REVIEW

Newman: Conviction: The Determination of Guilt or Innocence Without Trial

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Conviction: The Determination of Guilt or Innocence Without Trial. By *Donald J. Newman*. Boston: Little, Brown & Co., 1966. Pp. xxvii, 259. $8.50.

Even the prosecutor worries about convicting the innocent. Deeply ingrained in our criminal jurisprudence is the simple principle that it is better to acquit nine guilty men than to convict one innocent person. While the prosecutor would like to improve those odds by convicting more of the guilty, he still pauses with concern over fast procedures which may cut the corners of justice in the name of administrative convenience. After noting Professor Newman's conclusion on page 66 that conviction of the innocent is no more frequent on the guilty plea than after trial, this prosecutor read the final 177 pages in a more relaxed frame of mind.

The in-depth analysis of the processes of criminal law administration, undertaken by the American Bar Foundation, is obviously commendable. More attention needs to be given to what actually occurs in the pit of our trial courts as distinguished from the lofty generalizations which rise from the refinements of appellate decisions. From that point of view, Professor Newman's work is a significant step forward. His treatment of plea bargaining is sufficiently fundamental for the novice and sophisticated enough to cause the experienced prose-

Penal Code contains few provisions on mandatory sentences. Where present in the narcotics laws, the courts have injected elasticity by findings of guilty on possession instead of sale, or sometimes the mandatory sentence provisions are simply ignored. Plea bargaining occurs occasionally where a guilty plea will be entered to operating a motor vehicle without the consent of the owner with a nol pros on larceny of an automobile. In such cases, the facts would support conviction on either charge with the essential difference being in the intent of the defendant to retain permanent possession of the automobile. The semblance of plea bargaining is also present where a guilty plea is entered to larceny with a nol pros of a burglary bill where the only evidence of burglary is the tenuous inference arising from possession of property which was recently taken from burglarized premises. Even these situations do not occur with frequency.

In Philadelphia the major use of what could be categorized as plea bargaining occurs in homicide cases. Many such cases involve a factual situation indicating "variable guilt." The dictum that "[j]ustice and liberty are not the subjects of bargaining and barter" does not fit the realities of a typical barroom killing of which there are, unfortunately, many in Philadelphia and elsewhere.[5] Contrary to Judge Rives' statement of high principle, justice does not readily flow from a computer where the survivor of a fight and witnesses at the taproom relate stories which indicate, in variable quantities, the facts of intoxication, provocation, malice aforethought and self-defense.

There is ordinarily sufficient evidence of malice and deliberation in such cases for the jury to find the defendant guilty of murder in the first degree, which carries either life imprisonment or death in the electric chair. Or, the conceded drinking by the defendant may be sufficient to nullify specific intent or malice to make the case second degree murder, which calls for a maximum of 10 to 20 years in jail. From all the prosecutor knows by the time the cold carbon copies of the police reports reach the District Attorney's office, the defendant may have acted in "hot blood", which makes the offense only voluntary manslaughter with a maximum penalty of 6 to 12 years. And, the defense invariably produces testimony showing that the killing was pure self-defense.

When such cases are submitted to juries, a variety of verdicts are returned, which leads to the inescapable conclusion of variable guilt.

5. Judge Rives in Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957).

Most of those trials result in convictions for second degree murder or voluntary manslaughter. The judges generally impose sentences with a minimum range of 5 to 8 years and a maximum of 10 to 20 years. That distilled experience enables the assistant district attorney and the defense lawyer to bargain on the middle ground of what experience has shown to be "justice" without the defense running the risk of the occasional first degree conviction which carries a mandatory minimum of life imprisonment and without the Commonwealth tying up a jury room for 3 to 5 days and running the risk of acquittal.

Plea bargaining in Pennsylvania on such cases is explained not only because of the concept of variable guilt, but also because our statute prohibits a waiver of a jury trial on a murder bill of indictment. If our procedures permitted a waiver of a jury on a second degree murder bill in such cases, it is probable that even more of these cases would be disposed of without plea bargaining.

Based on my experience in plea bargaining and the materials in Professor Newman's book, I would answer his "major unresolved question" by unequivocally stating that plea bargaining is proper providing that the procedural standards detailed in his book are met. In reaching that conclusion, I would place relatively little emphasis on the administrative convenience of the judicial system. Our Philadelphia experience shows that our trial lists can be managed without plea bargaining. I would summarily reject the plausible but imprecise postulate that "[j]ustice and liberty are not the subjects of bargaining and barter." Professor Newman comprehensively identifies the enormous discretion at work in criminal law at all levels. That shows a spirit of "accommodation" which means much the same although it sounds more polite than "bargaining and barter." Professor Newman realistically identifies the discretion of the police officer who may decide not to take a suspect into custody. The very broad discretion of the prosecutor has been recognized by decades of judicial decisions. In one of his best sections, Professor Newman candidly convicts the courts for acquitting the guilty. But the courts have acquitted the guilty for a variety of civilized reasons just as such discretion is injected into law enforcement processes at every level. Such experience is convincing that such compromise is socially desirable.

From the defendant's view such "accommodation" frequently makes sense so long as the innocent are not convicted. An indispensable ingredient of plea bargaining is the defendant's representation by counsel who provides the practical assurance that an innocent man will not stand convicted. The strategic position of the defendant is often never

better than before the state's witnesses have been heard at trial. Police reports (unlike verbose book reviews) are often terse and frequently omit unsavory facts which are developed at trial when the police officer testifies. In the middle of trial, the prosecutor sometimes finds a previously unidentified witness who adds detail and depth to the criminal acts. Comparing a guilty plea, a non-jury trial and a jury trial, the conclusion is inescapable that judgments are ordinarily more harsh in direct proportion to the fuller disclosures involved in those proceedings. On a guilty plea, only the essentials of the offense are presented in order to be sure that there is the corpus of a crime which would warrant a conviction when the confession of guilt is added. At trial, on a waiver or before a jury, the facts are developed at much greater length. After a jury trial with lengthy summations by counsel and charge by the court, the trial judge is very likely, at least subconsciously, to consider the case more serious, when it comes time to sentence, than he would have if he had thought about it for only a few minutes on a guilty plea.

The plea of guilty also removes the temptation for the guilty defendant to perjure himself in his own defense. Prosecutors obviously cannot bring charges for perjured testimony every time it occurs without materially increasing the backlog, but the trial judge frequently takes that factor into account on the day of sentencing. And as Professor Newman has pointed out, the defendant who pleads guilty ordinarily needs less of a penalty because he has already started the process of rehabilitation after showing remorse. Without disagreeing with the conclusion of Judge Duffy that "[a] defendant in a criminal case should not be punished by a heavy sentence merely because he exercises his constitutional right to be tried before an impartial judge or jury,"[6] these are some of the legitimate reasons for the trial judge to impose a lesser sentence on a guilty plea.

But, facing the facts squarely, prosecutors and judges have been heard to say that the state is entitled to its "full rights" when it comes to sentencing after a protracted trial with the assertion by the defendant of his "full rights." Wrong as that attitude is, some courts are influenced by it. A realistic defense lawyer knows that he may save years of time for his client by saving days of time for the court. Given the assurance that those who plead are really guilty, which can be provided by diligent defense counsel, there are sound policy considera-

6. United States v. Wiley, 278 F.2d 500, 504 (7th Cir. 1960), cited by Professor Newman, CONVICTION 65.

tions for the court, the state and the defense to use plea bargaining in the proper context.

A study of the general quality produced by Professor Newman should also have devoted some attention to the problems on the horizon for plea bargaining. Some recent decisions may curtail the use of the bargained plea where such convictions have been reversed because of unsuspected nuances at the time the plea was entered. Or, such decisions may merely make the prosecutor more careful in touching all of the bases, if in fact he can identify them or anticipate new ones before proceeding on the compromise plea.

Such problems are indicated by a recent opinion of Judge A. Leon Higginbotham, sitting in the United States District Court for the Eastern District of Pennsylvania.[7] *Cuevas* has many similarities with the variable guilt homicide in Philadelphia described earlier. Cuevas and Carrasquillo, soon to be the deceased, quarrelled over a debt at a dice game. The defendant claimed the deceased attacked him with a knife. That was denied by other witnesses. After Cuevas shot Carrasquillo, Cuevas went home, told his wife that he had shot someone and called the police.

At trial Cuevas entered a plea to murder generally, and the Assistant District Attorney certified that the offense rose no higher than murder in the second degree. It is obvious that the normal precautions were followed at the time the plea was entered from the following extract from Judge Higginbotham's opinion:

> With utmost caution his counsel advised the court as follows: "If Your Honor, please, let the record show before the defendant pleads generally guilty that the District Attorney intends to certify with Your Honor's permission that this case does not rise higher than second degree. I would like to have for the record an examination of this defendant so that he understands fully what the situation is." The defendant was subsequently fully advised of his rights to enter a not guilty plea, and, that "under those circumstances a jury could convict you of murder even up to the first degree. Do you understand that?" Defendant: "Yes."
>
> Defendant admitted "that there had not been any promises made to you of any kind." That "there has been no threats made to you." That "you're doing this of your own free will"; that "you understand all of the situation here"; and "you're satisfied to plead guilty under those circumstances?" His reply was that as

7. United States *ex rel.* Cuevas v. Rundle, 258 F. Supp. 647 (E.D. Pa. 1966).

> a result of entering a guilty plea his only understanding was that "it can't go higher than second degree."[8]

Cuevas was convicted of murder in the second degree and sentenced to 7 to 18 years in prison.

Cuevas successfully attacked the conviction in the United States District Court on the contention that his guilty plea was induced by a statement which was obtained in violation of the United States Consitution pre-*Escobedo*. Rejecting the Commonwealth's contention that the conviction should stand because the statement was exculpatory, Judge Higginbotham found that there was psychological coercion in the obtaining of the statement because of the defendant's limited intellect, fatigue, poor emotional health and police deception. The court rejected the Commonwealth's argument that the statement was immaterial to the plea of guilty by finding that the "plea of guilty was induced by the existence of the statement."[9] This decision requires that the prosecutor be extremely circumspect in plea bargaining where there are any conceivable constitutional infirmities underlying the plea which may later be raised.

On the facts of this case, characterized by Judge Higginbotham as "unique,"[10] no appeal was taken by the Commonwealth. It was decided that it would be preferable to accommodate our practices to the problems inherent in the *Cuevas* situation rather than risk broader application through appellate review. But the case does obviously raise many problems on the compromise plea for murder in the second degree, which is the only substantial use made of this procedure in Philadelphia today.

Another troublesome consideration is the question of consent or voluntariness in the entry of the guilty plea. This subject is discussed by Professor Newman, but more attention needs to be given to the procedures for nullifying the conviction on a later contention of lack of requisite voluntariness or consent. A relatively recent celebrated case in Philadelphia raised this question in a very unusual context where the penalty was not compromised and the Assistant District Attorney had no part in any bargaining. During the course of jury selection in the case of *Commonwealth of Pennsylvania v. Scoleri*, the defendant's lawyer approached several judges, none of whom was the presiding judge, to determine their "feelings about death sen-

8. *Id.* at 659.
9. *Id.* at 656.
10. *Id.* at 660.

tences"[11] as a preliminary to considering a change in plea to murder generally before a three judge panel. The history of this involved case indicated that defense counsel had good reason to believe that his client's interests would be well served if he received life imprisonment on a guilty plea.[12] Scoleri did ultimately change his plea to guilty, and one of the judges, to whom defense counsel talked, was ultimately called to sit on a three judge panel to hear the evidence on Scoleri's guilty plea. The proceedings show that the court and prosecutor questioned the defendant very extensively on the voluntariness of his plea and his understanding that there was no commitment as to penalty.[13]

After the three judge court imposed the death penalty, defense counsel asked leave to withdraw the plea of guilty on the ground that he had a flat promise from one judge that he would impose life imprisonment. An extensive hearing followed on the motion to withdraw the plea of guilty. The judge alleged to have made the commitment withdrew from the bench, appeared as a witness, and denied any such commitment.

Declaring the case to be "sui generis," the Supreme Court of Pennsylvania permitted the withdrawal of the guilty plea, indicating that the key considerations were the belief of the defense lawyer rather than precisely what the judge said, the statements by the defense lawyer to the defendant, and the reliance of the defendant in entering the guilty plea on his lawyer's statements. Since "sui generis" cases are frequently precedents for later cases, the *Scoleri* decision gives this prosecutor some concern over the finality of the guilty plea process. Despite such reversals, the guilty plea process makes sense from the state's viewpoint, and the prosecutor cannot be unduly concerned about those appellate problems, because he has so many others.

Experience in Philadelphia corroborates Professor Newman's conclusion that plea bargaining is here to stay. In the proper context it has a legitimate place in the administration of criminal justice. Professor Newman's book should help project it into the proper context.

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11. Commonwealth of Pennsylvania v. Scoleri, 415 Pa. 218, 223, 202 A.2d 521, 523 (1964).
12. On three occasions the death sentence has been pronounced. Twice the judgments have been reversed, and an appeal is now pending from the third trial.
13. 415 Pa. at 224-26, 202 A.2d at 524-25.

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