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PERSONAL REFLECTIONS ON THE OPIOID EPIDEMIC AND LEGAL RESPONSES

*Hon. Catherine Currin Hammond (Ret.)**

*Shannon Taylor***

* The Honorable Catherine C. Hammond is a retired judge from Henrico County. During her tenure on the bench she helped start and administer the county's first drug court in 2001 as an alternative to incarceration for those suffering from substance addiction.

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REFLECTIONS FROM THE BENCH

Hon. Catherine Currin Hammond (Ret.)

This piece was written by Judge Hammond for the Richmond Public Interest Law Review to share her experiences with defendants affected by drug addiction. These three stories shared by Judge Hammond are not specific to any single person but exemplify fact patterns and situations that were all too common during her tenure on the bench.

Court always starts at nine o'clock. My day starts before that in chambers. I drink coffee and review the files on my docket. Today I have eighteen felony cases. Two are for sentencing, three are for probation violations, eleven are for guilty pleas and two are bench trials.

About five minutes before nine I put on my black robe and look out my window. This is the time when I give myself a quick reminder every morning. Each person coming before me is an individual. No two cases are the same. This is an important day for each person; none of this is routine to them. I need to remember this every morning, especially when it comes to drugs, because the evidence is so similar that it can seem like a recording.

When I enter the courtroom the Deputy Sheriff precedes me and commands, "All Rise," in a pretty hearty voice. I walk up three stairs to the bench and take my seat. Everyone sits down. There is a flag on either side of me, United States and Virginia. These are symbols of the institution: the robe, the raised bench, the flags. Also institutional are the nine o'clock start time, the procedure and, not least, the formal courtesies.

The first case is one that's there every day - in all five of our courtrooms - in multiples.

Possession of narcotics, Section 18.2-250 of the Code of Virginia. While the Clerk stands and reads the indictment to the defendant, I take a look. He seems to be about 25 or 26, nice looking, white shirt tucked in. He looks alert and ready, but he also looks nervous. With him at the table is his attorney, a man not much older than the defendant. At the other table is the prosecutor. Behind her, in the first row, are two police officers in uniform, summoned to appear as witnesses. Behind them, I spot the grandmother.

The grandmother is a familiar presence. I don't know her. But she is often in the courtroom for her grandson or granddaughter. She sits silently and watches. Maybe she will go over to the jail after court to put money in his canteen account. Maybe she took off work to be here. But she is often

present, in this windowless room that is usually empty of anyone other than the people ordered to appear.

The prosecutor calls the police officer to testify and he describes the arrest.

We received a call for emergency medical services at the McDonald's on Broad Street. I responded to the call and was directed to the men's restroom. There I found a white male on the floor who appeared unconscious. There was a syringe on the floor beside him. He was transported to Henrico Doctors on Parham. The syringe was packaged and sent to the Division of Forensic Sciences.

The officer shows little emotion. He has told this story before, plus it is his job to state the facts, not to weigh in.

I look at the defendant again, in the moment when his brush with death is described. He looks down. I feel slightly ill, picturing him on the floor of the McDonald's bathroom. Today he thinks that's behind him. A twenty five year old is strong and his body is resilient.

The prosecutor stands up to offer the lab report as an exhibit. I look at the grandmother. She has no expression. Her dark green coat is buttoned up. Her pocketbook is on her lap in front of her. I imagine she is trusting me. I think about how she's already raised her children and now she's on a second go around.

I find the defendant guilty based on the plea of guilty. The whole thing is over in about ten minutes. His criminal history is minimal: a conviction for possession of marijuana two years ago and trespass last year. He will get probation supervision. And the law requires that he lose his license for six months. He can have a restricted license to go to work and probation. He looks relieved. Both lawyers know, and I know, that he will probably be back here before too long – if he is still alive. I don't lecture. The Clerk calls the next case. The defendant walks out with his grandmother.

Up comes another young man and his lawyer. The prosecutor looks behind her to see if her witness is in the courtroom. This time the charges are for writing bad checks – using someone else's bank account to get money for drugs. Two checks will get you four felony indictments: forging, uttering, forging, uttering. Conviction on all four would carry a maximum of forty years with the Department of Corrections.

This young man also looks ready, but not in a springy, alert way. He slouches. His t-shirt hangs low. He gives his lawyer sideways glances. He may not really understand the process but wants to look like he does. Hard to tell, yet.

The prosecutor advises that the Commonwealth will proceed on only two of the indictments in exchange for a guilty plea on the other two. The defendant is arraigned and the evidence is summarized. This time a grandmother is also here, but it's a different situation. The defendant lives with her, like case number one. Here's the twist: The defendant took his grandmother's checkbook and cashed two checks before she figured it out. She is the Commonwealth's witness. She is the victim.

After the guilty plea, I conduct the necessary allocution. This is how I make sure that the plea and the plea agreement are knowing, intelligent and voluntary. To the question, "How far did you go in school?" the answer is tenth grade. That seems to be the year that most of the male defendants drop out. I have two boys at home and I know that I couldn't physically get them to high school once they were almost six feet tall and weighing in at 160. I ask the other required questions that I know by heart:

"Have you discussed this matter with your attorney?"

"Do you understand you are giving up your right to go to trial?"

"Do you understand you are giving up any defenses you might have?"

This takes some communicating, one of the only moments I will speak directly to the defendant instead of his attorney. If I am not sure he understands the questions, I rephrase and try again. I try to remember to ask open-ended questions.

Everything I say and everything he says is being recorded. If there is an appeal, there will be a written transcript. I try to leave enough of a pause between us that the court reporter can avoid a mess of words when she puts in her earphones to type. I look at the defendant's expression to try to tell whether he is just saying yes or if he means it.

At the end of the allocution I am satisfied that this man does understand the effect of the plea, and that he wants the deal he is getting. Plus, I know this attorney. He is court appointed in our Circuit because we have confidence in him. I am certain that he has explained to the defendant his rights and his waivers, what the evidence would be at trial, and the pros and cons of a jury trial. We each have a job and he did his. At the presentation of the sentencing guidelines, I have to pause. The plea agreement is within the guidelines – they call for probation – no jail time. The defendant will be ordered to repay the money he took. He has no criminal history except a vandalism case in juvenile court.

But, what about this grandmother as victim? Is she safe taking him back to her house? What will he do the next time he needs money for drugs? I

quickly bring myself back to the present. This is not my call. What she does with her family is up to her, not me. It's a free country.

The third case is a charge of violating probation. This defendant is older; she looks about forty, thin, with very long hair. I can see from the probation officer's report that she has been convicted of five separate felonies in the past eleven years. When I say separate, I mean on different dates. If all four were from the same episode I might look at them as slightly less than five. I see grand larceny, possession of narcotics, two compound larcenies (petit larceny third offense), and prescription drug fraud. There is no grandmother in sight. There is no grandmother, mother, husband or friend in court to support her. Most likely, this defendant has used up her capital. Her family accounts, if she had any to start with, have been drained.

The probation officer is in court to testify, but no one calls her as a witness. It would be a waste of time because there is no way to contest the facts set out in the written violation report. The issue is not whether the defendant violated the terms of her suspended sentence. The issue is what to do about it now.

She got out of jail fourteen months ago and began supervision with District 32. She was referred to a substance abuse treatment group, attended two meetings, missed the next meeting, called to say she had no ride, attended one more office meeting with the probation officer, was warned about attendance, and disappeared for the next ten months. The probation officer was not able to find her. The only reason that the defendant is here today is that she was in somebody else's motel room, near the airport, when the police showed up with a search warrant. The search warrant had nothing to do with this woman. But once she crossed paths with these officers, they executed the old *capias* that I issued after she absconded. So, here she is again. I look at my notes from the last time she was here for sentencing, almost two years ago.

Back then, the defendant had completed the Sheriff's program, Recovery In A Secure Environment (RISE), during her ten months of incarceration on the grand larceny. This meant that she lived in the therapeutic community at the jail, took classes instead of watching television, and went through hour after hour of peer counseling and reentry counseling.

She had plenty of information on addiction, relapse and how to recover her health. In my notes, I had written down in quotation marks what she said to me that day.

“Your honor, the RISE program is the best thing that's ever happened to me. I never had a program before. You will never see me in your courtroom again.”

The prosecutor and defense attorneys make their arguments about how much of her suspended sentences should be revoked. The Commonwealth points out that she did not seek help from probation or cooperate; she dropped out of sight and ignored her court-ordered obligations. She was a fugitive from justice. She got a lot of chances over the years. The defense attorney points out that she has no new criminal charges, and that her criminal history does not include any violent offenses. He emphasizes that she had no driver's license and no transportation to and from the probation office.

“Judge, Ms. _____ is a drug addict. She needs help and she's not a threat to anyone. She does not need incarceration.”

This reminds me of a comment I heard another Judge make years ago: “When will it be time for the merchants of Virginia to get a break from this defendant?”

Ms. _____ is standing silently at the table beside her lawyer. Everyone is talking about her but she is just waiting. She twists her long hair around her finger and looks up at me. Substance abuse – the current vocabulary for this calamity – has taken its toll. She looks exhausted. I notice her sparkly acrylic nails and wonder how she managed that with everything else going on. There is really no answer to how much time should be revoked. Judges have to weigh the risks, the probabilities, the effect of the punishment. So far, Ms. _____'s periods of incarceration have not had much effect. I revoke part of her suspended sentence and the Deputy escorts her back to jail, in handcuffs.

It's time to take a recess.

Everyone has been in Court for an hour plus. When I get back to chambers I joke around with the Deputy Sheriff who works with me. He is good company. Any amount of humor is so welcome. Another Judge walks into my office wearing his robe. He's in the middle of a motion to suppress and sketches out the issue for me.

We talk it over and ask each other some questions. I try to be helpful, but I do not tell him how to rule. That's his job and his job alone. Did the police officer have probable cause to search the car? It depends on the totality of the evidence, along with the frequent appellate cases deciding this issue. The Judge makes the decision and moves on.

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The rest of the cases are heard and decided. When it is time to go home, I walk down the same hall that all the defendants walked, in handcuffs, to get back to the jail. It's quiet now. Everyone is finished. I get to the door but I can't get out. My electronic security card is on my desk instead of in my wallet. I walk all the way back up to get it, and back again. Outside, I pass by the jail to get to my car. The criminal justice system has morphed into the health system.

Cormac McCarthy started a chapter in *No Country for Old Men* with these words. "I think if you were Satan and you were settin around tryin to think up somethin that would just bring the human race to its knees what you would probably come up with is narcotics." When I came to the bench in 1999 it was crack. Now it's opiates. The faces change but the stories don't vary much. On Friday I will preside in our Drug Treatment Court. There the stories will be more optimistic.

A PROSECUTOR'S PERSPECTIVE ON A PUBLIC HEALTH CRISIS

Shannon Taylor

Over the last twelve months, I have seen *Heroin...The Hardest Hit*, *Chasing the Dragon*, Former NBA Star Chris Herren (“The Herren Project” and “Project Purple”), and have participated in the Henrico County’s Opioid Summit live streaming for all who want to watch and learn about addiction and recovery. These documentaries and speakers come to educate us about addiction, opioid drugs (both prescription and illegal) and heroin, and the impact of what addiction does to the individual and to their loved ones. We hear the stories of those who are in long term recovery, as well as from the mom, the brother, or another family member who talks about the pain when the loved one has died from an overdose.

We talk about how we cannot arrest our way out of this problem and that it is a public health crisis. All of this is true. So, what does it look like from my position – an elected official, a prosecutor, a “past life” defense attorney – someone who has been in the criminal justice system for the last 20 years?

The Law is set to establish what I call the “Rules of Society.” The Law tells us what behavior is acceptable and what is not. The Law tells us when we can be accountable for our actions and when we cannot. The Law tells us what the parameters of punishment should be for violating our Rules of Society. The Law does not tell us when to show compassion or empathy. The Law does not tell us when to use our prosecutorial discretion (just that we have it), and the Law does not tell us to turn a blind eye to illegal behavior.

It is unrealistic to think that those of us in Public Safety (law-enforcement and prosecutors) would simply turn our backs on people who break the law. It is unrealistic to think that Public Safety and the Courts do not have a role to play in this Opioid epidemic, but the definition of that role is delicate – the attempt to balance the interests of a public health crisis revolving around a criminal activity. Yet, that is what I – an elected official, a prosecutor – am asked to do.

I believe that we can use the court system as a guide and not as a hammer. It can be used to hold people accountable for their unlawful behavior who otherwise might only be accountable with their lives. All parties involved can work together to identify the particular needs of an individual, identify what resources are available within the community and, when no such resource exists, try to find another community with an answer. Where

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no answer exists, when a void is discovered, we should all be working on finding an answer.

I am aware that not everyone shares my views, but this epidemic was not created overnight and it will take some time (and effort) to change our behavior regarding opioid medication and criminal behavior. We need to give offenders a chance to prove themselves, offer rewards when earned, and have some empathy. While the Law cannot tell me when we will have achieved our goal, I am confident that this community will collectively work to a point where we all feel as if this epidemic has been eradicated.

