



On the Challenges of the Alford Plea

By Lloyd Liu

This column has mentioned the vanishing trial and its implications. There are fewer trials for a multitude of reasons, some more troubling than others. Defense attorney Stephen Braga recently discussed with me his experience with the West Memphis Three in which the circumstances made getting a new trial essentially impossible.

A partner with Bracewell LLP, Braga chairs the firm's government enforcement and investigations practice. He began his career clerking for Judge Thomas Flannery, whom Braga describes as "a very humble man, very quiet. He was the perfect candidate to be a district court judge. He had great trial skills. He would call it as he saw it."

Braga says that Flannery made his decisions "based on the evidence put before him, not any broad policy arguments, not any reflections of contemporary society. What does the evidence show? And how did that evidence implicate the application of the law to the problem before him?"

When Braga completed his clerkship, he informed Judge Flannery of his interest in becoming a criminal defense lawyer and asked the judge for advice on where to go. Judge Flannery, who had been the former U.S. attorney for the District of Columbia, tried to direct Braga to that prosecutor's office, telling him: "Even as good as you might be as a defense lawyer, a responsible prosecutor can do much more good for the cause of justice. A responsible prosecutor can serve justice by

declining to bring ill-founded charges with the stroke of his pen. The best a criminal defense lawyer can do is try to talk people out of potential guilt one charge at a time. And that's a much slower process than the prosecutor's ability to not bring charges in the first place."

In 2009, while at Ropes & Gray LLP, Braga began pro bono representation of Damien Echols of the West Memphis Three. Echols, Jessie Misskelley Jr., and Jason Baldwin were charged with the brutal murder of three eight-year-old boys in the early 1990s in West Memphis, Arkansas.¹ The investigation and trial were plagued with a litany of issues: a suspicious confession, speculation over a satanic cult, and questionable forensics work, among others.² Nevertheless, the three teenagers were convicted. Echols received the death sentence.³

The prosecutor expressly defended the Alford plea by citing the amount of money he saved his constituents by exercising his discretion the way he had.

The case drew national attention, garnering the support of celebrities such as Peter Jackson, Eddie Vedder, Natalie Maines, Johnny Depp, and Henry Rollins. As the case gained notoriety, new evidence and defense avenues emerged, particularly a new DNA-testing statute.⁴ DNA test results failed to link the defendants to the scene, and instead pointed to other individuals as the potential perpetrators.⁵ The defense team offered additional evidence that questioned the reliability of the state's case as well.⁶

In November 2010, the Arkansas Supreme Court granted the defendants' request for an evidentiary hearing to determine whether to have a new trial.⁷ Braga took that development as an opportunity to talk the prosecutor out of pursuing the charges any further. Despite the significant new evidence, the state remained steadfast in its desire to retry the West Memphis Three. Braga persisted, however, and negotiated an agreement for Echols to maintain his innocence but also plead guilty via the compromise device of an Alford plea.

The situation reminded Braga of Judge Flannery's advice about prosecutorial discretion:

I've gone back and thought about this in terms of Judge Flannery's statement about the impact of a responsible prosecutor. There is one additional point which complicates my feelings about this further. I think a responsible prosecutor in this case would have had no problem walking away from the guilt or innocence aspect of the case if there was never a civil liability question. In such a circumstance, I think the prosecutor would have dropped the case completely. He wouldn't have had a dog in the fight.

But there was a liability question, potentially tens of millions of dollars, and the prosecutor was an elected official, too. He had to show he got something out of the resolution of the case, and that something became saving the state a pile of money. In that way, it's even a little more unseemly, right? You have the decision of the freedom of these three men not turning entirely on questions of guilt or innocence but also on the collateral liability of the state and the electability of the prosecutor.

Indeed, the West Memphis Three prosecutor expressly defended the Alford plea by citing the amount of money he saved his constituents by exercising his discretion the way he had.⁸

One of the challenges with the Alford plea was its potential broader consequences. "I suspect after the West Memphis Three deal was entered that there have been prosecutors in other places that have said, 'We'll let you go when the evidence looks shaky if you'll agree to waive civil liability.' They won't agree to a walk-away," Braga says.

About those broader implications, Braga has this to say: "I understand the issues that some in the wrongful conviction community might have with the resolution. But I'm the lawyer for Damien. I'm not the lawyer for the cause. My client has told me his goal is to get off death row, to get out of prison, and to lead the best life he can from this point forward. There's nothing more to talk about."

Lloyd Liu is a partner at Bennett Doyle LLP where he focuses on white-collar defense, government investigations, and complex civil litigation.

NOTES

- 1 See *Misskelley v. State*, 915 S.W.2d 702, 706 (Ark. 1996).
- 2 *Echols v. State (Echols II)*, 2010 Ark. 417, at 3, 2010 Ark. LEXIS 511, at *16 n.3.
- 3 *Misskelley*, 915 S.W.2d at 707.
- 4 *Echols v. State (Echols II)*, 2010 Ark. 417, at 3, 2010 Ark. LEXIS 511, at *3; see Ark. Code Ann. § 16-112-202 (2001) (amended 2005).
- 5 *Echols II*, 2010 Ark. LEXIS 511, at *4.
- 6 David S. Mitchell Jr., "Lock 'Em Up and Throw Away the Key: 'The West Memphis Three' and Arkansas's Statute for Post-Conviction Relief Based on New Scientific Evidence," 62 Ark. L. Rev. 501, 506-07 (2009).
- 7 See "Timeline of Events in the West Memphis Three Case," *Arkansas Times* (Aug. 24, 2011), arktimes.com/news/cover-stories/2011/08/24/timeline-of-events-in-the-west-memphis-three-case.
- 8 Andrew DeMillo, "Ellington: Money a Factor in West Memphis Deal," *The Associated Press* (Apr. 18, 2012), arkansasonline.com/news/2012/apr/18/ellington-money-factor-west-memphis-3-deal/?news-arkansas-specials.

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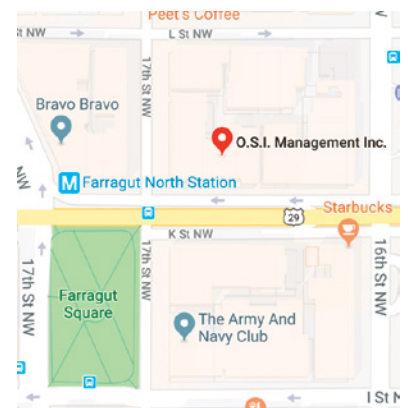
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