CIRCUMSTANTIAL EVIDENCE

ANNALS OF JUSTICE

By Steve LaCheen

I recently read an essay by the Pennsylvania attorney whose nom de plume is S. Sponte, Esq., which he titled "An Upchuck of Jurors." An older lawyer, he describes his attempt to console a younger one who had just suffered an adverse jury verdict and wanted to interview the jurors to find out why.

Advising the younger attorney against doing so, Sponte refers to jurors in post-verdict mode as an "'upchuck of jurors, like a pride of lions or a gaggle of geese," and references a fictional Russian psychophysicist named Yura Shtunk, who in 1927 supposedly published the results of a study that produced Shtunk's Constant; that is, that every juror added to an upchuck reduces its mean IQ by an exact constant factor of 0.33176.

In Sponte's essay, the young plaintiff's lawyer does nevertheless interview the jurors and learns that they found for the defendant because the plaintiff was dressed so nicely (as he had been "prepped" by the attorney) that it just didn't seem like he needed any more money. That revelation caused the young lawyer to experience his own very real "upchuck."

I know whereof Sponte, Esq., spoke.

Years ago, in the late 70s, I was appointed Criminal Justice Act counsel to represent Lloyd N., a young man charged in a federal indictment with participating in a drug transaction. My recollection is that the charges were developed by way of a government "sting," in which a federal drug agent had posed as a potential drug buyer in a transaction in which Lloyd had acted in some supporting role, either as a courier or lookout. That is, Lloyd had neither a principal role nor a stake in the enterprise, other than to be paid for acting as a "go-fer."

Lloyd had been an up-and-coming boxer on the local prize-fighting circuit, highly regarded as a potential contender; but, as the result of poor management, bad financial advice, and a drug habit, had fallen on hard times and been reduced to eking out a meager living as a sparring partner and free-lance ad hoc support staff for whoever needed help.

It was then, as it still is in some quarters, the commonly held belief that the drug business, involving in most instances a willing seller and a willing buyer, is in effect a victimless crime. Officialdom, however, factors into the equation the resulting deleterious effect of drug abuse on society in general and has an entirely different "take" on the subject.

Ironically, the only time government prosecutors regard addicted persons as victims is when an accused participant in a drug transaction is not an addict, and can therefore, be accused of taking advantage of, and inflicting further harm upon, the nameless, faceless hordes of addicts who are so enslaved as to be completely bereft of the willpower to resist the seductive importunings of their friendly local supplier.

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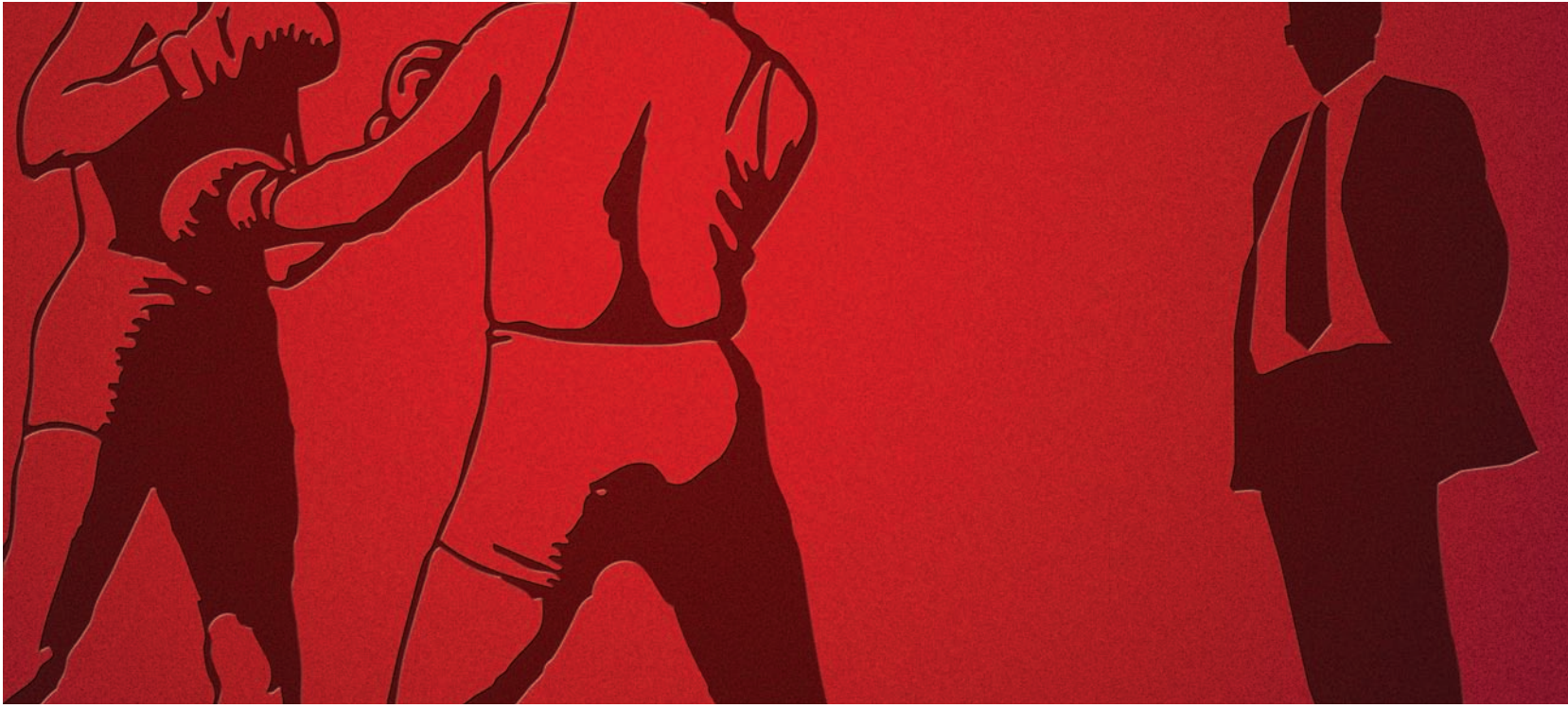
It is an entirely different story, however, when the defendant in a particular case is an addict engaged in selling drugs to make enough money to support his or her own habit. Then the cry of the prosecutor is that drug addiction is simply a matter of choice, and even an addict who sells drugs to support his/her own habit has the ability and responsibility to overcome such circumstance, now regarded not as an addiction but a temptation.

So it was with Lloyd's case. The prosecution declined to offer a negotiated plea that would have taken into consideration Lloyd's own drug problem as a mitigating factor for sentencing purposes. Such intransigence left us no alternative but to go to trial.



During jury selection, I noticed one of the panel members had listed her husband's occupation as judge, Philadelphia County Court of Common Pleas. It was obvious to me that the prosecutor would not strike her; she was undoubtedly aware that her husband tried similar cases all the time. After much discussion with my client, we decided not to strike her either. After all, if any juror would understand the concept of reasonable doubt, who better than she. The wife of a judge, she was undoubtedly familiar with the concept, and would be able to educate other jurors who might not otherwise give it full appreciation and consideration.

The case went to trial. The evidence came in quickly and cleanly; it wasn't overwhelming – no wiretaps, no photographs, no arrest in flagrante dilecto. A verdict either way would not have been unreasonable.

Concerned that the jury might be distracted by the question of how my client, clearly a broken-down ex-fighter, could afford my services if he were not engaged in some unlawful conduct, I took great care in selecting my courtroom attire – nothing new, nothing too fashionable, nothing flashy; and I took the opportunity both in opening remarks and closing argument to refer to the fact that I felt privileged to have been appointed by the court to represent him.

The case took two days to try. The jury was out longer than that. First, the jury requested to have certain testimony re-read; then, they requested a repeat of the conspiracy charge; finally, a note from the jury asked how they were to deal with the fact that the count of the indictment that charged the substantive drug offense also charged aiding and abetting. In response, the judge charged the jury that, if they found the defendant guilty of aiding and abetting, they were to return a verdict of guilty on the count charging the substantive offense.

With that, it was all over. Twenty minutes later, the jury had a verdict: Not guilty of conspiracy; guilty of the substantive offense. Surprisingly, however, the jury had annotated the verdict sheet with the following post-script:

"We the jury, find the defendant guilty only of aiding and abetting, and we recommend mercy at his sentencing."

At sentencing, the judge remarked on the record that he was taking the jury's recommendation into consideration and, therefore, imposed a sentence of two years rather than the five years he said he would otherwise have imposed, adding that the court hoped that Lloyd would take advantage of his time in custody, not only to strengthen his resolve to overcome his drug habit but to develop an alternative to his erstwhile lifestyle, to help him avoid backsliding and re-offending upon release.

The sentence did, in fact, have the intended effect. While in federal custody, Lloyd finished his high school education, took some college courses, and upon release, went back into the fight game, not as the potential contender he once was, but as a trainer. He completed his probation without incident and never had occasion to contact me again.

I did hear from one of the jurors, however. Several months later, I chanced to see the judge's wife at a Bar Association function. She made a point of telling me how much she had enjoyed the experience of being a juror, and that she thought I had done a good job for my client. But he was really lucky to have had her on the jury, she said, because the other jurors spent a lot of time discussing how much my suit must have cost. Without her there, she said, the jurors would never have understood that I was court-appointed counsel and not an expensive lawyer, and that, therefore, they should not consider that a factor in deciding he was guilty, but should consider it as a basis to request leniency from the judge at sentencing!

My inclination was to remind my erstwhile juror that mercy is no substitute for justice; but she was a judge's wife, and, discretion being the better part of valor, I bit my tongue and politely excused myself. Unlike Sponte's mentoree, however, I headed not for the lavatory but the bar. ■

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