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SYMPOSIUM PROBLEM

THE WRONG MAN IS ABOUT TO BE EXECUTED FOR A CRIME HE DID NOT COMMIT[†]

Seven years ago Frank Smith was convicted of first-degree murder with special circumstances and sentenced to death. The jury found that Smith had killed a police officer by shooting him in the head at point-blank range while fleeing from an aborted bank robbery attempt. At trial Smith testified that he was home alone watching television during the relevant times. The prosecution had no physical

[†] This Symposium Problem was inspired by one of several role plays featured in an educational television series entitled *The Constitution—That Delicate Balance*. Hosted by Professor of broadcast journalism and former radio and television journalist Fred Friendly, the series was produced by the Columbia University School of Journalism's Seminars on Media and Society, and distributed by the Public Broadcasting System.

In one program in the series, which first aired in 1988, Professor Charles Ogletree of Harvard Law School played the role of a man who had just murdered his girlfriend. He sought advice from a clergyman, a psychiatrist, and several lawyers—each portrayed by prominent persons in the indicated fields. After Professor Ogletree settled on noted criminal defense lawyer James Neal to defend him, he told his lawyer that he had earlier killed someone else, and that an innocent person was scheduled to be executed for this crime.

As Professor Ogletree and Mr. Neal discussed their quandary, the conversation was joined by others in the "town meeting" format that characterized the entire PBS series. The participants included Supreme Court Justice Antonin Scalia, New York University School of Law Professor Stephen Gillers, Journalist and Author Anna Quindlen, Union Theological Seminary President Donald Shriver, Hastings Center President Dr. Willard Gaylin, past President and CEO of Planned Parenthood Federation of America Faye Wattleton, and Massachusetts Attorney General Scott Harshbarger (then a local district attorney).

Dean Gerald McLaughlin of Loyola Law School of Los Angeles proposed to the editors of the *Loyola of Los Angeles Law Review* that the current Symposium revisit the issues addressed in the Ogletree role play. The editors were able to secure the participation of Professor William Hodes of Indiana University School of Law-Indianapolis, who has often used the PBS video in his professional responsibility classes. Professor Hodes has written an introductory essay for the Symposium, and also assisted the editors in revising the Symposium Problem to make it richer and more full of nuances that would—it was hoped—provoke more interesting commentary.

evidence connecting Smith to the crime scene, but the jury credited the testimony of two tellers and a bank customer who identified Smith, first in a lineup and then at trial.

Smith appealed both his conviction and his death sentence. When that failed, he applied for a writ of habeas corpus in federal district court. The writ was promptly rejected because Smith could point to no constitutional errors. The lineup was conducted fairly, his counsel performed with reasonable skill, and the trial was otherwise error free. Appeals through the federal system were also to no avail, and Frank Smith has been scheduled for execution at one minute after midnight next Friday.

This Tuesday morning, Claire Hopewell, a third-year public defender, met for the second time with her client, Ben Jones. Jones is currently charged with a drug offense, and he has been in and out of prison over the last twenty years, usually for similar drug offenses or small-time robberies perpetrated to secure money for the purchase of drugs. The state had recently strengthened its multiple offender law to comport with the "three strikes and you're out" philosophy, and Hopewell tried to impress upon Jones the seriousness of his situation: some of his earlier convictions might count as "strikes."

During their meeting and without much warning, Jones informed Hopewell that it was actually he—not Smith—who had murdered the police officer at the bank. Hopewell was initially dubious, but after further questioning she gradually came to believe that Jones was almost certainly telling the truth. Hopewell then demanded to know why Jones had waited so long to make this revelation and what he wanted her to do with this information.

Jones replied, "Well, counselor, let's just say that I wanted you to know everything so that you could maybe work me a deal of some kind. You're the lawyer, but the way I see it is that the more you have to deal with, the more dealing you can do. Plus, I know Frank. I never thought they would actually get around to executing him; you and I both know how long appeals can drag on and on. Frank's a nasty dude and probably would have ended up in jail anyway, but he doesn't deserve to die. It's not right."

"I think I understand," Hopewell responded, "but you haven't answered my question. If you're talking about confessing to the authorities, I can help arrange that, but unless you go voluntarily or authorize me to, it won't help Frank Smith very much. You can't be forced to testify because of the Fifth Amendment—you know, self-incrimination. And I can't be forced to testify because of the

attorney-client privilege. Of course, I'm not even supposed to tell anyone about this conversation, so nobody would know enough to try to make either of us testify anyway. But look—you hit me with this so suddenly that I don't even know myself what I'm going to do. I'm not your minister and I'm not your shrink—by the way, have you told anyone else?"

Jones shifted nervously in his chair. "Now hold on just a second. I said I hoped something could be done for Frank, but I'm not stupid either. Nobody tells nobody anything until I find out what I get in return. You're my attorney; you work for me. If I can get a deal out of this and it helps Frank too, fine. But don't use my name, not yet."

Soon thereafter the conversation petered out. Claire Hopewell and Ben Jones agreed to meet the next day to discuss the matter further.

What should Claire Hopewell do?

After leaving Hopewell's office, Jones wandered around the downtown area for a couple of hours and then sat and ate his lunch on a park bench. He hadn't attended religious services in a long time, either in prison or out, but he suddenly felt a strong yearning to talk to a member of the clergy about his situation.

As a child and teenager he had attended services regularly with his family, and their house of worship was only a short bus ride away. When Jones arrived, he found that Paul Samuels was still there, now a much older man nearing retirement. Upon seeing him, Jones started to weep and told the entire story of his involvement in the bank robbery and killing, as well as his meeting with Claire Hopewell.

What should Paul Samuels do?

Ben Jones had received psychiatric counseling during his last stay in prison, and when released he had been referred to Jennifer Palmer, a psychiatrist, to continue weekly therapy sessions. As luck would have it, his regular session was scheduled for that evening.

By the time he walked into Dr. Palmer's office, Jones was beginning to panic. He was confused about the options that Hopewell had presented, and his conversation with Samuels had only increased his anxiety. Dr. Palmer immediately noticed his distracted mood and

encouraged him to talk about what was bothering him. Jones launched into a full account, including his involvement in the bank robbery, the killing, and his visits with Hopewell and Samuels earlier that day.

What should Jennifer Palmer do?