

The Defense Attorney Views the Identification Witness

By Percy Foreman

Attorney at Law
Houston, Texas

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In planning the 1969 annual conference of the International Association for Identification, which was held in Miami Beach, Fla., last July, the general chairman of the conclave, John Tyler, Director of Security, Dade County Schools in Miami and a past president of the IAI, thoughtfully provided two interesting and instructive talks by outstanding members on opposite sides of the bar. The first to speak was William Meadows, United States Attorney, Miami, Fla., whose address, "The Prosecution Views the Identification Witness," was published in these columns last month. The second was the famed defense attorney of Houston, Texas, Percy Foreman, whose message is given here. Both presentations are of such educational value that readers are urged to read them carefully and to save them for future reference in the years to come. Editor.

"Thank you, Mr. President.

"Mr. Chairman and distinguished workers in the field of legal justice:"

This concludes the prepared portion of my address. (Laughter.)

The ideal convention address should be like the mini-skirt—long enough to cover the point and short enough to sustain the interest. But my remarks almost invariably resemble the mu-mu, the Mother Hubbard which the missionaries put on the South Sea islanders, in that I cover the whole of creation and touch nothing.

It has been said that a lawyer's speech is like a dog's tail—it's bound to occur. Mine have been more nearly likened to a cat's tail—fur to the end.

I tried a little murder-misdemeanor case [Mossler-Powers case] (laughter) here in Miami in 1966, and at the conclusion of my five hour and fifteen minute closing argument, Judge Schultz said, "Mr. Foreman, you have a splendid train of thought, but you lack adequate terminal facilities."

Most so-called funny stories rely for a great deal of their humor on ethnic origin or attitudes, and now you can't tell them any more. Ex-

crybody's got an anti-defamation league.

Last night I was thinking back over my life to try to find a story about identification, since I was going to meet with this splendid group today. And I recalled that about sixty years ago in a little East Texas town where I was born—I was then seven years old—I experienced the most dramatic confrontation with identification that I have ever had.

An old Bavarian, a German, had moved to this little East Texas community. His name was Hans. Hans was well respected. He lived alone, he was not married. He lived down the H E & W T Railroad, about four and one-half miles from the post office. H E & W T stood for Houston, East and West Texas, but we said, "Hell, either way you take it."

Sometimes Hans would walk up the railroad track to the post office, sometimes he would drive his buggy, to get his mail. Hans wore the old Bavarian costume, the peculiar hat and the great wide belt, and boots, the like of which had never been seen in East Texas except when Hans wore them.

Mutilated Body Found

One November morning, Hans' remains were found ground to "indistinguishment" on the railroad tracks—the train had cut him to pieces. There was nothing left but the boots, the belt and the hat. So the funeral notices were gotten out and laid on the counters, and all the stores arranged to close when, lo and behold, at about two o'clock in the afternoon Hans drove up in his horse and buggy to get his mail. The entire community converged on him and it is suggested that since the wearing apparel that had been identified as Hans' was so peculiar that maybe Hans might recognize the remains as one of his countrymen. Hans agreed to go

ENCLOSURE

down to the funeral home, and when he came out the editor for the *Polk County Enterprise*, the weekly paper, said to him,

"Well, Hans, what do you think?"

And Hans replied,

"Vat you mean, vat I think?"

He said,

"Well, did you recognize the corpse?"

And Hans replied,

"Vell, no, but chust as soon as I seen it I knowed it wasn't me."

(Laughter.)

My experience with identification goes back to the time when I was in my father's office as county sheriff in 1910. I was then eight. He was county sheriff for 16 years, and



Photo by Richard Snowberger

PERCY FOREMAN

ahead of him my grandfather was sheriff of that county and died in office. I spent the first four years of my life after I was a year and a half old in a county jail, where my father was chief jailer before he became sheriff. I've been more or less identified with law enforcement one way or the other ever since I was born.

The field of science that you follow today was then called Bertillon

by the French, but some of these theories have been discredited in those days, and in the early days of my law practice which spans more than forty-three years, in the criminal courts both as prosecuting attorney and defense lawyer, I've seen a great revolution in the field of law in which and to which you have given your lives.

It used to be that the adversary system even more than today, was a contest more like a physical battle of baseball, football or boxing, tennis or some other game, than that which it is growing to be now, a scientific investigation of facts and applications of rules of law to those facts. That should be the ultimate end of our code of criminal procedure.

But in the '20's, the '30s, and even down on into the '40s and '50s, and up until June of 1960 we had the delayed action bomb, the line behind the law, the dropping of the bomb at the end of a trial to blast the defense out of the court room, and usually it was, for many, many years the telltale finger prints. There is no segment of our society, there is no field of law enforcement that has any more respect for the scientific value of the tools of identification than defense attorneys.

Recalls Old Bank Robbery

To me, circumstantial evidence is frequently more important and more trustworthy, more reliable, than what we call direct evidence, eye-ball identification against I.D. identification. I remember in 1933 I was prosecuting in Criminal District Court No. 2 of Harris County two bank robbers with long penitentiary records, they were brothers. They were Irish and their name was Shea. But one of them had a nickname, "Dago," and the other was "Frank." They had been indicted for robbing the bank in Spring, Texas, out of Houston about eighteen miles.

They were not apprehended for some two years later, at which time they were arrested on a highway near Spring, with sawed-off shotguns and automatic rifles, sub-machine guns and a whole group of guns such as those which had been used in the Spring bank robbery. The defense attorneys, I was prosecuting, had not subpoenaed a witness and I thought I had a "breeze"

because the postmaster, the depot agent, every worker in the bank and there were three, and an R.F.D. carrier, all positively identified both of these brothers as participants in the bank robbery a year and a half before.

When I completed the state's case, the defense attorney called a district judge from Easlom, a district attorney and seven members of a jury who were trying these two fellows at the identical hour, some 550 miles away from Houston, at the identical moment that the Spring bank was robbed, which, in the early days—this coming as it did during the first five years of my law practice—has caused me to have some qualms, some quandary, about positive identification. In most crimes of violence the excitement itself detracts from the efficacy of eye witness identification.

It has been established that finger print identification means more to an experienced defense attorney than eye witness or direct evidence.

Explains His Presence

The reason that I am here in Miami at this time at your invitation, to distinguish from at least two dozen others that I had for this same week, is my experience with the identification departments of the Dade County Sheriff's Office and of the City of Miami, and some of your private practitioners here in Miami. It is true that we had almost every question that can be raised in identification in the Jack Mossler murder case which was tried here in Judge Schultz's Court, January to March, 1966. And the fact that today members of your profession have achieved the position where you rise above the adversary system—you no longer take a position of the guilt of a man and then attempt to bend your opinions to support that preconceived notion of guilt, as so many of the constabulary now do. I felt that because of this reputation, because of the sense of fairness, the stewardship of the integrity of the identification expert's conscience, which exists here, in my appreciation for that type of officer, I just could not say "No"—as I do, and as I have to do 90% of the time, to invitations.

We had there in the early days, identification by hair. There had

been only a year or two, at least of my knowledge, of this new field. I knew nothing about it; I hadn't read a word. But between June of 1964 and March of 1968 I read everything that was printed, whether it was by McGill University, or Berkeley, or the University of Texas, or at A & M—or in South America. I had 38 pounds of literature on hair identification which I did not have to use eventually because the government's expert analysis was favorable to the defense and was accepted by the prosecution as such, it having been subpoenaed by the prosecution.

Ident Men Were Leaders

In the early days of my law practice, and down to June of 1950 when Mapp v. Ohio first broke the dike that had kept the constitutional rights of defendants in state court from being enforced in federal courts, and discovery became a part of the law, we had such a jumble in court rooms. You were the predecessors, you were the evangelists, you were the John the Baptists of discovery. The first thing a defense lawyer wants to see now in any motion, whether state or federal, in his bill of discovery, in his motions for the production of evidence, is whatever scientific evidence, finger print, writing, or other reports, may have been made.

After you, in some of the major cities, including the great metropolitan area, came the forensic pathologist, the substitute for the old justice of the peace in inquests. We have now, not only you, but also in some states with appropriate laws where the appointment of a psychiatrist is done by the trial judge as distinguished from the political masters of the county, as a political plum, the court appointed psychiatrist is also in the field of scientific investigation. And more than ever we are approaching the ideal in law enforcement that we should have.

Weakness of Our System

There are those who have acquired a certain expertise in advocacy who would perpetuate the adversary system where largely the prosecuting attorney and the defense counsel are on trial instead of the defendant. But, as I stated a

moment ago, we are approaching and making progress in the last few years in modifying, in qualifying, the short-comings of the adversary system. But some of us think, and I am one of them, that there are some phases of scientific applications to law enforcement of which I am a little suspicious, and of which the jurors are.

There is a tendency not in your field, but in law enforcement generally, to relegate some scientific formula, like the amount of alcohol in the blood, or the radar system, or the Breathalyzer, to attempt to take away from the jury the ultimate finding of fact and to have it done in a laboratory. This is because punishing is something most judges and most jurors hesitate to take upon their consciences, and the tendency of a great many of the invented precepts of discovery and the establishment of guilt are pointed toward that tendency of human nature. But none of us now will question the efficacy, the authenticity, the absolutely complete reliability, of finger print evidence.

Prints Purposely Placed

When I went into the James Earl Ray case I was—well, I had to do it because it was Sunday and he was to go to trial on Tuesday and I knew it would be a certainty of conviction and I thought the penalty under the image then established—but my decision to undertake to negotiate a plea of guilty was brought about by the certainty of finger print identification. One of the amusing things about the case was that Ray wanted me to show up the FBI, to show how utterly inefficient they were. He told me,

"Mr. Foreman, they claim there were three finger prints on that gun barrel. I tell you, Mr. Foreman, there wasn't a square inch on that gun barrel or gun stock that didn't have my finger prints on it."

He had purposely put them on there and he had wrapped them in a bed cover with his laundry mark on it that he had had for more—well for all of the time he had been out of the Missouri State Penitentiary—he had carefully wrapped it to protect the prints, and he had wrapped it so that nobody else would get credit for what he thought was a great and heroic deed.

Not only that, he evidently didn't

have as much faith in finger prints as his attorney, because in addition to the finger prints he put his radio, with the serial number from the Jefferson City Penitentiary, the Missouri State Penitentiary at Jefferson City, in the same bag. And also, every piece of underwear with his laundry mark, all of this purposely wrapped and laid, just before he got into the car to escape, in the doorway, so that he would be apprehended.

The facts of the case being what they were, and him pictured by his own defense counsel as a paid killer—absolutely no sense of justification as in the Sirhan case—coupled with this positive identification, made it, in my opinion, proper to negotiate. The defense lawyer is able to justify his existence as much by his judgement and experience and evaluation of the facts of the case and the probability of conviction and sentence as he is by walking the defendant out of the court room free. The average person, not to you who work in law enforcement, but to the average person that's what you are supposed to do to win a case. I'm as proud of the verdict in the Ray case as I would be had it been an acquittal of someone else.

Ident Man As A Witness

Now a few words about you and your position as a witness in a courtroom. I know that Mr. Meadows discussed that yesterday to some extent. I never undertake to destroy the testimony of a sincere honest identification expert. That does not mean that I do not attempt to destroy the efficacy of him as a witness. I'm not proud of that, but it is part of the adversary system, and we still work under it, and as long as we have district attorneys the defense lawyer will be required to use whatever art he may have acquired in the handling of witnesses in the courtroom to the advantage of his client.

I have seen some of the best identification men from the standpoint of acquired ability and professional standing who were most ineffective as witnesses. As a matter of fact, the better a doctor is a doctor or scientist, the less effective he is as a witness. A damage suit lawyer doesn't try to go to the best doctor to have his potential client or his client examined. He goes to a doctor with a certain amount of

standing, as much as he can get, but primarily for his ability to withstand cross-examination.

I was amazed, and have been throughout my lifetime, to have men with outstanding reputations, people who worked with the FBI for many years, and others with various state and city police departments, who, in their laboratories, their studios, and so on, are equal to the best, but who develop a sort of hesitancy. Maybe it is modesty, maybe it is just a lack of experience in the courtroom.

Ident Man Seldom in Court

At any rate for every case you work on you know that you appear in court in only one out of a hundred, or perhaps a thousand. Actually, all criminal cases, at least in 90 to 95% of them in every jurisdiction in America, are negotiated. Were they not we would need as many court houses as we have filling stations, because we would not otherwise have the personnel or the courts to handle them. You are primarily scientists, secondarily, witnesses.

Don't Talk Too Much

Some of the ways to utterly discredit a witness is to let him discredit himself. Sometimes the witness assumes the position of prosecuting attorney. He wants to argue why his findings are correct. It is the experience of trained lawyers and judges that when a witness starts arguing why something is correct that he is not certain of his facts, or else he is lying, because you don't have to argue the truth. Truth argues itself. And when the witness, whether he be an expert or a lay witness to an objective fact, totally unconnected with identification—whenever he shows an interest, an animus, in selling his testimony, that is to argue (which belongs to and is the function of the advocate, the lawyer, the district attorney or defense counsel)—when the witness resorts to that in response to the fundamental instinct of self justification (which is second only to self-preservation)—the witness shows himself to be interested in making you believe him, as distinguished from stating an objective fact that you will accept it as true because it is true—then you lose your effectiveness as a witness.

I always cross-examine the ex-

pert. I may not cross-examine him on his testimony, his identification, or why he believes that those are John Doe's finger prints. There was one man, whom some of you may remember in the Texas State Bureau of Identification. He was a frustrated medical student, and he loved to talk about medicine and what he would liked to have been. He went to SMU and dropped out. He joined the Texas Highway Patrol, and moved over into identification work there. He also worked as a conductor. He was very garrulous, very loquacious. Usually every time I had a chance to cross-examine him—until they put someone else on my cases—I would let him tell us about how he was a conductor on a street car line and how he would have liked to have been a doctor. It gave me a chance to argue that here was a man who was just misplaced—he's a failure at everything he started and that we have no right to believe that he is any better at identification than he was a street car conductor. Actually he was a competent identification man; he was a sincere man; but he just had the "foot in mouth" disease. He ran all over Texas, talking.

Discrediting A Witness

One of the ways of discrediting you experts, and some of you are so young I couldn't do this to, but the thing I've done that made more than one Texas Ranger want to pull a gun on me from the witness stand was just questioning the divine origin of the officer as such, proving that before he was a Texas Ranger he was a speed cop, giving tickets to people like the jurors who were there. Immediately they were on my side.

I remember, and in my opinion probably the best trial lawyer Texas ever produced, a man named J. J. Collins in East Texas, close to my home town. One time a Texas Ranger had completely decimated J. J.'s defense. I've forgotten the facts of it, but it was a very cruel killing. This ranger wore one of those Howie Blocker's cowboy hats, even for a Texas Ranger this was a tremendous hat—and he laid it on the front seat of the audience section as he walked to the stand. At any rate, he gave a very graphic description of the facts of the case,

what he saw, the taking of the confession, and so forth. All J. J. did was ask,

"Well, let's see, how were you dressed?"

And the witness replied,

"Just like I am now."

"You mean you didn't have on your hat?"

"Yes, I had on my hat."

"Where is your hat?"

"Over there."

"Would you get it please?"

Then he walked up and placed it on his head,

"Is this the way you were wearing the hat?"

"Yes."

"Now, sir, would you walk right down to the front door of this court room?"

The witness walked down there and when he got to the door J. J. said,

"Now you can go on, that's all."
(Laughter.)

Opens His Bag of Tricks

There are many defense attorneys who overlook the fact that the witness may furnish them a way of discrediting the witness in the eyes of the jury. Now these are tricks, and they should not be a part of law enforcement. But they are essentially a part of the adversary system and the prosecution will take advantage of any factor of this kind that comes to his attention or that he can. I always like to have a witness for the other side that has some thing grotesque, low sideburns or wide moustache—nowadays hair is getting so common that it's almost not a weapon. I've won cases because the witness wore big boots. I'd try his boots instead of the facts. And the witness is on trial.

And I've lost a case or two because of my witnesses. Once there was a man whom I was certain would be acquitted. Well, all of the defense witnesses waiting for the verdict, got high on beer. The jury came in for dinner in this tavern, the same tavern near the courthouse where all my defense witnesses, about 12 of them, were, well, just disorderly. That alone discredited just about all of the testimony they had put on.

Be Careful How You Dress

The point I am trying to make here is that your dress, a sport outfit if it is different from that of the jury or what the jury is used to, may unduly influence the jury. They are prone to consider those factors almost as much as they are the evidence, if not more, sometimes.

I remember on one occasion when I represented one of two men charged with robbing a shoe store at about 4:30 or 5:00 in the afternoon on Main Street in Houston. One was a Latin American and the other was an Anglo. I represented the Anglo and I prepared this case for trial. There was a perfect alibi.

Two honest policemen, 30 miles away, made a one hour error in issuing a traffic, a speeding ticket, to a motorcycle. These boys belonged to a motorcycle club and there were some 35 or 40 of them in a cavalcade going down to the Thunderbird Inn in Galveston County on the Gulf Freeway from Houston. It was that cavalcade that the police stopped, so I had those 35 witnesses and the policemen themselves. The officer didn't think he made an error, but he gave the exact minute the robbery was happening some 30 miles away on Main Street in Houston on his ticket—that is the hour he gave on the ticket.

How Jurors Make Decisions

Well, I turned my investigation and witnesses over to the attorney for the Latin American co-defendant who was convicted and received a five year sentence. It was inconceivable to me and I interrogated a juror as to why they had convicted this man in view of what I considered a completely convincing alibi. The man told me, "We didn't talk much about the ticket or the policeman. We talked about those motorcycles and the riders, and the black jackets. And there wasn't a member of that jury that sometime or other hadn't had some trouble with somebody on a motorcycle. We talked about all of them and we wouldn't believe one of them under oath and that is why we arrived at the verdict."

I mention that again to tell you that some of the most insignificant dress or mannerism can destroy

whatever handiwork, brainwork, research you muster up. One of the ways I had to discredit one of your profession so as to make his testimony less believable was to ask,

"Now, just when did you decide, at what stage of your research, did you decide that this was the handwriting of this defendant?"

He's got to answer one of two ways. He's got to say,

"Well, right away, anybody could see it who is skilled in reading handwriting."

Or, as he may prefer,

"Well, I made....."

"How many hours did you work on this? Six, seven, five? How many days?"

"Three or four, taking pictures and so forth."

"And, at the end of all of this you then concluded that this was this

man's handiwork?"

Well, you've got him. You can argue that this man must have had a sincere doubt about it or he wouldn't have spent all of these days and hours arriving at this conclusion.

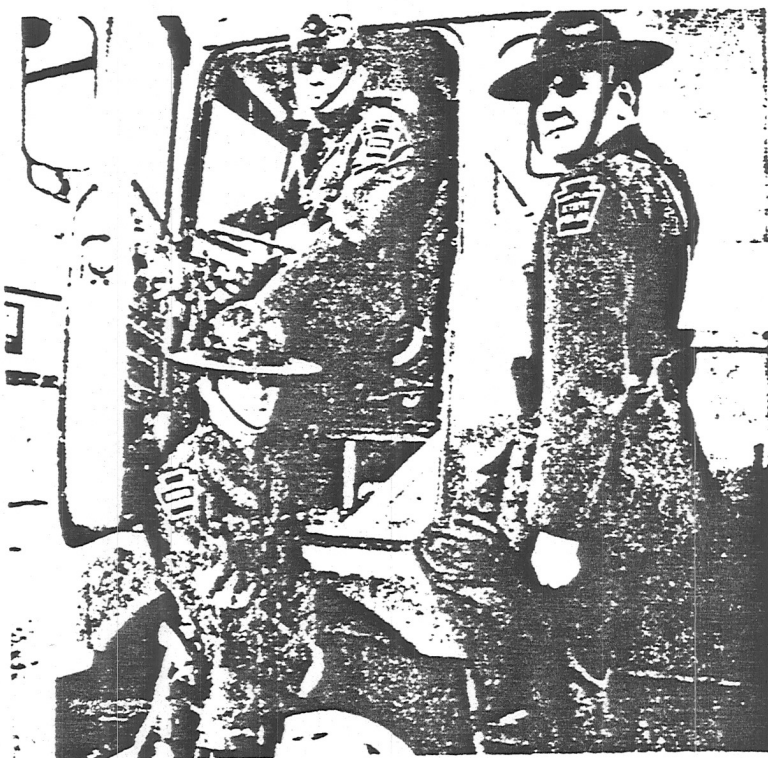
Hopes Thoughts Will Help

Actually I'm here just ruminating and reminiscing—I've used more time than I intended to but I do appreciate the privilege. I consider myself just as much a law enforcement officer as any of you, as any district attorney or any police officer or member of the constabulary. For the law of criminal procedure, the law regulating the trial of cases, the law fixing the rules by which a case must be tried, evidence must be admitted, is as much a part of the law of the land as the

penal code fixing the offenses and defining the offenses against the law. I consider this, being the international organization that it is, I consider this an opportunity to put in a word, to plant a seed, a hope, that might sprout ideas anywhere in this country, or for that matter in the world, that will help us achieve what is my idea of what law enforcement should be, and that was stated in the opening of these remarks: investigation and establishment of the facts as they exist, and then the application of the rules of law to those facts.

I thank you for the privilege of being here.

Identification



TROOPER-DRIVERS—Ten Pennsylvania State Police officers have graduated from a truck driver school in cooperation with the Pennsylvania Motor Truck Assn. From left, Philip J. Erickson, Washington; Ronald A. Kibler, Harrisburg; George A. Kolinofsky, Reading. State police commander Frank A. McKetta said the two-fold goal was to help troopers understand trucking problems and to have skilled drivers for his department's three mobile command units. Story on page 4.

TRANSPORT TOPICS

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