

# **A BROKEN CRIMINAL JUSTICE SYSTEM AND PRISONS FOR PROFIT**

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*The degree of civilization in a society can be judged by entering its prisons.*—Fyodor Dostoevsky (1821-1881)

Our criminal justice system has never functioned to provide “justice” to the poor and powerless among us, and we bury the results of that failed system in our prisons --- prisons that enslave and punish rather than rehabilitate. So, it should come as no surprise to our brothers and sisters who are criminal defense trial lawyers to be told that the system seems broken beyond repair; that overworked and underpaid public defenders with huge case loads are too often unable to prepare for trial; and that indigent defendants too often suffer prison sentences that could have been avoided.

## **NO JUSTICE FOR THE POOR**

Certainly the current bad economy has aggravated the inherent problems in our criminal justice system, but the system failed to provide justice for indigent defendants 52 years ago when I began practicing law --- nothing has changed, but in many states its just much worse now. For example, before Colorado adopted a state-wide public defender system in 1965, the newest members of the bar were appointed by the judges to represent the indigent charged with a felony, without regard to the lawyer’s inexperience and incompetence. Lawyers were paid only a token amount per case, which encouraged guilty pleas. In Boulder County, lawyers were paid \$30.00, whether a jury trial or guilty plea. No additional funds were provided for expert witnesses, investigators, or testing. Defense counsel was not entitled to the results of the District Attorneys investigation or witness statements, and the prosecutors witnesses were told not to discuss the case with defense counsel. With that background, let me tell you a story.

In July 1960 I had just finished my Colorado Supreme Court clerkship and was moving into my new office when I received a call from the clerk of the Boulder District Court informing me that the judge had just appointed me, as the newest member of the Boulder bar, to represent a defendant

charged with a felony. I was delighted. This would be my first client. I asked for the client's name and where and when I could meet him. "You don't understand – Judge Buck is in court waiting for you with a room full of jurors ready to start trial. Your client is in the courtroom." I explained that I was in my Levis and would have to dash home to change into a coat and tie.

When I arrived at the courthouse, a grey-haired judge in a black robe was pacing the hall waiting for me. (I later learned that the defense lawyer from Denver had failed to appear for trial because he had not been paid.) I introduced myself and when told to enter the courtroom to begin jury selection, I stammered something akin to needing a continuance. In response the judge said I could make whatever motions I wanted in chambers after the jury was selected, stating with some anger and frustration that the jury had been waiting for hours.

I entered the courtroom filled with lily-white jurors and noticed an attractive, young black woman holding a small baby seated in the first row and a black man at counsel table. I sat next to him, introduced myself, told him I had been appointed to represent him, and he asked if I had finished law school. "Just barely", I said. He asked if I had ever tried a criminal case. "No," I answered. He reached over, patted me on the knee and said, "Don't worry, I'll help you." I learned that he had been caught red-handed burglarizing a clothing store and was also being charged as a habitual criminal which carried a life sentence.

When the judge entered the courtroom, I stood and moved for a continuance, quickly starting to list objections to proceeding with the trial. The judge, with red face, was pounding his gavel and ordering me to be silent as I quickly "made a record." He then ordered me to the bench, threatening to hold me in contempt and reminding me that he had ordered me to wait until a jury was selected. I informed him that I didn't want to waive my client's rights. It was a short trial and the jury deliberated 14 minutes, long enough to pick a foreman and find him guilty.

I was granted a new trial and received a call from the local newspaper reporter who covered the courts, telling me that unethical lawyers like me were not welcome in Boulder. "When a criminal is guilty, he should plead guilty and not waste the taxpayers' money." In the second trial, the jury deliberated only 10 minutes before rendering a guilty verdict and the newspaper's front page story vilified me and my client. My career and

reputation was off to a fine start. However, as a new lawyer and with only 52 practicing lawyers in Boulder County, I received several additional appointments resulting in jury trials, and was paid \$30.00 per trial. I then received a call from a member of the Judge's staff warning me that with one more plea of "not guilty" I would receive no more appointments. My next "not guilty" plea ended the appointments.

## **OVERWORKED AND UNDERPAID PUBLIC DEFENDERS**

So, have things changed dramatically in criminal law? A series of United States Supreme Court decisions in the 1960s and 1970s gave defendants greater protection and more rights. It seemed that the indigent defendants were going to have greater access to justice. But the public defender systems that were adopted in many states became financially strapped. In recent years, nationwide, our criminal justice system has become an under-funded disaster, as evidenced by the many boycotts and lawsuits brought by public defenders who are underpaid and unable to handle their overwhelming case loads.<sup>1</sup>

For example, in 2008 Missouri's 350 public defenders handled more than 83,000 cases, with some juggling more than 200 cases at a time, resulting in the Missouri Supreme Court urging judges, prosecutors and public defenders to find a solution.<sup>2</sup> In similar fashion a Florida judge in Miami-Dade County ruled that the public defenders office could refuse taking new cases because the average number of felony cases handled each year by each lawyer had grown to 500, and the caseloads for lawyers assigned misdemeanor cases had grown to 2,225 each year.<sup>3</sup>

In many areas of the country, the defense of indigents charged with felonies goes to the lowest bidder. For example, three lawyers handled the cases of 776 poor people in five Georgia counties in 2002 for an average cost of \$49.86 per case.<sup>4</sup> With inflation, this is far less than the \$30.00 per case that I received in 1960. So, to save money, many states pay lawyers appointed to represent the poor such low rates that in some cases the attorneys make less than the minimum wage. So it's no wonder that lawyers become discouraged and change careers.

States are too frequently trying to save money by depriving poor people of assigned legal counsel. Consider, for example, a Colorado statute<sup>5</sup> stating that in misdemeanor cases, the appointment of legal counsel "shall be

deferred until the prosecuting attorney has spoken with the defendant” and shall “tell the defendant” of any plea bargain offer being made.

Can you believe this?

So, the prosecutor can bargain directly with a defendant, scare the hell out of him or her and obtain a guilty plea without the assistance of counsel. This statute, enacted in 1992, clearly violates the Sixth Amendment right to counsel<sup>6</sup> and is now finally under attack on constitutional grounds in the federal court.<sup>7</sup> In the meantime, how many people were overcharged or were innocent, but pled guilty out of fear and intimidation. Just to save the State some money by reducing the number of public defenders needed to render justice.

So yes, the criminal justice system is a disaster. Yet many dedicated trial lawyers, working in the trenches, fight for justice for their clients’ despite a system that too often makes that fight seem nearly impossible. Many of those lawyers have found a home in the Trial Lawyers College which has provided scholarships for public defenders for 18 years, and has assisted them in developing new skills to use in doing battle for their clients. But how frustrating it must be for some TLC graduates to return to a system where there is no time for discovering the story, no time for re-enactments, no time or money for focus groups, and no time to even prepare for trial. Getting to know, understand, like, and perhaps even love a client is a fantasy, not the reality. I have personally experienced this frustration and used some TLC methods at a distance, but more on that later.

## **THE CAUSE OF A BROKEN SYSTEM AND THE CONSEQUENCES**

So what are the consequences of a broken criminal justice system and what caused the system to fall apart? The cause is apparent and well documented. The media sensationalize crime, enhancing the public’s fear of crime, and politicians capitalize on that fear. Ever since the Willie Horton ads were aired to discredit Democratic Presidential candidate Michael Dukakis in 1988, politicians have had a morbid fear of appearing soft on crime. So starting in the 1980’s, States and the federal government began enacting legislation criminalizing more and more conduct,<sup>8</sup> creating a tide of criminal prosecutions. The consequences are an incarceration boom that filled our prisons to overflow capacity, and contributed to the creation of a

private prison system which focuses on profit and punishment rather than rehabilitation --- which in turn results in an elevated recidivism rate.

Yes, we have become a prison nation addicted to imprisonment, and no one seems to care. Politicians don't care because prisoners can't vote. Lawyers often don't care because prisoners and their poor families can't pay, and there are too many hurdles to overcome in litigation. And it is with some embarrassment that I acknowledge that I was one of those who didn't care. I paid no attention to the exploding prison population with more people behind bars: 2.3 million prisoners --- than China and Russia combined. If I had heard that our nation's prisons employ nearly 800,000 prisoners as workers, more than the auto industry<sup>9</sup>, I obviously gave it little thought.

You see, it was late in my career when I became involved in prison litigation. I had no experience with representing prisoners and their families in state tort claims or Section 1983 Civil Rights claims.<sup>10</sup> I had never heard of the draconian federal legislation, the Prison Litigation Reform Act, enacted in 1996, known by its acronym, the P.L.R.A.,<sup>11</sup> which drastically limits the remedies for sentenced inmates. Yet, I did what many of you would do when a potential client's case cries for justice. I left my comfort zone and filed a lawsuit, not knowing the impact it would have on me and how it would influence my remaining days as a trial lawyer.

When I filed the lawsuit our prison population was something foreign to me. I was only vaguely aware that changes in our criminal laws were resulting in an increasing prison population, which apparently necessitated the building of more prisons. Beyond that, I gave the persons incarcerated in our jails and prisons little thought.

Why was I disinterested? Was it because I was not representing people charged with crimes, and not familiar with what was happening to them during and after incarceration? Was it because I never had a close friend or relative in the prison system? Why didn't I seem to care about our growing prison population? Did I just assume that most of those folks probably deserved to be in prison?

I don't know the answers to those questions, I only know that I am now embarrassed that I practiced law for over 40 years before I became actively involved in prison litigation and in efforts to reform our nightmarish prison system.

## **THE DEATH OF A MENTALLY ILL INMATE**

For me, it all started when I agreed to represent the elderly mother of a 54-year-old mentally disturbed man who died May 7, 1998, while incarcerated as a pre-trial detainee at the El Paso County jail in Colorado Springs. Her son, Michael, had no previous criminal record. After his arrest, police placed him in the mental ward of the jail where he soon became psychotic.

It was the practice at the jail to remove a mentally ill inmate who became psychotic and noisy from the mental ward and place him in soft restraints in a special detention cell so that he would not disturb the other inmates.

On the day of his death, they placed Michael in detention twice when he began talking loudly to the walls and pipes, was delusional, confused, and was disheveled and not fully oriented. Each time, the soft restraints simply aggravated his psychotic condition, causing him to yell incoherently and fight the restraints. So, each time this occurred they placed him on a “restrainer board” and strapped him face down, with his head turned sideways and his torso and extremities strapped to the board so that he could not move. Restraints were tightly placed across his head, upper back, upper arms, wrists, hips, thighs and ankles (11 restraints), which immobilized him.

The second time they placed him on the board, he strenuously fought the restraints out of fear and panic; he yelled incoherently and was obviously psychotic. No one checked his vital signs, respiration, temperature and airway. No one gave him water or liquids. After three hours and twenty minutes, he began shaking as if he were having seizures, and when they released him from the board, he was in respiratory and cardiac arrest. He died of positional asphyxia, a well-known and recognized cause of death of people placed in a position that inhibits the full use of the diaphragm in breathing. This can occur, as it has in Denver recently, when police place their weight across the back of an arrestee who is lying face down, for more than four minutes. Death by positional asphyxia can result.

Michael’s 80-year old mother was successful in recovering damages in her wrongful death lawsuit,<sup>12</sup> but more importantly, the El Paso County

Sheriff's office discontinued its use of restraint boards, as did the jails in several other Colorado Counties.

## **PRISON LITIGATION AND REFORM**

So, how did this lawsuit start me on a new path of prison litigation and reform? Well, during the course of this litigation, I met Paul Wright, the president and founder of Prison Legal News<sup>13</sup>, who opened my eyes to what was happening in our nation's prisons and jails, and I learned how we had become a prison nation with the rebirth of both private prisons and debtor prisons.<sup>14</sup> I read the books and other materials that Paul supplied. I was astounded to learn that the number of prisoners in our nation's prisons and jails had grown from 300,000 in the mid-1980's to more than 2.3 million by 2007<sup>15</sup>, and another 5 million were under supervised probation or parole.<sup>16</sup> One and a half million children have a parent behind bars.<sup>17</sup> Fifty percent of our prison population is black, 16 % Hispanic<sup>18</sup> and more than 250,000 are mentally ill.<sup>19</sup>

Further, I learned that 68% of prisoners didn't finish High School, 53% earned less than \$1000.00 per month before incarceration, and 50% were unemployed or working only part time.<sup>20</sup> So, most prisoners are poor, and it is no surprise that **80% of those who go to prison were therefore unable to pay for an attorney.**<sup>21</sup> But perhaps my biggest surprise was learning of the re-birth of the private (for-profit) prison industry in the United States. I have previously described the history and re-birth of the private prison industry and the disastrous consequences of merchandizing people for profit.<sup>22</sup> Many books have been published which document prison abuses and in particular, the evils inherent in the for-profit prison system.<sup>23</sup>

By January 2000, 28 states had authorized the use of private prisons, and only two states had prohibited their use.<sup>24</sup> This is a growing industry dedicated to making a profit from human merchandise by cutting the cost of food, medical care, services and programs; by understaffing prisons with poorly trained, cheap labor; and by leasing prisoners as slave labor for corporate America. Unfortunately, the public operated prisons have also resorted to similar cost-cutting measures as tax revenues diminish and the prison population grows. The result, in both private and publically operated prisons, is flagrant civil rights violations. These violations flourish, in part, because very few of the justifiable claims are litigated for lack of counsel who must face the severe restrictions placed on litigation by the P.L.R.A.

So, with that background, in 2005 I became involved in prison litigation, filing some lawsuits and participating as co-counsel in others. Lawsuits that involved serious life threatening injuries for lack of medical care, including a prisoner and a detainee, both of whom suffered a below the knee leg amputation; a lawsuit for a prisoner who was brutalized and left for dead in a prison riot; and a lawsuit against a private prison corporation on behalf of more than 200 prisoners who were also brutalized and injured in a prison riot.

All of the lawsuits have had one thing in common ---all resulted from prisons and jails cutting costs and attempting to profit from human merchandise. I will describe two of those that illustrate the evils inherent in incarcerating people for profit rather than for punishment and rehabilitation.

### **A FOR-PROFIT COUNTY JAIL**

Moises Carranza-Reyes was a healthy young man when he left Mexico with his brother, illegally crossing the border into the United States, hoping to find work near Chicago where his father was employed. He and seven other immigrants were traveling through Colorado in a pick-up truck when they were pulled over by a deputy sheriff, then arrested by the U.S. Immigration & Customs Enforcement (ICE), and transported to the Park County jail located in Fairplay, Colorado.<sup>25</sup>

He was placed in a “pod” designed to accommodate only 18 people, but on arrival there were 49 other ICE detainees in the pod, and most of them were visibly ill with vomiting and diarrhea. He was given a mattress and told to sleep on the floor in the overcrowded pod, where feces and urine were deposited around the only two toilets available; where toilet paper soaked in phlegm was littered all over the floor; and where the mattresses detainees slept on were placed on the floor in direct proximity to this human waste. Additional detainees arrived bringing the pod population to 61 illegal immigrants.

Within days, Moises became so ill and weak that his brother had to assist him, and his requests for medical attention were ignored, as were the requests of other detainees. Within one week of his confinement he was near death and finally taken to a hospital with pneumonia and in septic shock. He went into cardiac and respiratory arrest. He was resuscitated, but because of



the late treatment of his infectious disease, he developed a necrotic right lower lobe of one lung, suffered acute respiratory distress syndrome and acute renal failure. He was hospitalized for three months and his left lower leg was amputated due to gangrene.

So, why were 61 detainees packed into a pod designed for 18? Why were they denied medical attention? Because the county jail had decided to become a profit center for the county by increasing revenues and decreasing costs, and there was a profit to be made in housing ICE detainees until they could be deported. Turning a public facility into a profit center was the brainchild of a newly hired jail captain, Monte Gore. When hired in September 2000, the jail had only twelve inmates and was losing money.<sup>26</sup> Gore began soliciting prisoners from overcrowded counties charging \$45 a day and mailing a brochure to other counties, inviting them to, “house your prisoners in our ‘Park’”<sup>27</sup> He also contracted with the ICE to house illegal immigrants.

Gore’s efforts to increase jail occupancy produced \$900,000 in his first year of operation and \$1.6 million his second year. He exceeded his projected \$1.8 million in 2003, the year Moses lost his leg.<sup>28</sup> To further increase profits, this sparsely populated county of only 14,523 residents approved a \$2 million jail expansion to increase occupancy by another 110 beds.<sup>29</sup> To promote jail expansions, Gore announced that there were hidden benefits to the county: “Inmates at the jail have provided over 4,000 hours of free labor within the community. They have helped remodel the Fairplay town hall, worked in the county maintenance department, supplied help for the U.S. Forest Service at the ranger station and worked to maintain trails and repair fences, as well as providing labor for fire department and senior services.”<sup>30</sup>

Upon completion of the jail’s new addition, which increased capacity to 260 inmates, Park County announced that in charging other counties to hold their prisoners, Park County can pay all expenses and still make \$1.5 million in annual profit.<sup>31</sup> Gore proudly boasted that, “I don’t think there is another jail in the country that is offsetting costs like we do.”<sup>32</sup> Further, “The County can use that money to build a bridge or give raises to county employees.”<sup>33</sup> The *Denver Post* staff writer who interviewed Gore states that Gore was so eager to win business from other counties that he offered an inducement that has the ring of a sales gimmick: “Send your inmates to our jail,” he tells them, “and we’ll bus them for free.”<sup>34</sup>

So, Moises lost a leg to satisfy the County's lust for profits. And what happened to the remaining sick detainees? Two days after Moises was hospitalized ICE arranged to have them transported elsewhere. Many were still sick and without medical care when they were allegedly deported. Moises brother was released in order to be with him at the hospital.

And yes, a lawsuit was filed,<sup>35</sup> and I did have the pleasure of cross-examining Gore.

### **A PROFIT-INDUCED PRISON RIOT**

The harm to the detainees at the Park County jail is just a microcosm of the harm inflicted on inmates by the private prison industry in the quest for ever-increasing profits, particularly when the profit-induced prison conditions result in full-blown prison riots --- riots which too often harm hundreds of innocent-victim inmates.<sup>36</sup> This leads to my second illustration of the evils inherent in incarcerating people for profit rather than punishment and rehabilitation --- the Crowley County Correctional Facility (CCCF) prison riot in 2004, which led to consolidated lawsuits by more than 200 inmates who did not participate in the riot, but were innocent victims.<sup>37</sup>

This riot occurred at a private prison, CCCF, which is owned and operated by Corrections Corporation of America (CCA), the largest owner and operator of private prisons in the United States. The prison is located in Crowley County, Colorado. It is isolated in this rural county, surrounded by sparse prairie grassland conditions, some ranch land, and a few farms. The County is also home to a state operated prison. These two prisons constitute the only "industry" in the county. **The 2010 census showed 5,518 county residents, of which 2,682 were prisoners, giving Crowley County the highest percentage of prisoners of any county in the U.S.** There are only four small towns in the County, which includes the county seat, Ordway, with a population of 1,080, a gas station, one small restaurant, and no overnight lodging. These demographics are relevant when considering the importance of family contact and visitation to successful rehabilitation.

The first riot occurred at CCCF in 1999 when it was operated by another private prison company<sup>38</sup>. That company arranged to have a large group of medium security prisoners transported from the state of Washington to CCCF in order to fill vacant beds and increase profits. The

transfer interrupted the Washington inmates' programs and jobs, interfered with family visitation and contact with lawyers, and placed them in an isolated environment. Soon after the transfer a small group of unhappy Washington inmates started a disturbance which became a riot with destruction of property. Following the riot, the Washington inmates were transferred back to their home state.

CCA then took over the management and operation of CCCF on 1/19/03, and to increase profits it immediately made plans for a substantial expansion of the prison, adding two new units to house several hundred additional inmates. When construction was near completion, CCA arranged to have 300 inmates from Washington again transferred to CCCF to fill the new housing. Upon learning of the planned transfer, inmates and correctional officers (CO's) who had been present during the 1999 riot voiced their concern and fear of another riot should the transfer take place. Their objections and concerns were ignored by CCA's management at its home offices in Nashville, Tennessee, and the first batch of 100 inmates from Washington arrived in late June, 2004, followed by a second batch two weeks later.

Upon arrival, Washington inmates learned there would be no conjugal visits with their wives, no smoking, and no Washington law library, all of which were available to them when incarcerated in Washington. Instead, they were isolated at CCCF with limited programs and jobs. They complained, some threatened to riot, and their complaints were generally ignored by CCA management.

Then, on the morning of July 20, 2004, there was a visible show of force when CO's took an 18 year old Washington inmate down in the yard and carried him to segregation as hundreds of inmates watched. Some angry Washington inmates, who thought that excessive force had been used, planned a confrontation that evening when both yards would be opened for recreation and the entire population of 1100 inmates released from their cells. As word of this plan spread, many inmates concerned for their own safety, voiced their concerns and fears to CO's and warned them of the planned disturbance. The CO's in turn notified their superiors and voiced their own concerns. The captain in command called a meeting of the CO's that evening, before inmates were released, to discuss the threats of a disturbance. During that meeting several CO's opined that inmates should not be released for fear of a riot, and should remain in lockdown until

tempers cooled. They were overruled by the Captain who simply cautioned the CO's to be careful when they patrolled the yards after the inmates were released.

So, all inmates were released for yard recreation in the two yards, east and west,<sup>39</sup> despite the advance notice and warnings of a planned disturbance. A group of Washington inmates in the West yard immediately confronted the two yard COs, demanding to see the Warden to voice their grievance over the morning incident. When the CO's refused, the inmates began throwing rocks at them. They panicked and ran from the yard, as did the two CO's in the east yard. Then the two CO's in each of the five housing units abandoned those units, as the disturbance became a full-blown riot.

Realizing that the prison had essentially been abandoned by CO's, rioters went on a rampage: setting fires, breaking into housing units, destroying property, looking for sex offenders, and creating chaos. The CCCF Operations Manager, did not have adequate staff and munitions to control the initial disturbance and the developing riot, and had to wait for three hours for Special Operations Response (S.O.R.T.) teams to arrive from other distant facilities in order to again take control of the prison. In taking control, CCA indiscriminately treated all inmates as if they had all participated in the riot, even those who had remained in their cells or been locked in the medical ward or the library throughout the riot.

As a result, physical and psychological injuries, in varying degrees, were commonly sustained by the plaintiffs, none of whom participated in the riot. Every plaintiff suffered from smoke and gas inhalation, from fear of injury or even death, from excruciating pain resulting from the punishment inflicted on all inmates once the riot was under control, and from months of lockdown. Most plaintiffs, when cuffed and placed in the yard, were forced to urinate in their clothing and wear that clothing for many hours or even days. Many were forced to shower at gun point, without curtains, in front of female guards who made fun of them while video taping them in the nude. Many were placed in overcrowded cells with no bedding, mattresses or even hygiene products --- many without toilet paper --- for days. Many were forced to sleep on concrete floors or hard steel bunk beds for days. They were fed baloney sandwiches, dropped on their cell floors by COs. All were mistreated or punished as rioters, the guilty and innocent alike, and locked down for up to three months with little or no contact with family.

There were also injuries to some individual plaintiffs that were not common to all, but were unique because of pre-existing conditions that were aggravated by the riot, or because of more brutal treatment inflicted on some. For example, those plaintiffs who were told to lie face down in their cells in sewage water that flooded the cells, then drug through the water by their ankles to be cuffed so tightly that the ratcheted plastic cuffs cut into their skin and numbed their hands and shoulders as they were left in that condition for hours. Or those inmates who were tear gassed at close range while lying in the yard, cuffed, and being told, "That's what you get for rioting." Some inmates were under treatment following major surgery and begged not to be re-injured and their complaints ignored. Some had a serious asthma condition and were denied use of their inhalers. Some were under treatment for mental illness and their medication discontinued. Some were severely mentally traumatized and have had recurring nightmares of being trapped and burned alive, or beaten to death by mobs of crazy inmates.

All of this because CCA transferred a large group of unhappy Washington inmates to Colorado to fill newly built units and increase profits, then ignored their complaints and the advance notice of a planned disturbance, --- a disturbance that could not be controlled because of CCA's cost saving practice of understaffing its prisons with untrained personnel.<sup>40</sup> Lengthy investigations conducted by the Colorado Department of Corrections (DOC), and the departments Office of the Inspector General,<sup>41</sup> revealed the cause of the riot to be directly related to the cost-saving conditions existing at the prison and the bulk transfer of Washington inmates who were transferred on short notice, and separated from friends, family and any support system.<sup>42</sup>

The practice of treating inmates as merchandise to be transferred in large groups from one prison to another for greater profits has resulted in numerous prison riots with many innocent inmates being severely injured.

So, did CCA learn anything from the Crowley experience? Apparently it did not. It contracted with the California DOC to send its inmates to the 2400-bed medium-security prison operated by CCA in Sayre, Oklahoma, resulting in a riot started by the California inmates on 10/11/11, seven years after the Crowley riot. The Oklahoma riot resulted in injuries to 46 inmates.<sup>43</sup>

**One thing is clear:** when a private prison company's duty, as a custodian, to protect the safety and welfare of its inhabitants, conflicts with its desire to create profits for its shareholders, the profit motive always prevails.

## **TLC METHODS AT A DISTANCE**

Can TLC methods be utilized when representing over 200 inmates, most of who are still incarcerated in prisons located in Washington, Colorado, and other states? I mean, how can you discover each inmate's story and the feelings that the story evokes, without re-enactments? How do you get the client to relive the events in the first person? How do you really get to know, understand, and like or love your client when your only communications are by correspondence and telephone? Well, I did several things that were very helpful, but a poor substitute for the real thing.

First, early in the litigation, I sent each client a letter asking that he send me an essay, in response to questions that we often explore in psychodrama, hoping that the response would help me to know, understand and like my client. Here is what I wrote and requested:

“As you know, your case against CCA for your damages resulting from the Crowley prison riot is now scheduled for a jury trial. As part of my personal trial preparation I need to represent you, and our more than 200 clients, with a passion and understanding of who you are. The people who will be seated as jurors do not know you and most will assume that all of you are “bad people” or you wouldn't have been in prison when the riot occurred. During the trial and in my closing arguments to the jury, I want to be able to convince them that you are human beings just like them ---that you have a heart and soul and are perhaps a victim of your own life events. I need background information that will help me humanize you during the trial.

“So, I have three important questions that I want you to give a lot of thought too, and then please write to me with your answers. The information you send me will be considered confidential and will **NOT BE PROVIDED TO DEFENSE COUNSEL OR TO THE COURT!** It is for my use only so that I can better understand and know you, and then present your case to the jury with passion. As I said, you should give deep thought to your answers,

even if it takes days, before sending me your response. Here are the questions with an explanation of what information each question is seeking:

1. WHO AM I?

(Answering this question requires deep thought and soul searching, so take your time. Each of us is a product of our life events starting from birth, some of which we had no control over and others were the result of choices we made. The totality of those events and experiences has made you who you are today. So who are you?)

2. WHY I AM WHO I AM.

(Describe the life events and experiences that made you who you are today,)

3. WHO OR WHAT I WOULD LIKE TO BE, IF GIVEN THE OPPORTUNITY.

(We all have dreams of a better life, what are yours?)

“As you think about your answers to these questions, remember, we have all been greatly influenced by our parents, our childhood experiences, our friends, our grief and the good and bad things that we have experienced. Pour out your true and honest feelings so that I also feel them. They will remain confidential, but useful to me in representing you. Mail your essay or response directly to me in the self-enclosed envelope.

“Thank you in advance for letting me get to know you, better understand you, and better represent you.”

I received nearly 100 essays. Most of the stories were surprisingly similar and heart-breaking, yet hopeful and compelling. Each client was “humanized” by the stories he told, and provided me with the information necessary to understand each as a likeable person that I could relate to. The information provided was then often useful when later preparing them for the depositions being taken by CCA, and will be invaluable on direct examination at time of trial.

The next TLC method that was utilized, but at a distance and over the telephone, was the use of reliving the story in the first person during deposition preparation. I was surprised at how quickly most of the clients adapted and understood what was required. You all know the technique that

applies. “Jim, in order to give honest accurate testimony during your deposition, I want you to close your eyes and picture the scene and describe what you see, just as if you are there and again reliving it.<sup>44</sup> When I question you, I will tell you to do that, and then ask you where you are located. Your answer will come from your visual image of the riot. For example, ‘I am standing in my cell looking out my cell window at the yard’. And what do you see and hear? ‘I see inmates yelling and screaming and starting fires.’ It will be like going to a movie with a blind person and describing what you see so that the blind person is seeing everything that you see.”

Surprisingly, without the benefit of a physical re-enactment, many clients visually re-enacted in the first person and in doing so, again displayed the emotions that the riot evoked. Some needed to be corrected at the outset when they slipped into the past tense, but then found it easy to describe the events in the present tense with the usual direction of, “what are you seeing?; what are you doing?; what do you hear?; how do you feel? etc.” In fact, some seemed relieved that they could finally describe the horror of the riot and suffering experienced during and after the riot, to a sympathetic listener.

This type of deposition preparation was necessary because CCA was taking the depositions of all plaintiffs, and I wanted my clients to tell their stories during my questioning in case those depositions were then transcribed at CCA’s request for use in trial. Also, the depositions of clients who are still incarcerated at time of trial could then be used to present their stories to the jury. This advance preparation would also help when later preparing the testimony of clients who have been released from prison and able to personally appear for trial.

However, after taking the depositions of 126 plaintiffs, CCA chose not to depose the remaining 74 plaintiffs, and requested that only seven depositions be transcribed. It must have become increasingly apparent to CCA that their lengthy fishing expedition was not helpful, the testimony did not support its affirmative defenses, and they were just assisting in preparing the plaintiffs’ trial testimony.

The scorched earth policy of lengthy depositions (average 2 to 3 hours) will in fact assist us in preparing each client for his trial testimony. Although the depositions were not transcribed, we took copious detailed notes.



To establish CCA's culpable conduct and punitive damages I took the depositions of twenty employees including the warden, assistant warden, and CO's on duty during the riot. In doing so, I used roll-reversals to identify the potential use of "soft" cross-examinations at time of trial. As a result of the testimony obtained, the trial judge found that there was good cause to support an amended complaint asserting punitive damages based on CCA's willful & wanton conduct. At trial, the "soft" cross-examinations will also help support my description of CCA employees as victims of CCA's greedy and tortious conduct.

You see, the only villain in this case is CCA who transferred a large group of unhappy Washington inmates to Colorado for profit, knowing that the transfer placed the prison at high risk for a riot, a riot that CCA would be unable to control because it understaffed the facility with inadequately trained CO's. CCA knew that a riot would not only harm many innocent inmates, but would place its own employees at risk of harm. In fact when the riot commenced, frightened employees abandoned the yards and units and many later resigned. Why work at low wages when your employer fails to protect you from harm. CCA was the legal custodian of the innocent inmates and responsible for their health and safety. It was also responsible for the safety of the surrounding communities and for those who responded to the riot. As an employer, it was responsible for the safety of its employees. As the villain, it violated all of those duties and responsibilities --- blinded by the desire for greater profits.

So, the plaintiffs were victims. The employees were victims. The responders were victims. It can also be argued that the Washington inmates who started the disturbance and riot were victims of CCA's total indifference to their need for family contact and rehabilitation, when transferring them to an isolated prison in Colorado. The plaintiffs, who had no control, could only trust that CCA would protect them, and instead they were betrayed.

The heroes, of course, are the jurors who can, by their verdict publically reprimand CCA, telling them that this conduct is reprehensible and unacceptable in a modern civilization.

## **CONCLUSION**

Yes, justice for the poor in our so-called criminal “justice” system is too often just a fantasy. Overworked and underpaid assigned counsel and public defenders that are fighting in the trenches need all the help that they can get, help that is not forthcoming from the states and the federal government because politicians’ have no interest in protecting those who are charged with a crime. Their only interest is in being re-elected by assuring the public that “criminals” will be convicted and incarcerated. Nothing has changed for the poor people. They have always been victimized by the system.

Then those convicted and imprisoned, often for lack of adequate counsel, are again victimized by a private prison system that places profits over rehabilitation, thus increasing the recidivism rate.

So what can we do? In the daily battles for justice for the poor, trial lawyers too often face insurmountable odds created by a system designed to convict and imprison. We win some battles, but never the on-going war with prosecutors, politicians and those who seek imprisonment rather than justice. We can all become more involved in the battle by seeking change through legislation and the judicial process, by informing and educating the public, and by bringing lawsuits when civil rights are violated in our prisons and jails. We can also join and assist those organizations who seek change.<sup>45</sup>

In short, we can each do our share to promote change. We may not succeed, but we will never know unless we engage in the battle and try!

Bill Trine

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<sup>1</sup> For example, see *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990), and the Philadelphia Public Defenders Association Boycott in August, 2012 seeking additional funding. *The Naked City Blog*, , 8/10/12. Also, see the expose’ in the New York Times, Nov. 9, 2008 describing at least seven states where Public Defender offices were refusing to take new cases or sued to limit their caseloads, citing

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overwhelming workloads. The New York Times also describes a Florida judge in Miami-Dade County who ruled that the public defenders office could refuse to represent many who are arrested on lesser felony charges so the lawyers could provide a better defense for other clients.

<sup>2</sup> See, Court Urges Public Defenders to Rein in Workload: NPR, December 22, 2009, by Maria Altman.

<sup>3</sup> See, article in New York Times, Nov. 9, 2008, VOL. CLVIII, No. 54,489, *Citing Workload, Public Lawyers Reject New Cases*.

<sup>4</sup> Tera Herival and Paul Wright, *Prison Nation: the Warehousing of America's Poor* (2003) at p. 7.

<sup>5</sup> C.R.S. § 16-7-301(4)

<sup>6</sup> See, *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008); and *Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S.Ct. 1486 (2010).

<sup>7</sup> See, David Carroll, *Gideon Alert: Lawsuit challenges Colorado Law refusing appointment of counsel until after clients meet with DA*, NLADA, December 12, 2010.

<sup>8</sup> On the federal level, the incarceration boom has blossomed by enactment of the *Sentencing Reform Act of 1984*, 18 U.S.C.A. § 3582(c)(2); the *Violent Crime Control & Law Enforcement Act of 1994*, 42 U.S.C.A. § 13701 *et seq*; the *Illegal Immigration and Immigrant Responsibility Act of 1996*, § 304(a), 8 U.S.C.A. § 1229(c)(d)(1); and the *1994 Crime Control Act*, 18 U.S.C.A. § 1301 which provides money for prison construction to states which pass "Truth-in-Sentencing" legislation. Hundreds of similar pieces of criminal justice legislation were introduced in states throughout the country in the mid-1990s.

<sup>9</sup> See, *Private Prison Industry Grows* by Scott Cohn CNBC 10/18/11, 10:44 AM, ET.

<sup>10</sup> 42 U.S.C. § 1983

<sup>11</sup> 42 U.S.C. § 1997

<sup>12</sup> *Aylett Lewis, as next of kin and personal representative of the estate of Michael Lewis v. Correctional Medical Services, et al, and El Paso County Sheriff's Office, et al*; District Court, El Paso County, Colorado, Case Number: 99CV1847.

<sup>13</sup> Prison Legal News (PLN) is a monthly publication of the Human Rights Defense Center, P.O. Box 2420, West Brattleboro, VT 05303. PLN maintains a large depository of pleadings, legal briefs, verdicts and motions from litigation that can be accessed by trial lawyers representing prisoners in civil litigation.

<sup>14</sup> See, *Prison Nation, the Warehousing of America's Poor*, (Tara Herivel & Paul Wright, eds., 2003); Brigitte Sarabi & Edwin Bender, *The Prison Payoff: The Role of Politics & Private Prisons in the Incarceration Boom* (2000); and more recently, *Prison Profiteers, Who Makes Money from Mass Incarceration*, (Tara Herivel & Paul Wright, eds., 2007).

<sup>15</sup> *Prison Nation*, *supra* n.5 at intro. & p. 31.

<sup>16</sup> *Prison Profiteers*, *supra* n.5 at intro. and x.

<sup>17</sup> *Prison Nation*, *supra* n.5 at intro. and p. 65.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

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<sup>20</sup> Recently released report by the *Bureau of Justice Statistics*.

<sup>21</sup> *Prison Profiteers*, *supra* n. 5, and see *Prison Nation supra* n. 5 at p.2.

<sup>22</sup> *The Warrior*, winter 2005, pg. 11.

<sup>23</sup> See, *Capitalist Punishment --- Prison Privatization & Human Rights*, edited by Coyle, Campbell & Neufeld, published by Clarity Press, Inc., (2003); *Prison Nation --- The Warehousing of America's Poor*, edited by Herivel & Wright, published by Routledge (2003); *The Prison Payoff --- The Role of Politics and Private Prisons in the Incarceration Boom*, by Brigette Sarabi & Edwin Bender, published by Western Prison Project/Western States Center (Nov. 2000); and *With Liberty for Some --- 500 Years of Imprisonment in America*, by Scott Christianson, Northwestern University Press (1998), pp. 290-295.

<sup>24</sup> *The Prison Payoff*, *supra* n. 5 at p. 1.

<sup>25</sup> Fairplay is a small, somewhat isolated community located in the mountains of south central Colorado. Park County has a population of less than 20,000.

<sup>26</sup> *Summit Daily News* --- "Park County to Expand its Money-Making Jail," Linda Balough, 11/21/03

<sup>27</sup> *The Craig Daily Press*, by Robert Gebhart, 7/23/04.

<sup>28</sup> *Summit Daily News* --- "Park County Jail Hits Record Income," Linda Balough.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *The Denver Post* --- "Officials Aim to Lock in Profits from Jail," Kirk Mitchell, Feb. 2005.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Moises Carranza-Reyes v. Park County, et.al*, in the U.S. District Court for the District of Colorado, Civil Action No. 2005 –WM-377 (BNB). The lawsuit was filed by my friend and TLC graduate, Joe Archuleta.

<sup>36</sup> For example, A CCA prison in Sayre, Oklahoma was filled with prisoners from California, which began transferring prisoners out-of-state in 2007 to ease overcrowding. A riot at the North Fork Correctional Facility in Sayre, on 10/11/11 over poor food, lack of medical care and other grievances resulted in injuries to 200 inmates. Similarly, a CCA prison holding 2,500 illegal immigrants at the Adams County Correctional Facility near Natchez, Miss. was the scene of a deadly riot on May 21, 2012, which was sparked in protest of poor food and medical care. See, *NYDailyNews.com* for story. In Idaho, the high level of violence at a CCA-run prison prompted Federal lawsuits and increased state oversight. Vermont inmates being held at a CCA prison in Tennessee were subdued with chemical grenades after refusing to return to their cells.

<sup>37</sup> *Adams v. Corrections Corporation of America* filed in the District Court of Crowley County, State of Colorado, Case Number 2005cv60 Div:B, consolidated with *Abrahamson v. CCA*, Case Number 2006cv08. The litigation is still on-going with no end in sight. It has been the subject of four appeals, resulting in two published opinions. See, *Adams v. Corections Corporation of America*, 187 P.(3d) 1190

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(Colo. App. 2008) and *Adams v. Corrections Corporation of America*, 264 P.(3d) 640 (Colo. App. 2011). After 146 depositions and over 150,000 pages of document production, it is finally scheduled for a six month trial in 2013, unless the trial is further delayed by motions or interlocutory appeals.

<sup>38</sup> On 1/1/99 Crowley County entered into an agreement with a Delaware limited liability company, Crowley County Correctional Services (CCS) to operate CCCF.

<sup>39</sup> The prison, as constructed when CCA took over in 2003, had four housing units and two yards separated by a fence. Units 1 & 2 were located in the west yard and units 3 & 4 in the east yard. CCA then expanded by adding an additional unit to each yard. There were 1100 inmates housed in the prison when the riot occurred.

<sup>40</sup> See, *Prison Break: Budget Crises Drive Reform, But Private Jails Press On*, by Terry Carter (ABA Journal, October 2012). Quoting Judith Greene, director of the non-profit Justice Strategies, who states that the profit margins of private prisons “depend mostly on spending less for the biggest business cost --- personnel. That means paying less for prison guards, already an extremely low-paying occupation. One result is high turnover and the incompetence that inexperience brings.” Also see, *Private Prison Industry Grows Despite Critics*, by Scott Cohn, CNBC 10/18/11: Quoting Alex Friedman, editor of Prison Legal News: “Literally, you can put a dollar figure on each inmate that is held in a private prison. They are treated as commodities. And that’s very dangerous and troubling when a company sees the people it incarcerates as nothing more than a money stream. \*\*\* You have fewer guards that are less experienced, that are paid less, who get fewer benefits \*\*\*”.

<sup>41</sup> See, Colorado Department of Corrections After Action Report –*Inmate Riot: Crowley County Correctional Facility, July 20, 2004*, Published on October 1, 2004, pp. 13-17.

<sup>42</sup> Id.

<sup>43</sup> See, Reuters, *Oklahoma Prison Riot*, by Steve Olafson, Oklahoma City, 10/11/11

<sup>44</sup> Each incarcerated client was alone in a room with a reporter when deposed, with all attorneys participating by teleconference. With no distractions, it was easier for a client to paint mental pictures, describe those pictures, and also more accurately respond to defendants questions. The oral preparation for the deposition occurred within 24 hours of the deposition time, so the process of painting mental images was still fresh in the clients mind. We had previously sent each client a document containing detailed instructions on deposition preparation and they were asked to again review that document before the deposition. The defense conducted an exhaustive 2 to 3 hour deposition in an effort to support CCA’s affirmative defenses and minimize damages, without much success.

<sup>45</sup> There are non-profit organizations in nearly every state, often with lobbyist working for legislative change. In Colorado, the Colorado Criminal Justice Reform Coalition has been somewhat successful in promoting legislative change (contact is Pam Clifton). The ACLU National Prison Project in Washington, D.C. is active in promoting change, and the State branches of the ACLU are always looking for assistance from trial lawyers in prison civil rights cases. The Human Rights Defense Center, publisher of Prison Legal News (contact Paul Wright, President) now has a legal department bringing prison lawsuits and is always looking for local counsel and additional funding. Many churches and religious groups are active in criminal justice reform.