## UNPUBLISHED LEGAL ETHICS INQUIRY 79-16

## (October 11, 1979)

Reference is made to your letter of September 11, 1979, asking for advice from this Committee concerning your duties with respect to a criminal defendant whom you have been appointed to represent in post-conviction habeas corpus proceedings. You state in your letter that after considerable investigation and review of the applicable law you have concluded that the petitioner's trial attorney conducted no investigation of the facts surrounding the homicide with which your client was charged and advised him to plead guilty to the homicide on the basis of conversations with the prosecuting attorney. You further state that although you are of the opinion that the trial court will not set aside the guilty plea, it is likely, under its recent decisions, that the Supreme Court of Appeals will permit your client to withdraw his plea of guilty. You feel, however, that if the guilty plea is set aside your client would then have to stand trial on a first degree murder charge. Your client is now serving a sentence of ten years to life pursuant to a first degree murder conviction with a recommendation of mercy. You fear that if your client stands trial again there is a likelihood that he will be convicted of first degree murder without a recommendation of mercy which would require a life sentence.

Although you have asked four questions in your letter, they may be summarized as follows:

(1) Do you have the right to elect whether or not to proceed in the habeas corpus proceedings?

(2) May you withdraw from the case?

You do not have the right to elect whether to continue with the habeas corpus proceedings. In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. Except in such situations the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken. A lawyer is bound by his client's instructions. See Code of Professional Responsibility, EC 7-7 and 7-8.

We call your attention to the case of Anders v. California, 386 U.S. 738, 18 L. Ed. 493, 87 S. Ct. 1396 (1967), wherein Mr. Justice Clark wrote:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course,

> if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

See also Rhodes v. Leverette, 239 S.E.2d 136 (W. Va. 1977), in which Mr. Justice Miller quotes with approval from Anders.

DR 2-110 of the Code of Professional Responsibility regulates withdrawal of counsel. DR 2-110(A)(1) and (2) provide:

> (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
>
> (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

DR 2-110(C) provides, in pertinent part:

> If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:
>
> (1) His client:
>
> (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
>
> (b) Personally seeks to pursue an illegal course of conduct.
>
> (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.
>
> (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

From the foregoing we conclude that if your client insists, after having been fully advised as to the possible consequences, that you continue with proceedings to have his guilty plea set aside, you must do so. You may withdraw from the case only if you come within the provisions of DR 2-110(C)(1)(a) through (d).

In applying to the court for permission to withdraw you should not disclose the facts which you have discovered concerning your client's case during the course of your representation.

**UNPUBLISHED LEGAL ETHICS INQUIRY 79-16**

**Letter of Inquiry**
**September 11, 1979**

**RE: Your guidance regarding situation below:**

I wish to present a factual situation to you so that you can give me some advice as to how or what is the proper ethical way to proceed.

I was appointed to represent a black male in his late forties who was charged with shooting his nephew in the back and killing him. This was a post-conviction habeas corpus appointment. After spending considerable time and energy, over thirty (30) hours of investigation and review of the law, I have concluded that the petitioner's trial attorney conducted no investigation of the facts surrounding the shooting and advised my client to plead guilty on the basis of conversations with the prosecuting attorney.

Our own investigation revealed that there were several witnesses who were with the petitioner just before the time of the shooting, that the petitioner had been drinking for a day, that he was totally drunk, although somewhat cogent, that he would probably be entitled to get the intoxication instruction to the jury on the possibility of reduction from murder one (1) to murder two (2) because of his intoxication; however, said witnesses acknowledge that there had been ill feelings directed by the petitioner towards his other nephew, who was not shot that evening.

The death was accomplished by means of a shotgun, if I am not mistaken, and the nephew was shot and killed while asleep in bed in the early hours of the morning. The petitioner has advanced the rationale of accident as his possible defense.

The dilemma in which I find myself is this: I believe that although the trial court will not set aside the guilty plea, it is likely, under the cases presently out, Call v. McKenzie and its progeny, that the Supreme Court of Appeals would not uphold a guilty plea of this petitioner, nor uphold the legal representation as being "effective." If the guilty plea is set aside, which I see as fairly possible to likely, then he would stand trial on a first degree murder charge, with the facts boiled down to him shooting and killing his nephew, accidentally or purposefully, in the middle of the night while his nephew was asleep. There have been four (4) straight first degree murder verdicts in County, with the last one being without a recommendation of mercy. This case has facts which are at least as bad if not more serious than the facts in those four cases. I have apprised the petitioner of the entirety of these facts and circumstances, and he wishes to go ahead with having the guilty plea set aside,

or try to get it set aside, regardless of the consequences. Incidentally, he is serving a ten (10) year to life sentence, pursuant to a first degree with recommendation of mercy plea of guilty, that was accepted in mid-1977. I have been reluctant to proceed as the petitioner wishes in this case because I don't think he can get any advantage by having this case tried before a County Circuit Court jury in view of the foregoing.

I ask you for guidance at this time as to these particular questions:

(a) Do I have the right to elect whether or not to proceed in this Petition for Writ of Habeas Corpus?

(b) Are the petitioner's wishes, after being fully informed of the gravity of this situation, the directing force for an attorney in a situation like this?

(c) Is it appropriate for me to move to withdraw from this case and ask that another attorney be appointed, knowing fully well that no attorney in County would be interested in prosecuting the wishes of the petitioner any further?

(d) Should I proceed with my representation of this client, assuming that the basis of his response to my correspondence as being satisfactorily informed to decide that he wishes the case to be further prosecuted?

Any help or direction that you can give me with respect to this dilemma will be greatly appreciated by this counsel.