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# RODNEY S. WEBB: UNITED STATES ATTORNEY FOR THE DISTRICT OF NORTH DAKOTA FROM 1981 TO 1987

LYNN E. CROOKS\*

## I. INTRODUCTION

Rodney S. Webb served as the United States Attorney for the District of North Dakota from 1981 until he was appointed by President Reagan to be a United States District Court Judge for the District of North Dakota in 1987. During his term as United States Attorney, the State of North Dakota experienced one of the highest profile murder cases in its history. The reports of the murders and the subsequent trial became one of the most intense news events in modern North Dakota history. Indeed, the intense news coverage became one of the principal issues on appeal and was the subject of a dissent by Chief Judge Lay from the opinion affirming the convictions.<sup>1</sup>

## II. A HIGH-PROFILE MURDER CASE

In 1977, Gordon Kahl, a member of the tax protester group *Posse Comitatus*, was convicted in the Western District of Texas of two counts of failure to file federal income tax returns.<sup>2</sup> Following his release from prison, Kahl was placed on probation.<sup>3</sup> In 1981, the sentencing court issued a probation violation warrant for his arrest.<sup>4</sup> Several unsuccessful attempts were made to arrest Kahl in North Dakota.<sup>5</sup> On February 13, 1983, United States Marshal Kenneth Muir and Deputy United States Marshal Robert Cheshire were gunned down on a North Dakota highway near Medina, North Dakota, while attempting to arrest Kahl on the outstanding warrant.<sup>6</sup> Deputy United States Marshal James Hopson, Deputy Sheriff Bradley Kapp, and Medina City Constable Steve Schnabel were also injured in the exchange of gunfire.<sup>7</sup>

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1. *United States v. Faul*, 748 F.2d 1204, 1223-24 (8th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

2. *Id.* at 1224 (Lay, C.J., dissenting).

3. *Id.* at 1208.

4. *Id.*

5. *Id.*

6. *Id.* at 1209.

7. *Id.*

On that Sunday afternoon, Kahl and several of his close associates had been observed at a *Posse Comitatus* meeting in Medina by Deputy Sheriff Kapp, who, being aware that a federal warrant was outstanding for Kahl, called the United States Marshal.<sup>8</sup> The Marshal hastily assembled several of his deputies to assist him in arresting Kahl.<sup>9</sup> He and Deputy Carl Wigglesworth came from Fargo.<sup>10</sup> Deputies Cheshire and Hopson came from Bismarck.<sup>11</sup> They arrived at the meeting place just as Kahl and his entourage were leaving.<sup>12</sup> The law enforcement officers confronted Kahl and his group just north of Medina.<sup>13</sup>

The evidence indicated that Kahl's son, Yori, opened fire after a nine-minute standoff, during which the marshals tried to talk Kahl into surrendering.<sup>14</sup> Kahl and Scott Faul quickly joined in the shooting.<sup>15</sup> Within minutes, Ken Muir and Bob Cheshire lay dead on the highway.<sup>16</sup> Of the six-man arrest team only Deputy Wigglesworth remained uninjured.<sup>17</sup> By contrast, of the three shooters on Kahl's side, only Yori Kahl was injured.<sup>18</sup> Kahl became a fugitive from justice, leaving his son, wife, and family friends to face murder charges by themselves.

Within days of the murders, United States Attorney Webb received a high-ranking visitor from the Criminal Division of the United States Department of Justice in Washington, D.C. They met for breakfast. After introducing himself, the visitor stated that he had recently reassigned a case involving the murder of a United States District Court Judge in Texas to the United States Attorney from another district to prosecute. Rodney Webb's United States Attorney's Office was in for two days of intense scrutiny by the "man from Washington." What he was most interested in, of course, was whether the North Dakota United States Attorney's office knew how to try a murder case. Most United States Attorney's offices dealt mainly with non-violent, white-collar crimes. However, the United States Attorney's office for the District of North Dakota was no stranger to violent crimes involving assaults and murders; it tries many such cases every year. It also had assisted in prosecuting the high-profile case against Leonard Peltier

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8. *Id.* at 1208.

9. *Id.* at 1208-09.

10. *Id.* at 1208.

11. *Id.*

12. *Id.* at 1209.

13. *Id.*

14. *Id.* at 1209-10.

15. *Id.* at 1209.

16. *Id.* at 1209-10.

17. *Id.*

18. *Id.* at 1210.

who murdered two FBI agents in South Dakota.<sup>19</sup> At the conclusion of his visit, the Department of Justice official assigned the marshal murder case to the North Dakota United States Attorney's office for prosecution.

The investigation of the murders, search for Kahl, and preparation for trial consumed the entire office until the trial and appeals were over. While only two lawyers had been assigned to the trial team, every other lawyer in the office, particularly United States Attorney Webb, spent a portion of every day doing something connected with the case. It was Webb's primary responsibility to deal with all matters concerning the steady stream of press inquiries. Likewise, he was directly involved in all major decisions about the case, including which charges to bring, who to bring before the grand jury, and what major strategies to use at trial.

Gordon Kahl was still a fugitive when the trial finally started in Fargo on May 9, 1983.<sup>20</sup> After three and a half weeks of trial the jury convicted Yori Kahl and Scott Faul of second-degree murder and several lesser offenses.<sup>21</sup> The jury also convicted another member of the Kahl party, David Broer, of harboring a fugitive and conspiracy.<sup>22</sup> One other member of the group, Vernon Wagner, had previously pleaded guilty to harboring a fugitive.<sup>23</sup>

On June 3, 1983, Kahl was finally located in Arkansas.<sup>24</sup> In an exchange of gunfire both Kahl and a local sheriff who was attempting to arrest him were killed.<sup>25</sup> These events led to another federal trial in Arkansas for those who harbored Kahl there.<sup>26</sup>

### III. FROM MURDER CASE TO WILL CONTEST

Fortunately, all of the cases that were tried during United States Attorney Webb's tenure were not as serious as the marshal murder case. One case that took on a somewhat bizarre, if not humorous, vein involved a will contest, which is not the usual fare for United States Attorneys. In 1984, a will was filed in Ransom County which contained a somewhat unusual provision: it identified the "United States Of America" as the

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19. *United States v. Peltier*, 585 F.2d 314, 318 (8th Cir. 1978), *cert. denied*, 44 U.S. 945 (1979).

20. *United States v. Faul*, 748 F.2d 1204, 1207-08 (8th Cir.1984).

21. *Id.* at 1208.

22. *Id.* at 1210.

23. *Id.* at 1207.

24. *Id.* at 1210.

25. *United States v. Udey*, 748 F.2d 1231, 1235 (8th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

26. *Id.* at 1234-35.

residuary devisee and effectively devised to the United States the bulk of the decedent's multi-million dollar estate.<sup>27</sup> As difficult as it may be to believe, the decedent's brothers contested the will.<sup>28</sup> The investigation developed a picture of an individual who had no offspring, but had come into conflict with the siblings who would inherit his real estate in the absence of a will to the contrary. While he had developed a reputation as a relatively belligerent, contentious individual, there was no established history of mental disease or incompetence.<sup>29</sup> There were people in the community, however, who felt that the deceased had become incompetent by the time his will was executed. The siblings hired a very prominent psychologist to research the decedent's mental competency.<sup>30</sup> After making inquiries in the community, the psychologist formed an opinion that the deceased's mental competency had deteriorated in the last years of his life to the point he was suffering from a psychosis, paranoid schizophrenia.<sup>31</sup> In the psychologist's opinion, the deceased was out of touch with reality.<sup>32</sup>

The matter was set for a jury trial on the issue of the deceased's mental competency to execute his will. Despite a gallant fight by United States Attorney Webb, the jury sided with the siblings, and the windfall was lost.<sup>33</sup> Strangely enough, nobody else in the office was particularly surprised by the verdict and the boss came in for some good-natured ribbing.

#### IV. SUCCESSFUL APPEAL OF A CRIMINAL CASE DISMISSAL

As the will contest case demonstrated, Rodney Webb as United States Attorney was never afraid to take on "tough" cases. On May 7, 1984, approximately ten thousand dollars in currency was taken from the vault in a drive-up teller area of a West Fargo bank.<sup>34</sup> The eventual defendant, a substitute maintenance man at the bank, had been having financial difficulties before the theft.<sup>35</sup> "Shortly following the theft [he] paid a total of nearly \$4,500 to various [] creditors. None of these payments was made

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27. Last Will and Testament of Lloyd Miller, on file with the Ransom County Clerk of District Court, Ransom County, North Dakota.

28. Robert Miller v. United States, Civil No. 4312, In the County Court of Ransom County, State of North Dakota, *In re* the Estate of Lloyd L. Miller, deceased, available from the Ransom County Clerk of District Court.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *United States v. Mundt*, 846 F.2d 1157, 1159 (8th Cir. 1987).

35. *Id.*

by check.”<sup>36</sup> The evidence developed at trial was that only a short time later the defendant had also obtained a cleaning contract at a Fargo Savings and Loan Association.<sup>37</sup> In the fall of that year “approximately \$12,000 was found missing from [that institution’s] main vault.”<sup>38</sup> During the period encompassing both thefts—May 1, 1984, to October 31, 1984—evidence showed that the defendant “spent nearly \$8,000 more than his verifiable income for that period.”<sup>39</sup> Again, in the week following the second theft there were substantial amounts of cash spent by the defendant, and he was indicted for bank theft.<sup>40</sup>

The trial began before United States District Judge Paul Benson. United States Attorney Webb personally handled the case for the government. Midway through the trial a bomb was sent to Judge Benson, who then recused himself.<sup>41</sup> The trial continued with newly appointed Judge Patrick Conmy presiding. At the close of the government’s case, the trial judge dismissed the part of the government’s case that charged possession of stolen property and reserved ruling on the remainder.<sup>42</sup> The jury convicted the defendant of the remaining two counts of bank theft.<sup>43</sup> The trial court then granted the defendant’s motion for judgment of acquittal on the remainder of the government’s case.<sup>44</sup> The government appealed.

The Eighth Circuit Court of Appeals reversed and reinstated the jury verdict.<sup>45</sup> It criticized the district court for assuming the jury’s function of weighing evidence and drawing inferences.<sup>46</sup> The appellate court reviewed the evidence and found that it established that the defendant had the means, motive, and opportunity to commit the bank thefts involved.<sup>47</sup> The court then found that the defendant’s possession of substantial unexplained amounts of cash immediately after each theft was sufficient circumstantial evidence to infer that he was the thief.<sup>48</sup>

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. The bomb case was never solved.

42. *United States v. Mundt*, 846 F.2d 1157, 1159-60 (8th Cir. 1987).

43. *Id.* at 1160.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

## V. SUCCESS WITH GOVERNMENT APPEALS

During his term as United States Attorney, Rodney S. Webb was a frequent litigator in the Eighth Circuit Court of Appeals. If a check were made of Webb's name during the time that he was United States Attorney, one would find hundreds of cases in which he was listed as government counsel. As is the normal practice, virtually all litigation during an individual's term as United States Attorney will appear in his name. In Rodney Webb's case, however, a substantial number will also show up in his name as the actual litigator. Two cases that United States Attorney Webb personally argued, *United States v. Cree*<sup>49</sup> and *United States v. Hintzman*,<sup>50</sup> are worthy of note.

*Cree* established, over a vigorous dissent, Eighth Circuit precedent concerning the "other exceptions" provisions of hearsay Rule 803(24) [now 807],<sup>51</sup> which was included in the newly enacted Federal Rules of Evidence.<sup>52</sup> This ruling has become highly useful in cases involving child abuse where the young victims have named their abusers in pretrial interviews.

Two boys, aged two and four, were found severely bruised.<sup>53</sup> When asked about his bruises, the older boy told investigators that Patty, one of the defendants, had done it.<sup>54</sup> He then was formally interviewed by a trained social worker in an attempt to determine how the two-year-old had been injured.<sup>55</sup> The boy again indicated that Patty had done it.<sup>56</sup> The statements made to the social worker and to the FBI by the four-year-old were introduced against the defendants under Rule 803(24).<sup>57</sup> The court of appeals ruled that the five requirements of Rule 803(24) had been met in this case.<sup>58</sup> The statements were trustworthy, were material, had probative value, were in the interests of justice, and had been offered upon proper notice to the defense.<sup>59</sup> With regard to the defendants' "confrontation of witnesses" argument, the court ruled that they waived their right to

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49. 778 F.2d 474 (8th Cir. 1985).

50. 806 F.2d 840 (8th Cir. 1985).

51. FED. R. EVID. 807.

52. *Cree*, 778 F.2d at 474-504.

53. *Id.* at 474-75.

54. *Id.* at 475.

55. *Id.* at 476.

56. *Id.*

57. *Id.* at 477.

58. *Id.* at 478.

59. *Id.* at 477-78.

confrontation, even though they did not call the young witness, because he had been available to the defendants as a witness.<sup>60</sup>

In *Hintzman*, the defendant attempted to take advantage of some of the administrative rights won in the nationwide class action suit of *Coleman v. Block*.<sup>61</sup> The defendant was charged and convicted of converting property pledged to the Farmers Home Administration (FmHA).<sup>62</sup> The defendant's theory was that *Coleman* gave him the right to unilaterally dispose of FmHA-secured collateral to meet necessary farm and family expenses.<sup>63</sup> The court stated that the defendant was attempting to "read the *Coleman* decisions as having decriminalized conscious fraud."<sup>64</sup> The court ruled that the opinion in *Coleman* "did nothing of the sort."<sup>65</sup> The court further ruled that even if "untrammelled discretion" were found to exist as to which farm conversion cases were referred by the USDA to the Department of Justice, that fact alone would not establish evidence of illegal selective prosecution.<sup>66</sup> Without some showing of unlawful, arbitrary, or discriminatory selection no issue of selective prosecution could be shown.<sup>67</sup>

Rodney S. Webb ended a very eventful and illustrious career as United States Attorney with his appointment in 1987 as one of the two United States District Court Judges for the District of North Dakota.

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60. *Id.* at 478-79.

61. 580 F. Supp. 194 (D.N.D. 1984).

62. *United States v. Hintzman*, 806 F.2d 840, 841 (8th Cir. 1986).

63. *Id.* at 845.

64. *Id.*

65. *Id.*

66. *Id.* at 843.

67. *Id.*



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