



4. William Harbison, Jr., (Harbison) was the defendant in two criminal cases in the Burke County Superior Court which were styled State of North Carolina v. William Harbison, Jr. and numbered 76 CR 3865 and 76 CR 3862. In 76 CR 3865, he was charged with first degree murder and in 76 CR 3862, he was charged with felonious assault.
5. These cases were consolidated for trial and were tried during the term of Superior Court beginning August 30, 1976. The Honorable John R. Friday presided.
6. Harbison was represented in these cases by the Defendant John H. McMurray (McMurray) of the Burke County Bar and James C. Fuller, Jr. (Fuller) of the Mecklenburg County Bar. McMurray had been appointed by the court to represent Harbison. Fuller was privately retained by Harbison's family.
7. Prior to trial, Harbison expressed to his attorneys Fuller and McMurray that he desired to plead not guilty and further desired that his plea of self-defense be pursued throughout the trial.
8. Harbison entered a plea of not guilty to all charges.
9. Harbison testified in accordance with his defense of self-defense.
10. Judge Friday ultimately charged the jury on the defense of self-defense.
11. At no time did Harbison authorize McMurray to abandon the plea of not guilty or the defense of self-defense.
12. Following the close of the evidence, both of Harbison's lawyers argued to the jury. Fuller argued first for acquittal based on self-defense.
13. After Fuller's argument and the argument of the District Attorney, McMurray gave a closing argument for the defense. As a part of his closing argument, McMurray made reference to the evidence being sufficient to convict his client of manslaughter.
14. Although the court reporter, Clara T. Cline, did make stenographic notes of the closing arguments along with the rest of the proceedings, a

12500

00556

transcription of her notes of the closing arguments was never requested or made. Although a diligent search for the notes was made when this matter arose in 1984, they have not been located and are deemed lost.

15. The Committee is unable to determine by clear, cogent and convincing evidence exactly what was included in the entire closing argument of McMurray. The Committee is unable to determine whether any of the following possibilities occurred: (1) whether McMurray couched his argument with respect to conviction of manslaughter in the alternative to an argument for acquittal; (2) whether he argued on the theory that the evidence for the State, taken in the light most favorable to the State, warranted at most a conviction of manslaughter; or (3) whether he abandoned the defense of self-defense entirely, abandoned the plea of not guilty and based his entire closing argument on the theory that his client was in fact guilty of manslaughter.
16. Harbison was found guilty by the jury of second degree murder and felonious assault. Judge Friday sentenced Harbison to life imprisonment for murder and to 10 years imprisonment for assault. Harbison thereafter served notice of appeal and McMurray and Fuller were appointed by the Court to represent Harbison on appeal.
17. The murder conviction was appealed by right directly to the North Carolina Supreme Court. A motion to by-pass the North Carolina Court of Appeals was granted relative to the assault case and the cases on appeal were consolidated.
18. Neither of Harbison's attorneys assigned as error before the North Carolina Supreme Court any aspect of the closing argument of McMurray.
19. On November 11, 1977, the North Carolina Supreme Court filed its decision in State v. Harbison, 293 N.C. 475. The Court found no error and affirmed the conviction.
20. A federal habeas corpus proceeding was thereafter filed on Harbison's behalf relative to his conviction. No question of impropriety was raised concerning McMurray's closing argument.
21. The first time McMurray was made aware of any allegation of impropriety concerning his closing

argument was during 1984, approximately eight years after the Harbison trial.

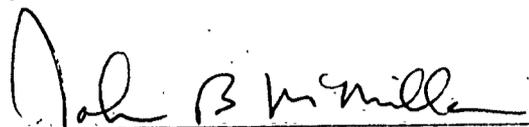
Based upon the foregoing Findings of Fact, the Committee makes the following Conclusions of Law:

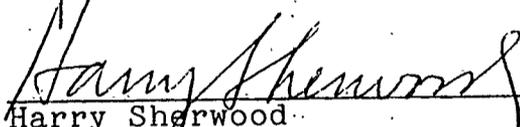
1. The client who stands accused of a crime has an absolute right to decide how to plead. Although his lawyer has a professional obligation to assist him in making that decision by informing him of considerations relevant to his best interests, the decision is exclusively that of the client. See EC7-7 and 7-8. Once a decision to plead not guilty is made, it is the lawyer's duty under DR7-101(A)(1) to employ every reasonably available means, including reliance upon the presumption of innocence and the assertion of any reasonably available defense, to achieve his client's lawful objectives. Included within the client's lawful objectives can be acquittal and/or, when authorized by the client, the conviction of a lesser included offense. Indeed, the client's best interests may be served by a decision to argue solely for conviction of a lesser included offense and to abandon all arguments for acquittal. However, it is necessary to realize that such a decision, like the decision of how to plead, is for the client to make, and is binding upon the lawyer.
2. In a homicide case, once a criminal defendant has made the decision to plead not guilty, has instructed his attorney to maintain his innocence under the theory of self-defense, has testified in accordance with that theory, and has an expectation that the trial judge will charge the jury on that defense, the attorney cannot, absent permission of his client, abandon the defense of self-defense and the presumption of innocence and argue exclusively for a conviction of a lesser included offense. To do so would amount to the compromising of the client's earlier decision with respect to his plea.
3. The lawyer is permitted, and in fact may have a duty, to argue in the alternative to acquittal, that the evidence of the State would at most permit a finding of guilt of some lesser included charge.
4. Because the Plaintiff has failed to prove in this case by clear, cogent and convincing evidence what was said by the Defendant in the entirety of his closing argument, the Committee concludes that the

Plaintiff's case should be dismissed for failure to sustain the burden of proof.

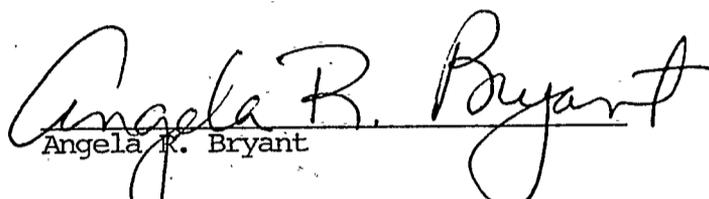
IT IS THEREFORE ORDERED that this case be dismissed.

This the 28<sup>th</sup> day of March, 1985.

  
\_\_\_\_\_  
John B. McMillan, Chairman

  
\_\_\_\_\_  
Harry Sherwood

Dissenting:

  
\_\_\_\_\_  
Angela R. Bryant

DISSENT (See attached)

DISSENT

The State Bar proved by clear, cogent, convincing, credible, uncontroverted and competent evidence that Attorney McMurray said in the jury argument at issue herein that the criminal defendant, Harbison, should be convicted of manslaughter. Attorney McMurray in his written statement in response to the grievance admitted, "I stated to the jury that on this evidence I was of the opinion defendant would be convicted of some criminal offense, but he should be found guilty only of manslaughter." The State Bar further proved by clear, cogent, convincing, credible, uncontroverted and competent evidence that Attorney McMurray made statements to the jury that suggested that his client would and/or should be convicted without the prior consent of, consultation with or knowledge of his client or co-counsel. Moreover, the statement and suggestion that his client should be convicted of manslaughter was in subversion of and inconsistent with the criminal defendant's plea of not guilty, his trial defense of self-defense and co-counsel's jury argument consistent with the plea of not guilty based on self-defense. The clear, cogent, convincing and competent evidence further showed that Attorney McMurray made the statement in his jury argument intentionally and that he believed that a decision to suggest or confess his client's guilt to the jury was a matter in his professional discretion about which he did not have to consult with his client. All the competent and credible evidence taken together proved that Attorney McMurray violated DR7-101(A)(1) in this instance.

As an advocate, a lawyer should resolve in favor of his client any doubts as to the bounds of the law and urge any permissible construction of the law favorable to his client without regard to the likelihood that it will ultimately prevail. (E.C. 7-3 and 7-4). In the criminal trial at issue here, the trial judge had indicated that he would be instructing the jury on self-defense, so the criminal defendant's objective of a not guilty verdict based on self-defense was "non-frivolous" as a matter of law.

A lawyer should advise his client vigorously if in his professional opinion an adverse result is likely from a certain course of conduct or strategy; however, on matters affecting the merits of the cause and involving non-legal factors (e.g. the likelihood of a particular jury reaction or the impact of race, cultural differences, socio-economic status and/or sympathy), the decision about objectives and methods is for the client after consultation with his lawyer. (EC7-5, 7-7, 7-8 and 7-24). In this case, defendant Harbison did not receive the benefit of confronting the opinion and experience of his lawyer because Attorney McMurray did not advise or consult with him. As a result, defendant Harbison was not accorded the human integrity inherent in having a personal advocate in the adversary process. He felt abandoned by the very person who was supposed to be on his side. Our system affords each of us the human dignity that comes with the opportunity to maintain our innocence to the end. The criminal defendant serves the time not the attorney. If a lawyer cannot seek the lawful objective of his client in litigation, he must

confront and consult with his client, and if necessary, request permission to withdraw without revealing any confidences to the Court that would prejudice his client. See DR7-102(B)(1).

I was influenced by the ten or more defense witnesses who presented inadmissible opinion evidence for the defendant and "for the record only" on the ultimate issues to be determined by this hearing committee, so I must infer that it is very likely that the other committee members were also influenced. Most of those witnesses did not present any admissible evidence. In hindsight, the defendant should have been limited to an offer of proof by affidavit, deposition or statement for the record, because of the volume of the improper evidence and because of the highly political nature of the witnesses, i.e. a federal court judge, a former senator, superior court judges, the attorney general and the chairman of the Democratic Party.

Finally, I will examine the significance of the racial implications of this situation. The criminal trial arose out of an interracial relationship between a Black male defendant and the victims, a white female and a Black male. It is my opinion that the impact of the racial character of this situation was not taken into account in the lawyer-client relationship nor in the criminal trial. It is clear from this experience and from an examination of social-psychological literature, that even in 1985 and surely in 1976, negative racial attitudes do affect the response of lawyers, clients, and jurors to sexually-motivated crimes when the parties are of different races. The lack of awareness and sensitivity to the impact of racial differences on the ethical and professional decisions of lawyers can best be exemplified by a quote from a note written to Attorney McMurray by defendant Harbison's mother which was introduced as defendant's exhibit #6: "Thank you for trying to help William Jr. The pressure have been great But being colored the cards are stack against us before Court even starts".

For all of the above stated reasons, I strenuously and respectfully dissent from paragraph fifteen of the "Findings of Fact", paragraph four of the "Conclusions of Law" and from the dismissal of Plaintiff's case based thereon. The State Bar carried its burden of proof that the conduct of Attorney McMurray violated DR7-101(A)(1).