The Devil's Advocate

State v. Maik, 60 N.J. 203, 287 A.2d 715 (1972), shows how the therapeutic state [see Kittrie, THE RIGHT TO BE DIFFERENT (1971)] rigs the odds in a "heads I win, tails you lose" fashion to secure its pound of flesh and to maintain preventive detention. The New Jersey supreme court decision, written by that eminent jurist, former Chief Justice Weintraub, puts down psychiatry and hoists the banners of *lex talionis* over the courthouse at Trenton.

The defendant became a "prisoner of psychiatry" [see Ennis, PRISONERS OF PSYCHIATRY (1972)] because he lacked the *mens rea* for murder that the law requires. He was denied release from hospitalization despite unanimous medical testimony that he was in a state of remission. In effect, this decision holds that the state does not have to prove the *mens rea* element beyond a reasonable doubt but that the defendant must prove beyond a reasonable doubt a complete "cure" in order to regain his freedom.

The trial court convicted the defendant of murder in the second degree, and questionable instructions were given to the jury. The intermediate court reversed the conviction and held that the trial court should have directed a verdict of acquittal on the ground of insanity at the time of the killing. The New Jersey Supreme Court reversed and remanded, not on the ground that there should have been a directed verdict, but because of improper jury instructions to the effect that a psychosis precipitated by voluntary use of drugs could not lead to an acquittal. After this decision, on retrial the defendant was found not guilty by reason of insanity, and by a special verdict it also was found that such insanity continued. Presumably, the defendant remains incarcerated in a state hospital for the criminally insane.

Although the *Maik* decision raises many interesting points, we are here concerned with the phenomenon of *rationalization* and how the highest court of New Jersey achieved its purpose of institutionalizing a "dangerous" killer. We have selected two from among many questions.

Q: How does a court get around the unanimous opinion of several psychiatrists and psychologists that the accused at the time of the killing (and before and afterwards) was psychotic and suffering from schizophrenia, paranoid type?

A: The method used by the New Jersey court was as follows (step by step):

1. Such opinions were based upon extra-judicial statements as to why the defendant killed the deceased and as to the delusions he said attended the event. "That the psychiatrists relied upon the defendant's extra-judicial statements of course did not establish their truth. On the contrary, if the psychiatrists depended upon those statements, their opinions were vulnerable on that account." There must be independent proof of the truth of the contents of the defendant's statements [the court not regarding the prior medical history, behavior, family relationships, etc., as constituting "independent proof"].

2. The jury was not obligated to accept the expert opinions. [Compare the Charlie Chaplin case, in which the jury was permitted to reject the results of a properly conducted blood grouping test and in lieu thereof to accept the questionable testimony of Joan Berry.] This was so because "there was no evidence in the record to support critical facts upon which the psychiatric opinions apparently rested." [This statement ignores "facts" which the court itself relates in its opinion.]

3. The psychiatrists were unable to point to the specific factor which, operating on the underlying illness, triggered the psychotic episode they found. The possibilities were (1) the effect of the drugs (LSD and hashish); (2) a romantic failure with a young lady whom defendant thereafter tried to "reform." "The witnesses apparently assumed that the psychotic episode was not precipitated by the fact of homicide." [If a

M.D. admitted that he did not know the "cause" of a particular disease, this court apparently would hold that there was no proof such a disease existed.]

Q: If the accused killed and if he is acquitted on the basis of the insanity defense, how does one make sure that he is put away for good? [Under N.J.S.A. 2A:113-4, maximum penalty for second degree murder is up to 30 years.]

A: By holding (the issue is for the courts, not the mental facility) that the patient has not been "restored to reason." This may be done, even though the patient is certified to be in a state of remission by the hospital for the criminally insane, by the following rationalizations:

1. "Until there is assurance that the threat of that defect of reason has been eliminated" it may not be found that the patient has been restored to reason.

2. Here there was testimony that the defendant was in remission. But none of the doctors said that the defendant no longer suffered from the underlying condition which erupted into a psychotic state in response to a stress defendant could not handle. "In short, there was no medical assurance that this latent personality disorder [*sic*] would not be triggered again into violent expression by reason of some stress defendant could reasonably be expected to experience. On the contrary, the tenor of the testimony would suggest there is no medical basis for such assurance as a probability. . . . The protection must be equal to the risk of further violence."

CONCLUSION: The defendant got the worst of both possible worlds and stands a good chance of involuntary hospitalization regardless of remission for a period longer than the 5-10 years he might have served in prison if convicted (out of the possible sentence up to 30 years).