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# THE PETITION TO EXHUME JOHN WILKES BOOTH: A VIEW FROM THE INSIDE

**by Francis J. Gorman**

Rarely do history debates leave the confines of classrooms, academic journals, or meetings of amateur historians. Did George Washington really chop down a cherry tree? Or, on a more serious note, did Franklin Roosevelt have advance warning of Japan's attack on Pearl Harbor?

In Maryland, however, an obscure history debate exploded into the courts. The debate involved John Wilkes Booth — America's greatest villain — and the contention that he escaped in 1865. Most historians and history buffs consider the escape theory to be folly, or even fraud. Nevertheless, the reliability of the Booth escape story was litigated in the Circuit Court for Baltimore City and in the Court of Special Appeals of Maryland.[1]

I never imagined that I would have the opportunity to try a case that might be noted by historians. Most cases fade away quickly, even those with reported opinions, but the suit to exhume John Wilkes Booth was likely to be remembered. Regardless of how historians might view the case's outcome, representing Green Mount Cemetery in the exhumation petition provided me with a history lesson and a court trial I will never forget. This article relates what happened in the case and some of my experiences.

## I. BACKGROUND

### A. The History

The Army of Northern Virginia, under the command of Confederate General Robert E. Lee, surrendered to the Union on April 9, 1865. With the Civil War over, President Lincoln was determined to begin the process of national reconciliation.

A few days later, on Good Friday, April 14, President and Mrs. Lincoln went with Clara Harris and her fiancee, Major Henry Rathbone, to a performance of "Our American Cousin" at Ford's Theater in Washington. During the performance, John Wilkes Booth, an accomplished Shakespearean actor and a familiar face at Ford's Theater, entered Lincoln's box and shot the President in the back of his head. After committing his dastardly deed, Booth jumped to the stage and shouted "*Sic semper tyrannis*" ("Thus always to tyrants"). Booth and one of his accomplices, David Herold, then escaped from Washington.

Union troops commenced a widespread search for Booth and others thought to be involved in the conspiracy to assassinate Lincoln and other high-level U.S. government officials. A unit of detectives assigned to the War Department, along with a detail of twenty-six troops from the 16th New York Calvary commanded by Lieutenant Edward Doherty, tracked Booth and Herold through Southern Maryland, across the Potomac River, and to a farm owned by Richard Garrett located not far from Port Royal, Virginia. They arrived at the Garrett Farm around 3:00 a.m. on the morning of April 26, 1865.

The debate arises at this point. Some contend that Booth was either not in the barn when the troops arrived or that he escaped from the barn. For most people, however, the history goes on as follows.

Booth and Herold were in the barn. The soldiers ordered them to come out and eventually threatened to set the barn on fire. Herold came out and was captured, but Booth remained inside as the barn was set ablaze and was shot through the neck. Booth was pulled out of the burning barn and taken to the steps of the farm house, where he died several hours later.

Booth's body was taken by wagon from the Garrett Farm to a steamboat, the JOHN S. IDE, on the Potomac River. The IDE took the body to Washington where it was transferred to the U.S.S. MONTAUK. Aboard the MONTAUK, an inquiry and

[1] *See* Kline v. Green Mount Cemetery, 110 Md. App. 383, 677 A.2d 623 (1996).

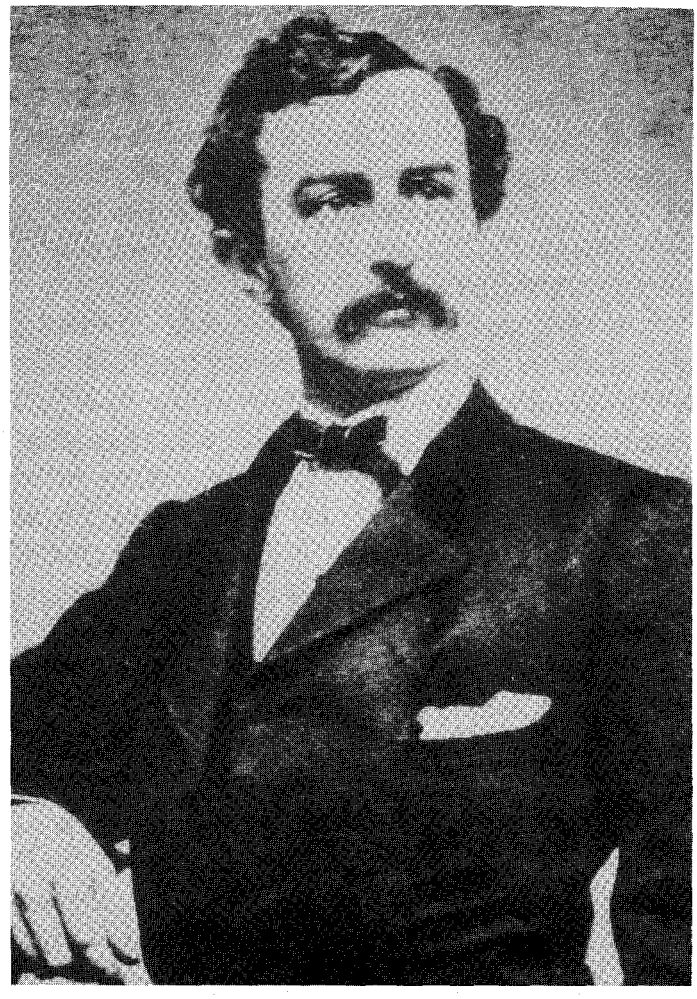
an autopsy were performed under the supervision of Surgeon General Joseph K. Barnes. A number of witnesses identified the body as that of John Wilkes Booth. Thereafter, the body was taken off the MONTAUK to a wharf at the Arsenal in Southwest Washington. Adjacent to the Arsenal was the former Washington Penitentiary where civilian prisoners had been housed until 1862. The penitentiary had become a warehouse and storage area for the Arsenal. Booth's body was buried in a storage room at the Penitentiary in the presence of representatives of the War Department. Two years later, in 1867, Booth's body was disinterred, moved, and buried a second time in another storage area in the Penitentiary.

After a number of requests from the Booth family, President Andrew Johnson released the body to his family. On February 15, 1869, an undertaker named Weaver brought Booth's remains to his funeral establishment in Baltimore. The winter conditions did not permit burial at that time so the body was placed in a holding vault at Green Mount Cemetery.

Green Mount Cemetery is located in Baltimore City, extending from the southeast corner of North and Greenmount Avenues. Green Mount Cemetery is the burial site of some of the most famous and prominent Marylanders, including Johns Hopkins and Enoch Pratt. It still operates as a cemetery and offers burial and cremation services.

In June 1869, Mary Ann Booth, the mother of John Wilkes Booth, purchased Lots 9 and 10 in the Dogwood area of the cemetery for use as a family burial plot. The deed from Green Mount Cemetery granted and conveyed to Mary Ann Booth Lots 9 and 10 "for the purpose of sepulcher alone, and none other, subject to the provisions of the Act of the General Assembly of Maryland, passed at December Session, 1837." This Act, and a supplement passed in 1838, incorporated Green Mount Cemetery and imposed upon the cemetery a permanent fiduciary duty to assure protection to the remains buried in the cemetery.

John Wilkes Booth was buried in Green Mount Cemetery in an unmarked grave in the Booth plot on June 26, 1869. Members of the Booth family and members of the public were present at the burial. His grave was purposely not marked as a result of the wishes of his family, particularly his older brother Edwin Booth, also a famous Shakespearean actor.



**The Real John Wilkes Booth (circa 1862)**

### B. Modern Day Interest

I soon realized that thousands of people around the world are interested and intrigued by this history. Many of these people have focused their interest on Lincoln. Some have focused on Booth. Their interests move beyond the obvious facts of history into details that can be full of ironies and fascinating coincidences. By joining a local Lincoln Group, or the Surratt Society, anyone can discover the fascination of this history.

For example, here are some of the little known true facts I learned about Booth while handling the case:

- John Wilkes Booth came from a Baltimore "gang" of many of the era's best known actors. Back then, Baltimore was a powerhouse in the acting profession. Among the boyhood friends with whom Booth grew up were John Sleeper Clarke, Samuel Knapp Chester, Stuart Robson, and Theodore Hamilton. All these names were quite familiar to persons who knew the stage in those days.

- Booth's theatrical debut took place in the Charles Street Theater in August, 1855. The theater and the Baltimore Museum (another theater next door) stood where the office building at Two North Charles Street stands today. Coincidentally, this is where the offices of Gorman & Williams are located.

- Booth lived on Exeter Street, Old Town, near Brewers Park and where the U.S. Post Office now stands. The Shot Tower was built nearby during Booth's boyhood. In the same neighborhood was the Front Street Theater where Booth's father (Junius Brutus Booth) and his brother Edwin had performed and where Lincoln was nominated in 1864 for a second term as president.

- The Holliday Street Theater was owned by John T. Ford of Baltimore, who also owned Ford's Theater in Washington, D.C. The carpentry staff at the Holliday Street Theater had been coaxed during a summer break to come to Bel Air to work for Junius Booth and build Tudor Hall for the Booth family. These same carpenters were later transferred to Washington to build Ford's Theater. That is one reason why many of the staff at Ford's Theater on April 14, 1865, were familiar with John Wilkes Booth. They had helped build the house in which he grew up. In fact, some of these people — James J. Gifford and Edman Spangler — were arrested as suspects in the assassination. Spangler was actually prosecuted.

- Ford was a civic leader in Baltimore and was one of the most respected and admired people in the theater business. He had once been acting mayor of Baltimore, and he was responsible for the installation of sewers and street lights. At the time of his death in 1894, he was the head of the Maryland state prison system. He never gave up the theater business. In fact, Ford's Opera House in Baltimore, at Fayette and Eutaw, operated until 1964.

- After the death of Junius Booth in 1852, the Booth family attended church at the Christ Episcopal Church at Gay and Fayette, opposite the Veteran's Plaza. Nearby was John H. Weaver's funeral establishment and the Holliday Street Theater. Thus, it was easy for many people who knew Booth and his family to walk over to Weaver's establishment for a look at Booth's body in February 1869.

I also learned that Lincoln and Booth history buffs delight in exposing accepted history as false. For example:

- The expression "your name is Mudd" does not come from the case of Dr. Samuel A. Mudd who treated Booth's injured leg. Actually, it dates back to at least 1845.

- The expression "break a leg" did not originate when Booth broke his leg jumping to the stage the night he assassinated President Lincoln. This expression was quite common in Shakespearean England.

- Booth did not "get past" Lincoln's bodyguard because the guard had gone off to watch the play. In fact, President Lincoln did not have a guard. Presidents were not guarded until after President McKinley's death in 1901.

- There is some evidence that Booth did not break his leg when he jumped to the stage. One of the experts in the case, Michael W. Kauffman, in a 1990 article in the *Blue and Gray* Magazine wrote that Booth broke his leg when his horse tripped and rolled over him somewhere outside of Washington.

All of this is the grist of historians. The debate over whether Booth escaped, however, went far beyond a fascinating anecdote of history.

## II. HOW THE DEBATE MOVED INTO THE COURTS

Two men with a lifetime interest in Booth and the Lincoln assassination — Arthur Ben Chitty, a historiographer at the University of the South in Memphis, Tennessee, and Nathaniel Orlowek, an educator in Silver Spring, Maryland — are among those who believe that Booth escaped. The Booth escape story gained national attention in 1991 when *NBC's Unsolved Mysteries* portrayed the theory on network television.

During this time, the President of Green Mount Cemetery was a prominent Baltimore attorney named William C. Trimble, Jr.[2] In 1992, Mr. Trimble had turned down several requests from Chitty and Orlowek and their attorneys for permission to exhume Booth's remains. He had considered the reasons advanced for the exhumation and concluded that the Booth escape story had no historical support.

Several different attorneys had been involved with the exhumation effort. In March of 1992, a third year law student named Mark Zaid read a newspaper article about the Booth escape theory. He eventually agreed to assist with legal research. In August of 1993, Mr. Zaid assumed representation of Chitty and Orlowek in their endeavor to exhume the remains of John Wilkes Booth.

In the latter part of 1993 and the early part of 1994, Mr. Zaid contacted a number of persons who were or claimed to be descendants of John Wilkes Booth or of his family. John Wilkes Booth had no legitimate children and no direct descendants. Two distant descendants agreed to become Petitioners in a legal effort to force Green Mount Cemetery to permit the exhumation of the remains of John Wilkes Booth: Virginia Eleanor Humbrecht Kline of Pennsylvania, a first cousin twice removed, and Lois White Rathbun of Rhode Island, a great, great, great niece.

Not all the distant descendants were in favor of an exhumation. At the time of the hearing, Marie Worster, who is Petitioner Kline's sister, did not consent to an exhumation, nor did her daughter. Mrs. Worster and her daughter have possession of the original deed given by Green Mount Cemetery to Mary Ann Booth. I spoke with Mrs. Worster and urged her to come to court and testify as to her opposition, but she did not want to become publicly involved.

## III. THE PETITION TO EXHUME TELLS THE ESCAPE STORY

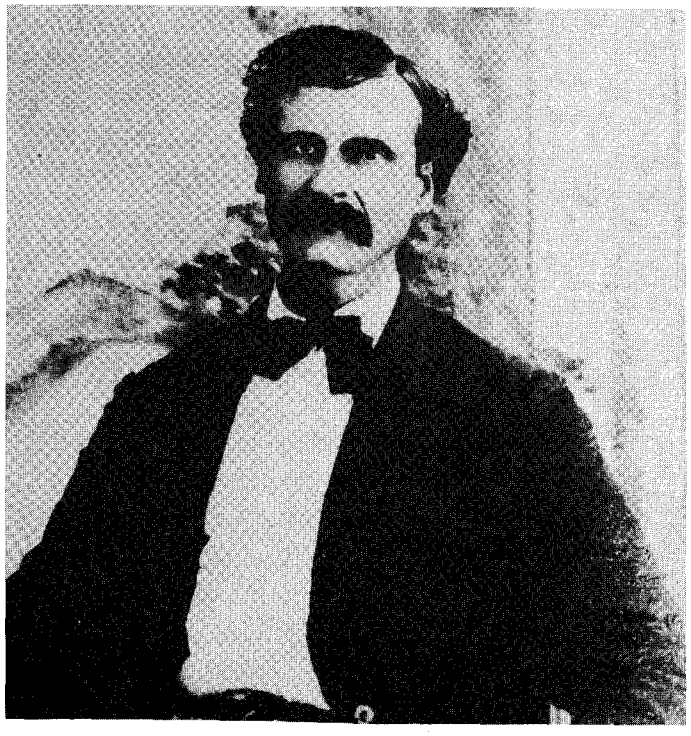
In October of 1994, amid media fanfare, a petition was filed in the Circuit Court for Baltimore City "to exhume the alleged remains of John Wilkes Booth from Green Mount Cemetery." With the filing of this petition, the Booth escape theory became a hotly contested legal issue.

There have been many fanciful stories over the years concerning the fate of John Wilkes Booth. He had been allegedly sighted in Ceylon, India, Mexico and elsewhere. Yet, Chitty and Orlowek contended that there was only one story supported by both physical and eyewitness evidence that had survived through the years with its credibility and persuasiveness intact. This was the story written by Finis L. Bates in his 1907 book entitled *The Escape and Suicide of John Wilkes Booth.*

Bates was an attorney who practiced in Texas and Tennessee. He contended that in 1872 he met a man named John St. Helen in Granbury, Texas who, thinking himself near death, told Bates that his name was John Wilkes Booth, the assassin of President

[2]A board member who also acted as the attorney for Green Mount Cemetery in the 1950s and 1960s was J. Rieman McIntosh, the uncle of my partner, David McI. Williams.

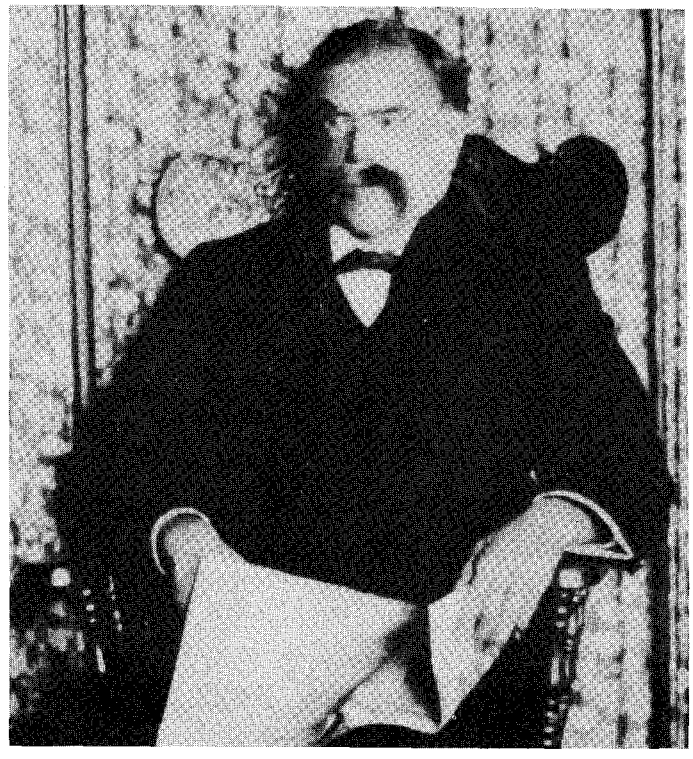
Lincoln. Several days later, St. Helen recovered and had a subsequent discussion with Bates in which he described his story of escaping the federal troops at the Garrett Farm and that in actuality a young man named Ruddy or Roby was the person killed at the Garrett Farm. As the years passed, Bates continued to pursue this story and corresponded with officials in the War Department during the 1890's. In 1903, Bates was living in Tennessee when he received word that a man named David E. George had committed suicide in Enid, Oklahoma and that his personal papers contained documents in which he claimed to be John Wilkes Booth. Bates went to Enid, Oklahoma, took possession of the George corpse, declared it to be his old friend John St. Helen, and instructed the mortician to mummify the remains.



**John St. Helen (Granbury, Texas 1872)**

The Bates book sold very well. Decades later, Nathaniel Orlowek came across the book and began his quest to establish that John Wilkes Booth had actually escaped.

The initial Petition filed in October of 1994 had four Petitioners — Kline, Rathbun, Chitty, and Orlowek. The Petition claimed that many alleged Booth descendants had consented to the exhumation of the remains. The Petition claimed legal standing based on the status of Kline and Rathbun as descendants, possessing lawful rights to seek exhumation. The Petition recited Green Mount Cemetery's refusal to permit exhumation, and it set forth an analysis of Maryland court decisions on exhumation.



**David George (Enid, Oklahoma 1903)**

The Petition also discussed the historical background, noting the many stories about Booth's sightings but concluding that "only one story, supported by both physical and eyewitness evidence, has survived through the years with its credibility and persuasiveness still in tact." This is the story in the Bates 1907 book. The Petition also laid out plans for exhuming and examining the remains.

The Petition concluded with a plea that the debate as to whether John Wilkes Booth escaped should be resolved by an exhumation. Accordingly, the Petitioners requested an order from the court authorizing the disinterment and exhumation of the

"alleged" remains of John Wilkes Booth.

Green Mount Cemetery moved to dismiss Orlowek and Chitty as Petitioners on the grounds that they lacked standing. The circuit court agreed, and granted the Petitioners leave to amend. An Amended Petition was filed naming only Kline and Rathbun as Petitioners. Green Mount Cemetery answered the Amended Petition and stated its position as follows:

> Green Mount Cemetery was entrusted by Mary Ann Booth in 1869 with the remains of her son, John Wilkes Booth, and with the remains of other members of the Booth family who are buried in a family plot at the cemetery. Green Mount Cemetery holds a position of trust with respect to the remains of John Wilkes Booth and to the remains of all the Booth family to insure that these deceased rest in peace. It has a duty of insuring that substantial, credible, and objective historical and scientific evidence be presented to the court in response to the amended petition in order to prevent disturbing the remains of the deceased for frivolous or unsubstantial reasons. The duties and obligations of Green Mount Cemetery arise out of the contractual and trust relationship between Green Mount Cemetery and Mary Ann Booth and the members of the Booth family.

Beyond its own duties in the matter, Green Mount Cemetery countered that the 1907 Bates story of Booth's escape was a hoax, and that no legitimate historical controversy was presented by the Amended Petition. Thus, the Amended Petition did not present a substantial reason to exhume of the remains of John Wilkes Booth.

Green Mount Cemetery also contended that any exhumation and examination of the remains, after 125 years of burial, would be inconclusive. It would be, Green Mount Cemetery argued, a source of potential exploitation, contrary to the respect, quiet repose, and protection at law and equity to be afforded to the remains of the dead.

## IV. THE EVIDENCE PRESENTED AT THE HEARING

How does a lawyer try a history case? I pondered this question for several months, with no good answer. Did I have to master and then prove all this historical detail?

Then one morning while I was shaving, it occurred to me that this was an "identification case." My job would be to introduce through history experts evidence of the many identifications of Booth after the assassination. We broke down the evidence into three chronological segments: (1) from the time of the assassination to the arrival at Garrett's Farm; (2) from Garrett's Farm to the MONTAUK; and (3) from the burials in the Arsenal up until the burial at Green Mount Cemetery.

After some discovery initiated by the Petitioners (interrogatories and a request for production of documents), the case proceeded to trial on May 17, 18, 19 and 25, 1995. The presiding judge was Joseph H. H. Kaplan, a graduate of the University of Chicago Law School. Judge Kaplan had been appointed to the Circuit Court for Baltimore City in 1977 and promoted to Administrative Judge in 1984. At the first meeting of counsel in Judge Kaplan's chambers, we all noticed right away the portrait of Lincoln on the wall in the anteroom.

A lot of media hype surrounded the case before, during, and after the hearing began on May 17. One particularly determined newscaster from Channel 9 in Washington asked me moments before the hearing if I would agree to live cameras in the courtroom. The reporter told me that Mr. Zaid was in favor of live television coverage inside the courtroom and that Judge Kaplan had stated that if Green Mount Cemetery would agree, he would have no objection. To be blunt, I am not in favor of live television in the courtroom. Looking for a diplomatic way to say no, I pointed out to the reporter that the proceedings were already being officially videotaped by the court cameras. She was not persuaded, or happy, by this reply, and at the first break she left. Not surprisingly, the print media reporters were not clamoring for television coverage.

The Petitioners presented the following witnesses: Kline and Rathbun to testify as to their status as descendants and their reasons for wanting an exhumation; Lisa Booth, who claimed to be a descendant of John Wilkes Booth based on the family history contained in her family bible that John Wilkes Booth fathered an illegitimate son in December 1866; Dr. Douglas H. Ubelaker, a forensic anthropologist at the National Museum of Natural History; John E. Smialek, M.D., Chief Medical Examiner for the State of Maryland; Dr. Paul Sledzik, a forensic anthropologist with the National Museum of Health and Medicine, Armed Forces Institute of Pathology; Dr. Jean Baker, Professor of History at Goucher College; Gus Russo, on the assassination of President Kennedy and the exhumation of Lee Harvey Oswald; and Nathaniel Orlowek.

Petitioners' evidence sought to establish that they had standing, that an exhumation was possible, and that an identification of the remains would lead to some conclusions as to whether the remains were those of John Wilkes Booth. Petitioners also sought to create an historical basis for a controversy as to whether Booth had escaped. At the hearing, however, the Petitioners backed away from claiming (1) that Booth had in fact escaped; or (2) that the 1907 Bates book was reliable.

The witnesses for Green Mount Cemetery were Dr. James Starrs, a professor of forensic sciences; Steven Miller, who has done extensive research into the lives and careers of the soldiers who were at Garrett's Farm; Dr. William Hanchett, Professor of History Emeritus at San Diego State University and the author of several books about Lincoln and the Civil War; William C. Trimble, Jr., President of Green Mount Cemetery; Michael W. Kauffman who has done extensive research and writing on Booth and his assassination of President Lincoln; Dr. Terry Alford, Professor of History at Northern Virginia Community College; and James O. Hall who, since 1946, has researched John Wilkes Booth and his assassination of President Lincoln.

Our presentation of evidence flowed as follows: Kauffman testified as to the identifications of Booth as he traveled to the Garrett Farm; Miller testified as to the identifications by the troops, the detectives, and until Booth's body was placed onboard the MONTAUK; Alford testified as to the identifications onboard the MONTAUK, by Weaver the undertaker, and by others including Booth family members in Baltimore in June of 1869; Professor Starrs presented the scientific forensics as to whether the situation called for an exhumation; Mr. Trimble gave testimony on degrees of relationship and on Green Mount Cemetery's institutional history; Professor Hanchett provided the scholar's view; and Hall added additional details and historical nuances to the evidence presented.

Green Mount's evidence was designed to show that there was no legitimate historical controversy and that any exhumation would be problematic and inconclusive at best. There were many contemporaneous identifications of John Wilkes Booth. There were identifications putting him at the Garrett Farm when the calvary unit arrived, identifications after he was shot and pulled from the burning barn, and identifications of his body aboard the MONTAUK prior to his burial in Washington. In addition, there was evidence as to identifications of the remains when the body was removed from Washington, brought to Baltimore, and eventually buried in June of 1869. Green Mount Cemetery's evidence also established that the grave was unmarked, that there were substantial questions as to where in the cemetery the grave might be (not just as to where within the family plot), and that the remains would be in an unsuitable condition for examination due to soil and water conditions at the site.

The scientific witnesses expressed uncertainty about the condition of Booth's remains and whether they would permit any kind of meaningful examination. Dr. Ubelaker testified that "it is difficult to predict what the condition of the skeleton would be." Professor Starrs testified that "No one knows for sure . . . what the condition of the remains will be . . . because there are so many variable factors."

Dr. Smialek's testimony established that no deoxyribonucleic acid ("DNA") testing could be done because there are no known matrilineal descendants with whom any DNA could be compared. The

evidence at the hearing also established that video or photographic superimposition was "experimental" and not a reliable technique to make a positive identification of remains. In fact, only one of Petitioners' scientific experts was familiar with superimposition. He admitted that the technique is experimental:

> Q. Now, Doctor, would you agree with me that superimposition, you call it computer-assisted photographic or video graphic superimposition. Would you agree that that is still in an experimental stage?
>
> A. I would agree that in like all of our techniques we would benefit from a considerable amount of additional research. To that extent, it continues to be experimental.

Furthermore, Petitioners' scientific witnesses also testified that it was unlikely there would be a "positive identification," and that they would need to have the Booth remains for a minimum of six weeks or even months. Other scientific witnesses could not commit to any definite time as to how long Booth's remains would be out of the grave.

There were comparisons made by Petitioners to the exhumations of Lee Harvey Oswald and President Zachary Taylor, but these comparisons proved why Booth's remains should not be exhumed. Oswald's body was out of the grave no more than ten hours, and President Taylor's body was also out of the grave for just a few hours.

The case attracted press coverage from around the nation, and Judge Kaplan and Green Mount Cemetery received many telephone calls about the case. On the second day of trial, Judge Kaplan received a call from a person he knew (not identified) who stated that a woman who worked in the caller's office was related as a niece to descendants of John Henry Weaver. As a result, she knew the Weaver family story about the location of Booth's remains in Green Mount Cemetery, i.e., that John Wilkes Booth was not buried in the Booth family plot. Judge Kaplan took this report seriously because he knew the caller to be reliable. Judge Kaplan told counsel in his chambers about this call, and we all agreed that he should follow up on the information. I requested that the information from this phone call be placed on the record. Judge Kaplan agreed and in open court directed Mr. Trimble to conduct a further investigation of this lead (and several others) on behalf of the court and to report back in detail.

A day or so later, Mr. Trimble took the witness stand and related that the Weaver family niece had no memory of being told where Booth was buried. He also reported that a former manager of Green Mount Cemetery said to him that "she knew what the secret was." Upon further questioning by Mr. Trimble, she said John Wilkes Booth is buried in an unmarked location in the Booth family plot.

Mr. Hall had told me from the start that the escape theory was poppycock. When I met with him he said he would provide me with "some helpful information." A few days later, I received a large box of notes and lists of microfilm reel numbers. A letter from Mr. Hall urged me to go to the National Archives and read these documents. It would have taken a couple of years.

All of the witnesses for Green Mount Cemetery were very helpful and supportive. Steven Miller came from Chicago at some disruption to his personal and business schedule. Michael Kauffman and Terry Alford each spent hours with me so I would appreciate the nuances and significance of their research evidence. Professor Hanchett came from California. He was a true Emeritus-type history professor. My wife, Pat, and I had the pleasure of hosting him at our home the night before he testified. He has published several books on Lincoln, and on direct testimony Dr. Baker readily acknowledged Hanchett's expert knowledge and reputation in this area. Professor Hanchett testified that there was no legitimate historical controversy concerning Booth's death at Garrett Farm in 1865.

The turning point in the trial may have been during Mr. Kauffman's testimony when he compared the Bates photograph of David E. George with photographs of John Wilkes Booth when he was alive. Mr. Kauffman demonstrated how Bates doctored the photograph of George to fit the description of Booth.

Judge Kaplan and Mr. Kauffman compared

Booth's features in photographs — his widow's peak, the size of his hands — with the 1903 photograph of George, concluding that they were obviously not the same person:

> THE COURT: If you look at the hairline of John Wilkes Booth where he has sort of a widows peak, what they call a widows peak. When you look at that of the corpse of George, you'll see that, that George has hair in the area where Wilkes Booth does not. And usually as you get older, you lose hair, you don't gain it on, on your head anyway. And there is more hair towards his forehead than, than John Wilkes Booth does.
>
> His hands, John Wilkes Booth's hands are smaller than George's, they just are. And if you look at his eye expression, it's not the same. The stand between his eyes is different. Though we all gain a little weight with age, well, most of us do anyway. Their, their body structure is, is not the same. Though George is dressed up to look like John Wilkes Booth. He's got a bow tie and, and the outfit. And his, his eyebrows are, are made to look —
>
> THE WITNESS: Your Honor, as we will hear later one of the, one of the other witnesses will tell that the embalmer gave a newspaper interview in which he said that Mr. Bates kept insisting he color the hair and do everything else he could to make it look like John Wilkes Booth.

## V. JUDGE KAPLAN'S DECISION

Judge Kaplan issued a thirteen page Memorandum Opinion and Order on May 26, 1995, just one day after the hearings concluded. The opinion was rendered so quickly after the hearings that I was surprised when Jacqueline Brannon, my secretary, called me at home to say that a decision had been rendered. I headed to the office while my law clerk, Paul Chin, picked up the decision from Judge Kaplan's chambers.

In the opinion, Judge Kaplan reviewed the evidence and the controlling Maryland court decisions. He concluded that there was no compelling reason for exhumation:

> To summarize, the alleged remains of John Wilkes Booth were buried in an unknown location some one-hundred twenty-six (126) years ago and there is evidence that three infant siblings are buried on top of John Wilkes Booth's remains wherever they may be. There may be severe water damage to the Booth burial plot and there are no dental records available for comparison. Thus, an identification may be inconclusive. A distant relative is seeking exhumation and any exhumation would require that the Booth remains be kept out of the grave for an inappropriate minimum of six (6) weeks. The above reasons coupled with the unreliability of petitioners' less-than-convincing escape/cover-up theory gives rise to the conclusion that there is no compelling reason for an exhumation.

A day or so after Judge Kaplan's decision, I received a telephone call from Paul Valentine, a Washington Post reporter. At trial, the hair color of the man killed at Garrett's Farm had become an issue because some attributed a statement to Joseph Zisgen, a soldier at the Farm, that said the man in the barn had red hair. Although Steven Miller discredited this information and testified there was no evidence of any such statement by Zisgen, Booth's hair color remained an issue. Several other witnesses testified that persons who came onboard the MONTAUK to see Booth were permitted by the Marine guards to cut locks of his hair.

Valentine informed me that after Judge Kaplan's decision, Dr. John C. Watson from Virginia called and stated that his great grandfather, Sgt. J. M. Peddicord, had snipped a lock of Booth's hair while stationed as a Marine guard onboard the MONTAUK. This man said he had the snippet of Booth's hair in his possession. So, I asked Valentine, what color did he say it was? After a prolonged silence, Valentine said "jet

black." Relieved, we had a good laugh before I hung up.

## VI. THE APPEAL

Petitioners appealed Judge Kaplan's decision to the Court of Special Appeals of Maryland. As an advocate, I thought there was no basis in the record for an appeal. The testimony had been recorded on video and audio tape, but for the appeal a typed transcript was prepared.

Petitioners' brief raised three main arguments. First, that Judge Kaplan erred as a matter of law by failing to restrict the role of Green Mount Cemetery in the proceedings. Second, that Judge Kaplan erred as a matter of law in determining that Virginia Kline was not a next of kin and therefore not a proper person to seek an exhumation. Third, that Judge Kaplan's factual determinations were erroneous and that there was "no evidence" to support many of Judge Kaplan's findings of fact. Overall, the Petitioners accused Green Mount Cemetery of interfering with the wishes of the Booth family, and they also argued that the compelling reason to exhume the remains of John Wilkes Booth was to resolve whether John Wilkes Booth escaped.

Green Mount Cemetery responded with the following arguments. First, under Maryland law, courts are reluctant to order disinterment or exhumation without substantial and compelling reasons. Second, the evidence established that there are substantial and compelling reasons why John Wilkes Booth's remains should not be exhumed. Third, there is no legitimate historical controversy as to whether John Wilkes Booth escaped; indeed it has been established that he did not escape. Fourth, Green Mount Cemetery had a duty to participate as a respondent and to present evidence. Fifth, the circuit court did not err in stating that Petitioner Rathbun, as a next-of-kin, had a greater interest in the Petition than Virginia Kline or any member of the general public.

Courts are reluctant to disturb the sanctity of the grave because the law generally abhors disinterments.[3] In *Dougherty v. Mercantile Safe Deposit & Trust Company*[4], the court of appeals affirmed the trial court's decision not to permit a disinterment, even though it was the wife of the deceased who had sought to disinter her deceased husband. The court, quoting Justice Cardozo, stated that "[t]he dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose."[5] Where an interment has taken place with the consent of those interested at the time of the burial, the interment is regarded in law as a final sepulture.[6] In this case, no substantial reason for disinterment or exhumation of the remains of John Wilkes Booth was presented to, or found by, the circuit court.

We did a thorough job of researching disinterment and exhumation court decisions from all jurisdictions. There was no clear statement from the Maryland appellate courts on a cemetery's standing. The law clerk who helped me with the appeal, Pinelopi Makrodimitris (Paul had left for a two-year job in Japan), found several decisions in dusty old books holding that a cemetery has standing in such cases. We cited these decisions in our brief, and the court of special appeals noted several of them.

Green Mount Cemetery participated in the circuit court proceedings because of its fiduciary position of trust with respect to the Booth family to allow the deceased to repose undisturbed and to rest in peace. Beyond this, Green Mount Cemetery participated to ensure that substantial, credible, and objective evidence was presented to the court.

The trust obligation of a cemetery to those who buried relatives at the cemetery has been recognized in legal texts dealing with burial:

> There are cases where all the next of kin support an application to remove a body

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[3]PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 101-105 (2d ed. 1950).

[4]282 Md. 617, 387 A.2d 244 (1978).

[5]*Id.* at 620; 387 A.2d at 246 (citing *Yome v. Gorman*, 242 N.Y. 395, 152 N.E. 126 (1926)).

[6]*Id.* at 621, 387 A.2d at 246.

and no voice is heard in opposition but that of the entity owning the cemetery. While the owner of the ground has interest in such a controversy, it has no rights of its own to assert. Whatever contentions it may make are those it advances representing the decedent, for whom it might be said to speak, *as the custodian of the body in trust*, or representing the lot owner.[7]

## VII. THE DECISION OF THE COURT OF SPECIAL APPEALS

Oral argument was held on May 8, 1996, in Annapolis. Again, there were lots of reporters. The case was heard by Chief Judge Alan M. Wilner,[8] Judge James R. Eyler, and retired Judge James S. Getty, who had been specially assigned to this panel. A twenty-four page opinion by Chief Judge Wilner was filed on June 4, 1996. Judge Wilner wrote an extensive statement of the conventional history surrounding the assassination of President Lincoln by John Wilkes Booth and dealt with each of the issues raised by Petitioners.

The Court concluded that all of Judge Kaplan's factual conclusions were supported by substantial evidence:

> For the reasons noted, we conclude that Judge Kaplan did not err in dismissing the amended petition. He properly allowed Green Mount Cemetery to participate actively in the case; his factual conclusions were supported by substantial evidence; his legal conclusions were correct; and the judgment call he made was entirely appropriate.[9]

The legal principle that resulted from the case is that a cemetery has standing to challenge and present evidence with respect to an exhumation where immediate family is not available:

> Green Mount Cemetery does have an interest in opposing the disinterment . . . . If Green Mount is not allowed to offer active opposition — to challenge with reputable documentary evidence the tenuous hypotheses constructed by appellants and to present other reasons why exhumation is not called for — there would, in this case, be no one to do so. The proceeding would effectively revert to the *ex parte* one appellants initially sought, and the presumed desires of Booth's mother and brother that his body remain at peace and undisturbed would be given little recognition.[10]

## VIII. CONCLUSION

The debate will go on, of course, among history buffs, if only for the sake of intellectual curiosity and enjoyment. Speaking as a lawyer, there is proof beyond a reasonable doubt that John Wilkes Booth was killed at Garrett's Farm on April 26, 1865. The law, but not the historians, should let him rest in peace.

**About the Author:** Francis J. Gorman is a partner at the law firm of Gorman & Williams, with offices in Baltimore, Maryland and Washington, D.C. Mr. Gorman is also an adjunct professor at the University of Baltimore School of Law.

[7]Jackson, *supra* note 3, at 118.

[8]Judge Wilner has since been appointed to the Court of Appeals of Maryland.

[9]110 Md. App. at 406, 677 A.2d at 634.

[10]*Id.* at 398-99, 677 A.2d at 630.

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