We Must Speak to the Only Ones Who Will Listen.

By Greg Westfall, Articles Editor

I have had two heroes in my life ― Stevie Ray Vaughan and Chief Justice Earl Warren. Stevie Ray Vaughan cost me about ten years while I tried like hell to become a rock star. In 1983 Stevie Ray, who I had been following and idolizing as he wove his way through the Texas club scene, got a gig with David Bowie. I said, "If Stevie Ray Vaughan can do it, so can I." I practiced hours and hours a day, but alas, I didn't follow in Stevie Ray's footsteps. So I decided to do what lots of washed-up musicians do. I went to law school. Stevie Ray was killed during my first week.

Earl Warren, on the other hand, I had never really given much thought to before I went to law school. I was in a small class on constitutional interpretation and we each had to pick a justice to study. I chose Earl Warren ― mainly because so many of the people I didn't really like (such as Robert Bork) hated him. It was during the course of studying his life and his jurisprudence that be became my second hero.

At first, the interpretive style of Chief Justice Warren was nearly impossible to figure out. He didn't use any particular method of analysis such as other justices who proceed from text and go through history, the intent of the framers, etc. Warren might start out doing this, but often he would get off track and come up with a result that flew in the face of all of these conventions. Oftentimes, his legal analysis was virtually non-existent. Rarely, if ever, did his opinions reflect the kind of pragmatism we see in the law today. Cold, hard legal analysis and pragmatism do not create cases like *Brown v. Board of Education*, *Loving v. Virginia*, or *Miranda v. Arizona*. Cold, hard legal analysis and pragmatism produce cases like *Dred Scott*, *Plessy*, *Chapman*, and *Witt*, to name but a very few.

It finally occurred to me that Warren's legal analysis consisted of one basic test: what is *fair*? Regardless of our history of slavery, is "separate but equal" *fair*? Is it *fair* to outlaw interracial marriages? Is it *fair* to not tell a person he has a right to a lawyer so a confession can be obtained? Is it *fair* to prosecute a person through the use of a confession that was beaten out of him? Is it *fair* for an indigent person to stand trial for a felony without a lawyer? The fact that Warren (and the "Warren Court") answered each of these questions in the negative was obviously not very pragmatic. It was simply the right thing to do.

Obviously, the appellate system today is not driven by the urge to do the right thing. Is it *fair* to sustain the conviction and death sentence of a person whose attorney slept through trial? Is it *fair* to hold that a citizen accused of a crime can waive the statute of limitations? Is it *fair* to require so many incredibly arcane procedures for preserving error? Is it *fair* to gut what error does actually get preserved through the use of the harmless error rule? The appellate system today is driven by pragmatism, pure and simple, and it's not going to change anytime soon. No matter how unfair the harmless error rule may be, you have to recognize its beauty as a pragmatic tool.

But there are still Earl Warrens out there. I've not seen any on a court in a while, but I have met many in jury panels. They are the ones we have to appeal to now. A lot of jurors have the sense of fairness that is so absent in the politically-driven court system. We have to tap into it. The "Warren Court" jurisprudence was really an historical anomaly. Individual rights have always had it rough in this country. Before the Warren Court, great trial lawyers like Clarence Darrow won by communicating with *juries*. Because of the "Warren Court" we have grown to

rely on communicating with judges and justices. They are no longer listening. We need to re-commit ourselves to communicating with our fellow citizens ― the juries.