

# THE SAN ANTONIO DEFENDER

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## THIS IS YOUR ORGANIZATION!

### *In Memory* Judge Jim Barlow

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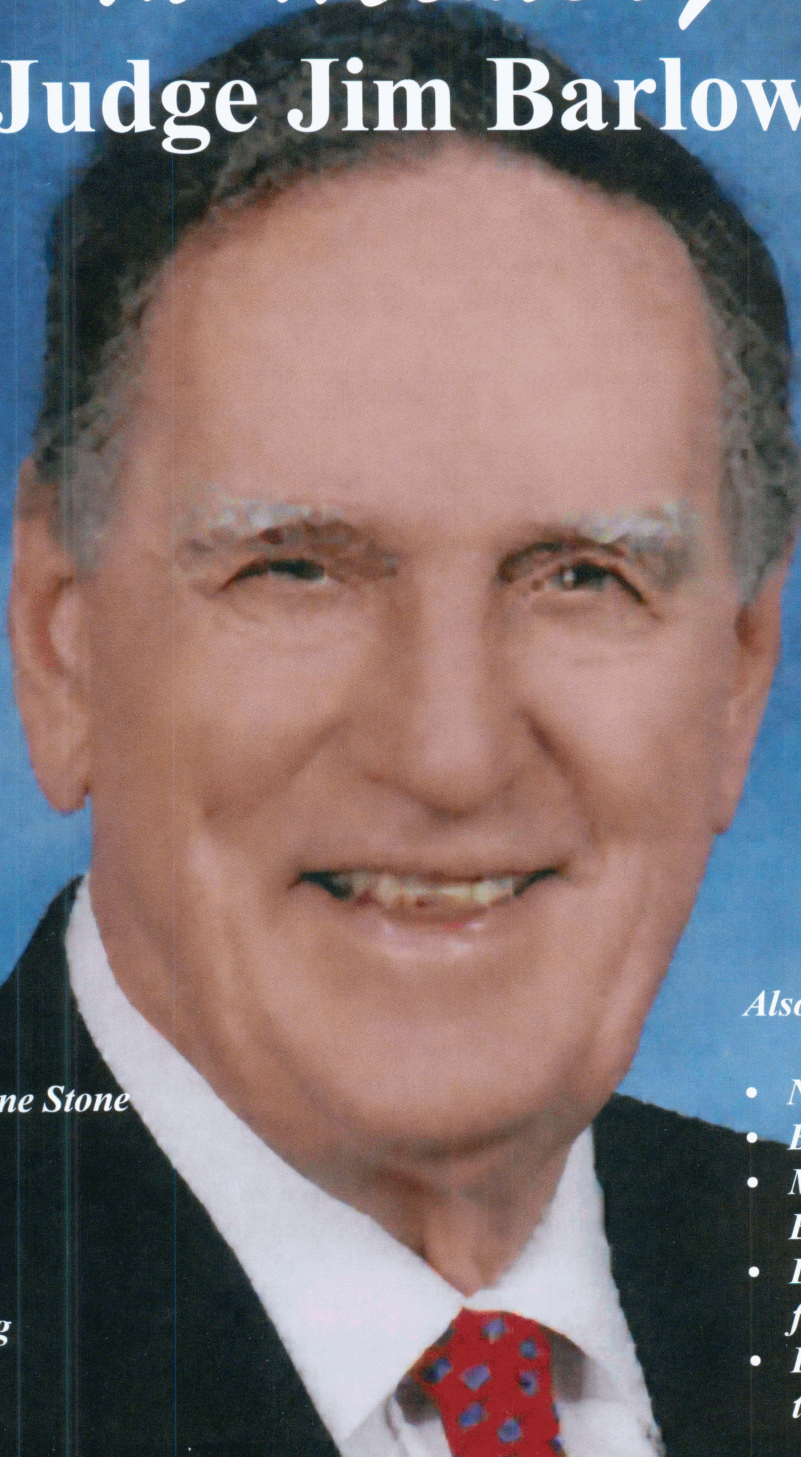
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# Judge James E. Barlow

“You Should Have Had To Buy A Ticket”

By Mark Stevens

**T**he defendant looked about 70 years old. She was simply dressed, and was clearly uncomfortable in court. When it was her time to speak, she managed to say the magic word – “Guilty” – but just barely, and with no enthusiasm at all, and everything else about her suggested that she didn’t really mean it. Judge Jim Barlow sensed the woman’s reticence, and asked her to tell him what had happened to cause her to wind up in his courtroom.

She explained that late in the afternoon several months earlier, while she sat on the front porch of her home just east of downtown San Antonio, two strangers ran into her yard, and one tackled the other. They rolled around fighting for a few minutes, and she was afraid for their safety and her own. She yelled at them to stop, but was unable to get their attention, so she stepped into her house, got her small pistol, and fired once, straight up into the air, intent on breaking up the fight. Her plan worked. The man who had been tackled stopped fighting just long enough for the other to slap handcuffs on him. That man then identified himself as a San Antonio police officer. It turned out he had been working off-duty as a plain-clothed security guard at a K-Mart located a block or so away from the woman’s home. He caught the other man shoplifting, a chase ensued, and it ended in the woman’s yard.

Apparently the officer was unwilling to share any credit for subduing the criminal. Indeed, he was so unappreciative that he took her gun away and put a spare set of cuffs on her. She was

arrested for the first time in her life, taken to jail, and later indicted for aggravated assault with a deadly weapon, hence her business that day in the 186th. The prosecutor and her lawyer worked out a deal for a misdemeanor, and she “agreed,” albeit with obvious reluctance.

After hearing from the defendant, Judge Barlow asked the prosecutor and the defense lawyer if those were more or less the facts of the case, and they both agreed, a little sheepishly, that they were. “I tell you what,” said the judge, “I find you not guilty. Go on about your business.”

This, of course, is the opposite of what we usually see. Probably not a day passes in our courthouse without someone busting a plea bargain thought to be not tough enough on the defendant. That was the only time, though, that I ever saw a judge undo an ill-advised guilty plea, because he believed the defendant was in fact not guilty. Although I had not seen this happen before – or since, for that matter – when I tell this story to Barlow’s former prosecutors, no one is surprised. One, now a judge himself, chuckles when he says that he still “nurses the scar” from having lost a guilty plea 30 years ago in the 186th.

We once had a District Attorney in San Antonio who was anxious for some good press – imagine that – and he thought he would look like a hero if he threw some people in prison for a long time. Today defense lawyers complain about the habitual offender statute and its harsh range of punishment, 25 years to life. In those days, it was

even worse — there was no “range of punishment” for a habitual. It was life imprisonment, period. Our enterprising district attorney got together with the police department and they hatched a sting operation to trap a bunch of small time dealers selling dime bags of heroin on the west side. After several months of this fearless investigation, a few dozen indictments were obtained, then unsealed all at once, to great fanfare in the local media. All the hapless crooks who qualified were indicted as habitual offenders, and the District Attorney declared that he would not plea bargain with any of them. Life imprisonment for everyone. According to a story I heard from a very reliable source, Judge Barlow summoned his prosecutors and predicted that, for any such cases winding up in his court, they would have a difficult, perhaps an impossible, time meeting their burdens of proving the prior enhancement allegations. In light of this projected difficulty, the judge suggested it might be wise for them to urge the boss to reconsider his no-plea bargain policy. I’m told they did exactly that.

These examples illustrate just a few of the ways Judge Barlow differed from so many of his colleagues. A lot of judges think nothing of busting a plea bargain that goes too easy on a defendant, but would not reject one just because the defendant was not guilty. How many judges these days would refuse to play along with a District Attorney who was using the criminal justice system for political gain? Nobody who knew Judge Barlow would accuse him of being soft on crime. He would not selectively apply, or disregard this law, or that one, simply because he felt sorry for the person in the dock. A judge’s oath will not allow those things, and above all, Barlow was a judge. As tough as he was, and as seriously as he took his oath, though, this judge was also compassionate, and had a finely-developed sense of right and wrong. Whenever he could, consistent with his duties to

the bench, Judge Barlow did the right thing. To be sure, his and my sense of right and wrong did not always coincide, and this caused me to appeal a number of his rulings. Sometimes I won, and sometimes I didn’t, but I never once doubted for a minute that he was doing justice as he saw it, without worrying about the political enemies he might make, or the newspaper headlines he might make — or not make.

One thing Judge Barlow worried not one whit about was being reversed on appeal. I discovered this in case after case, but it was never clearer to me than in one of the first I tried before him, in the early 1980’s. My client was an older man, with no criminal record, who was charged with attempted murder for shooting a couple of young, bandana-wearing gang members who had vandalized his home and terrorized him for months, and who threatened him on the day of the shooting. Stupidly — there is no other word for it — I asked the judge to instruct the jury to disregard “bias, prejudice, or sympathy,” probably for no better reason than I had seen that charge in McClungs. He looked at me like I was crazy (I still think stupid is a more apt description) and asked if I really wanted such a charge. As dumb as I was, as soon as he asked that question, I immediately realized that there was plenty of room for sympathy, as well as bias and prejudice in the case, but that each of these emotional factors would doubtless favor my client. Quickly coming to my senses, I told him that, upon further consideration, I didn’t want that charge after all. Amazingly, he stated that he would not give the instruction I had stupidly requested, and also told me he would deny it on the record, so that I could appeal him on this issue if the need arose. In other words, he was saving me from my bad judgment at trial, but still allowing me a shot in the appellate courts. Of course the only decent thing for me to do at that time was to withdraw my requested jury instruction, and I did.

Fortunately, the properly-instructed jury did the right thing, and no appeal was necessary. I don't know if the jurors were sympathetic toward my client, or biased or prejudiced against the thugs, but it wouldn't surprise me if they were.

Judge Barlow hated unfair fights. Three decades ago a drunken sanitation worker killed a San Antonio police officer on Christmas Eve, and the District Attorney bombastically announced that he himself would try the case, and seek the death penalty. Judge Barlow could have appointed any of a number of former prosecutors who had recently left public employment and were hungry for such a case. Instead, much like Judge Taylor in *To Kill A Mockingbird*, Judge Barlow made a personal call to Alan Brown, and asked him to take the case. Alan had not handled an appointed case in years, but was well known as one of the most effective and aggressive lawyers in San Antonio. The community was inflamed by the crime, and I'm sure that the judge, like most everyone else in town, had more affinity for the officer's widow than the lowly garbage-truck driver. Even so, the judge insisted that the playing field be level. And level it was. Nobody, not even the District Attorney, was going to push Alan around. Alan fought the case for years, before two juries and on appeal, and there was no death penalty. His client eventually served five years and was released on parole. A few years later, two brothers killed another officer, and their cases were indicted into Judge Barlow's court. Once again he made a personal call to a noted lawyer, this time Gerry Goldstein, who succeeded in saving his client from execution, just as Alan Brown had done before. Had lesser lawyers been appointed, these defendants may not have been as successful.

In 2003 Judge Barlow published *Tales From The Southwest Courtroom*, a wonderful collection of stories from his life as a private citizen, defense lawyer, prosecutor, legislator, and

judge. He says this in the Foreword:

*Most people find legal things interesting. Some do not. I don't understand those that don't since most of what I have been involved in, I think you should have had to buy a ticket to see. Since I feel like that, I have enjoyed every minute of it. It was like a continuing Broadway show, with a different act each and every day.*

If you ever saw Jim Barlow sitting tall on the bench, calling the docket on a Monday morning in that booming voice he had, you know that is exactly how he felt. As much as anyone I know in this business, he loved his job. He may not have enjoyed "every minute of it," but if not, he fooled me.

The day before Judge Barlow died I was sitting with several lawyers in the jury box of one of our county courts at law waiting for docket call to begin. One of our group commented that some days he could barely stand to come to the courthouse, and asked if I felt the same. Truthfully, sometimes I do feel that way, though not often. Sometimes I claim to hate my job, even when I don't. That day, though, I resisted the urge to answer my colleague with more cynicism of my own. For some reason I thought of the passage from Judge Barlow's book, and one I had heard him express several times: "you should have had to buy a ticket to see" what he had been privileged to see during his long life in the courthouse. I answered the lawyer honestly, that he and I and the others in the box that morning were among the luckiest people in the world, to get to do the jobs we do, and even, occasionally, to be paid for it. All of us would be better judges and lawyers if we remember this, and if we enjoyed our jobs half as much as Jim Barlow did.