

## **“Murder by Duel,” Humiliation, Challenge, and Homicide, 2009: A Historian’s Dilemma of Judgment**

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Historians are sometimes called to the witness box in civil trials. Questions about racial discrimination, voting, Indian treaties, tobacco disputes, and historic preservation are among the common subjects.<sup>1</sup> Seldom, if ever, does a member of our profession serve as an expert on some historically pertinent issue in a criminal trial, such as the case of *State v. Simpson* in January 2009. A distinguished defense attorney, Lacy Wright, Jr., was to open this new vista into American crime and mayhem to a historian, who was, for the first time, called upon to serve as a trial witness. Unless some reader knows of other examples, I can confidently say that I may be the only historian, serving in the name of that profession, ever to be placed in a murder case that involved the ancient practice of the duel.

Serving as a witness leads the historian to unexpected and perhaps troubling discoveries. The scholar enters a realm where understanding the language is daunting and the procedures unfamiliar. In this case, there is also the distance between the cloistered world of letters and the culture of an Appalachian region, a stretch not to be measured in miles alone. Welch, the seat of McDowell County, was once a thriving coal-mining center. The town sits in a steep ravine. Wood-frame houses perch precariously on either side. It is a rough, hard-scrabble part of the country, far from the life that many of us in the academic line would ever know. When my wife Anne and I were about to check out of the comfortable Count Giuli Motel, Jack, the manager, apprised the pair of us about local history. The Hatfields and McCoys, he pointed out, had battled each other in the 1880s across the nearby Kentucky and West Virginia border. During the murderous 1920 coal strike, Jack went on, Constable Sid Hatfield, an heir to that feuding tradition, had been killed. The assassins were Baldwin-Felts detectives, working for the coal-mine operators. Blaming Hatfield for a bloody riot during which two agents, Matewan’s mayor, and three others were mortally wounded, they were bent on revenge. In a hail of bullets, Hatfield died on the steps of the imposing hillside courthouse, built in 1894 in the Romanesque style. Jack told the story as if it had happened the day before. The atrocity took place just across the street from a second courthouse where the *State v. Simpson* trial was situated. A 1987 film, Matewan, included David Strathairn as Sid Hatfield.

In its prime, according to attorney Wright, McDowell County had had a population of 100,000. Welch boasted of 25,000 inhabitants. The city’s current size is five times smaller, he lamented. The coal seams have gradually played out. Wright disclosed that two courthouses had become necessary to handle the increased number of trials. Assault and battery, wife abuse, child abuse, murder, suicides, drunk driving, drug crimes and overdoses were sad consequences of high unemployment and broken families in once prospering McDowell County. Yet, its people had a cheerful demeanor, and the stranger would never suspect a darker side to life in

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<sup>1</sup> I thank Lacy Wright, Jr., For the invitation to participate and for the extensive trial materials sent.

Welch.

Learning about local history was quite revealing. But something else occurred. I had begun with a narrow focus on my duties as a trial witness. Gradually, however, the horizon grew broader. The individuals whom we met assumed greater interest than even the oddity of the indictment and how it should be treated. Yet, by representing just one side of a trial, I could only know and converse with the individuals associated with that position. On the other hand, the unencumbered historian can draw upon a wider frame of reference if the sources permit.

In late April 2008 an email from Lacy Wright, Jr.'s law office in Welch asked me to assist the defense of his client, Stephen Bryant Simpson. After I had enthusiastically agreed, Karen Roberts, Wright's efficient assistant, sent me a large packet of court documents. They included the arresting officer's report, the witnesses' statements, and photographs of the crime scene. The defense counsel wished to demonstrate that this was in no sense a duel at all.

The circumstances were these. Standing near a gravel road in Gilliam Bottom, not far from Welch, at about 4:30 in the afternoon on 20 April 2008, Steve Simpson, age 49, shouted in fury at a passing ATV. Then doing part-time construction work when not unemployed, Simpson is hefty enough to be known as "Big Steve." Dana Martin, 41, of Northfork, West Virginia, was racing noisily back and forth on a mission to help Karen George, a friend and neighbor, prepare a move from her house in Gilliam Bottom to New Jersey. He was in the trucking business but at the moment was trying to locate a pickup for use in moving the furniture. He was speeding at about 50 miles an hour in a 15 mile speed zone, Simpson claimed. Along the roadside, a witness's grandson Tommy and other children were playing. Moreover, the trucker was also spraying Simpson's father's Cadillac with showers of paint-scarring gravel. It was the elder Simpson's first Cadillac, his son later informed the court. Warning him to obey the street signs announcing children at play, Simpson got in his truck and immobilized Martin's four wheeler against a chain fence on one side and his pickup on the other. Martin leapt angrily from the ATV. Why he felt infuriated will emerge later.

According to one witness, Simpson, who has a game leg, tried to hit him with his crutch. Quickly Martin snatched it away and struck Simpson on the side of the nose, neck, and back with his Northfork volunteer fire department cell phone. Some observers said he had taken it out to call for police help. Others claimed that Martin started the fight, not Simpson. In any event, Martin pinned him against the fence. Aware of the fight which she could hear from her porch, Rema Aguire King dialed 911. The police, however, arrived after the fatality. The loud quarrel drew other onlookers to the unfolding drama. Karen George, Martin's friend, rushed up and managed to get Martin and his vehicle back on the road. Martin, though, announced that he was going home to Northfork, about two miles distant. He shouted that he would be back soon. And when he did, he vowed menacingly, "I ain't gonna be empty-handed." A state trooper, presumably reporting what had been told him, and another witness swore that those were the exact words he yelled.

Informed of Martin's murderous intentions, Simpson hobbled up the road about a tenth of a mile to his mobile home and grabbed his Rossi revolver with .357 Magnum bullets in the chamber. He then went back to the scene and got into his pickup. As promised, Martin returned, too. He was armed with a Sig Arms Mauser semi-automatic .45 caliber weapon. Both men held up their guns to show that they were ready. Almost immediately Martin fired

into Simpson's pickup, then loaded with a stack of planks. He blew out the windshield and back window. Bullets caromed around the inside of the cab of the parked truck. Simpson pushed Robert Green, his wood-cutting partner, down in the front seat and then both made quick exits, unharmed, with Martin closing in. Standing behind his truck, Simpson then got off five or six shots at the approaching shooter-- none effective. Then he stepped forward to get a clear view and fired his Rossi twice more. The first shot struck Martin in the upper left chest. The impact must have spun him around. The second entered Martin's lower back. He fell across the hood of Simpson's pickup and slid to the ground. Despite the efforts with CPR, administered by some witnesses, he was dead before an ambulance drove him to the hospital.

Ordinarily, in such cases of "mutual combat" or "affray" to adopt legal terms, the survivor is subject to indictment for second degree murder or, given mitigating circumstances, the lesser charge of manslaughter. At least that is what the legal service, Westlaw, helped me find in other states where murder by duel was among the charges. Lacy Wright explained that first degree murder scarcely exists under West Virginia law, unless the case concerns multiple deaths. For reasons that the court documents fail to reveal, Sidney Bell, the prosecutor, reached back to an anti-dueling Virginia statute (1849). No other trial under this indictment had ever preceded this case, 158 years after its passage in the Virginia legislature. (West Virginia had adopted the statute after winning statehood from Virginia in 1863.) He admitted that no other trial under this indictment had ever preceded this case, 158 years after its passage in the Virginia legislature. (West Virginia had adopted the statute after winning statehood from Virginia in 1863.) There were, though, he added, cases in New Mexico and Alabama. He had to admit that in both instances "the state Supreme Court of those states reversed convictions saying similar facts didn't constitute a duel at the time the statutes were enacted."<sup>1</sup> The language of the law precluded claims of self-defense, and it set the crime as first degree murder. From that point of view, Prosecutor Bell's selection was a shrewd tactic. It invalidated the most obvious argument available--that of self protection. Yet, the indictment ran the risk of an acquittal or hung jury--what members of the bar call "jury nullification."

Bell, however, had one significant advantage. Simpson was a felon with a damaging record of mayhem. In 1981 with a knife he "maliciously made an assault. . .and did stab, cut and wound with intent" one Mike Jackson. He spent a year in state prison. He ran into trouble for owning guns. Felons are prohibited from possessing firearms. In April 1982, Simpson was unlawfully carrying an unlicensed pistol, "loaded with gun-powder and leaden shot." Moreover, during some quarrel with a bunch of others, he struck one Michael Constantino of Northfork with his fists and the butt of his uncertified pistol. With his fists he also struck Timmy Terry and Brian Ray Meade. Another victim of his wrath on this occasion was David Hines, whom he was charged with kicking repeatedly. In 2001 he was indicted for "domestic battery," according to assistant prosecuting attorney Sarah N. Hall. Then, after another two years, the McDowell County Court ordered him to have no "uninvited or unwelcome" contact with his wife and daughter. Moreover, he was enjoined to "participate in counseling for anger-management."

In 2003 a grand jury found Simpson guilty of "unlawfully and feloniously" possessing a gun. The arresting officers of Pocahontas County, where Simpson then lived in a double trailer, had found sixteen firearms, various boxes of bullets, several banana clips, and two switch-blade

knives on the premises. Mysteriously no action was taken against his felonious ownership at that time. Years before, in 1985, moreover, the West Virginia Department of Corrections had sent Simpson notice that he was discharged from parole and that his civil rights had been restored. In that part of the nation, a gun is almost a second self. Hunting with a firearm would thus be considered a God-given or at least Second Amendment right. Simpson had so assumed and never applied for a license. By 2008 he had collected an arsenal of twenty or more lethal weapons in his home. He was, though, wrong in his interpretation of his restored rights. The penalty for a felon with possession of guns could run as long as five years in prison. He could also be prosecuted under a federal statute in which felons with guns faced as many as ten years in prison. In a very real sense, that indictment was more troublesome to his defense counsel than the question of murder. Nonetheless, the charge of homicide remained the more important issue.

When I asked Judge Rudolph J. Murensky of the Eighth Circuit Court of McDowell County, about the origin of this unusual indictment, he told me that he thought the state trooper who wrote the report about the gunfight was the originator of the idea. That source of inspiration seems most extraordinary. It is true, however, that State Trooper First Class C. K. McKenzie was Dana Martin's brother-in-law. McKenzie was nonetheless assigned to make a thorough investigation of the case. One would hardly expect that a policeman would know about a Virginia statute over a century and a half old and known to few professional historians.

That peculiarity is not the only one involved in this situation. Although little was said about it, everyone involved in the relatively small community was all too aware that this crime had racial overtones of the weightiest kind. Regardless of how the results of the impending trial might turn out, one or the other of the two races in the community would be highly incensed and perhaps in a dangerously riotous mood. Simpson was white; Martin was black. The African American did have good reason for feeling humiliated and angry. He deeply and impulsively reacted to the highly insulting words that Simpson had flung at him as he barreled down the lane. Staining a man's honor in this way was usually the grounds for a duel in the old days. Witness Karen Jane George, whose furniture Martin had been working to move, told the investigating officer that Dana Martin had returned to her house in a state of rage. Simpson had been cussing him out with racial epithets. Martin announced that Simpson had threatened to "Snatch his Nigger Ass off[f] his four wheeler," she testified. Arriving on the scene just as the gun battle was about to begin, Karen George herself heard Simpson repeat such language. He shouted, she declared, "I'm going to kill you, nigger." When making their statements, the white witnesses invariably treated Dana "Boo" Martin most unsympathetically. Although he was over forty years old, they referred to him as that "boy." The local white leaders, whether directly or indirectly involved, were no doubt worried for good reason about the safety and good order of the community when dealing with this volatile state of affairs.

Two continuances, for which Lacy Wright had shrewdly petitioned the court, delayed the trial from June 10 to September 29, 2008, and then to January 12, 2009. By that time tempers had cooled, memories faded, much to the advantage of his client, free on bond. A former state legislator and senator, Wright had run for state governor in the Democratic 2000 primary but lost for lack of sufficient campaign funds. He is now the leading lawyer in Welch and a very effective one.

On the day before the trial, my wife Anne, though not feeling well, and I left our house in

Baltimore. We drove for seven hours on interstates and curving mountain roads as the shadows began to fall. Anne, however, had felt even worse with a virus of some kind as we made our way. After dinner, our solicitous host arranged for us to visit the emergency room of the Welch Community Hospital (which he, as a state legislator, was able to procure for the town). The long-suffering attorney and I waited four hours before her release, but her care had been quite satisfactory. Also I happened to meet Mark Simpson, the defendant's brother. He was a very accommodating orderly who kept us informed of events in the ward. It seemed, however, an inauspicious beginning. Yet Anne's illness was to have a bearing on later events.

Of course, all along Anne and I had been looking forward to the cross-examination that prosecutor Sidney Bell would undertake. Some days before we arrived, Hugh Marbury, a partner at the law firm of DLA Piper and my wife's nephew, had coached me on how to assume the duties of an expert witness. In such instances, the opposing attorney's line of attack is invariably to undermine any expert witness's credibility, Marbury explained. The prosecutor would try to trick a hapless witness like me, into making judgments of a hypothetical character. My sole duty, Marbury stressed, was to stick to the facts of the case and supply only opinions based on those facts established by other witnesses. The expectation that I would strictly follow that line was the reason why I could be present during the whole trial, he continued. Other witnesses would be denied that privilege to prevent the possibility of collusion. My obligation, Marbury said, was to avoid any statements that could be construed as belittling the officers of the court and the various witnesses. Also, he warned, prosecutor Bell most likely would insinuate that my testimony was tainted because I was being paid, perhaps lavishly, to say what the defense counsel wanted jurors to hear. (I was far from being compromised on that account, although the stipend would eventually come from the Office of Public Defenders, as Judge Murensky had ordered.) Such experts as ballistics or medical specialists, Marbury informed me, can make as much as \$500 per hour of preparation, and \$800 per hour in the witness chair. Above all, I was not to express any judgment about the guilt or innocence of the defendant. My courtroom inexperience and relatively small compensation, Marbury asserted, put me in a good posture. In this case, it was clear, he said from his reading of the documents, that the gunfight at Gilliam Bottom did not conform to the meaning of a duel, certainly not as the legislators of 1849 understood the term. That would be my most telling point, he reassured me.

The judge had requested that Lacy Wright have me write a summary of my testimony in a pretrial hearing on 5 January, a week before the trial date. I sent in a three page single-spaced report on the traditions and practices of dueling. As most readers probably know, the source of the trouble leading toward a meeting on the field of honor had customarily been a quarrel in which the challenger grossly and publicly insulted his opponent. To retain his community's approbation, the offended party felt obliged to vindicate his personal, family, or group honor. The ensuing duel was a time-hallowed ritual only allowed between gentlemen of standing. Protocols about choice of weapons, time, and place were religiously followed. Seconds, who were gentlemen of equal moral and social repute as the principals, were enjoined by the *code duello* to seek reconciliation before the engagement of arms. A mutually agreed upon choice of surgeon was to be present to deal with the outcome. There were other stipulations designed to assure fairness in the execution of the encounter. In contrast to a shootout or spontaneous melee, the duel was never meant to be a crime of passion,. Instead, the parties were expected to

agree in a rational and solemn manner on the terms of the combat. My report closed with an effort to conform to the testimonial rules of West Virginia, as Lacy Wright had earlier requested: “Given the distinction between mutual combat or gunfight, as in the case of *State v. Simpson*, and a formal duel, this testifier sees no grounds for a prosecution under the Virginia statute. All my opinions are based on research that has a reasonable degree of historical certainty.”

A few days before the trial was to begin, Simpson had turned down a plea offer that the judge, defense counsel, and prosecutor had worked out. He would have an unspecified time in prison for feloniously having a gun. Defense counsel argued that Simpson had the right to carry weapons since in 1985 the parole board had restored his civil rights. The judge denied that motion and rightly so. The murder by duel charge, which carried a possible death sentence as a case of first degree murder, was, however, to be dropped. Simpson would serve, though, additional time for brandishing his gun as a felon. Shrewdly, as it turned out, Simpson refused the bargain. He reasoned that he might do better with a jury trial. He could plead self-defense, and the judge acknowledged that his attorney could easily support such an argument. In defiance of the indictment, however, the jury might very well accept it. Then, just before the seating of the jury, Prosecutor Bell sweetened the offer. The sentences for the two misdemeanors (the felony charges having been dropped) would be served concurrently instead of consecutively or a lesser time in prison would be possible. “I believe the case would have went to the jury,” Bell told the Bluefield Daily Telegraph. “It was a very, very difficult case. We felt like the plea agreement was appropriate.”

Judge Murensky, who had not participated in the negotiations, later questioned Simpson closely to make sure that he understood the difference between concurrent and consecutive sentences. The defendant claimed he did. When pressed, acknowledged that the judge was not bound by the terms of the plea. All this was done in chambers and not the courtroom.

Meanwhile, Anne and I waited patiently in the crowded courthouse corridor, conversing quietly with witnesses and Simpson kinfolk. To her amazement, Anne heard a Simpson relation speak of Martin as a “boy with a chip on his shoulder,” a reference confirming what the court documents had earlier disclosed. Meantime, in the courtroom negotiations were underway. Finally the bailiff appeared a little after 10:00 am and called on us to follow him. To our surprise there were no spectators, no witnesses, no jurors present in the courtroom, only the judge, defense counsel, defendant, bailiff, court reporter, and prosecutor. Seated high on his bench in the spacious courtroom, the judge welcomed us, though, and declared his hearty agreement with all that had been placed in my pretrial report. He was especially gratified with my closing paragraph that Lacy Wright had asked me to write. We also surmised from his remarks that he had been impressed with our journeying from so far away, despite Anne’s illness. Judge Murensky then invited us into his chambers. He arranged for me to have a copy of *State v. Romero* (New Mexico, 1978), with almost the same lethal circumstances as in the West Virginia case and in which “Murder by Duel” was the indictment. The Appeals Court of New Mexico had rejected the conviction and acquitted the winner of that gunplay. The judge and our small party spent the next hour conversing with this history enthusiast about old duels, affrays, and Civil War history.

Afterwards, in Lacy Wright’s law office down the street, we met Steve Simpson and his family. He was a hefty ex-Marine, it turned out. He had joined before graduating from high

school. He received a leg injury during a training exercise, and he receives a military disability stipend. Turning toward me as we sat, he put his tattooed hand close to his mouth and whispered confidentially, "Lord knows, I ain't no saint, but I ain't never meant to kill nobody." He told the crowd gathered around that his chief worry was his survival during imprisonment. He had to have his pain-killers, oxycodone and morphine SR 30, as I later learned. Prison authorities are dead sure inmates would fake their agony for non-medical purposes to get the addictive prescriptions. Simpson would most likely be suspected of selling some of his painkillers to other prisoners and have the drugs confiscated. "They will kill me in there," no matter how long he had to serve, Simpson complained. It was clear to me that, indeed, he was in constant pain. You could see it in his face. Lacy Wright assured him that this matter would be brought up before the judge's pronouncement of sentence. House confinement might well be the solution, Wright conjectured. I asked Simpson if he thought Martin, given his volatility, had been on drugs. He replied that the autopsy showed no signs of alcohol or drugs. "Clean as a whistle" he mused, shaking his head.

Like his antagonist, Martin had problems with "anger-management." He, too, had a record, the indictment being a misdemeanor: "wanton engagement with a firearm" in 1997. Bond was set at \$5000. Unlike Simpson, Martin, however, had successfully petitioned the McDowell County Court in 2004 so that he could carry a concealed firearm. He supported his case by proving that he had earlier passed a National Rifle Association Protection Course. Then, a month before the events in Gilliam Bottom, the police confiscated Martin's gun. He had threatened his girl friend with it "in a domestic dispute." Unfortunately, the weapon was later returned to him. No charges against him, though, were issued for reasons unknown.

From a historical perspective, the fight at Gilliam Bottom does have some features that do conform to the dueling tradition that died out by 1880, when one of the last famous duels took place in Camden, South Carolina, between attorney William Shannon and planter Colonel Ellerbe B. C. Cash. Like Shannon, Martin's sense of honor had been violated. Simpson had deliberately humiliated him. The African-American sought vindication with little thought of the consequences. After he had hopped in his all-terrain vehicle and sped off, Simpson was not about to rush to the Welch police station and report the fracas at Gilliam Bottom. That move could have been interpreted in the community as dishonorable, cowardly, and shameful no less than it would have scandalized a Southern antebellum community. Instead, he took up his own means of self-protection. His honor, too, was at risk. Could he let a member of the black race get away with impunity?

Martin, however, might have thought a little harder about the formidability of his opponent. With his experience in the art of killing as a Marine, Simpson would be, like all his buddies, well versed from basic training onward in how to use their best friend, the gun at hand. "I am a good marksman," Simpson told a state trooper. Also, he had recently been target practicing to sharpen his skill. To be sure, his first shots had missed their prey, but at that point he was firing without a good angle on his target. Simpson's sentencing was set for 19 March 2009. But when that date arrived, the judge cancelled the hearing and did not set a new time for it. The reason, attorney Wright emailed me, was that the judge needed a full medical report on Simpson before pronouncing sentence. To retrieve military and even local medical records must take time. Needless to say, Steve Simpson was quite "nervous," Wright informed me.

The delay means more days of freedom but no doubt he would like to know his fate.

Two issues out of this case come up. First, what would have been the outcome of a trial under the original indictment? My guess, though improvable, is that Simpson would have had a better than 50% chance of an acquittal. In earlier times and even today, juries often ignore the strictures of the law. They may fully apprehend the evidence presented yet refuse to apply it for one reason or another. Nearly all those indicted under the pre-Civil War statutes against dueling won their freedom or paid a small fine. No Southern “cavalier” ever hanged or suffered life imprisonment. Often in the antebellum South, juries refused to have charges leveled at all. Even in the twenty-first century, the potential jurors in McDowell County, most likely all white, would look favorably on the defendant. Simpson, they could conclude, was simply defending his life and that of his fellow worker, Robert Green of Algoma Bottom. One McDowell County citizen, who claimed not to know Simpson at all, wrote to a newspaper, “If this is not Self-Defense, what is?”

Other factors suggesting a sympathetic jury are worth mentioning. After all, Simpson’s felonious crime had occurred 27 years earlier. He was then only twenty years old when he went to prison for a year. Furthermore, the Simpson family is well respected. Simpson’s father, Harold Simpson is a pillar of the community. He preaches to congregations at the Old Fashioned Full Gospel Church, located in Northfork, West Virginia, and the Trinity Full Gospel Church in Amonate, Virginia. So we later learned after meeting him in Lacy Wright’s law office. Steve’s brother Mark, whom we had met the night before at the hospital, is a genial, conscientious worker, not given to problems with the law. Besides, what man did not own a gun in McDowell County, whatever his past sins might have been? Moreover, with a game leg in a brace that had to be unhooked when he sat down, Simpson, a veteran, would have most likely garnered the sympathy of his peers.

Or, maybe not. Much would depend on how well liked he was in Northfork Hollow and beyond. Moreover, the jury was not entirely composed of neighbors. Most were from other parts of the county. Out of a total of 68 in the jury pool, two were black, one of them from Northfork and likely to be excused as a neighbor. Lacy Wright told me that Simpson personally knew only one of the selected jurors if, that is, the jury had been seated. Nonetheless, words and judgments leading to a consensus, pro or con, spread quickly in such a place, even when the parties involved may not be personally known.

Another concern is the state of the black community throughout this situation. In this case, as a defense counsel’s witness, the historian reaches a limitation. We never met any of the Martins, nor should we have under the circumstances of my hiring. We gained the feeling, though, from what the judge said that my pretrial statement and our very courtroom presence had helped him decide the case the way he did. We could have stayed home because of Anne’s sickness, and the outcome might well have been the same. But we are inclined to believe that our appearance under such circumstances of health and distance made some difference.

While in chambers Judge Murensky was eagerly pulling out from his extensive library shelves volumes of his favorite Civil War readings, we heard wailing outside his chambers. Someone said he thought it was Dana Martin’s family. He had left behind ten children and step children and a fiancée, all dependent on his trucking business. Other anguished family members may also have been outside the judge’s chambers.

After our return to Baltimore, we learned from attorney Wright that two days after the canceled trial, Simpson returned to the courthouse to face two hearings before Judge Murensky. I obtained a transcript of the event from the court reporter. The judge asked Simpson if he understood that “murder by duel” was second degree murder, whereas first degree murder carried the death penalty and only egregious circumstances would elevate the felony to the highest level. He replied that he did. The judge ascertained that he could read and write. Simpson left ninth grade in high school, but he had earned a GED while in military service. The court also learned that Simpson suffers from Post-Traumatic Stress Disorder. Medications? Simpson explained that after his injury he had been paralyzed for over two years and still had pain and limited use of his right leg. The judge then asked about the daily dosages. “I—I take shots three times a day, 50 N and 30 R three times a day [insulin]” along with metformin for type 2 diabetes. He also took “Alprazolam, a nerve medicine,” he said. (It belongs to the benzodiazepine category or Xanax and used for episodic anxieties that arise from moods of moderate affective disorder.) Also for his problems with depression, Simpson added, he was on Paxil.

Taking considerable care, Judge Murensky sought to discover as much as he could about Simpson’s circumstances. He did so because diminished mental acuity would be taken into account in sentencing. The judge wished to know if this array of heavy medications affected Simpson’s “ability to think clearly.” Yes, the defendant confessed; they did interfere, leaving him “groggy at times.” He had once been an alcoholic, Simpson confessed when asked. But, he went on, he had been clean since 1981. With Simpson’s willingness to sign the papers for a plea of guilty to lesser charges, the judge accepted his request for a “waiver of indictment or a warrant.” That means a grand jury would not be called on his case. By pleading guilty, the judge warned him, he would face “the maximum penalty,” which would possibly be “two consecutive one-year sentences.”

Throughout this lengthy post-trial hearing, Judge Murensky was probing in his questioning. He also queried attorney Wright about his client’s mental health and ability to recollect events and assist in his own defense. The judge pointed out to Simpson that he had not accepted Wright’s motion to dismiss the charge of murder by duel. That was despite its “vagueness,” as he put it, given the historical and cultural distance between the 1849 legislation and the present. On the other hand, not “all 23 rules of the code duello would have to be proved.” Judge Murensky was right. Oftentimes the exact protocols were not followed to the letter in the Old South but were still considered duels and not simple gun exchanges. The judge likened the charge to the football rules in the early twentieth century, “when they were thinking of outlawing it.” But the state would have had to establish, he noted, that “it was a duel and not an affray, an affray being what most people would think of as a gunfight or mutual combat.” In his view, that would be a prosecutorial argument unlikely to impress a skeptical jury.

There followed a lengthy questioning of Simpson’s understanding of the charges, procedures, and likely outcomes, if he were to have his case before a grand jury. While my wife and I wondered on the morning of the trial the reason for the delay, it seems that the prosecutor had offered Simpson and his family--father, brother and two daughters--to consider the prosecutor’s plea bargain of two felonies reduced to misdemeanors. They had done so. He pled “guilty” on the count of “involuntary manslaughter” and “guilty” on the charge of

“brandishing a firearm” when a felon.

At this post-trial hearing Dana McDaniel, Dana Martin’s father, who lives in Florida, appeared in Welch to register the family’s objections to the plea bargain. The judge could have refused to have him participate since he had not been a witness to any of the events. Generously, though, he allowed McDaniel to speak at the end of the hearing. The first point McDaniel made was that his son had been shot in the back. The circumstance suggested to him that Martin was preparing to leave the scene. The judge pressed McDaniel to admit, however, that it was not a duel but “a gunfight.” McDaniel reluctantly agreed but argued that, if Simpson had died, his son would have been charged with the same, original indictment and most probably convicted. He accused the prosecution of not calling all the witnesses, implying a racial bias. Some, indeed, were black. Simpson had been “proven to be a racist,” McDaniel declared. But there his testimony ended. His charge that not all the witnesses had been interviewed was simply not true. One of the participating troopers was himself an African American. Yet, as in so many similar instances, witnesses’ accounts differed widely. So, it would be practically impossible to work out the exact timing and circumstances in the rapidly unfolding altercation and gun-fighting. Who was more to blame, Martin, the black, or Simpson, the white? They both had showed their weapons to each other before the firing commenced.

After the hearing closed, the Martins and others in the black community loudly protested in front of the courthouse doors. Yet, no riot developed. No reporter from the Bluefield Daily Telegraph nor a journalist from any more distant newspaper showed up at any point in this affair. No television crew was poised to shoot a good story. When the arrest for murder by duel first had been announced in the previous spring, US News, Associated Press, and MSNBC had covered the unusual case. By this point, public interest had vanished completely.

At first, Welch citizens had been pleased at the unexpected attention in the national media. On the other hand, as Anne Wyatt-Brown reports, a woman complained of unfairness in bitter terms, as we waited in the hall for the trial to begin that Monday morning. The woman from Welch resented the way her town and county had been stereotyped as a veritable Dogpatch. After the trial was aborted, the white crowd dispersed, and the Martin family drifted off. Thereafter, all was undisturbed and unheralded. The once busy streets of Welch with its boarded stores returned to somnolence, except for sporadic spurts of traffic. Sentencing did not occur until 4 August 2009. Judge Murensky ordered Simpson to be imprisoned at the Southwestern Regional Jail at Holden, West Virginia, to serve one year for involuntary manslaughter and another year for brandishing a gun when a felon. The sentences are to be served consecutively.

Defense counsel Lacy Wright appealed the decision on the ground that the original arrangement, which was offered and which Simpson accepted, stipulated that the sentences would be served concurrently. Simpson and his family, he reported, “were totally surprised by the Court’s sentencing.” “Misrepresentations” and “manifest injustice” were the terms Wright employed. In his presentation, Simpson, on Wright’s advice, withdrew his agreement to the plea. He thus was requesting a trial under the original indictment of “murder in dueling.” When, earlier, Judge Murensky was probing Simpson’s understanding about the guilty plea, however, he had asked the defendant, “Now, do you, understand that after I sentence you, if you do not like or approve the sentence that I give you, that is not reason, in [or] of itself, excuse me,

to try to then withdraw your plea?” “Yes, Sir, I do.” But Simpson and Wright were also appealing the judge’s ruling on other grounds. The rationale was that “the defendant is the primary caretaker of his young granddaughter; community sentiment, leniency, and the facts and circumstances surrounding the plea negotiation.” This motion to withdraw the plea and return to the first charge in hope of a reduced sentence provided the judge with the opportunity to defend his two-year prison assignment. Judge Murensky argued that the transcript of the pre-sentencing hearing did not “support the defendant’s allegations that the Court committed itself” to a one-year time in prison. Besides, both families, the victim’s and the offender’s, were, he pointed out, dissatisfied. As a result, Murensky reminded defense counsel he had allowed McDaniel to make his case, a rare deviation from courtroom procedure. Actually, Simpson, the judge maintains, received a “good” sentence and one, he pledged, that will not be altered in any way.

The historian, with no contact possible with the Dana Martin family and their friends, reports no easy final judgment of the case. But the experience of being involved was enlightening. My attitude had changed from expecting a straight-forward presentation of why this was an offense of passion and not a duel to contemplating larger matters. That perspective recognized the complications about race, community solidarity, the clash of personalities, and the unknowable circumstances that may lie behind a sequence of events of this kind, no matter how phrased in legal terms.

A final question arises: how well, one ponders, was justice really served? From the legal perspective, the result is satisfactory. I came away with respect for the way the case was handled by all those involved, that is, the judge, the prosecutor, and the defense counsel. West Virginia jurisprudence may be currently and justly questioned at the state Supreme Court over matters of political favors for campaign gifts. But the Court in McDowell County is above reproach. Perhaps, as Lacy Wright maintains, Judge Murensky had more to do with the plea offer of a concurrent sentence than appears in the actual transcript, certified by the County Clerk. Fighting hard for his client, as an attorney should, Wright may have expected more mercy than *lex dura*, hard law, than the Court, after considering all the factors, would countenance.

Indeed, one could speculate that Martin’s father, Dana McDaniel, had impressed the judge that a concurrent sentence was inadequate. Certainly others in the black community concurred with McDaniel’s protest. Even so, a two-year residence in prison might scarcely satisfy the black community. But then, Simpson’s precarious health and the very likely prospect of a serious decline during two years of imprisonment are circumstances that cannot be dismissed. Simpson will soon enter the gates at Holden, some sixty miles from Northfork Hollow. How he will fare there would be hard to predict.

Disappointing as it was not to have the experience of testifying, I think Simpson would have won his case against murder by duel. A courtroom trial could well have led to jury nullification. Simpson’s white skin, military service, game leg, and connections in the community almost guarantee it. That was a consequence to be avoided if only because of black resentment of white justice. But in that same trial, “brandishing a gun” when a felon was a matter the jury could not set aside. The result might even have meant a lengthier time of incarceration, possibly as much as ten years if the federal law was applied. From the historian’s view, there seems no clear answer about what the best, the fairest outcome should

have been, especially in light of its racial aspect.

#### Endnotes

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1. Charles Owens, "Simpson Enters Guilty Plea to Lesser Charges in Rare Murder by Dueling Case," Bluefield Daily Telegraph 14 January 2009.