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# The Great Downstate Escape of 1978

## Jeff's Sidebar



By Jeffrey B. Levens

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An Associated Press story that appeared online June 13 began, "A worker at an upstate New York maximum-security prison has been arrested on charges she helped two convicted killers escape, state police said Friday."

The story continued, "(Joyce) Mitchell is accused of befriending (the inmates) and giving them contraband." Other stories intimated she had begun a romance with one of the sweet-talking murderers.

History repeats itself, I thought, as I harkened back to 1978, when a similar story appeared in the Springfield State Journal-Register.

Two prisoners — murderers who had escaped a federal penitentiary in Missouri — had been captured somewhere in central Illinois and were being held in the Springfield city jail.

On Jan. 23, 1978, the front page of the morning paper reported that during the night, they had broken out of their cells by sawing through the bars, overpowered the jailers but were recaptured before they ever made it out of the building.

Although William Smith had been injured, the article reported, he and another jailer had been arrested and charged with aiding the attempted escape. The article quoted the police chief as saying he didn't know how or why Smith had aided the prisoners, as the investigation was ongoing. Where, however, would the world be without anonymous sources "not authorized to speak for the department"?

"According to a police source," the article continued, "Smith was homosexually involved with one or both of the convicts, leading to his alleged involvement in the escape." Interesting word construction by the reporter: Involvement in the escape was an allegation; the homosexuality was a given.

Adding insult to injury, the story continued, "The source also said Smith owned a black onyx ring, which allegedly was given to one of the prisoners in return for sexual favors. The ring was later found in one of the cells."

A few weeks later, the truth revealed itself. The prisoners' girlfriends had smuggled in hacksaw blades. I guess the "source" had overlooked the part about the girlfriends.

The charges were dropped against Smith, but the injury had been done. He was disowned by his family, excommunicated from his church and laughed out of Springfield. It's not that they were intolerant, mean-spirited, homophobic bigots. They were just disappointed in him.

Smith went shopping for a Chicago lawyer. He found one in the phone book with the same name as his and called him. Smith referred Smith to [Fred Lane](#), a veteran trial lawyer from whose intense post-graduate trial technique course I had recently graduated.

Knowing I lived in Springfield, Lane referred the case to me.

I filed a libel lawsuit on Jan. 23, 1979, exactly a year after the story had appeared. I deposed the detective who had spearheaded the investigation, during which I learned the anonymous source was the police captain on duty the night of the attempted escape.

The detective was terminally ill at the time, so I promptly preserved his testimony through an evidence deposition. He struggled through it, connected to an oxygen tank, but I admired his willingness to tell the truth, which led to a settlement with the city.

I distributed the proceeds but held back some money in our client fund account for expenses going forward.

Going forward meant locking horns with the newspaper's attorney, [Barry O. Hines](#), a fine attorney well versed in the myriad issues newspapers encounter in struggling to exist. Hines had made it clear the case would have to be tried because his client would never settle a libel claim.

Hines moved for summary judgment, arguing that because Smith was a public official, we would have to demonstrate the newspaper had published the article with actual malice. Because the anonymous source was a high-ranking police officer, he insisted, we could never prove reliance on the source constituted reckless disregard for the truth, regardless of the awkward sentence construction.

I quoted from case law which held the term "public official" applies "to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." Smith may have had a uniform, but he had no "control over the conduct of government affairs." A batboy wears a uniform, I contended, but that does not make him the manager of the baseball team.

The trial court agreed with Hines and granted the newspaper summary judgment. I appealed the ruling to the 4th District Appellate Court, which set out the issue succinctly:

"The defendants argue that the plaintiff, as a jailer, is indistinguishable from a police officer. Police officers, of whatever rank, are unquestionably 'public officials' in Illinois. The plaintiff counters that because of the lack of training or education required for the jailer position, the utter lack of authority over other employees or members of the public, and the total lack of discretion accorded him in performing his duties as jailer, he should not be considered a public official."

The court held Smith was not a public official and reversed summary judgment. *Smith v. Copley Press*, 140 Ill.App.3d 613, 94 Ill.Dec. 785, 488 N.E.2d 1032 (4th Dist. 1986).

During the next few years, Hines petitioned the Illinois Supreme Court for leave to appeal. When his petition was denied, he filed a petition for certiorari to the U.S. Supreme Court, which was also denied.

Which raises the question: Has any attorney ever opposed a petition for certiorari and really hoped he or she would win?

By now, the case was seven years old, and when it was returned to the trial call, it was assigned to a judge sitting 35 miles away in Jacksonville. His clerk phoned Hines and me and beckoned us to Jacksonville.

Always cordial, Judge Richard E. Mann invited us in, sat us down, offered us something to drink, sat back in his chair and pointed to a waist-high pile of files against the wall.

"Know what that is?" he asked. "That's your case. Now, I happen to be retiring in nine months, and if you think I'm going to spend one minute of time reading all that, you have another think coming.

"Either of you have a problem with that?" the judge asked with a big ol' smile.

How could I say anything other than I couldn't blame him one iota.

"All right then, I'll send it back to the chief judge in about nine months and you boys can have at it."

Nine months later, I had moved to Chicago to establish a practice with Al Augustine, who has been my partner for 29½ years. And the files had disappeared from the courthouse, if they had ever made it back from Mann's chambers. However, we did not press the matter, because our client had disappeared as well.

At 19 years, it was far and away the oldest case on the docket when, in September 1998, then- Chief Judge [Sue E. Myerscough](#), now a federal judge for the Central District of Illinois, suggested I take a voluntary dismissal without prejudice pursuant to Section 2-1009 of the Code of Civil Procedure, and were Smith to surface in the ensuing year, we could refile, although that wouldn't necessarily have solved the problem of where the court files were.

Our concerns were moot, however, for Smith never did surface, and I escheated the contents of the trust account to the Illinois treasurer's office, which to this day has never sent me a thank-you note.

As for the escape in upstate New York, if Joyce Mitchell happens to contact you, please don't refer her to me.