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TRIAL BY JOURNAL IS TROUBLING TERRITORY LURE OF PUBLICITY POSES QUANDARIES

Twila Decker, Staff Writer

The Associated Press contributed to this report.

"I Want to Tell You," writes O.J. Simpson. Kato Kaelin has a story, too. Al Cowlings has a 900 number. Now, it's David Smith writing about his rocky marriage to the most hated mom in America.

It seems taking the stand isn't enough for witnesses anymore in the country's most publicized trials. Instead, witnesses want to tell the public in their own words, for a price, what really happened. Even ex-jurors are writing their story. The new trend -- of witnesses cashing in on their sometimes starring roles in big-name trials -- presents its share of problems for judges, defense attorneys and prosecutors.

Not only do judges have to make sure jurors aren't reading newspapers and watching TV news while a trial is in progress, they have to watch jurors taking copious notes: Are they taking notes feverishly to be conscientious jurors or future authors?

Lawyers, on the other hand, have to worry about the other side questioning the motives and honesty of witnesses-turned-entrepreneurs.

Book deals create one of the biggest headaches. They serve as an additional deposition -- ripe with opportunities to point out inconsistencies should the witnesses say something different on the stand, lawyers say.

"The Simpson case has had a dramatic effect on the justice system," said Columbia defense attorney **Jack Swerling**. "Everybody sees the opportunity to profit; even defendants are writing books. But they wouldn't be doing it if people didn't want it. That's the concern I have."

New kind of hype. Before the days of Court TV, CNN and satellite trucks, big trials just weren't quite as BIG. And, neither were the book deals that went with them.

There were some issues. "Son of Sam" laws, which prevent convicted criminals from making a profit off their crimes while in prison, began popping up in late '70s and early '80s in several states, including South Carolina.

The laws require that fees and royalties criminals get for telling their stories be turned over to the families of their victims. Such a law was ruled unconstitutional in New York. But South

Carolina's law still exists.

But in the days of instant news -- when the public can watch on live television as a suspect is trailed by police cars or a small-town sheriff says a woman killed her sons -- things move quickly.

Defendants are writing books before a jury even decides whether they should go to prison. Witnesses appear on the witness stand by day and market books and appear on television talk shows -- sometimes for pay -- by night.

"The bottom line is people have always been fascinated by stars and people in predicaments," **Swerling** said. "There was a time when the media didn't pay a whole lot of attention to that. Now, the media is more in tune to it."

For cases to have the book appeal that the Smith and Simpson trials have, they must be drawn-out proceedings, said Susan Fain, assistant professor of justice, law and society at American University in Washington.

"The Bobbitt case was just as high-profile," Fain said. "But, because it didn't take long for it to get to trial, there wasn't enough time for books."

If Susan Smith were to plead guilty tomorrow and be sentenced to life in prison, the David Smith book deal would lose its appeal, she added.

"The assumption the publishers are acting on is they will have enough time to do a book while this is still news," Fain said. "They are counting on the free publicity (from the news media.)"

Jurors-turned-authors. The Simpson case seems to be the first time a judge has had to wrestle with the issue of jurors writing books while impaneled.

California since has passed a state law that prohibits jurors from cashing in on their experience until 90 days after a trial has ended.

Dismissed juror Michael Knox, a 47-year-old Federal Express courier from Long Beach, Calif., is writing "The Private Diary of an O.J. Juror: Behind the Scenes of the Trial of the Century." In the book, due out next week, Knox says he believes Simpson is guilty.

Excerpts of the book will appear in People magazine, which also plans to publish excerpts of David Smith's book.

Swerling said the problem with jurors writing books is that it creates the potential to taint the entire justice system. Suddenly, lawyers have to make sure people aren't trying to get on the jury just to make money.

"You want jurors who will be fair and impartial," **Swerling** said. "You'll have situations where peoples' motives to get on juries are different than in the past. Are they being completely candid, or are they just saying what it takes to get selected to make a profit?"

Also, once on the jury, a juror-author has a stake in a trial's outcome.

For example, if the juror-author was the only holdout to a guilty verdict or a death sentence, then suddenly their book would have even more sales appeal.

There's also the issue of how a book would affect other jurors whose comments would be made public.

“Jurors traditionally operated under the assumption that what went on in the jury room was secret. And they might be criticized as a group, but not individually,” Columbia attorney Dick Harpootlian said.

“When jurors start writing books, that lets every potential juror know that the public might know what they said. It creates tremendous problems.”

David Smith's book. David Smith's book now is being called “Beyond All Reason: My Life With Susan Smith.” The book's release is scheduled to coincide with the verdict in Susan Smith's death-penalty trial, set to begin July 10, the publisher says.

Smith has set up promotional interviews with Barbara Walters of ABC's “20/20,” Katie Couric of NBC's “Today” show, Larry King and Phil Donahue.

Paul Dinas, publisher of Kensington Books, said David Smith is not writing a book to capitalize on his sons' deaths. Instead, the book will help Smith deal with the death of his sons, Michael, 3, and Alex, 14 months, his publisher said.

“It doesn't drive anything in his life,” Dinas said of the book deal. “He's not writing this book to make money. He wants to heal himself.”

But defense attorneys say if Smith wants to write a book to help heal himself, he should have done it after his ex-wife's death penalty trial was long over. They say his timing and talk-show bookings will devastate him.

“David Smith marketing his book is about as destructive as (Prosecutor Christopher) Darden telling O.J. Simpson to try on gloves in courtroom and them not fitting,” **Swerling** said. “If I was a fly on a wall, I would suspect (16th Circuit Solicitor) Tommy Pope is having a fit right now.”

Harpootlian agrees.

A few months ago the prospect of cross-examining the grieving father would have been a nightmare for Smith's defense lawyers, Harpootlian said. But now that David Smith has signed this book deal, he has made himself easy prey.

“The difference in David Smith writing a book (and) say Kato Kaelin is, the defense in this case is going to try to lay some of the blame at David's feet,” Harpootlian said.

“They'll say he is the one who was a philanderer and abused her. The book deal will help support those claims,” he said. “The defense will say to the jury: ‘This shows you what kind of human being Mr. Smith is. One who would attempt to make money off the deaths of his two children.’”

Isn't it true? Witnesses who write books or sell statements have to be willing to pay the consequences once they get on the witness stand, says American University law professor Ira Robbins.

``We saw it in the O.J. case with cross-examination: `Isn't it true you were on ``Hard Copy" and got paid \$25,000?' It's better to wait until after the trial ''

Smith



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IN MEDIA'S GLARE, CAN JUSTICE BE BLIND? LEGAL EXPERTS SAY SMITH STILL CAN GET FAIR TRIAL

Clif LeBlanc, Staff Writer

Despite a media onslaught, Susan Smith still can get justice in a South Carolina courtroom, legal experts say.

More than 2,000 articles have been published about what happened in Union. Every major TV talk show and supermarket tabloid has featured the case. Three books have been published and a fourth, by the children's father, is due out this summer. The faces of Susan, Michael and Alex Smith are familiar even in Japan and Germany, which are sending reporters to her trial. Despite the unparalleled media coverage, lawyers, professors and judges agree Smith can get a fair trial because of the court's built-in safeguards for cases like hers, which angered and horrified a nation and divided a community along racial lines.

"Pretrial publicity does not have the effect on jurors that is generally believed," said Gene Cerruti, a New York Law School professor who helped draft the American Bar Association's guidelines for fair trial and free press.

"The fact of the matter is that the jury system works," Cerruti said. "They do seem to make a decision based on what happens inside the courtroom. What happens outside the court just doesn't compete."

Smith's defense team is not sure of that. It contends that news leaks have damaged Smith so much that the judge should override the prosecution's decision to seek the death penalty.

Trial Judge William Howard disagrees. But last week, his concern that intense media coverage could poison the July 10 trial prompted him to ban cameras from the courtroom.

Coverage of the Smith case has been pervasive but evenhanded, said the lawyers interviewed.

But a nationally known defense attorney from Miami characterized it as "among the handful of cases where pretrial publicity has been horrendous and devastating."

"There has been an incredible amount of publicity from The New York Times to the so-called TV news and even the tabloids," said Jeff Weiner, past president of the National Association of Criminal Defense Lawyers. "All of it has been unfavorable."

"The odds of getting a fair jury in this case are next to impossible," Weiner said. "It's cases like this where the justice system is truly tested."

Columbia attorney **Jack Swerling** dismisses that as standard defense-lawyer talk.

"If I had to call it right now as a referee, I'd have to say there's been an equal amount of hurtful and favorable information for both sides," said **Swerling**, who has defended clients in some of the state's most high-profile cases.

Pretrial publicity often is measured not only by the content of the news accounts but by the number of them. Unrelenting coverage can prejudice people who might sit in the jury box.

The legal system can accommodate that, too.

"We're not looking for ignorant jurors; we're looking for fair jurors," said California Superior Court Judge Alexander Williams III, who helped write the ABA guidelines.

"People mistakenly think that requires that they haven't read anything, seen anything," Williams said. "They only have to be able to put that aside. That's the mission of voir dire (questioning of the jury pool)."

David Bruck, Smith's attorney, said he does not fault the media.

"I sort of treat the press as that which rushes into a vacuum," says Bruck. "They can't help themselves. In that respect they're sort of just like fire ants -- they come with the territory."

Declining to discuss the issue in depth, Bruck deferred to allegations he'd previously made in court papers. There, he contended the prosecution team has leaked one-sided and damaging information about Smith.

Bruck cited news accounts using anonymous sources to depict:

Smith as a woman who uses sex as a weapon.

The psychiatrists evaluating Smith's mental state as having a pro-defense bias.

The prosecution's plans to re-enact the sinking of Smith's car in John D. Long Lake. That disclosure drew dozens of reporters and photographers from the Carolinas and national television networks for an event that critics say was intended to inflame potential jurors.

The May 24 event came close to being prejudicial, said Erik Collins, a USC journalism law professor.

"Did it significantly affect anybody's perspective of the case? I don't see any hard evidence of that," Collins said.

Prosecutor Tommy Pope countered in court that Bruck didn't complain when news accounts depicted Smith as a victim of child and spousal abuse, driven to suicide attempts. Pope, who would not be interviewed for this article, also has noted that Bruck began to build sympathy for his client in January. Then, Bruck told a national television audience that Smith's case would

be ``a story of mental illness."

THE LEAKS

Defense attorneys interviewed agreed with Bruck's complaints about leaks from police and prosecutors.

``That's the biggest pretrial threat to a fair trial," said Joe McCulloch, former president of the state defense attorneys' organization. ``Some solicitors make virtually no effort to discourage pretrial comments . . . by law enforcement."

That effectively allows the prosecution to disclose information lawyers are barred from releasing under ethics guidelines for attorneys, the lawyers said.

And since anonymity protects the sources, it's also hard to verify the information.

``Next thing you know, it's fact in the minds of jurors when it never was fact at all . . . and law enforcement sits back and laughs," Weiner said.

In the Smith case, the trial judge's gag order has kept the defense from fighting fire with fire, Bruck contends.

From the outset, police disclosed that Smith confessed to drowning her sons.

The media, citing unnamed sources, reported among other things, that she was bluffed into confessing, that she did not pass polygraph tests, that investigators chipped apart her account of what happened the night of Oct. 25, and that a boyfriend broke up with her in part because he wasn't prepared for a ready-made family.

But such damaging disclosures rarely result in overturning cases, Cerruti said. ``There are terribly, terribly few, almost none," he said.

Judges have options for counteracting pretrial publicity, but that can be complicated in small communities.

Judges can allow extensive questioning of potential jurors to weed out prejudice. They can delay the trial, although that has limited value when a case draws national attention. They also can move the trial or draw a jury from someplace else.

Smith's case flips that last remedy on its head. The defense almost always seeks a change of venue. But Bruck has said he does not want one. Pope reportedly is considering asking to import a jury. That happens rarely.

Experts say the defense is banking that people who know Smith or her family cannot bring themselves to sentence her to the electric chair.

``What concerns me is the size of the community up there," **Swerling** said.

``They know her. They know her family. They know her brother. They know her husband. It's something they discuss at dinner, at the gas station, in meetings. It's in every aspect of this

community. It's not that Susan Smith is on trial; it's the town that's on trial, and these people don't want that."

Anecdotal evidence indicates that many Union residents would rather avoid a long, expensive and soul-baring trial that will include testimony about adultery, incest, suicide, suicide attempts and other dirty laundry.

Opinions in Union are split on whether Smith deserves the electric chair. In the days after her arrest, hometown sentiment was so strong there were calls for lynching her.

Public disclosure of her personal troubles tapped into Union's Bible Belt traditions. Public outrage appeared to ease among those who knew Smith as the girl next door, voted friendliest in her high school class, and as a doting mother.

Union residents, who will comprise the jury pool, also have been part of the case.

Hundreds joined in the search for Michael and Alex, initially reported by their mother to have been taken by a carjacker.

Townpeople blanketed the area with fliers. They wrapped ribbons on trees. They prayed in church for their safe return. Some mounted horses and combed the woods, while others searched on foot. Frightened schoolchildren were counseled to be watchful of strangers and how to cope with the fear that they, too, might be abducted.

When they learned Smith had confessed, many felt betrayed.

In the midst of all this, potential jurors were expressing their opinions about justice to the dozens of reporters who invaded the town.

The Smith case offers yet another wild card: the race factor.

Blacks make up about 30 percent of the population of Union County and many were angry that Smith let the nation believe for nine days that a black man took her children. A composite drawing of a man in a wool cap was in newspapers and on television sets all over the country.

AND GOD CREATED JUDGES

Situations like the one in Union are when the bench should exercise its power, said Williams, the California judge. "That's why God made judges. The judge has the responsibility for making things happen."

The lawyers and judge have responded to those challenges with a larger-than-normal jury pool, 250. One-third of that group has been eliminated with legitimate excuses such as age, medical conditions or residency.

In addition, jurors received a 12-page questionnaire designed to weed out those who have prejudged the case because of publicity or personal experiences that would keep them from being impartial.

Two of the 74 questions are about pretrial publicity; three are about peer pressure in a

community where it seems everybody knows everybody; one is about race.

Once questioning of the remaining jurors begins Monday in the Union County Courthouse, lawyers for each side may dismiss jurors who make them uncomfortable.

Generally in a death-penalty trial, the defense may reject 10 jurors and the prosecution, five. The judge has the choice of discharging as many as he or she wants and can grant additional "strikes" to the lawyers.

Judge Howard has clearly signaled he intends to take charge of the trial.

In recent months he has:

Muzzled attorneys and psychiatrists who will testify about Smith's mental state.

Allowed Smith's lawyers to pursue sources of news leaks by questioning law enforcement officers and others under oath. It proved fruitless.

Threatened a reporter with jail because she wouldn't disclose the names of sources on an article about the findings of Smith's mental evaluation.

But trying to control the media may not be necessary in a small town, Collins said. Instead, the coverage tends to be a great leveler. It could make witnesses and jurors "straighten up and act even more responsibly, and in that sense enhance her chances for a fair trial," he said.

THE SIMPSON TEST

Concern that intense media coverage could jeopardize Smith's right to a fair trial is heightened by the O.J. Simpson murder trial, which has left legal scholars wondering whether confidence in the legal system has been damaged, **Swerling** said.

"The Simpson case is the quintessential case of everyone trying to enhance themselves at the expense of the integrity of the judicial system," **Swerling** said.

He cited jurors and witnesses writing books, lawyers holding daily press briefings to put their spin on testimony and the judge granting an interview. "It's not a criticism of the media," **Swerling** said. "I'm criticizing the performers."

With the Simpson case as a backdrop, Bruck argued for banning cameras during the trial.

The prosecution of the Smith case also has been tainted by a contract between the children's paternal grandmother and a tabloid, which published excerpts of Susan Smith's diary, and mostly by David Smith's upcoming book and his promotion of it, **Swerling** said.

David Smith has a deal for an undisclosed sum to tell his account of life with Susan Smith. It is due out in August, and he has booked national television appearances to market his story.

"What he's done to the Smith case has as much of an impact as the glove incident in the Simpson case," **Swerling** said, referring to the "classic legal blunder" when the bloody glove found near Nicole Simpson appeared not to fit O.J. Simpson.

“David Smith was the surviving victim in this case. There wasn't a person in the world who didn't feel for his plight,” **Swerling** said. “I look upon him as everybody else -- he's trying to make a buck off this case.”

David Bruck, attorney for Susan Smith, talks with a media crowd after a court hearing in March. FILE PHOTO BY TIM DOMINICK / THE STATE



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BEHIND THE SCENES PEOPLE, PLACES AND HAPPENINGS IN UNION

*Staff Writers Twila Decker, Margaret N. O'Shea, Clif LeBlanc
and Chuck Crumbo contributed to this report.*

LINE FORMS EARLY FOR LIMITED SEATS

Before dawn, people lined up at the front door of the Union County Courthouse hoping they'd snare one of the handful of seats reserved for the public.

Lee Bruce, taking a break from engineering studies at Clemson University, was first in line at 4 a.m. Venda Wade, of Cross Keys, arrived around 5:45 a.m. to claim second-place. Both were there for very different reasons. "I just wanted to be a part of it, to see it firsthand," Bruce said.

Bruce said he wants to sit in on as much of the trial as possible. He won't comment on what he thinks is the most fitting punishment for Susan Smith.

"That's for the court to decide, but after the trial ask me again."

Wade's more interested in seeing justice done. She thinks that there's a possibility that Smith, who confessed to drowning her two small sons, won't pay for her crime.

"I've seen so many people in Union County commit a crime and just walk away," Wade said.

The deaths of Michael, 3, and Alex, 14 months, "just tore me up," Wade said. "I'm not able to have children. She could've given them to me and I would have taken care of them."

S.C. FACES ON NETWORKS

There were a few familiar faces from Columbia on network television news programs Monday.

Former 5th Circuit Solicitor Dick Harpootlian, who's now in private practice, did a stand-up gig for ABC television.

Jack Swerling, a prominent criminal defense attorney, offered his insight and opinions for NBC. And Jim Anders, another former 5th Circuit solicitor who's now in private practice, opined for CNN.

Dr. George Rekers, a psychologist who's on the staff of the University of South Carolina's Medical School, dropped in to comment for CBS

HEAT WILTS NORTHERNERS

Believe it or not, temperatures in the mid-90s and a humidity index to match caught a lot of Northern journalists -- OK, we'll call 'em Yankees -- off guard.

And Marian Hawkins was more than happy to help those folks quench their thirsts.

Hawkins, who sells food and drink from a converted school bus parked across from the courthouse, had to run back home by midday for more drinks, bottled water and ice.

Six cases of Cokes (Yankees call 'em sodas or soft drinks) were sold out by noon. Four cases of bottled water were gone and Hawkins sold bottle after bottle of Gatorade. Ice cones were a hit, too.

"I had a TV lady in a red dress come up here Sunday and said she was surprised by how hot it gets in South Carolina in July," Hawkins said. "I thought it would be a little cooler," Hawkins quoted her as saying.

She returned later, this time in a cotton sun dress.

THE NO-NEWS PAPERS

SLED officials, who are in charge of security for the Smith trial, leave little to chance.

For example, Judge William Howard doesn't want potential jurors to read, see or hear anything about the Smith trial.

Following the judge's orders, authorities covered the windows of newspaper racks posted at one of the courthouse entrances. All the potential jurors could see on the boxes were the names of the papers, including The State.

DREAMS BY DOZENS

Ann McDaniels wants to help some neighbor kids have a chance to see another corner of the world. So she's helping about a half-dozen youngsters sell doughnuts and snacks at a makeshift stand on Main Street, about a half-block from the courthouse.

"These kids have never left Union," McDaniels said. "We're hoping to raise enough money to send 'em to camp or maybe even Disney World."

At \$2.25 a dozen, it'll take a lot of doughnuts to make the boys' dreams come true.



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PSYCHIATRIST 'WORKS FOR THE COURT' NO STRANGER TO CONTROVERSY, MORGAN PRAISED BY BOTH SIDES

Twila Decker, Staff Writer

Dr. Donald Morgan gets his paycheck from the state of South Carolina, but he can be counted on to call it as he sees it, say doctors, prosecutors and defense attorneys.

The 61-year-old forensic psychiatrist shook up the trial of Susan Smith on Monday when he said he had concerns about whether she could testify in her own behalf -- a due-process right of all criminal defendants. The testimony could give the defense an issue to raise on appeal and could dissuade jurors from sending the 23-year-old Smith to death.

"Normally, you would expect the state's psychiatrist to testify in favor of the prosecution," said Columbia defense attorney I.S. Leevy Johnson. "But he threw everything out of kilter by testifying in favor of the defense."

Despite Morgan's testimony, Circuit Court Judge William Howard ruled that Smith is competent. Sixteenth Circuit Solicitor Tommy Pope, however, said Tuesday that too much was made of Morgan's testimony.

Still, the soft-spoken Morgan will be called again to the stand to tell the jury of his opinion of Smith's state of mind.

In addition to concerns about her competency, Morgan also will say that he found that she suffers from severe depression and is suicidal.

Morgan, who grew up in New York, came to Columbia 10 years ago from Walter Reed Army Medical Center in Washington. He is married and has three grown children.

When he's not delving into the minds of criminals, Morgan spends his time on his farm in Chester County worrying about what the weather will do to his crops, his colleagues say.

"He drives an old pickup truck and is comfortable in rural areas," said Dr. George Rekers, a psychologist at the University of South Carolina. "He relates to a lot of different people with ease. But basically, he is a very independent person that makes up his own mind."

Morgan is no stranger to controversy.

In 1988, to the dismay of the prosecution, he found that Jamie Wilson, who killed two 8-year-

old girls at a Greenwood elementary school, was guilty but mentally ill.

Guilty but mentally ill means that he knew right from wrong, but couldn't conform his actions to the law.

The prosecution, unhappy with Morgan's findings, hired another doctor who disagreed with Morgan. The same doctor, Park Dietz of Newport Beach, Calif., is expected to testify in Smith's trial.

Wilson pleaded guilty but mentally ill, but a judge still sentenced him to death.

Morgan also testified in 1986 that Dawn Baxter, a Newberry nurse who killed her four small children, was not guilty by reason of insanity -- meaning he found she couldn't distinguish right from wrong.

In that case, the prosecution was seeking the death sentence.

As a result, in large part because of Morgan's testimony, a judge sentenced Baxter to life in prison with the possibility of parole in 20 years.

Columbia defense attorney **Jack Swerling** said Morgan has given opinions that have been both favorable and hurtful to his clients throughout the years. But he respects Morgan.

"Sometimes his position is unpopular, but irrespective of what people think, he tries to tell it like it is," he said.

Fifth Circuit Deputy Solicitor Johnny Gasser agrees with **Swerling**. "He is very serious about the fact that he doesn't work for the prosecution or the defense," Gasser said. "He works for the court."

Gasser, **Swerling** and Johnson also say that Pope will have a tough time rattling Morgan under cross-examination. As a witness, Morgan is sure of himself, rarely referring to notes during testimony. He also has a good demeanor on the stand, they say.

"He will concede points that are in the other side's favor and not get hostile about it," Johnson said. "If there's something positive about a defendant, he'll acknowledge it. That makes him very effective."

Dr. Donald Morgan



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COMMENTATORS FIND FUN, FAME AT TRIAL S.C. ATTORNEYS CRITIQUING CASE

TWILA DECKER, Staff Writer

Columbia defense attorney Dick Harpootlian's sound bite on "Entertainment Tonight" about the Susan Smith trial last week came right after actor Hugh Grant's spiel about why he had sex with a hooker.

Harpootlian is among several Columbia lawyers-turned-TV-commentators at the Smith trial. The attorneys say they are just doing it for the fun of it. They aren't paid and actually lose billing hours each day. "It's fun to sit back and handicap a trial," said Harpootlian, who comes to Union about three times a week to talk before television cameras. He said it reminds him of the days when he first started practicing.

"Lawyers would routinely watch whatever trial was going on, then they would go to coffee and talk about it," he said.

Other Columbia attorneys spotted on the airwaves include **Jack Swerling**, Joe McCulloch, Jim Anders, Lee Coggiola and I.S. Leevy Johnson.

The attorneys often make the trek from Columbia at the request of one of the networks or CNN, then find themselves surrounded by other television stations wanting their take on the day's events. Others do their talking from Columbia.

Most say it's hard to stay away from the courthouse when the state's highest-profile trial is unfolding. They say they also learn a lot by critiquing the players. But they'd love to be involved.

Swerling and Harpootlian have even kidded each other about who would pay the most to cross-examine David Smith, Susan Smith's ex-husband who is writing a book on the case, Harpootlian said.

For Coggiola, a longtime friend of Smith's attorney, David Bruck, and a foe of the death penalty, the interviews were sort of a shock, she said. She has been on CNN talking about the case.

She said she started getting calls from the networks after being quoted in a People magazine profile on Bruck. She said Bruck had a quiet power about him, a quote that seemed to fit Bruck to a T.

"It's scary," she said. "And, I can't help but say, 'Why do they want my opinion? I'm just a little ol' public defender from Richland County.'"

Johnson, who also enjoys critiquing the case, said he hasn't quite figured out if it has hurt or helped his practice. Johnson said he's run into some would-be clients who say, "I was going to call you, but I saw you on TV and figured you were too busy."

Others have told him they thought he would charge too much since he's on TV.

Harpootlian said he hasn't worried about people thinking he charges too much because he's on TV. People already think he's too expensive. And Harpootlian, a former prosecutor in Richland County who has never shied from the spotlight, admits the interviews boost his ego.

1-2. Harpootlian, Swerling



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JURY FACES LIFE-OR-DEATH DECISION

TWILA DECKER and MARGARET N. O'SHEA Staff Writers

Now that a Union County jury has found Susan Smith guilty of murdering her two children, the same 12 men and women will return to a courtroom today to decide if the 23-year-old woman should die.

The jury could finally see the horrific pictures of 3-year-old Michael and 14-month-old Alex, who were found upside down in their car seats with one tiny hand pressed against the window of the car. They also might see the car seats the boys were strapped inside when found at the bottom of the lake. And, the prosecution's much-publicized and highly criticized videotaped re-enactment of two Mazda Proteges, including Smith's, sinking into John D. Long Lake might finally make its court debut.

If the jury is allowed to see the video, they will experience the agonizing slowness of six minutes, ticking off second by second. When the event was re-created, it took two vehicles each that much time to sink.

"You can discuss all day what it was like for those children, but until you see pictures of it, you don't get the full appreciation of what happened," Columbia attorney **Jack Swerling** said. "If the state is successful in getting visual images of the children, that's the kind of thing that can create emotion."

Swerling said Circuit Court Judge William Howard will decide whether the jury will see photographs, the re-enactment and other visuals.

First Howard must decide if the items are relevant. If they are, the judge then must determine whether their relevant value outweighs their prejudicial value.

Swerling said photographs of crime scenes and victims often get into evidence during the sentencing phase to show the horrific nature of the crime.

The jury also could hear, for the first time, Susan Smith tell them she is sorry for killing Michael and Alex, although it is unlikely she will beg for her life. She is said to have a death wish. Jurors have heard about Smith's remorse from others, including her doctor, but not from her.

There will almost certainly be testimony from some of the grown men who cried at the lake when they recovered the boys' bodies.

But the jury also will probably hear from Sheriff Howard Wells, SLED agent Pete Logan and FBI agent Carol Allison who all told Smith she didn't deserve to die. They say that Smith's remorse was genuine when she confessed. Surprisingly, the three investigators have been key witnesses for the defense, rather than the prosecution.

In addition to doctors on both sides testifying about Smith's state of mind the night she killed her sons, jurors could see key players in Smith's life who remained in the background in the guilt phase:

-- David Smith, the father of Michael and Alex, might be called to the stand to tell of his grief and recount the nine days when his ex-wife told him their children had been taken by a carjacker. He wants his ex-wife to die. If the prosecution doesn't call him, the defense could show the dysfunctional, self-destructive family the boys lived in. David Smith's treatment of his wife figures heavily into the defense's portrayal of Susan Smith as a deeply depressed woman.

-- Her stepfather, Beverly Russell, might testify about the family's darkest secret exposed so far -- his incestuous decadelong sexual involvement with Smith. The two have had sexual relations since Smith was 15.

-- Linda Russell might admit that she blamed her daughter for the relationship with Russell and for telling teachers about it; that she sabotaged Smith's self-esteem from childhood; and that she turned thumbs down when psychiatric help was suggested for a suicidal, sexually exploited daughter.

"The guilt phase was basically the nuts and bolts," Columbia attorney Joe McCulloch said. "Now is when she gets even more demonized by the prosecution and humanized by (Smith's attorneys) David Bruck and Judy Clarke."

Sentencing phase

The sentencing phase of a death penalty trial is just as though a new trial has started, except new jurors aren't picked. Attorneys on both sides make opening statements, call witnesses and make closing arguments.

Sixteenth Circuit Solicitor Tommy Pope said Saturday he expects the sentencing phase to last about a week. He wouldn't say who he would call to testify.

Bruck said he will only present evidence that moves the understanding of Smith's troubled life forward. He wouldn't be specific about who he would call, but said Saturday: "There is more to this story to tell."

Judge Howard is under pressure in this phase because there are no alternate jurors left. If just one juror is dismissed, the sentencing phase of the trial could be in jeopardy. One juror was dismissed for allegedly lying to the court and another was let go Saturday for an undisclosed family conflict.

Swerling said the attorneys could agree to go forward with less than 12 jurors, although that would be rare. He said the attorneys also could pick a new jury to decide on a penalty, but to his knowledge that has never happened. He said it is typical for the state Supreme Court to overturn a sentence and order a new sentencing phase of the trial. But he said he is not aware

of a case where one jury decided the guilt of a defendant, and another jury decided on the penalty without the sentence first being overturned by higher court.

“Bruck could make a good argument that you have a right to be sentenced by those who found you guilty if that were to happen,” **Swerling** said.

In order to seek the death penalty, Pope must prove aggravating circumstances were present. Under state law, aggravating circumstances include killing a child younger than age 11, killing more than one person or torturing a person before killing them.

But Smith's attorneys might be able to spare her life if they can prove to a jury that mitigating circumstances were present. They will probably talk more about her father's suicide, her suicide attempts, her deep depression and her troubled marriage. They will continue their claims that the entire ordeal was a botched suicide, and that Smith changed her mind about the killings, but left the boys behind in a state of confusion.

Getting death

From the beginning the odds have been against Pope getting a death verdict. South Carolinians haven't sent a woman to her death in nearly 50 years.

In addition, a Union County jury hasn't sent a Union resident to death since the state bought an electric chair and started keeping records in 1912. If sentenced to die, Smith would choose between the chair and lethal injection.

But legal observers say the momentum in the case clearly shifted Saturday when the jury, which was thought to be a good jury for the defense, returned a verdict of two counts of murder in 2 1/2 hours.

The jury includes a woman who baby-sat Smith when she was an infant and several people who have had family members who were treated for emotional problems, including one man whose son was hospitalized for a suicide attempt. One man even knew Smith's father.

But **Swerling** and Columbia attorney Dick Harpootlian said an observer couldn't tell the jury was sympathetic to Smith by watching them Saturday night when they returned from the jury room with their verdict of murder and read it aloud.

“I think David Bruck and Judy Clarke have a lot to be concerned about,” said Harpootlian, a former prosecutor. “I saw something in that jury that I recognized as a prosecutor. I think they definitely have the ability to give the death penalty.

“You just don't publish a murder verdict with your chest bowed out and your voice booming. ‘Guilty of murder,’ ” Harpootlian said. “Most jurors don't want to look at the defendant. Not a one of these looked at his shoes. “There are two ways to look at a trial -- from the legal level and from the gut level. Bruck is ahead on strategy, and that can make a big difference on appeal. But Pope has got the emotional center of this case. The jury is on his side,” Harpootlian said.

But **Swerling** said that sentencing a person to murder is far different from sending a person to death. He said the jury might feel as though they were tough by convicting Smith of murder,

and concede to the life sentence.

“They could easily say to themselves, ‘This is a case of murder. We have spoken. But we just don’t feel the death penalty is the appropriate punishment and feel very confident in the fact that we were tough,’ ” **Swerling** said.

1-2. Bruck, Pope



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'A LAWYER'S NIGHTMARE': SHOULD SMITH TAKE THE STAND?

Twila Decker, Staff Writer

Should Susan Smith tell the jury that she is sorry for murdering her sons, Michael and Alex?

That's the question defense attorneys say David Bruck and Judy Clarke are probably anguishing over as they wind down their efforts to convince jurors not to sentence the 23-year-old woman to death. "I'm sure every time they think about putting her on the stand, they think of a hundred reasons why they shouldn't. And every time they think about not putting her on the stand, they think of another hundred why they should," said **Jack Swerling**, a Columbia defense attorney. "It's a lawyer's nightmare."

By law, Smith has the right to take the stand in her own defense and to address the jury during closing arguments. Convicted Saturday of murder, she could be sentenced to death or to life in prison with the possibility of parole in 2024.

Smith waived her right to talk to the jury during the guilt phase of her trial, but the stakes are now higher. The defense plans to rest its case today.

Charleston defense attorney Gedney Howe said the decision will hinge on how strong Bruck and Clarke believe 16th Circuit Solicitor Tommy Pope made his case to the jury that Smith should die.

"The higher they believe her risk of getting the chair is, the more risk they'll have to take," Howe said. "They've been reading the jury and they'll get a good sense of what they think is the right thing to do."

The other difficult decision before Bruck and Clarke is whether to call Smith's stepfather, Beverly Russell, who had a sexual relationship with Smith from the time she was 15 until two months before she killed her sons.

Attorneys say that decision is hard to call from afar. It will be based heavily on what Russell has said to Clarke and Bruck in private and how defensive they think he might get under questioning.

To help Smith in court, Russell, a prominent businessman and politician, would have to take the blame for molesting her.

"I think what the defense has to do is create some sympathy for her and some emotion for

her, especially after yesterday (Tuesday) with David Smith and the re-enactment," Columbia attorney Dick Harpootlian said. "Beverly Russell could do that, but we don't know what he might say."

Swerling agreed. "He would have to completely support her. If he in any way contradicts what the defense has said about her, he probably won't be put on the stand."

Swerling said Russell's testimony could help by confirming what Smith told her doctors about their sex life.

Attorneys doubt Smith will take the witness stand, but they say she could make an appeal to the jury during closing arguments.

"I would allow her to make closing statements, especially if she really wants to die," Columbia attorney I.S. Leevy Johnson said. "If it is true, and she genuinely means it, that she wants them to sentence her to die, I would have her tell the jury that."

"I think if she told them that, two things would happen. No. 1, it would confirm the diagnoses of the forensic psychiatrist and, No. 2, they wouldn't do it," Johnson said. But he said subjecting her to cross-examination would be too risky.

Howe also said he probably wouldn't put her on the stand.

"Generally, you want people to take the witness stand and remain very composed," Howe said. "I would be concerned if Susan took the stand and came across that way, it would hurt her."

"It could have this air of a calculating, cold sort of person, which is not what the defense is portraying her as."

"On the other hand, if she takes the stand and falls apart, God knows what will come out of her mouth," Howe said.

He said letting Smith address the jury is another matter. "If I thought she could carry off something as simple as, 'I am sorry and I feel terrible,' I might consider it," Howe said.

Swerling also agreed that letting Smith address the jury during closing arguments would be less risky. He said it would be safest for her to prepare a statement and read it, although it would have to be written by her.

"If she gets up there and reads something with a lot of legalese in it, and it sounds like something written by her lawyers, that's not going to cut it," he said. "It would have to be genuine."

As far as cross-examination, **Swerling** said his concern is that there are too many questions Smith might finally have to answer.

Smith could be asked details about that night at the boat ramp. Did she see the boys sink into the lake? Did she slam the car door shut? Why was she so anxious to talk with her ex-lover, Tom Findlay, after her boys were dead?

“One of the problems is I don't fully accept the state's theory that she killed the kids for Tom Findlay, and I don't completely buy the defense's theory that the kids died because of a botched suicide.” **Swerling** said.

“To me, somewhere between the two is the truth. There are too many questions that she would have to answer.”



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BOTH SIDES SCORE HIGH IN OBSERVERS' EYES

LISA GREENE, Staff Writer

Even though the jury voted against executing Susan Smith, prosecutor Tommy Pope might have justified seeking the death penalty, according to lawyers evaluating the star players' performances.

Many criticized Pope for refusing to accept a plea bargain from Smith's attorneys that would have given her a life sentence without putting the town through a costly, emotional trial. "Whether the verdict is life or death, one thing that comes out is that this should have been tried," said former 5th Circuit Solicitor Dick Harpootlian. "This should have been aired.

"Twelve men and women of Union County should decide this. To some extent, this begins the healing process rather than delaying or extending it."

Midlands lawyers had praise for defense lawyer David Bruck as well, saying he saved Smith's life by painting her as a deeply troubled woman with a violent past.

"The big difference for the defense is, there's never been any showing that she didn't love her children," said defense lawyer **Jack Swerling**. "If you believe she loved her children, there's no explanation why she would kill them, except that she lost it."

Harpootlian said the two men were a refreshing change from the legal feuding, glacially slow testimony and circus atmosphere of the O.J. Simpson trial in Los Angeles.

"With the presentation by the lawyers, the national media and the nation get to see a trial that works," he said. "Whether you agree or disagree with the verdict, the net result is justice. No Kato Kaelins. No theatrics. Nothing outrageous."

Eleventh Circuit Solicitor Donnie Myers, whom Pope came to for advice, was pleased with Pope's performance, saying he surpassed Myers' expectations. He said Pope won't be politically damaged by Union residents' questions about having the trial.

"I think once the dust settles, they will realize that if they or their families are the victims of a violent crime, they're going to want Tommy Pope on their side prosecuting the case," he said.

But the lawyers' performance during the trial wasn't what determined the verdict, others said. Myers and **Swerling** said they had little doubt the jury would deliver a life sentence before the trial even began

Myers said that was clear before the jury was even seated. Bruck did "99 percent" of his work keeping the trial in Union and swaying public opinion beforehand, he said.

"He played the media like a Stradivarius violin," Myers said. "He was able to get cameras when he wanted to, and keep them out when he didn't want the public to see."

Swerling said he thought some of Bruck's best decisions came during jury selection. He pointed to several jurors he thought would be pro-defense, including a pediatrician and a woman who baby-sat Smith as a child.

"Once the jury was seated in this case, it was pretty apparent to me there were several people who were not going to impose the death penalty," he said.

But **Swerling** didn't criticize prosecutors for not striking those jurors, saying that hindsight is always clear, and that they had information about the jurors that trial spectators didn't have.

Harpoottian and **Swerling** were in Union Friday, watching closing arguments and doing TV commentary. Both said Pope and Bruck were more low-key than they expected.

"I don't think (Pope) did as much fire and brimstone as people expected, but it was still an effective argument," **Swerling** said.

He said Pope's most effective tactic was to urge the jury to focus on the "real victims" of the case, Michael and Alex Smith. He prepared for them to focus on the boys by putting up David Smith's wrenching testimony and having jurors watch the gruesome re-enactment of the sinking car.

Harpoottian said Bruck was "more subdued" than he expected. "Bruck did about an hour filibuster before he got to the meat of his argument to cool down the jury (after Pope's argument), and I think that worked," Harpoottian said.

He also pointed to Bruck's quotes from the Bible as a persuasive argument in a churchgoing town. "Pope had a preacher-like style, but Bruck was the one who delivered the argument."



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