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Selling the sizzle

Letting jurors see something for themselves, maybe feel something, can be more powerful than counsels' arguments

By Walter ("Skip") Walker

I gained a bit of notoriety during my closing argument in the Alpine Meadows avalanche case (See the Netflix Documentary, "Buried, the 1982 Alpine Meadows Avalanche") when I purposely dropped a Waterford crystal goblet into a wastebasket in which I had secreted a brick. The goblet, of course, shattered, to the shock of everyone in the courtroom. The point I was trying to make was that the loss of the Waterford was far more consequential than the loss of a plain glass, even though they both served the same function as a drinking vessel.

Similarly, one person's life, I argued, could have a special value far beyond another's. My idea came from hearing that Racehorse Haynes, a famed Texas lawyer, had planned to stab himself in the hand with a knife during closing argument in order to show a jury that his client had really not caused much harm to his victim. While he did not actually go through with the stabbing, it was generally agreed that it would have gotten the jury's attention.

So it was that in our recent trial of *Gold v. California Highway Patrol* (USDC NDCA) we decided to bring an entire bathroom inside the courtroom. The idea perished quickly when we saw how very small the courtroom was. I also must confess I did not like the $25,000 price tag we were given for the construction. Instead, we opted for a two-dimensional mat that contained the exact dimensions of the bathroom as well as stencils of all the bathroom's features: a toilet, a sink, a shower basin, and a wide backsplash to the shower.

Now, why did we need that? Well, we were representing the mother of a young man who had been shot by a CHP officer in that bathroom. The details of the shooting were very much in dispute –



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and the officers' versions (note the plural) had been sufficient to get young Ari Gold tried and convicted of assaulting and brandishing a gun at a police officer.

Ari died while his conviction was on appeal, which caused the conviction to be abated and allowed us to proceed with a civil-rights action on behalf of his mother as his successor in interest, but his death also meant that his version of events could only be presented by means of testimony he had given in the criminal trial – and that obviously had failed to persuade the jury. Since we could not improve on Ari's testimony, our goal was to show the impracticality of the shooters' testimonies.

The facts and the factors

The criminal conviction and the absence of Ari himself were not the only issues with which we had to deal. There were also the facts that Ari:

- was high on methamphetamine;
- had stolen a truck;
- had driven the truck recklessly through Monterey and Salinas;
- had nearly hit the wife and daughter of a CHP officer;
- had been involved in a hit-and-run with a parked car;
- had abandoned the truck in the driveway of a home at the end of a cul de sac and been seen fleeing toward the house;
- had been found inside the house hiding in a bathroom behind a shower curtain; and
- was said to have pointed a loaded pistol at the officer who found him.

But, of course, there were other factors, and one of them was the bathroom itself. Before we agreed to take on the case, I drove down to Salinas with my son and law partner, Jeff Walker, to investigate the scene. What we discovered was that the bathroom floor extended only 4.5 feet from the door to the shower curtain. Defendant Officer Cho testified in the criminal case that she opened the bathroom door, surveyed the room, saw a rifle leaning against the wall next to the door, saw an almost closed curtain straight ahead of her, and took a "full step" into the bathroom to pull back the curtain, whereupon she discovered Ari sitting on the backsplash of the shower basin. From the police records, we knew that Officer Cho was 5'7" tall, which meant that she had at least halved the 4.5-foot distance across the bathroom floor when she pulled the curtain.

Her testimony at the criminal trial was that when she saw Ari, she raised her gun in both hands and held it out at arms' length, pointed straight at him; which meant the gun would have been within about two feet of him. ("Two to five feet" she would admit in our case.) According to Officer Cho, she told Ari to put up his hands, which he did. Then she told him to "get on the ground." Given the fact that she was occupying "the ground," that would have been a hard thing to do, but, according to her, he



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didn't do it. Instead, she said, he reached behind the curtain and pulled up a gun that he pointed at her. We showed the jury what that would have looked like:

Did this make sense? Not to us. But what also did not make sense was that Officer Cho proceeded to fire 16 shots at Ari without once hitting him. She put bullets in the ceiling, bullets in the floor, bullets in a Jacuzzi that was outside the bathroom. As she backed out of the bathroom, she fell onto her butt and kept firing. She sent a bullet down the hall behind her and out a window several rooms away. She put another bullet into a mirror next to her partner, who was approaching the bathroom from an adjoining bedroom. Nevertheless, at trial she insisted that she had complete control of her gun at all times. She just wasn't a very good shot, she said.

The courtroom stage

We wanted to replicate her story in front of the jury. Jeff Walker did not spend ten years in professional theater without making friends. He called a set designer and had the mat made and delivered. We stretched it out in front of the jury box and got Officer Cho to come down off the stand and demonstrate how she had taken a full step from the doorway into the 4.5-foot space, how she had pulled the curtain, raised her gun, given Ari commands. She stood in the doorway marked on the mat and Jeff sat on a stack of books exactly the height of the backsplash on which Cho claimed Ari was seated. "How," I asked, "did you expect Ari to 'get on the ground' when you were occupying the ground?" Officer Cho responded by diving onto the mat, right into the space her story had her occupying.

Then we examined Officer Weaver, the other CHP officer on the scene. He explained that he had been eating lunch when he was called by his wife on his personal cell phone and told that she and their daughter had nearly been hit by a crazy driver who had then hit a parked car before leaving his truck in a driveway at the end of a cul de sac. Weaver told her he would be right there and rode his motorcycle immediately to where his wife and daughter were standing with a group of people looking down the cul de sac. One of those people had called 911 to report the hit-and-run, which brought Cho to the scene in her SUV. The two CHP officers were looking through windows of the house where the hit-and-run driver was believed to have gone when the homeowner, Ari's grandmother, showed up. They told her someone might be "hunkered down" inside and asked if she wanted them to clear the house. She gave them the key and they went inside with their guns drawn. Neither had ever cleared a house before.

After they checked every other room, Weaver used his insurance card to manipulate a locked door that led to the master suite and, without saying anything to Cho, went off to search the bedroom portion of the suite. Finding nothing there, he walked along the wall that led from the bedroom to the bathroom door, where he could see Cho standing in the doorway. When she began shooting, he shot, too. Through the wall.

He shot 16 times (each of their guns held 16 bullets) and then ran back to the bedroom, reloaded, and shot 12 more times, including about eight shots through other walls. He admitted he did not know at what he was shooting, he did not know if there were children or hostages in the bathroom, but he was determined to end the threat to Officer Cho. Meanwhile, Ari Gold never fired a shot.

Which brings us to Ari's version. He testified in the criminal trial that he had stolen the truck in an attempt to get to the safety of his grandmother's house because he was so high on meth that he thought the devil was after him. His grandmother, he thought, would protect him. But when he got there, she was not home. He found a gun belonging to his uncle and took it into the master suite, locked the door, and hid in the bathroom, where he was sitting on top of the closed toilet seat when the door opened and he saw an officer standing there. According to Ari, he immediately threw the gun out the door and as soon as he tried to stand up, bullets began flying at him. One hit him in the hip and another sent him to the ground, never to move again.

The gun that Ari admitted holding was found outside the bathroom and would have corroborated Ari's story as opposed to Officer Cho's, but Weaver had more to tell. He said that after he had fired multiple shots, he saw Ari "dart" out of the bathroom. He fired about four more shots at him and Ari "darted" back into the bathroom – after which he stopped shooting and there were no more sounds. At this point, he saw the gun outside the bathroom. He then crept up to the doorway and peeked inside to see if Ari might have another gun. And what he saw was Ari lying on his back with his head on the front ledge of the shower basin and a rifle on his chest pointed at the doorway.

Except Ari had been rendered quadriplegic. So, how did he get in that position after darting out and back in? And since no bullets had been fired once he re-entered the bathroom, how did he get the rifle across his chest and pointed at the doorway? The questions needed only to be asked, not necessarily answered. But we had answers. We had expert testimony from a pathologist that Ari would have dropped the instant a bullet disrupted his spinal cord. He could not have darted back into the bathroom, he could not have grabbed the rifle, he could not have ended up on his back as Weaver claimed. There was one more thing, as well. Ari was 6'2" and the floor was 4'6", meaning Weaver did not need to creep and peek because Ari's feet and lower legs would have been sticking out the door.

To this, we added the testimony of a blood spatter expert. She examined all the accident scene photos and declared the blood patterns could not be explained. But what she could say was that the blood evidence most definitively did not support the officers' versions. With the officers' credibility seriously damaged,

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we used closing argument to set up a framework of what they were supposed to have done according to the testimonies of their supervisors. Using a flip chart, we showed 42 violations of CHP policies and procedures.

Overarching all these matters was the issue of what two Highway Patrol officers were doing inside a house in the first place, pursuing someone whose only known crime at the time they entered the house was a non-injury hit and run.

Still, they had gotten a conviction in criminal court even though Ari was paralyzed and in a wheelchair and the CHP's offer to settle our case was $0. At two different court-ordered settlement conferences defendants said they would not offer any money at all. When the evidence closed and we thought things had gone well for us, we raised the possibility of settlement again and were told by defense counsel that he would not recommend paying even $100.

The jury was out one day and came back with a verdict of $9,233,000 and a finding that entitled us to pursue punitive damages against the individual officers plus obtain attorney's fees for their violation of Ari Gold's Fourth Amendment right to be free of unreasonable search and seizure. Rather than fight those last two elements, the defense agreed to pay a total of $10,000,000.

Did the sizzle work? Well, it didn't hurt. It let the jurors see something for themselves, maybe feel something, that might not have been present if all they had was counsels' arguments.

Such opportunities do not arise in every case, but you might look to see if it does in yours.


Walker

Skip Walker is the managing partner of Walker, Hamilton & Kearns, LLP, *a San Francisco trial firm that he founded in 1988. He tried the* Gold *case with his partners Jeff Walker and Clarissa Kearns. Exhibits other than the mat were prepared by 3D-Forensic, Inc.*

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