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SHOULD RALPH FLEAGLE HANG?

*By Philip S. Van Cise of the Denver Bar**

THERE has been a great deal of discussion among lawyers and laymen and in the public press as to whether or not Ralph Fleagle should escape the death penalty for the Lamar murders, in return for his confession clearing up the whole tragedy.

There is no doubt in anyone's mind that if there ever was a case in which capital punishment should be inflicted, that case is the Lamar bank robbery with its resultant murders.

Four men had been arrested in other states, charged with this crime, positively identified by the eyewitnesses in the bank, extradited to Colorado, and were awaiting trial with almost certain conviction. Then a fingerprint was found which identified Jake Fleagle as one of the bandits. Jake has never been located, but Ralph Fleagle was arrested and brought to Colorado. No eye witness to the crime could identify him, (and no attempt was made at the trial so to do), *hence the evidence being circumstantial, only life imprisonment could be inflicted by the jury.* Before a jury could return a hanging verdict, as the evidence stood before his confession, Fleagle must make a legal confession or plead guilty. His associates were unknown, and the authorities wanted the entire matter cleared up at the earliest possible moment. The State wanted a confession, Fleagle's attorney, and Fleagle, wanted to save his neck, and conferences were held. Strange to relate, though an agreement was made, it was not in writing, lacked judicial approval—no order of Court being entered thereon—and the parties thereto are in hopeless confusion as to what they agreed upon!

The State's witnesses claimed that the agreement was limited to a promise that the jury would not be asked to return

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*EDITOR'S NOTE: This article was written by Mr. Van Cise, a former and most able district attorney for Denver, only with considerable reluctance and at the express request of Dicta.

The issue tendered has been the subject of much debate, it is not without significance, nor is it purely local in its scope.

As to the conclusion involved, Dicta draws closer the folds of the Editorial Cloak and continues to think deep thoughts.

a hanging verdict, the defendant's witnesses (including the attorney general of Kansas and Chief of Police Harper of Colorado Springs) that life imprisonment was the promise.

Until Fleagle talked, *as matters then stood,* Fleagle faced life imprisonment at the most (and possibly an acquittal). Would any lawyer advise his client to talk—and run the chance of being hung—unless he had a promise that by talking he would at least be as safe as if he had kept his own counsel? We believe it a fair assumption that both Judge Cunningham —the attorney for Fleagle—and his client honestly believed that a promise of life imprisonment was made. And in making this statement we do not mean to infer that their interpretation of the contract was justified by the statements of the State, only that such was their interpretation and belief, and the reason why Fleagle's lips were unsealed.

Where does this leave the State of Colorado as a matter of law, criminal practice, and equity?

Three charges were filed against Fleagle:

(a) Murder, which included both first and second degree.

(b) Aggravated robbery, in which the Court alone fixes the penalty at from ten years to life (C.L. 6718).

(c) Kidnapping, in which neither death nor life imprisonment was involved, simply a short time in the penitentiary.

Fleagle pleaded guilty to all three, *and to first degree murder at that!*

Under the statutes (C.L. 6665) the jury alone and no one else can fix the penalty for first degree murder! No outside agency of any kind can interfere with this exclusive prerogative.

Many states have statutes authorizing a contract between the State and a defendant, which can be pleaded in bar, and afford a confessing defendant absolute protection. Colorado has no such statute. How then can an agreement with the State officials be made effective.

It is handled in one of four ways:

1. By a dismissal by the District Attorney, with the consent of the Court.

2. By accepting a plea of guilty to a lesser offense. (Recommendation by the District Attorney and approved by the Court).

3. By a written agreement entered into by the District Attorney and specifically approved by the court by order entered of record.

4. By an oral understanding between the State and the defendant.

While none of the first three was in any manner attempted in this case, and the fourth was indefinite, we will discuss them in their order.

1. Dismissal or *nolle prosequi.*

Under the common law and in Colorado, until 1913, a District Attorney had the absolute right, *without the consent of the court,* to enter a dismissal or *nolle prosequi.* In 1913, however, this was changed by statute (C.L. 7078) and no dismissal can now be made except upon written motion in open court with the consent and approval of the court. This is no bar to subsequent prosecution, though in practice it disposes of the case.

2. Acceptance of plea to lower offense.

This is a very common practice in all the Courts of Colorado, where manslaughter is accepted for murder, simple robbery for aggravated robbery, etc., and is an absolute bar to a second trial for the greater offense.

3. Written agreement entered into by the District Attorney and defendant and approved by the court.

In the Denver bunco cases immunity was given to Len Reamey by a written agreement entered into between Reamey and the Special Prosecutors and specifically approved by Judge Butler, both in writing and by order of Court. After Reamey fulfilled his agreement with the State his case was dismissed.

Some states enforce an oral agreement, but the weight of authority requires consent of Court. The reason for the rule is well expressed in *People v. Whipple,* 9 Cow. 708, as follows:

"So long as, by the policy of the law, accomplices are deemed competent witnesses against their fellows, so long must a discretion in regard to admitting them be vested somewhere or other in the government. It could not, con-

sistently with the nature of the power or the course and character of judicial proceedings, be committed to the chief executive magistrate; nor could it, with propriety, be intrusted to the public prosecutor or any other inferior ministerial officer of justice, because, strictly speaking, it is the exercise of a high judicial discretion; and the reasons for vesting it in the court, rather than in the committing magistrate, or even the public prosecutor, is, that the admission of the party as a witness amounts to a promise by the court of a recommendation to mercy, upon condition of his making a full and fair disclosure of all the circumstances of the crime."

4. Oral agreement between the State and the defendant, *without the approval of the Court.*

Such an arrangement is of no value whatever in Colorado, affords no protection to the defendant, and cannot be offered in evidence. It also is dangerous, as it opens the door of misunderstanding.

There is only one Colorado case on the subject, and while not squarely in point it passes upon the power of the district attorney. One Giano, long before Volstead days, was tried and convicted of selling liquor. At the trial an offer of proof was made that he had been previously tried for a similar offense, and that a mistrial resulted, and that thereupon some sort of an understanding was entered into between defendant and the district attorney, whereby defendant was not to be further prosecuted. This offer was rejected. The Court sustained this ruling and stated:

"We are not aware that the District Attorney has the power to suspend the operation of a statute or to make a valid agreement by which he is to refrain from enforcing the criminal laws of the State * * * proof of such an agreement, if made, was improper."

And this decision is in line with decisions elsewhere:

"The decided weight of authority sustains the doctrine that an agreement to turn State's evidence, made with the prosecuting officer alone, without the court's advice or consent, affords the defendant no protection in the event he be placed on trial in violation of the agreement."
1 *Bishop's New Criminal Law,* 9th Edition, 679.

This leaves only two propositions for discussion, what should have been done to perfect an agreement, and what should the State do under the present circumstances.

A written agreement could have been entered into under which Fleagle pleaded guilty to both aggravated robbery and

kidnapping and received life imprisonment on the former and the maximum term of years on the latter. The agreement could have been filed in the murder case, together with a motion to dismiss, approved by the Court and contingent upon full confession and disclosure by Fleagle and testimony against his accomplices. Upon compliance with his bargain the dismissal in the murder case would have been entered as a matter of course and the matter disposed of for all time.

Under the practice in this State (though it has not been passed upon by the Supreme Court) many pleas of second degree murder have been accepted by the Court though the facts call for first degree murder. If a plea of guilty to second degree murder had been accepted in this case, life imprisonment could have been imposed thereon by the judge without a jury. Then an absolute bar would have been created to further prosecution.

What Should the State Do?

Bearing in mind that the State had several innocent men in jail awaiting trial on this Lamar murder charge—men who had been positively identified as the murderers, that the State could not hang Fleagle and did not know his confederates, (except Jake), that by keeping quiet his neck was safe, while by confessing he saved the State from probable judicial murder of innocent men, cleaned up the whole tragedy, and secured the conviction of his accomplices Abshier and Royston, what should the State do?

Our most dangerous criminals are not individuals, but organized gangs. What breaks them up and keeps their numbers small is not fear of the law—but of each other. The ordinary man sneers at the man who turns state's evidence and defendant's lawyers call him a sneak and a traitor. Yet he is the greatest protection society has against gangdom, and constitutes the greatest menace to the underworld. Police officials, like Chief Harper of Colorado Springs, district attorneys and law enforcing agencies, all know that in order to get results concessions of some sort must be made to some criminals (and often to desperate ones) in order to enforce the law. But before a law-enforcing officer can get this help from a defendant he must "tote-square" with the underworld.

Once it is known that the defendant has been double-crossed by an official, that officer's usefulness to society is in a large measure ended. [And we charge no state official in this case with bad faith of any kind].

Fleagle, under the methods pursued in his case, has no redress in law (unless for errors in the trial). His resort is to the pardoning power for commutation to life imprisonment. What action the governor should take is clearly set forth by the Supreme Court of the United States in *U. S. v. Ford,* 99 U. S. 593, 25 L. Ed. 399-403, where the Court said:

"The accomplice acquires only an equitable right to the clemency of the Executive * * * Should it be objected that the application may not be successful, the answer of the court must be in substance that given by Lord Denman on a similar occasion, that we are not to presume that the equitable title to mercy which the humblest and most criminal accomplice may thus acquire by testifying in a Federal Court will not be sacredly accorded to him by the President, in whom the pardoning power is vested by the Federal Constitution."