Recollections on the VA Nurses Case and U.S. Attorney James K. Robinson

By Rich Rossman

On July 13, 1977, Filipino Narcisco and Leonora Perez were convicted by a federal jury of poisoning several patients at the Veterans Administration Hospital in Ann Arbor. The original indictment involved fourteen victims and fifteen respiratory arrests occurring on nine different days in 1975. The trial lasted nearly three months. The jury deliberated for thirteen days. The trial caught the attention of the national media. Judge Avern Cohn said, "This probably was as significant and newsworthy a criminal trial as was held in the United States District Court in the 20th century."

James K. Robinson was appointed by President Jimmy Carter to serve as the United States Attorney for the Eastern District of Michigan in 1977. He was sworn in shortly after the verdicts were returned. Jim was only thirty-three at the time, one of the youngest federal prosecutors in the country. He had little criminal law experience, having only practiced law for nine years and mainly at the Honigman firm. I was Jim's first hire and was sworn in as his chief assistant in November. Although I had been in the Oakland County Prosecutor's Office early in my career, I had been exclusively a federal criminal defense lawyer for the five years leading up to my joining the U.S. Attorney's Office. For three of these years, I was Chief Deputy Federal Defender in Detroit. Shortly after I joined the office, Lenny Gilman became the chief of the Criminal Division in our office, after extensive service in the Oakland County Prosecutor's Office.

As we were settling into our new duties, Judge Phillip Pratt dropped a bombshell. On December 19, 1977, Judge Pratt, who had presided over the VA nurses case, filed a 58-page opinion granting the defendants a new trial. Jim had approximately thirty days to decide whether to proceed with a new trial. Lenny and I joined Jim in diving into this complex case. We met with the Assistant United States Attorneys who had tried the case. We reviewed the thousands of pages of relevant trial transcript. We met with defense counsel. We met with the FBI and with officials at the VA Hospital.

A new trial would involve significantly different circumstances than the original trial. The evidence offered by the Government during the first trial related to eleven victims suffering eleven respiratory arrests on seven separate days. But Judge Pratt had granted a motion to dismiss on some charges and granted partial judgment of acquittal as to others. A new trial would be limited to evidence involving six victims suffering six respiratory arrests on three days.

Although mistakes had been made in the original trial – indeed, the granting of a new trial was the result due in part to government misconduct – neither Judge Pratt nor Jim Robinson questioned the good faith of the original trial team and the investigating agents. The decision whether to proceed with a new trial was focused on the likelihood of convictions. After careful review, Jim decided not to seek a new trial. On February 1, 1978, he filed a motion to dismiss rather than proceed with a new trial. His twenty page memorandum in support of the motion is extraordinary. His reasoning is laid out fully in an unprecedented manner. He wrote in conclusion:

> This memorandum was prompted by the view that the individuals involved, the Court and the public should know the reasons behind such an important prosecutorial decision. Only then may the prosecutorial function be understood and the wisdom of the decision be evaluated. The office of the United States Attorney is a high public trust; accordingly, his decision in important cases such as this should be subject to judicial and public scrutiny.

Jim's memorandum has become a model on prosecutorial discretion. It was the basis of a class he later taught at Georgetown Law School.

It is hard to believe that forty years have elapsed since these events. They occurred at the beginning of my relationship with Jim Robinson. I served as his chief assistant for three years and then succeeded him for a year as the court appointed U.S. Attorney. We remained close friends and colleagues. In 1998, I joined him in Washington at Main Justice as his chief of staff when he served as the Assistant Attorney General for the Criminal Division. It is hard to believe he has been gone eight years. ■

Review of *Paralyzing Summer*

By Daniel M. Share

At the beginning of July there was something unusual and vaguely disturbing in the hospital. By the end of the month, it still wasn't clear exactly what it was, but it was bad. Two weeks later, it was a horror movie come-to-life.

Paralyzing Summer, by Zibby Oneal and S. Martin Lindenauer (University of Michigan Press, 2016), brings us back to the dramatic events of 1975 at the Veterans Administration Hospital in Ann Arbor (the "VA Hospital"), and the resulting legal proceedings. Those who like true crime and the law will find much to enjoy and ponder in this fast-paced book. But be forewarned – you won't find this mystery tied up in a neat bow at the end.

The Investigation

Over six weeks, 36 patients resting comfortably in their beds suffered 51 respiratory arrests at the VA Hospital – more than four times the usual number – leading to ten deaths. The authors build dramatic tension as they describe the atmosphere in the hospital: the staff's struggle to keep up with the increasing number of respiratory arrests, and the effort to figure out how to stop this epidemic. Eventually, an anesthesiologist recognized symptoms of a class of powerful muscle relaxants that, when delivered intravenously, paralyze a patient. This drug, Pavulon, was used in operating rooms in combination with artificially-assisted breathing – never by the nursing staff on the patient floors. It was unthinkable that anybody would administer the drug to patients in their rooms, so the cause went unrecognized.

During a terrifying cluster of respiratory arrests in mid-August, the medical staff administered an antidote to Pavulon, which quickly relieved the victims of their distress. When the medical mystery was solved, the respiratory arrests abruptly stopped.

That gripping story is just the beginning of *Paralyzing Summer.* The VA Hospital shut down briefly to non-emergency cases. The medical staff and the FBI launched investigations. Two prime suspects were identified. Ten months after the last respiratory arrest, two registered nurses working at the VA Hospital, both Filipino nationals, were indicted for conspiracy, poisoning and murder.

The charges could hardly have been more startling: two nurses were alleged to have intentionally poisoned dozens of their patients. Already the subject of significant local media interest because of the sensational nature of the crimes, the allegations leveled against two foreign-born nurses quickly attracted national and international attention. The media remained focused on the case to its conclusion; so much so that for almost two weeks, Walter Cronkite opened his national newscast by stating the number of days the jury had been deliberating.

Because the crimes were alleged to have occurred at the VA Hospital, which is federal property, the case was tried in the U.S. District Court for the Eastern District of Michigan. Judge Phillip Pratt was assigned the case. Jury selection started March 1, 1977. The jury returned its verdict July 13, 1977. The authors rely on the trial transcript, interviews with participants, contemporary newspaper accounts, an article one of the defense lawyers wrote in a professional journal, and a diary that one of the authors, Dr. Lindenauer, who was Chief of Staff at the VA Hospital during the relevant time, kept during the trial.

Dr. Lindenauer participated in part of the pre-indictment investigation and in the prosecution's trial team. His diary offers interesting insights into the strategic choices that the prosecution team had to make. The quoted excerpts expose some of the tensions that occasionally flared among the prosecution team members. The book would have benefitted from similar insight into the decision-making and attendant tensions within the defense team. Surely in a case so long and complicated there were choices made and strategic disagreements on both sides. We do not know whether defense counsel were not asked for their cooperation or were asked and declined to give interviews.

Paralyzing Summer tells a complicated story well. The authors keep it factual. They tell the story from a neutral perspective rather than from the point of view of any single participant. The book is not a polemic for or against the prosecution or the defense. The authors concentrate on the narrative. They move the story forward through time with fast-paced, short chapters. This is not a definitive re-creation of the medical incidents, the investigation, the trial and the post-trial proceedings. A 211 page book cannot exhaustively record the full scope of the events the book covers. The trial transcript alone exceeds 5,600 pages. All but a few specialists will appreciate the choice the authors made to sacrifice some detail in the service of narrative flow. The authors chose to change the names of the victims to protect their privacy. This is confusing for those who want to read both the book and the reported decisions. Given that many of the victims' names are easily available in published sources, and that more than 40 years have elapsed since the events in question, obscuring identities seems an unnecessary convention.

Paralyzing Summer doesn't hold itself out as a scholarly work. The book doesn't explore in great depth the legal or jurisprudential issues the case raises. But it is eminently readable for both lawyers and a lay audience. It includes all the elements necessary for those who want to pursue the case more deeply.

The VA Nurses case had a host of fascinating features. Among them:

- Vulnerable veterans poisoned in their hospital beds.
- Two foreign nurses accused of committing these sensational crimes.
- A monumental investigation under the glare of intense public pressure to find the culprits.
- Approximately 750 people interviewed by the FBI.
- Pre-indictment depositions to preserve the testimony of witnesses in poor health.
- A witness granted immunity.
- Hypnosis used to recover witness memory.
- Exhumations of bodies.
- New and intricate scientific tests developed to identify chemicals in embalmed tissue.
- Massive pre-trial publicity.
- Numerous discovery disputes between the prosecution and defense.
- The prosecution's arguably inappropriate pre-trial contact with potential witnesses.
- Concealed redactions of some discovery material.
- Out-of-court statements by the prosecutors concerning their personal belief as to the guilt of the defendants, contrary to the ABA guidelines.
- Post-verdict contact between counsel and the jury while post-trial motions were to be filed.

After 13 days and over 94 hours of deliberation (still thought to be the longest jury deliberation in the Eastern District of Michigan), the jury returned "guilty" verdicts against both defendants on the conspiracy charge. The jury convicted each defendant of three poisoning counts, while acquitting one of the defendants of one poisoning and one murder. Subsequently, in response to defendants' post-verdict motions, Judge Pratt granted a new trial. The government decided not to pursue a second trial and dismissed the charges.

The Trial

From the outset, Judge Pratt was determined to provide a fair trial for both the government and the defendants. The government initially indicated it could call over 200 witnesses, including many experts. The Judge was concerned that the jury would have a hard time fulfilling their duty in a long and complicated trial featuring difficult factual and scientific evidence. He wanted to be certain that the trial was as efficient as possible. He especially wanted to avoid repeated adjournments resulting from delivery of Jencks material only after each prosecution witness testified on direct examination.[1]

Not surprisingly, the case was hotly contested. Both the prosecution and defense believed in the righteousness of their cause. Both sides were zealous advocates.

There were problems early on, not all of which the authors report. The prosecution often failed to produce discovery materials by dates that it had agreed to. The prosecutors admitted that they had not personally reviewed much of the FBI investigative file to determine whether any exculpatory material, required to be disclosed by *United States vs. Brady, 373 U.S. 83 (1963)*, existed. A few FBI interview forms provided to the defendants contained significant, unmarked deletions, some containing exculpatory information. The government sent letters to prosecution witnesses implying that they should not speak to defense counsel without first informing the government. In response to a pre-trial court order, the government disclosed that it would adduce evidence of eight overt acts supporting its conspiracy charge. One week before trial, the government sought to increase the number of overt acts it would prove to 24. When Judge Pratt denied the request to add overt acts, the government obtained a superseding indictment which included these additional acts, effectively seeking to evade the Judge's Order. Three days before trial, and even during trial, the government sought to add additional witnesses, ultimately totaling 36, to their witness list.

Judge Pratt sought an appropriate balance between the rights of the defendants to prepare an adequate defense, and the right of the government to prove its case. While the authors tell us that the government felt the Judge's sympathies were with the defense, defense counsel had their complaints as well. Contrary to defense counsel's requests, Judge Pratt didn't dismiss the case when he found a number of instances of pre-trial prosecutorial misconduct. He attempted to mitigate any prejudice to the defendants. He adjourned the trial several times to allow for appropriate discovery production. He required the government to provide all the un-reviewed potentially exculpatory material to defense counsel so they could review it. He required the prosecutors to correct the redactions. He required the government to send a corrective letter to witnesses. He restricted the number of overt acts the government could prove in support of the conspiracy count.

Paralyzing Summer tells the story of the trial and its conclusion well. The authors follow the arc of the trial. They summarize the opening statements. They move on to the expert testimony, which was the first evidence introduced. Then they describe the testimony about the respiratory arrests charged in the indictment. The trial builds briskly toward the dramatic verdict.

In one pivotal sequence, the authors recount the testimony of defendant Lenora Perez. She testified assertively on direct examination. She emphatically denied having harmed any patient. Cross examination went into the next trial day. In a dramatic moment, Richard Delonis, one of the prosecutors, asked Ms. Perez if a description of a nurse given by one of the doctors of a person at a victim's bedside at the time of an arrest fit Ms. Narciso, her co-defendant. Ms. Perez twice denied that the description fit Ms. Narciso, although it was clear to everyone in the courtroom that, while general, it could well have described Ms. Narciso. Larry Burgess, her own counsel, on re-direct, asked Ms. Perez whether her answer was accurate. She acknowledged it wasn't "because she [Ms. Narciso] is my friend". Mr. Delonis quickly returned to the subject on re-cross. In response to his pointed questions, Ms. Perez said she had denied the applicability of the description because her co-defendant "is my friend" who is a "good person"; she denied she was protecting her friend; went on to say it wasn't hard for her to testify the description fit Ms. Narciso, but ultimately admitted she had done so only in answer to her own lawyer's question, not to the prosecution's. The authors conclude the cross-examination "established that Perez had given false testimony to the jury. Despite her denial, it appeared obvious that the testimony was intended to protect Filipina Narciso. If it resulted in nothing more, this testimony would surely add weight to the prosecution's argument for a conspiracy." Very likely the exchange influenced the verdicts on the other counts as well.

The trial was long, intricate and full of demanding, novel issues. The case lasted almost three months. Over 100 witnesses, of whom 17 were experts, testified. The jury heard an entirely circumstantial case. Nobody testified they ever saw the defendants with Pavulon. Nobody testified they saw the defendants inject anything into a victim's IV line. There was no showing that the defendants were particularly familiar with Pavulon. There was testimony that, taken in the light most favorable to the government, showed one or the other of the defendants was present near each victim shortly before the arrest at a time when the Pavulon must have been injected and that, in some cases, nobody else was observed in the vicinity. There was no effective proof of – and little testimony about – motive.

The jury returned verdicts of guilty against both defendants, but also acquitted one of the defendants of two counts of murder and one count of poisoning.

The Post-Trial Proceedings

The defense filed a motion for a judgment of acquittal or, in the alternative, for a new trial. Judge Pratt issued a 58-page Opinion denying the Motion for Judgment of Acquittal and granting the Motion for a New Trial. For those wishing a deeper understanding of some of the legal issues in the case, seven of Judge Pratt's Opinions, including the Opinion ordering a new trial, are available at 446 F. Supp. 252 (ED Mich. 1997). The reported Opinions make interesting reading – and complement *Paralyzing Summer* nicely – for those who want a fuller understanding of some of the complex legal problems in the case.

Judge Pratt reviewed both the trial proceedings and the pre-trial proceedings, and concluded that there was prosecutorial misconduct. Mindful of the Supreme Court's holding in *Bruton vs. United States, 391 U.S. 123 (1968)*, that a defendant is entitled to a fair trial, not a perfect one, Judge Pratt struggled over what to do. On the one hand, he respected the hard work the jury put in to hear and decide such a different, complex case. On the other, he held the prosecution to a high standard – perhaps more so as a former prosecutor himself. Judge Pratt ultimately concluded that no single instance of prosecutorial misconduct, standing alone, required reversal. He then went on to consider the misconduct in the context of the entire case "free from the unavoidable tendency to preserve a trial in which the Court and the parties invested considerable time", and decided that:

A. there was evidence which, if believed in the light most favorable to the government, could sustain a conviction; therefore he would not substitute his judgment on the facts for that of the jury; but

B. given the relative weakness of the government's case, the cumulative effect of the prosecutors' errors likely influenced the jury's verdict.

The remedy was a new trial.

Judge Pratt held that during the trial, prosecutorial error occurred, most dramatically in the cross-examination of one of the defendants, and in the closing argument. During cross-examination of Ms. Perez, Mr. Delonis properly confronted her with inconsistencies between her statements and those of another witness. He asked her: who was lying, her or the other witness? Judge Pratt sustained a defense objection to this question. The prosecutor went on during cross-examination to ask that same question six more times, despite the Judge's repeatedly sustaining objections. Judge Pratt concluded this improperly sought to:

> "plant in the minds of the jurors the suggestion that either the defendant or the other witness was a perjurer. By using this method, the Prosecutor implied to the jury the differences in the testimony of the defendant and any other witness could only be the result of lying, and not because of mis-recollection, failure of recollection or other innocent reason. It also attempted to place the defendant in the untenable position of calling another witness a liar, or perjurer, or floundering on an analysis no person, or machine, has yet successfully accomplished. It is, of course, the function of the jury to examine conflicting facts brought out in the trial process and determine where the truth lies, and this may be done, and usually is, without a finding of perjury."

During closing argument, Richard Yanko, the other trial prosecutor, made comments that sought to shift the burden of proof to the defendants, and to speculate that the multiplicity of charges was evidence of guilt, despite the agreement of counsel and the instruction of the Court at the beginning of trial that the evidence on each count was to be considered separately.

Robinson's Dilemma

James K. Robinson became the U.S. Attorney during the trial. He had to decide whether to retry the defendants. He reviewed large portions of the trial transcript, met with the Assistant U.S. Attorneys who tried the case, counsel for defendants, the FBI, officials at the VA Hospital, including one of the authors of *Paralyzing Summer* and consulted with senior leadership in the U.S. Attorney's office in Detroit and with officials of the Criminal Division of the U.S. Department of Justice in Washington, DC. He decided to dismiss the indictment. He filed a 20-page Memorandum explaining his decision. After reviewing the evidence to be presented at a new trial, he concluded that "a jury after a new trial would be more likely to acquit than to convict". This, he noted, was not dispositive because serious crimes may require prosecution when the government believes the defendants to be guilty of the crime charged, even if conviction is doubtful.

> "The crimes charged were, indeed, heinous. The victims were helpless and the attacks upon them were performed secretly, under circumstances in which the perpetrator or perpetrators would not be suspected by the trusting victims. The consequences to the victims were extremely grave. The symptoms of conscious respiratory arrests and the emergency treatment procedures were undoubtedly terrifying and painful. The injection of Pavulon seriously endangered the lives of the victims, and the deaths of several victims were directly caused by the injections."

Ironically, one of the principal reasons the U.S. Attorney concluded conviction was less likely than acquittal was the reduced number of charges that remained for adjudication in a new trial. He said: "the greater the number of [respiratory] arrests with which the defendants can be connected by the evidence, the more likely a jury would be to infer that such connections are not merely coincidental." This is the same inference that the prosecution sought to draw in closing argument that Judge Pratt found to improperly invite the jury to combine all charges instead of considering the evidence of each charge separately.

U.S. Attorney Robinson next considered the impact of a re-trial on the public perception of the administration of justice. He wanted his decision to foster, not undermine, public confidence in the fairness and integrity of the federal criminal justice system.

> "Many members of the public who had followed the trial expressed genuine surprise, if not shock, at the guilty verdicts. Undoubtedly, the absence of proof concerning motive, the circumstantial nature of the evidence, and the unlikelihood that two nurses unknown to each other until months before the events in question, could have devised such a bizarre scheme – all contributed to this wide-spread public skepticism. The usual concern in criminal cases is that members of the public may be too quick to infer guilt (overlooking the presumption of innocence) simply from the fact of indictment. Here, the pervasive public doubt and concern as to the defendants' guilt has survived even after the guilty verdicts of a carefully selected jury which had the benefit of hearing nearly three months of evidence, including the testimony of the defendants."

No wonder the U.S. Attorney said "it would be difficult to contrive a more troublesome and factually-complex legal and moral dilemma for a prosecutor than the one presented in this case." At the end of the day, in a "difficult, close" decision, he decided that promoting the ends of justice, instilling respect for the law and advancing the cause of ordered liberty was best served by dismissing the indictment rather than pursuing a new trial.

The Ultimate Legal Problem

For lawyers, the VA Nurses case brings into clear focus the problems of defining reasonable doubt and harmless error. The definition of "reasonable doubt" in the standard Sixth Circuit jury instruction isn't much help:

"Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

"Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives."

Sixth Circuit Pattern Criminal Jury Instructions 1.03(4) and (5). "[A]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer...". *Holland vs. United States, 348 U.S. 121, 140 (1954).* Harmless error is not any easier to define.

Is there any way a trial judge, or a jury, can identify reasonable doubt and harmless error objectively? Assume you are a juror. You hear three months of testimony that is circumstantial, contradictory, highly-technical and, importantly to you, long. There was no proof of a motive for the crimes. At the conclusion of the government's case, you are certain crimes were committed and think it is more likely than not that the defendant committed the crimes. But you have some serious doubts. Then the defendant testifies and denies committing the crimes. The testimony doesn't change your view of any specific fact. You don't think the defendant's testimony altered the circumstantial nature of the case, but, perhaps because of an exchange like the one described above between Ms. Perez and Mr. Delonis, you just don't "trust" her testimony. Is that enough to move the decisional needle from "more likely than not" to "beyond a reasonable doubt"?

Now you're the judge. The Government has proved that somebody put fatal doses of muscle relaxant into patients' intravenous tubing, causing multiple respiratory arrests and several deaths. The Government further proved conclusively that these injections had to have been administered between one and a half to three minutes prior to the onset of the respiratory arrests. The Government also proved that one or both of the defendants were working at the VA Hospital at the time of each arrest, and were seen in the vicinity, either shortly before or shortly after each of the respiratory arrests. The chain of Government's proofs was:

- poisoning;
- by injection directly into the IV tubing;
- within one and a half to three minutes before the onset of the arrests;
- the defendants had access; and
- the defendants' access was exclusive.

Without hesitation, you can tick off all the boxes but one. The evidence showed, beyond a reasonable doubt, that somebody put Pavulon into the patients' IV lines. The defendants had access at a relevant time, but there is doubt about exclusive access. In fact, the testimony was that security at the VA Hospital was lax or nonexistent. Anybody could walk in and go to the areas where the crimes occurred.

There were numerous instances of prosecutorial misconduct. On each of those occasions, you have done your best to mitigate the impact on the jury. Are the prosecution's errors harmless? Do they require a new trial? Do they require acquittal?

These are questions to which no algorithm offered a correct answer in 1977, and none may exist today or ever.

Do subsequent events bring the truth into any more focus? According to *Paralyzing Summer*, the defendants have remained active in the nursing profession without similar incident or scandal since the government dismissed the indictment nearly 40 years ago. Yet we know that crimes like that charged in *U.S. v Narciso* have occurred and a conviction has been obtained in a similar case. In 1995, Kristin Gilbert, a Nurse at the VA Hospital in Northampton, Massachusetts was suspected of causing 80 deaths arising from 300 suspicious cardiac arrests caused by the unauthorized injection of epinephrine. She was convicted of four murders and sentenced to life in prison after 12 days of jury deliberations. Kristin Gilbert was eight years old in 1975 and, so far as we know, nowhere near the Ann Arbor Veterans Administration Hospital.

One of *Paralyzing Summer's* strengths is that it expressly acknowledges the unsatisfactory resolution of the case. Those who support the two defendants believe they were insufficiently vindicated by the way the case ended. The government's decision not to re-try the case was not a declaration of innocence. Others, who believe the defendants committed the crimes they were convicted of, are disturbed that two people a jury found to have poisoned patients should be set free, suffering no consequences. Yet as much as Dr. Lindenauer's journal shows he was hoping and working for a conviction from 1975-1977, Paralyzing Summer acknowledges that while Judge Pratt's decision to grant a new trial is "repeatedly questioned", the authors find it "difficult to see how he could have decided differently". They conclude "Judge Pratt acted as he was bound to do when he deemed the women's rights had been compromised. He was obliged to see that justice was served as prescribed by the U.S. judicial system, however unsatisfactory this was to his critics."

Paralyzing Summer reminds us that somebody got away with murder. ■

Daniel M. Share is a Member of Barris Sott Denn and Driker PLLC. He was a Law Clerk to the Honorable Philip Pratt during the VA Nurses case.

End Note

1. Under the *Jencks Act, 18 USC §3500*, the defense cannot compel the prosecution to disclose witness statements until after their direct testimony. Congress passed the Jencks Act because of concern about witness intimidation.

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