



# The Advocate

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## ETHICS: QUANDARIES & QUAGMIRES

TEX FITZGERALD

BY: Vince Aprile  
Director for Professional Development  
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Query: May a defense attorney ethically permit his client in a criminal case in Kentucky to enter a plea of guilty even though the defendant is either not willing or unable to admit his guilt?

"[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970). Furthermore, "[a]n individual accused of crime may voluntarily, knowingly, and understandably consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Id., 91 S.Ct. at 167.

In North Carolina v. Alford, supra, "the State had a strong case of first degree murder" against Alford. "Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term." Id., 91 S.Ct. at 167. The Supreme Court emphasized that Alford's plea of guilty had to be

The death of Terrence R. Fitzgerald in September of this year has left the legal profession, in general, and his colleagues, in particular, with a profound sense of loss. It serves no purpose to question why he died, for even if answers were provided he would still be gone. But we can reflect upon the incredible contribution to the practice of law that he made, and remember for a moment the man we knew.

Martindale-Hubbell's tells us that "Tex" was born in 1939 and was awarded his LLB from the University of Kentucky School of Law in 1964. For a long time I knew little more of his background, and most of what I did learn came from sources other than Tex.

Eventually, and only with considerable prompting, he revealed a little of the private man. I learned, for example, that he was an avid basketball fan, though he seldom sat to discuss the game. He was proud of his bridge ability, but played all too infrequently. One could detect a sense of joy when he attended social gatherings, but he often arrived late and left early. He was devoutly religious, and that was never masked. He was a traditional family man in a day when the traditional family is under attack.

At the office, I observed that he was a quiet man. And, although it is fashionable at times like this to say that everyone was his friend, that was not true. Many didn't know him well. Some felt that he was cold and aloof. But everyone respected him. From nine to five he was intense, fighting his legal battles with never ending energy and conviction. Occasionally, he was subject to displays of temper if he received an adverse ruling. But always, he continued his quest to make sense out of the law and to make it be fair and consistent.

He was a lawyer. First and foremost he was a lawyer. Most of the staff at the Jefferson District Public Defender, and many of those who have served there in the past, were in no small manner shaped by Tex Fitzgerald. As an instructor in the University of Louisville Law School's criminal justice internship program, he literally made law students into practicing lawyers. With his expert guidance they learned to transform raw research skills into precise, polished techniques, and to produce cogent, professional appellate pleadings. Through him, they were taught how to mold basic knowledge of the law into a formidable courtroom weapon.

Tex's was not an "ivory tower" view of the challenges which confront the practicing lawyer; he offered insight gained from personal experience. He left law school to become a trial attorney, first in private practice and later with the Jefferson District Public Defender. When the demands of a growing appellate case load necessitated specialization at that office, Tex Fitzgerald became Chief Appellate Defender, a position he held till his death.

Still, he was always available for consultation with the staff. There was a universal belief that if you had a legal question, Tex would have the

answer. Seldom was one disappointed. His command of the body of rules and cases which comprise the criminal law of Kentucky was nothing short of phenomenal. His desire to communicate this knowledge, and thereby improve the quality of criminal justice, ultimately forced him into new endeavors.

The wealth of information and understanding Tex had for the criminal law allowed him to produce an office manual for Jefferson District Public Defender lawyers. It was regarded as an unequaled reference source for them, and there was comfort in knowing that at all times it was complete and accurate.

Recognizing that there was a very real need to collate and condense the expansive body of criminal law into a source which would benefit lawyers engaged in the practice of criminal law, Tex began research on what was to become, Fitzgerald, Criminal Practice and Procedure (Ky. Practice, Vol. VIII). The significance of that book cannot be overstated. With its publication in 1978, lawyers state-wide could begin to benefit from the knowledge Tex had obtained. His contribution to the improvement of criminal justice in Kentucky was gratefully received, and is today regarded by many as the definitive word on criminal law. Across the state, lawyers who never met Tex Fitzgerald now owe him a debt of gratitude. His book has reached out to those he could not touch, and helped them to become better lawyers. Because of him we are better informed and more able to strive to achieve that illusive goal of justice for all. He is missed, but his mark on the profession continues; and while it is tragic that he died when he did, it would be so much more tragic to us all, had he never lived.

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WEST'S REVIEW OF RECENT  
COURT DECISIONS

Case law for the months of September and October includes two conflicting decisions involving juvenile jurisdiction from the Court of Appeals. In Johnson, et. al. v. Bishop, Ky. App. 26 K.L.S. 13 (September 21, 1979), the Court, in an opinion by Judge Wilhoit, granted the defendants' petition for a writ of prohibition preventing the Leslie Circuit Court from trying them for robbery. The charged offense had occurred prior to the defendants' eighteenth birthdays. Juvenile petitions charging the defendants with robbery were filed in district court but no action was taken. Then, following the defendants' eighteenth birthdays, both were indicted. The Court of Appeals, granting the writ, cited KRS 208.020(1) which vests in the district court "exclusive jurisdiction" of "any person who at the time of committing a public offense was under the age of eighteen years." Because the charged offense had been committed while the defendants were less than eighteen, and because there had been no waiver of the district court's jurisdiction, the Court of Appeals held that the circuit court lacked jurisdiction to try the defendants.

A contrary holding was reached by the Court in Johnson v. Commonwealth, Ky.App., 26 K.L.S. 13 (September 21, 1979). Again, the defendant had committed the charged offense before his eighteenth birthday, and, although a petition had been filed in district court, no proceedings had followed. Upon becoming eighteen the defendant was indicted and subsequently tried and convicted. The Court of Appeals, Judge Wintersheimer writing, held that, because no proceedings had taken place in the district court, that court had not exercised jurisdiction over the defendant. The Court then reasoned that, as a result, the defendant "lost the protection of Chapter

208 when he became eighteen." Contrary to the holding in Johnson et. al. v. Bishop, the Court held that waiver proceedings are unnecessary unless the district court first assumes jurisdiction. Discretionary review will be sought to resolve this conflict.

In Commonwealth v. Keller, Ky.App. 26 K.L.S. 14 (October 19, 1979), the Court of Appeals granted a writ of prohibition sought by the Commonwealth after the Fayette Circuit Court refused jurisdiction of a misdemeanor joined with a felony in an indictment. The Court of Appeals cited KRS 24A.110(2), which gives the district court exclusive jurisdiction of misdemeanors, "except where the charge is joined with an indictment for a felony," as standing for the principle that a district court may waive its jurisdiction of such misdemeanors regardless of any prior appearance before it by the accused.

The Kentucky Supreme Court has definitively answered the question of what measure of value is to be used in determining whether an accused is guilty of receiving property valued at more than \$100 (a felony) or less than \$100 (a misdemeanor). Tussey v. Commonwealth, Ky., 26 K.L.S. 13 (October 9, 1979). Tussey had been charged with receiving stolen copper wire which, although it was worth approximately \$1500 when stolen, had been damaged and reduced to an acknowledged value of less than \$100 when received by Tussey. Tussey was convicted of receiving property worth more than \$100 and the Court of Appeals affirmed after holding that the controlling value was that at the time of the theft. The Supreme Court, reversing that decision, observed that "[t]o hold an individual responsible for an act unrelated to his or her own criminal liability would contradict all theories of fairness in modern justice."

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In Clark v. Commonwealth, Ky., 26 K.L.S. 14 (October 30, 1979), the Court held that the trial court had erred in failing to order an evidentiary hearing to determine the defendant's competency to stand trial. The trial court had ordered a psychiatric examination of Clark but declined to hold a hearing based on the psychiatrist's report that Clark was competent. The Supreme Court held that a hearing was required by KRS 504.040(4). That statute provides that after a defendant is psychiatrically examined on the basis of reasonable grounds to believe he may be incompetent "the court shall order an evidentiary hearing on the issue of the defendant's competency to stand trial." Despite the error the Supreme Court declined to reverse Clark's conviction because no hearing was requested and because there was no showing of prejudice on the record. In so doing however, the Court noted: "That is not to say that we will not enforce the mandatory provisions of the statute in other circumstances."

No opinions were issued by the U.S. Supreme Court during September and October. However, the Sixth Circuit Court of Appeals granted federal habeas corpus in the case of Eberhardt v. Bordenkircher, 6th Cir. \_\_\_ F.2d \_\_\_ (decided September 10, 1979). The Kentucky Supreme Court had affirmed Eberhardt's conviction of first degree robbery after holding that prosecutorial error in commenting on Eberhardt's failure to take the stand was not prejudicial. The prosecutor, while pointedly gesturing toward Eberhardt, had invited the jury to ask themselves what additional witnesses the defense could have called. Noting that the evidence against Eberhardt, while strong, was not overwhelming, and that the jury was not admonished following defense objection, the Sixth Circuit concluded that this error was not harmless beyond a reasonable doubt.

LINDA WEST

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## STAFF NOTES

DANNY DEES is a new investigator in Madisonville. He replaces CRAIG WILLIAMS who was transferred to Winchester and subsequently went to law school at the University of Kentucky. You may reach DANNY at 821-1508 or 52 Murphy Street Madisonville, Kentucky.

RANDY JEWELL has been transferred from Russell Springs to London to take the place of DOUG WILSON who has left us to become an investigator for the Federal Public Defender in Lexington. You may reach RANDY in London at (606) 878-8042. His address is P.O. Box 277, London, Kentucky 40741.

The office has three new attorneys. They are JOHN HENRIKSEN who will be working in Frankfort with the Protection and Advocacy program; PETER KUNEN, who will be working in the Southeast Project out of the Hazard Office; and NEAL WALKER who will also be working in the Southeast Project out of the Prestonsburg office. Congratulations to each of you.

BOB ARNOLD who had been the Director of the Protection and Advocacy program and more recently Executive Assistant to Mr. Farley has recently been appointed Executive Assistant to Mr. John L. Smith, the Secretary of Justice.

JIM WOOD, who has been with us both as an appellate attorney and more recently as Administrative Assistant in charge of the Southeast Project left on November 1, 1979, to go to work in the Commonwealth Attorney's Office for Jefferson County.

PEGGY RICHARDSON, our librarian for the last 2 1/2 years left us on November 1, 1979. She will be working for the Department For Human Resources in Louisville.

BILL AYER

## LEGAL MALPRACTICE

### Representing "Mentally Different" Clients

by Robert Plotkin

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Robert Plotkin is an attorney with the Mental Health Law Project, a public-interest law firm in Washington, D.C. The views expressed are his own, and do not represent the official policy of that office. This article originally appeared in the American Psychological Association's Monitor and is reprinted here with permission.

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U.S. Supreme Court Chief Justice Burger believes that more than half of America's attorneys are incompetent as trial lawyers. Much of the public suspects that all lawyers are shysters. And mental health professionals, feeling besieged by class actions and malpractice suits, often see lawyers as impeding the effective provision of services. Attorneys, in short, are suddenly finding themselves the subject of strict social scrutiny.

Such criticism is well earned and comes none too soon. There is, however, a particular irony in the mental health workers' view: they may be right to criticize lawyers, but for the wrong reasons. Usually their complaints are against ritualistic hearings and extensive record keeping requirements, which are said to drain resources and attention from patient needs. They charge that lawyers cause unnecessary tensions and frictions by their reliance upon adversarial tactics and "legal technicalities," thereby delaying or denying services to people in need of treatment.

This criticism rests on the dubious assumption that lawyers will always adhere to the basic tenet of their Code of Professional Responsibility, which states, "A lawyer should represent a client zealously within the bounds of the law." This is not an unrealistic expectation of an attorney representing involuntary patients, because commitment involves the loss of individual liberty, the most fundamental of all constitutional rights.

But in actual practice, lawyers routinely disregard their primary duty to represent their mentally disabled clients properly. The same zealous advocates who declaim the right of every accused criminal to a day in court have determined paternalistically that similar legal protections would not benefit persons branded mentally "sick." This basic misunderstanding of the lawyer's role in the mental health system derives from the pervasive but misguided belief that mentally ill people cannot judge what is "best" for themselves. This "justifies" the lawyer and/or hospital staff in making that determination for the client.

As a result, most lawyers do not act as advocates for their clients. They satisfy the technical legal demand that patients "have" an attorney, while actually responding to the concerns of the mental health professionals that treatment objectives not be thwarted. In short, the legal profession is guilty of making the same assumptions about its mentally handicapped clients as do the psychiatrists, psychologists and other "helpers" who also do what they believe is best for their patients.

The most striking example of this practice occurs at civil commitment hearings. These hearings, which authorize the person's involuntary confinement and treatment, are at the very heart of the public mental health system. The decision to commit is a legal one, arrived at after testimony

(Continued, Page 6)

by mental health professionals. But the "expert" opinions of these witnesses are of questionable scientific validity. Numerous studies have demonstrated that "mental illness" and "dangerousness" are elusive concepts that psychiatrists have great difficulty reliably identifying and treating. Their testimony is therefore vulnerable to proper cross-examination techniques, and lawyers trained in the art of advocacy ought to shine in these situations. However, reports from across the country show that lawyers representing potential mental patients consistently fail to act as effective advocates for their clients, choosing instead to defer to the expertise of clinicians.

For example, according to statistics compiled from commitment hearings held during 1975 in Milwaukee, Wisconsin, judges there often conducted as many as 15 hearings a day before lunch. The average case took no more than seven minutes. Of the hundreds of lawyers who practice in the Milwaukee area, that year only six different attorneys represented 827 different subjects for commitment. These attorneys routinely waived their clients' basic rights, such as the right to a jury trial and to subpoena witnesses. When they did bother to cross-examine adverse witnesses, the lawyers asked an average of two questions. Although more than 800 cases were heard that year, only one appeal was filed.

A more recent analysis by the Mental Health Law Project of the commitment procedures in Arlington County, Virginia, revealed a similar pattern. During one 33-month period, (1976-78), the same three attorneys represented the "defendants" in 53 percent of all the hearings. People were confined to state institutions on the basis of rote medical recitations filled in by the judges-often improperly-on preprinted forms. The same two physicians, neither one a psychiatrist or specially

trained in psychology, signed more than 70 percent of the petitions after only a cursory examination of the subject. But when they appeared in court they were rarely cross-examined, and in no case did any defense counsel present an independent expert witness to testify for his or her client. Appeals were taken in less than 6 of the 400 cases considered during that period.

These findings are not atypical. Classic studies from Texas and Arizona confirm their results, and other less formal observations in numerous locales have reached similar conclusions. In a Michigan state court a judge in one day appointed legal guardians for hundreds of mentally retarded persons; each "case" lasted one to two minutes and each person was "represented" by a lawyer.

In any other context, these practices would surely constitute malpractice. Yet few lawyers have ever been disciplined by the bar or sued by their clients for their actions in a commitment hearing. Indeed, complaints are rarely filed, for the only aggrieved party has usually been adjudged "sick" and incarcerated.

Many observers believe that these problems stem not from lawyers' personal judgments about their clients but from their lack of sophistication concerning the complexities of mental health law and its baffling jargon. Very few law schools or continuing education programs provide training in this area. Accordingly, it may be that lawyers are intimidated by the expertise of mental health professionals and simply need better training. However, a recent report in the journal Law & Human Behavior discounts this theory. In that study, attorneys who were appointed to represent clients facing commitment attended a workshop, which stressed their role as advocates and provided them with a handbook

(See Plotkin, Page 12)



CONDITIONAL DISCHARGE-  
CONDITIONAL RELEASE

Even though conditional discharge and conditional release are terms which sound alike they are in fact completely different. This difference is particularly significant in relation to KRS 533.060.

Conditional discharge is basically a form of probation. If a defendant is convicted the sentencing court may suspend the execution of the sentence of imprisonment conditionally and release the defendant without supervision. KRS 533.020(2). On the other hand conditional release is the equivalent of a mandatory granting of parole during that part of the defendant's sentence for which he has accumulated good time credits. KRS 439.555.

The distinction between these two concepts becomes important in relation to sentencing under KRS 533.060. Under that statute if a defendant is convicted of a felony while on parole, probation, shock probation or conditional discharge the defendant is not eligible for probation, shock probation or conditional discharge. Also the sentence on the new felony cannot run concurrently to any other sentence.

Significantly, the statute has no mention of conditional release. This is important in a number of respects. Obviously, the defendant who is convicted of a felony while on parole,

probation, shock probation or conditional discharge is still eligible for conditional release even though not eligible for conditional discharge.

More importantly, KRS 533.060 does not apply to one convicted of a felony while on conditional release. This means that this defendant is eligible for probation, shock probation and conditional discharge as well as conditional release.

Also the defendant is eligible for concurrent sentencing. Even though conditional release is the practical equivalent of parole it is not parole. Therefore the court still has the discretion under KRS 532.110 to run the new sentence concurrent to any other sentence including the sentence on which the defendant was conditionally released.

It is interesting to note that the legislature has at times apparently had difficulty grasping the difference between conditional release and conditional discharge. Three changes have been made in the statute dealing with Persistent Felony Offender sentencing, KRS 532.080, beginning in mid-1976. The two earliest changes stated that, "A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation or conditional release." The last amendment however, states that a second degree persistent felony offender is not eligible for "probation, shock probation or conditional discharge." KRS 532.080(5). (Emphasis added)

If you have any questions regarding the difference between conditional discharge or conditional release please contact the Post-Conviction Services Division of the Office for Public Advocacy.

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COOPERATION REQUESTED  
IN POST-CONVICTION  
INVESTIGATIONS

It is well known that under KRS Chapter 31 a "needy person" is entitled to the representation of counsel at trial and on appeal. However, he is also entitled to representation in any post-conviction proceeding if he and his attorney consider it appropriate. KRS 31.110(2)(c). Accordingly, the Post-Conviction Services Division of the Office for Public Advocacy is contacted regularly by inmates with requests for assistance in various post-conviction matters, usually for assistance in preparation and representation on motions to vacate, set aside or correct sentence under RCr 11.42. Consequently, the PCSD is obligated by Chapter 31 to investigate the merits of all allegations which are made.

One issue which is often raised by a request is that the defendant was denied effective assistance of counsel during the trial proceedings by his defense attorney. The Kentucky Supreme Court has ruled that this is a proper issue for inclusion in an RCr 11.42 motion. Therefore, due to the fact that the RCr 11.42 motion can be filed only once, this issue is presented to us regularly so that we will determine whether or not it is of any merit. Due to our obligation to check out all allegations, we will then contact the defense attorney to obtain his version of the error which was alleged to have been made.

Unfortunately, our requests for this information are sometimes met with reluctance to cooperate and occasionally hostility. Some attorneys believe that merely because we check into the allegations, that we have determined from the inmate's statements that the attorney was indeed ineffective regardless of the record. This is not the case, however. Even if the record of a trial reflects that the proceedings were handled flawlessly there may nevertheless be valid

reasons for checking out the defendant's allegations. For example, a defendant may allege that the defense attorney failed to interview a witness who could have absolved him of the crime. In this case the record would not reflect such a failure, and thus an investigation by the post-conviction attorney is mandatory.

To put it simply the defense attorney's information will always be important no matter what issue we are investigating. Therefore the Post-Conviction Services Division wishes to stress its duty of assistance and requests that any attorney who is contacted by us not take offense that we are so investigating. Often our investigation will reveal that the allegations are unfounded; however, without the cooperation of the trial attorney our task is made much more difficult. All of us are cognizant of the fact that criminal proceedings are often complex and difficult to handle. However our primary concern should be that the defendant receive the fairest trial possible despite any mistakes which may have been made. Your understanding and cooperation in these matters will be greatly appreciated.



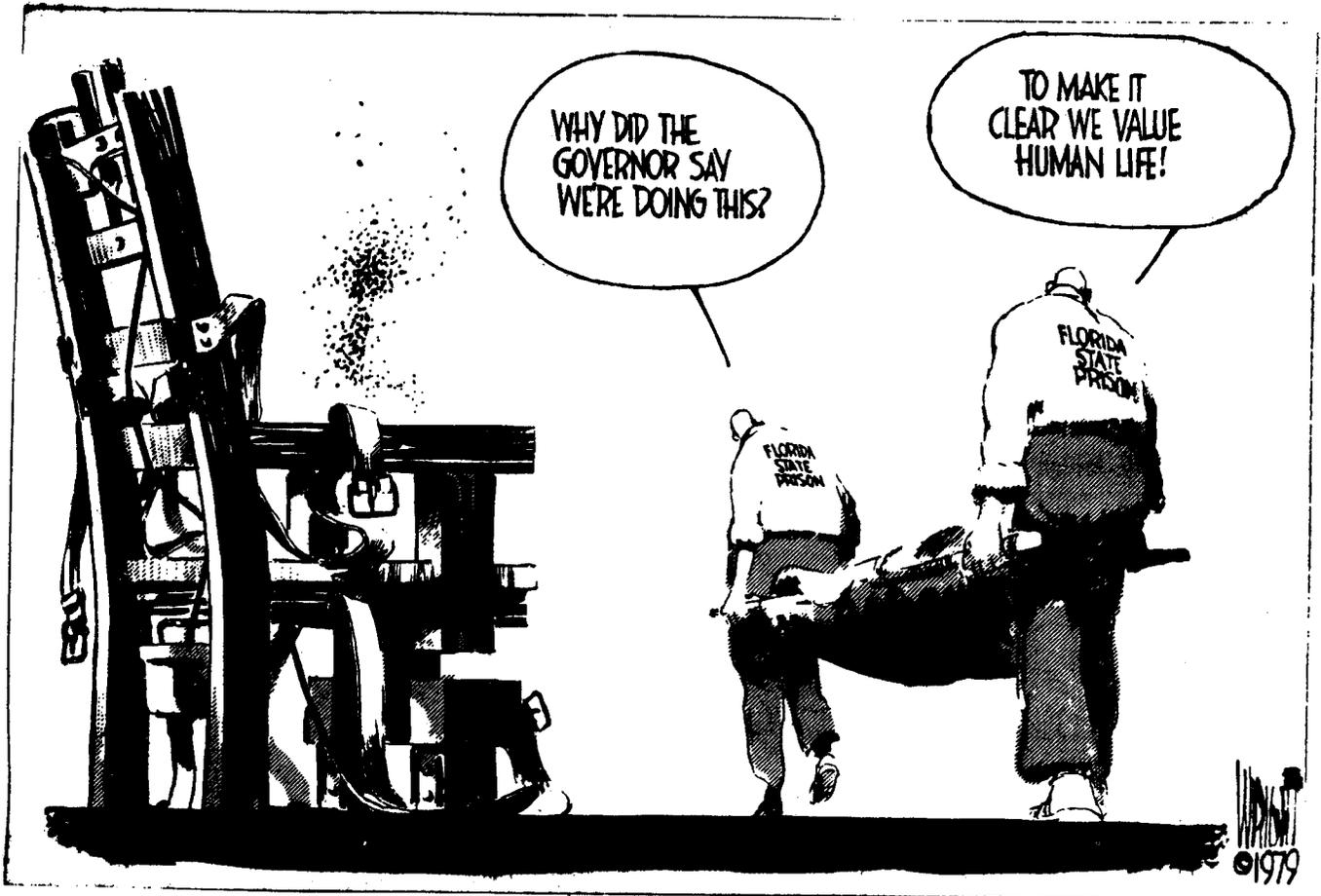
New Assistant Public Advocates John Henricksen (fifth from left) and R. Neal Walker (second from right) pictured with, from left to right Gayla Keown, Jack Farley, Bill Stewart, Bill Ayer, Patricia Walker, and Lieutenant Governor Martha Layne Collins.



# THE DEATH PENALTY



## Death is Different



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John Spenkelink was executed on May 25, 1979. He could not have been sentenced to die under Kentucky's capital punishment law. Rational? Fair? Acceptable? Hardly!

Jesse Bishop's recent execution requires us to reflect on the appropriateness of the death of John Spenkelink, as well as for any human being. Let us do that with William F. Buckley:

### EXECUTING SPENKELINK WAS A CRIME

This is an article by William F. Buckley, Jr. and appears with his permission.

Watching the television news on the day Florida executed John Spenkelink, I was struck by the eye-ogling bias of the rendition (CBS's).

There was coverage of the anti-capital punishment demonstrators, of the late-night vigil of the death

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chamber, of a woman reporter-witness who described the agony on the face of Spenkelink when he was strapped to the chair, of the wails of the bereaved, the macabre procession of the hearse and the doffed hats of some of the guards.

It was, in brief, a brief against capital punishment.

Why, I wondered, hadn't equal time been given to the crime - the 1973 slaying of Spenkelink's traveling companion - which I assumed was hideous.

The first unwilling execution in a dozen years (we exclude Gary Gilmore's willing execution in Utah in 1977) must have been the hideous work of a hideous man, hideously guilty.

I talked to one David Kendall, who most obligingly began to talk about the trial of John Spenkelink.

I was deeply moved by the experience.

Because, you see, it transpires that:

1. Spenkelink did not have a history of pathological violence.

2. His guilt - of first-degree murder - was not beyond a reasonable doubt.

3. And the idiosyncratic decision by then Gov. Reubin Askew to issue a death warrant against Spenkelink when he had to choose from a number of quite uncommon murderers against whom final death warrants had yet to be issued suggested that the governor may intentionally have put forward a flimsy victim to engage public emotion against the reinstatement of capital punishment.

As it happened, it fell to Askew's successor, Bob Graham, to make the decision whether to grant

clemency, and the decision was negative, as were several appeals.

Spenkelink, 30, was a young no-good who, however, had specialized in non-violent offenses.

He had escaped from a minimum-security prison in California, picked up a hitchhiker 20 years older, a professional felon who, in the course of their cavorting together in a bum-drunk fortnight, once assaulted and once sodomized Spenkelink.

The hitchhiker was in due course found dead in a Tallahassee motel room of two shots, one fired at close range.

Two men were soon arrested, and both were charged with first-degree murder. One was convicted - Spenkelink. The other was acquitted.

One took the witness stand - Spenkelink. The other didn't.

Spenkelink's critically damaging testimony was that he had told his codefendant, when heading into the victim's motel room, "If you hear a shot, come to Room 12."

The jury took this as proof of premeditation.

In fact, said Spenkelink, he had entered the room to return to the victim the pistol left in Spenkelink's car, Spenkelink having decided to part company.

When greeted violently, he testified, he fired - and killed - an aggressor in self-defense. His words to his companion had been intended to suggest that if there was shooting, the companion should race to help his friend.

Before the trial, the state of Florida, surveying the evidence, offered Spenkelink a second-degree murder rap if he would agree to plead guilty. Spenkelink refused.

Having been convicted of what they call "Murder One," the court had the option of meting out the toughest punishment this side of execution - 25 years in prison without possibility of parole - but went for the electric chair.

The defense supplied copious documentation from prison guards and wardens who had observed Spenkelink during earlier confinements.

This is a notoriously unsentimental breed, and they pleaded earnestly their conviction that Spenkelink was not the kind to commit first-degree murder.

It is ritual, at this point, to say that Gov. Graham was unmoved.

But unfair; perhaps he was moved, but felt that any stay of execution would be interpreted as, in effect, a defiance of the entire social movement to make certain moral, penological and constitutional assertions - namely that the return of capital punishment is a step toward the value society puts on human life rather than the reverse.

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#### BOOK REVIEW

Capital Murder, by David Crump and George Jacobs, Texian Press (1977).

At the beginning of this book, the authors tell us that they support the death penalty, "but we aren't so confident as to think we have all the answers." Indeed. In fact, inadvertently so, they raise as many questions about the death penalty as they answer.

You see, Jacobs and Crump are District Attorneys in Houston, Texas. And they have tried a lot of death cases in that city. The idea of their book is to paint the scene of some of the most brutal murders that one could imagine. As Crump stated of

#### DEATH ROW U.S.A.

AS OF OCTOBER 23, 1979, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE NAACP LEGAL DEFENSE FUND: 556

#### Race:

Black	225	(40.47%)
Spanish Surname	22	( 3.96%)
White	304	(54.67%)
Native American	3	( 0.54%)
Oriental	1	( 0.18%)
Unknown	1	( 0.18%)

Crime: Homicide

Sex:	Male	550	(98.92%)
	Female	6	( 1.08%)

#### DISPOSITIONS SINCE JULY, 1976

Executions:	3
Suicides:	4
Death Sentences vacated as unconstitutional:	505
Convictions or sentences reversed on other grounds:	194
Commutations:	4

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two of the cases, "I had no difficulty in deciding to ask the jury for the death penalty in these two cases. The circumstances of the crimes left me no other choice."

And there is no doubt that the crimes described were heinous and senseless. We have Kenneth Brock, first, who took a hostage during a 7-11 robbery, and in front of six police officers, executed him point blank prior to running into the woods. John Stiles Griffin broke into an apartment, tied two women up, one with a coat hanger, and raped, stabbed, slashed, and beat them to death. Ronald Clark O'Bryan put cyanide into a piece of Halloween candy and placed it into his son's

mouth. He also gave the same candy to five other children that Halloween night. The idea was to collect insurance money after his son's death. He even sang "Blessed Assurance" at his son's funeral, prior to arrest. The fourth case, that of Gerald Bodde, involved a kidnapping and brutal murder of an 81 year old woman. The final case was the "Brady Bunch" case, involving four Mexican-Americans who went on a one-day spree of armed robberies during which some five people died. All the murders were execution-style. The proprietor of the store was forced to lie down on the floor, and a bullet was put into the back of his head. The four men confessed to the murders at a press conference called by them. They were tried separately, and all convicted.

The authors' point in relating these crimes is that nothing short of capital punishment will do "justice" to the cases. And the authors tell their stories well, apparently leaving out anything mitigating in either the crimes or the criminals. They make their point effectively, on the surface.

Yet, below the surface, they do the cause they honor a distinct disservice. You see, Brock, O'Bryan and Bodde were sentenced to death. Griffin, who committed one of the most brutal crimes in recent history in Houston, was not.

More importantly, only one of the four Brady Bunch was sentenced to death. And the leader, the worst of the Bunch, Bernadino Sierra, plead guilty to less than death after a mistrial.

The authors explain these discrepancies by "weak juries", the "technical laws of evidence," and other reasons they seem to view as road-blocks in the way of justice. But the more important point is that only 4 out of 8 of these "heinous murderers" are

under a death sentence. The other four are in prison, awaiting parole, awaiting possible rehabilitation. No rational explanation can be offered as to why four of these men should die and four should live. And so it is that the arbitrariness condemned in Furman shines clearly through two prosecutors' effort to uphold capital punishment. And in that way, and perhaps only that way, the book is worth reading.

ERNIE LEWIS  
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(Plotkin, Continued from Page 6)

containing among other things, sample cross-examination questions. But when these attorneys were observed in court, the researchers found that even attorneys who had been specifically taught the method of aggressively challenging mental health experts' testimony remained reluctant actually to take an affirmative adversarial stance in the courtroom.

Paternalism, not lack of information, appears to be the root of the problem. Although attorneys will normally use every means at their disposal to assist other clients (especially those who can pay hefty fees) to obtain even socially questionable ends, once they make an individual judgment that a particular client is "mentally ill," they seem less inclined to expend time and effort to represent that client's interests and defer, instead, to the judgment of the service providers. They tend to forget that it is the judge, and not counsel, who has been entrusted with the ultimate decision.

These observations are not intended to minimize the lawyer's difficulty in representing this group of clients. They are often hostile, uncooperative or non-communicative; their behavior

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and appearance may seem bizarre according to accepted societal standards. Overworked courts will put great pressure on attorneys to provide perfunctory representation in order to process the case speedily. Spending time for proper investigation and interviewing is discouraged by the abysmally low fees lawyers are usually paid for their services in these situations.

These problems are not insurmountable. But their resolution first requires a re-definition of the lawyer's role in representing clients who are alleged to be mentally ill. Lawyers must realize that they can perform valuable functions in the commitment hearings by testing the adequacy of professional judgments by obtaining less restrictive alternatives to hospitalization and by generally focusing increased individual attention on their clients. Most importantly, they can prevent wrongful and unnecessary deprivations of liberty through zealous representation of persons entangled in complex legal processes. But until they shed their own paternalistic, judgmental attitudes, they must continue to bear equal responsibility for sins legally committed in the name of mental health.

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(Ethics, Continued from Page 1)

viewed "in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered." Id., 91 S.Ct. at 167. Because of "the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence," the plea was held to be constitutionally proper. Id., 91 S.Ct. at 168.

However, "[b]ecause of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choices," pleas of guilty coupled with claims of innocence "should not be accepted unless there is a factual basis for the plea" and "until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence." 91 S.Ct. at 167 n. 10.

Consequently, the Alford decision clearly holds that it is constitutionally permissible for a state trial judge to accept a defendant's plea of guilt even though that plea is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt as long as there is a factual basis for the plea.

In Kentucky "it is not improper for an attorney to influence a client to reach" the decision to plead guilty "to escape possible greater punishment." Glass v. Commonwealth, Ky., 474 S.W.2d 400, 401 (1972), citing Harris v. Commonwealth, Ky., 456 S.W.2d 690 (1970), and North Carolina v. Alford, supra.

The Kentucky Supreme Court in Commonwealth v. Campbell, Ky., 415 S.W.2d 614 (1967), discussed the propriety of a defense strategy in which a defendant entered a plea of guilty solely to obtain a lighter sentence and concluded that there was "nothing in this record to indicate that the advice given [the defendant] by his counsel was not proper and sound." Id. at 616. The defense attorney had made diligent effort to discover the incriminating evidence that would be presented against his client, and he was convinced the defendant stood no chance of beating the charge. "As so often happens, a plea of guilty resulted in a lighter sentence than might have been imposed. To influence a defendant to accept this alternative is proper." Id.

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Indeed, it is well recognized in this jurisdiction that "plea-bargaining in an effort to receive a lighter sentence than might be obtained by a full trial by jury in itself does not give rise to a claim of a denial of constitutional rights." Davis v. Commonwealth, Ky., 471 S.W.2d 740, 742 (1971). The validity of the guilty plea in Harris v. Commonwealth, Ky., 456 S.W.2d 690 (1970), was upheld because "[i]n short, the record fairly shows that the plea in this case was a bargain for a lighter sentence in a case in which there is strong evidence against" the defendant. Id. at 693.

The American Bar Association Project on Standards for Criminal Justice in its work, Standards Relating to Pleas of Guilty (1968), states in Standard 1.6 that:

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as may satisfy it that there is a factual basis of the plea.

However, the commentary to Standard 1.6 explains:

If the trial judge is otherwise satisfied that there is a factual basis for the plea, it is not required that he call upon the defendant to make an unequivocal confession of guilt.

In a retrial situation, the defense may tender to the trial judge excerpts from the transcript of the defendant's previous trial in order to demonstrate that there is a factual basis for the defendant's plea of guilty even though the defendant does not admit actual guilt. In other circumstances, the defense might submit to the trial judge an affidavit of a prosecution witness which contained sufficient information

to incriminate the defendant and provide a factual basis for the plea.

The United States Supreme Court in North Carolina v. Alford, supra, adopted the rationale of McCoy v. United States, 363 F.2d 306, 308 (D.C. Cir. 1966), where the court noted since "guilt, or the degree of guilt, is at times uncertain and elusive," [a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty."

Of course, a defense attorney may never support such a tactic unless his own independent investigation of the case convinces him that an objective factual basis for his client's plea of guilty actually exists.

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Note: To share your ethical quandaries and quagmires with the other public defender attorneys across the state, mail your questions or comments to this column.

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#### REAL AND IMAGINARY DANGERS LURKING BEHIND A SUCCESSFUL APPEAL

To determine intelligently the advisability of appealing his conviction, the defendant must be made aware of the potential disadvantages which inhere in a successful appeal.

In advising a convicted defendant of his right to a direct appeal, defense counsel should explain that the Supreme Court in Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973), specifically held that the rendition of a

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higher sentence by a jury upon retrial is constitutionally permissible as long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. In practice, the Chaffin decision means that a defendant who is convicted, for example, of first degree manslaughter under KRS 507.030 and receives a sentence of imprisonment for ten years should be informed that if he appeals and succeeds in obtaining a new trial, he could be reconvicted at his second trial and sentenced to a maximum punishment of confinement for twenty years.

The Chaffin decision, however, did not erode the constitutional principle that vindictiveness against an accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or jury. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Thus, at a retrial in which a judge determines the sentence, such as where the defendant enters a plea of guilty or waives a jury trial, the judge may not impose a harsher sentence without placing in the record his reasons for the increase and those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant which occurred subsequent to the original sentencing. Id.

A trial judge's imposition, on retrial following appeal, of consecutive sentences would constitute a violation of the Pearce rule where the sentences, as originally imposed, were to run concurrently unless the record contained a showing of identifiable conduct on the part of the defendant which would justify the increased severity of the sentence. Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969); State v. Sterling, Or. App., 537 P.2d 578 (1975).

While a more severe sentence may be imposed at a new trial, a defendant who has secured a second trial may not be prosecuted for an offense of which he was acquitted at his original trial.

In the situation where a defendant is originally charged with a greater offense (such as murder) and at his initial trial the jury convicts him of a lesser included offense (such as first degree manslaughter), the conviction on the lesser charge operates as an acquittal on the greater charge. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Thus, if the defendant appeals his conviction of the lesser charge and obtains a new trial, the Commonwealth may not prosecute him on any offenses greater than the crime of which he was convicted. Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); Owsley v. Commonwealth, Ky., 458 S.W.2d 457 (1970); Gunter v. Commonwealth, Ky., 576 S.W.2d 518 (1979).

The defendant must be advised that in the event the appellate court reverses his conviction for an offense on the basis that the evidence at trial was legally insufficient to prove the charge, the Double Jeopardy Clause of the federal constitution precludes a retrial on that charge. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). The 1978 decisions in Burks and Greene, both supra, implicitly overruled as unconstitutional Hodges v. Commonwealth, Ky., 473 S.W.2d 811 (1971), which held the contrary in this jurisdiction.

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