court crier, until he declared "Court adjourned until 2 p.m.," and I was told to return promptly at 1:45 p.m.

I showed up as directed and there was no one in the courtroom but court personnel and trial counsel. As soon as I entered the

courtroom, the crier directed that the door be locked so the public could not enter. For obvious reasons (which had not previously been obvious to me), this was to be an *in camera* proceeding. Nonetheless, the locking of the courtroom door sent a shiver down my spine. Was it also intended, I wondered, to insure against my "escape?"

My client was not in the courtroom. I knew he was in the building; I had seen him earlier. And then, I noticed someone who was. The first assistant had entered the courtroom without my having observed his doing so. As I was considering whether I was suffering from hysterical blindness, the judge, who had somehow ascended the bench while I was wool-gathering, spoke.

"Counsel, approach the bench and identify yourself."

I did so.

"And you are representing whom?"

I said I was representing someone subpoenaed by the prosecution.

"Does he have a name?"

"Yes, Your Honor," I said, identifying my client.

"And what is the problem?"

I should interject here that the judge presiding over this trial had the reputation of leaning more than a little in the direction of the Commonwealth, and being a harsh sentencer, and, even more to the point of my situation, considerably less temperate after lunch than before.

"Well,..." I said, not knowing exactly where to begin, and exactly how much I could disclose.

"Well, what, counselor?" the judge interrupted. At that point, the first assistant stood up, as if to interrupt.

"Excuse me," I said. "Your Honor addressed that question to me, and I am prepared to answer it."

"I will hear you," said the judge to me, waving the prosecutor to silence.

At that point, I started to explain that my client intended to invoke his privilege against self-incrimination, but the judge interrupted.

"Well, he won't have a problem as long as he tells the truth when he's on the stand."

I knew that the judge was right, that my client's testimony, if immunized, could not be used against him in a later proceeding; but I also knew that, whatever the truth, he would never testify that he had been offered a bribe by the defendant. And, if he would testify that no such bribe offer had been made, he would be prosecuted for perjury based on the theory that his earlier statement had been true and that his trial testimony was false - and, therefore, not immunized.

I was trying to form the words to convey that to the judge, without making more of an admission than I had to when the first assistant unintentionally came to my rescue.

"Your Honor," he said, "If he testifies in accordance with what he told us before, no problem; but if he testifies any differently from his statement, then he lied to us."

"So what you are saying," asked the judge, posing what I felt was a rhetorical question, "is that he has no alternative but to testify in accordance with the statement he gave previously?"

"Well," began the prosecutor...

But the judge interrupted him, "It sounds like the witness has no alternative..."

"None but to tell the truth," interrupted the prosecutor.

"Whose truth would that be?" was the rejoinder from the bench. "Our system does not permit such a Hobson's Choice," said the judge. "This court adopts the position presented by counsel for the witness. The witness is excused."

"But, Your Honor," began the first assistant, "I..."

"This has nothing to do with you," said the judge. "This isn't personal, and neither your personal feelings, nor mine for that matter, trump the rule of law. The subpoena is quashed and the witness is excused."

Then, as though just remembering, and barely, he looked in my direction, and through gritted teeth said, "That's all, counselor. You are excused."

"This isn't personal, and neither your personal feelings, nor mine for that matter, trump the rule of law."

I gathered up my briefcase, and left the courtroom to give my client the news.

About a week later, the morning paper noted that the defendant was acquitted.

It was almost 20 years, and more than a decade after he went into practice as a defense attorney, before I had any occasion to speak to the first assistant again (parenthetically, it was to seek his opinion and advice on an ethical issue). Long before that, within a half-dozen years of the trial, one of the attorneys who had represented Mad Dog's brother had been appointed to the bench. I eventually appeared before him, representing a defendant charged with murder, on whose behalf I filed a motion to suppress a "confession" which my client claimed he never made. After an extended hearing, the judge found the detective's version of my client's supposed statement incredible, and granted the motion to suppress; without that the Commonwealth had no evidence, and moved to dismiss the charges.

And, a year later, that client killed someone else in a street fight.

I never heard from Anthony Marshall or Mad Dog's brother again. As for Mad Dog, he eventually went to prison following a conviction for committing an arson for hire. Shortly after completion of his sentence for that offense, he was involved in a fatal motor vehicle accident.

"Moko" was razed later in 1968. All that remains of the prison today is a low, heavy masonry stone wall along Reed Street in front of an ACME supermarket. ■

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