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Convicting the Innocent

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CRIMINAL LAW CASE NOTES AND COMMENTS

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Convicting the Innocent

In the New York case of *Campbell v. State*,[1] claimant, who had been erroneously convicted of the crime of forgery in the second degree, was awarded $115,000 as damages for suffering, humiliation, deprivation of liberty and civil rights, and loss of earnings. The award covered the seven and one-half year period from his arrest until his pardon by the Governor of the State of New York. Three and one-half years of this time were spent in prison and the remainder on parole.

Campbell, a securities salesman, was arrested in 1938 due to his supposed similarity in appearance to the person guilty of passing numerous forged checks in the New York City area. He was convicted and sentenced to a five to ten year term in prison largely on the basis of positive identification by officers and employees of the banks upon whom the forgeries were perpetrated.[2] After serving forty months of his sentence Campbell was paroled, remaining on parole until the actual forger, one Alexander L. Thiel, apprehended by the Federal Bureau of Investigation in 1945, confessed to the crimes for which Campbell was convicted. Following Campbell's pardon on the ground of innocence, the state legislature passed a special act conferring jurisdiction on the New York Court of Claims to determine his claim against the state for damages.[3]

In surveying the problems of erroneous convictions, Professor Borchard collected sixty-five such cases.[4] In twenty-nine of these the mistake mainly responsible for the conviction was in identification; in eight of the twenty-nine, the criminal and the wrongfully accused person bore no resemblance to one another, and in twelve others the resemblance was not close.[5] A case quite similar to the principal one and falling into the category of remote resemblance was *Commonwealth v. Andrews*.[6] There, because of the identification by seventeen persons, the accused was convicted of uttering bad checks. But during and after Andrews' trial, similar bad checks continued to be passed in the vicinity, and this led to the apprehension of the real forger who confessed to the utterances of which Andrews was convicted. In the principal case, however, a

[1] 62 N.Y.S. (2d) 638 (1946).

[2] People v. Campbell, Court of General Sessions, County of New York, Calendar No. 77716-1938, Indictment No. 216,422.

[3] New York Laws 1946, c. 1, §§1, 2.

[4] Borchard, Convicting the Innocent (1932).

[5] *Id.* at xiii.

[6] Superior Court of Suffolk County, Massachusetts (1913). Discussed in Borchard, *cit. supra* note 4, at 1.

similar repetition of forgeries failed to avail Campbell as it had Andrews.[7]

Another striking analogy of the *Campbell* to the *Andrews* case lies in the lack of similarity between the accused persons and the actual culprits,[8] which emphasizes the unreliability of recollective identification.[9] It was Dean Wigmore's contention that no part of the field of proof has been so defective in its use of psychology as the identification of accused persons on arrest. Commenting upon press dispatches which stated that when police arrested a man suspected of robbing the wife of the mayor of Chicago, they took the handcuffed suspect to her home to be identified, Wigmore remarked, "The suggestion of guilty identity could not have been more violent."[10]

The procedure employed in bringing about the identification of Campbell was scarcely less violent in its suggestiveness than Wigmore's Chicago case. At public hearings conducted by the New York Criminal Courts Bar Association, three witnesses testified that prior to the identification of Campbell in the Attorney General's office following his arrest, they were shown a picture of Campbell on which a moustache had been superimposed and were given persuasive information that Campbell was the "front" man for a big forgery ring which bank employees must work together to exterminate. They also testified that Campbell was pointed out to them beforehand and that the identification occurred without the suspect being placed in any group or line-up.[11]

It would seem that the minimum requirements of fairness and accuracy, and adherence to the most elementary of psychological principles, dictate a more scientific and uniform method of identification procedure. The method of presenting the suspect in a line-up of several other men of similar dress and appearance is the most satisfactory yet suggested from the standpoint of fairness and practicability.[12] The process should be carefully supervised by un-

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[7] A report on the public hearing conducted by the New York County Criminal Courts Bar Association in the Bertram M. Campbell Investigation, New York Post, August 28, 1945: "Asst. U.S. Atty. Donovan, the final witness testified that the FBI in 1930 began investigating what they called the 'Mr. X Forgeries,' one of which was the crime for which Campbell was imprisoned. The FBI investigation went on after his conviction, Donovan said, and more 'Mr. X' forged checks continued to turn up until February, 1944."

[8] The resemblance in the Andrews case was characterized as "not close." Borchard, *cit. supra* note 4, at 5. In the Campbell case, aside from the fact that both men wore moustaches and both were middle-aged, no points of similarity between Campbell and Thiel were discernible. Campbell was taller and larger-proportioned than Thiel, his complexion was ruddy as compared with the rather sallow complexion of Thiel. A picture of the two persons standing side by side appeared in the magazine section of the New York Sunday Mirror, July 28, 1945.

[9] See, upon this point, the very interesting case reported in Sanders, The Danger of Direct Evidence (1946) 19 The Police Journal (England) 314. The reported case occurred in Colorado.

[10] Wigmore, Identification of Accused Persons on Arrest (1931) 25 Ill. L. Rev. 550, at 551.

[11] Interim and Partial Report, Bertram M. Campbell Investigation, New York County Criminal Courts Bar Association (1946) p. 40.

[12] More complex, though undoubtedly more accurate, methods involving use of vocal motion-pictures portraying persons of similar appearance in several different poses, with push-button identification, have been suggested by Wigmore, *supra* note 10, at 552, and Krosnick, Movietone Goes to Court (1930), 1 Am. Jour. of Police Science 521.

biased persons to prevent "coaching," and the observers should be isolated to assure that their conclusions will be reached unpersuaded by suggestions of others.[13]

A significant sequel to the erroneous conviction of Campbell occurred in the case of *People v. Coughlin*[14] where a man posing in the New York City area as a collection agent for a worthy enterprise fraudulently secured money from numerous people. The defendant was arrested, and upon trial was identified by several persons who had been swindled. After the defendant's conviction, when the collections continued, the district attorney ordered a study of handwriting on the receipts which the swindler issued, as this had not been done at trial. The positive opinions of experts that the convicted man had not written the receipts led to a re-opening of the case and an acquittal.

When pre-trial handwriting comparisons in the *Campbell* case revealed that Campbell could not have written the forged instruments, the state conveniently, if quite illogically, shifted to the theory that the accused was not the "scratch" man but the "front" man for a forgery syndicate.[15] Presumably, too, he was a sleight-of-hand artist who switched checks and signature cards before the bankers' eyes. The value of the impersonal and reliable process of handwriting identification as an offset to the unreliability of personal identification was thus dissipated by an apparently fixed presumption of guilt.

It is highly questionable whether any reasonable grounds for suspicion of Campbell existed initially. When the actual forger (Thiel) opened the account at the bank, he subjected himself to the customary inquiries in order to establish his identity as the man whom he was impersonating. In filling in the telephone number on the signature cards he inadvertently wrote Whitehall 4-2657 rather than the correct number, Whitehall 4-2567. The incorrect number happened to correspond to the phone of an office at which Campbell occasionally called.[16] Police watching the office saw Campbell and concluded that he answered the description given them of the forger (*i.e.* Thiel). The police theory must have been that Campbell, instead of giving a telephone number that pointed away from him, was so careless as to provide the police with a clue leading to his apprehension. Apparently no credence was given to the obvious theory that the criminal, relying necessarily on his memory (since it might have aroused suspicion had he referred to a memorandum to ascertain his own phone number), mistakenly interchanged the digits.

Campbell's only conceivable connection with a forgery ring, the main theory of the state, was a business acquaintance with a person

[13] At the public hearing for the Campbell Investigation, *cit. supra* note 11, a bank teller testified that he first saw Campbell while waiting in the ante-room of the Attorney-General's office without recognizing him. Later in the office, after the bank president and his secretary had identified Campbell, he said that he too recognized the accused man. New York Sun, August 25, 1945.

[14] Court of Special Sessions, Bronx County, New York (1940). Discussed by Stein, Proof of Handwriting and Typewriting (1941) 31 J. Crim. L. 637.

[15] See note 11 *supra* at 11. The crime of forgery in the second degree for which Campbell was convicted consists of "uttering" forged instruments.

[16] See note 11 *supra* at 15.

who had once been a forger. At the trial it was shown that the accused was unaware of this man's past record, and the ex-forger admittedly was not connected with the crime for which Campbell was prosecuted.[17] Of two prior forgeries committed by the actual culprit (Thiel), one occurred three years before the offense for which Campbell was tried. The state decided not to prosecute Campbell for this latter crime because of his formidable alibi,[18] but such crimes were nevertheless used as evidence against him for the purpose of showing a common scheme on the part of Campbell and his anonymous associates. There was no appeal from Campbell's conviction,[19] although exception was duly taken to what might have been considered reversible error in permitting remarks of prosecutor on summation to the effect that defendant's first counsel, who became ill during the trial, withdrew because Campbell had lied to him.[20]

What portion of responsibility should attach to Campbell's defense counsel for failure to expose the flimsiness of the state's case,[21] and what portion should attach to the court and to the specially selected "blue-ribbon" jury for their failure to perceive it for themselves is a highly conjectural and futile inquiry.[22] The remark of the court on passing sentence that it must take into account "the very

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[17] See note 11 *supra* at 17.

[18] In May, 1935, when this crime was committed, Campbell was working in the Nassau County Welfare Department where he was required to punch a time-clock showing when he came to work and when he left. His record during that month showed no absences. The indictment (No. 216,746-1938) charging him with this crime was dismissed, but the court in passing sentence upon Campbell, said it was taking this previous indictment into consideration. People v. Campbell, *supra* note 2 (steno. minutes 322).

[19] Presumably because of lack of funds. Counsel for the Bertram M. Campbell Investigation, *supra* note 12, estimated that the minimum expense, exclusive of attorney's fees, for taking an appeal would have been $525.00. The report of the investigation recommended legislation requiring appellate review without printed record for indigent defendants where the attorney certifies he is appealing without fee in the interest of justice.

[20] Daru, For Sale — Short Prison Sentences, Magazine Digest, January, 1946. The author, who conducted the public hearings in the Campbell Investigation, *supra* note 11, deplores the use of carefully planned publicity and court room tactics to build up the prosecutor as a sort of super-sleuth who possesses knowledge of the case apart from the evidence adduced at trial. At strategic moments, the prosecutor, capitalizing upon this reputation and his position as a public officer imparts such "information" to the jury.

It has been considered reversible error for counsel in argument to state as fact something not in the record, particularly if the comment is inclined to be inflammatory or abusive. Rossi v. U.S., 9 F. (2d) 362 (C.C.A. 9th, 1925); People v. Malkin, 250 N.Y. 185, 164 N.E. 900 (1928).

[21] It was the conclusion of the Interim and Partial Report, *supra* note 12 at 35, that Campbell was competently defended.

[22] One of the repercussions of this case was the introduction of a bill before the New York General Assembly to abolish the special jury system—Bill No. 726, entitled "An Act to Repeal Article 18-B of the Judiciary Law." Article 18-B provides that the district attorney or defendant may apply in a criminal case for a special jury to try issues of fact. Where it appears that the efficient administration of justice will be augmented by the trial by special jury, the court may make an order so directing. No specific standards are set out in the statute as to the education or employment qualifications of such jurors. The county clerk apparently has much discretion in selecting the panel, and the

rank perjury committed during the trial of this case,"[23] indicates that the judge and the jury were equally convinced of the accused's guilt.

The State of New York responded generously in attempting to rectify the wrong done to Campbell, although unfortunately he lived only a short while after the claim was adjudicated.[24] But the instances in which the public conscience is shocked to such actions are rare and are dependent upon the too fortuitous circumstances of notoriety accorded by the press and the consequent ability of claimants to persuade legislatures to provide indemnity.[25] Special legislation such as was employed in the *Campbell* case should not be necessary, for some compensation for all such innocent victims can be assured by statutory provision. Thus far, however, only three states, California, Wisconsin and North Dakota have provided by statute for the arbitration of such claims against the state by administrative boards.[26]

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intent appears to be to select persons of higher than average intelligence who are less likely to be biased by newspaper stories and better able to handle intricate factual issues.

The United States Supreme Court has this term granted *certiorari* in the case of People v. Fay, 296 N.Y. 510, 68 N.E. 453 (1946), where the New York Court of Appeals held that the decision of the trial court in granting the motion of the people for a special jury and in overruling defendant's challenge to the special jury panel was not a denial of due process under the 14th Amendment. The Supreme Court has recently held in Thiel v. Southern Pacific Company, ——U.S.——, 66 S. Ct. 984 (1946), that the systematic exclusion of daily wage earners from the jury list was error requiring reversal in the exercise of the Supreme Court's power of supervision over administration of justice in federal courts. But this holding apparently has no application to process in state courts, and in any event the decision was not reached on constitutional grounds and probably exceeded due process requirements. See Note (1946) 59 Harv. L. Rev. 1167.

[23] People v. Campbell, *supra* note 2 (steno minutes 322).

[24] Of the $115,000 awarded, $40,000 was for loss of earnings for the seven and one-half years from arrest until pardon. The remaining $75,000 was compensation for suffering, humiliation and deprivation of liberty and civil rights.

Mental pain and suffering is an element of compensatory as distinguished from exemplary damages, Adams v. Stockton, (Kansas City Court of Appeals) 133 S.W. (2d) 687 (1939), Gillespie v. Brooklyn Heights, 178 N.Y. 347, 70 N.E. 857 (1904), and in any event the latter may not be recovered against the state. Tierney v. State, 178 Misc. 421, 266 App. Div. 623 (1943).

[25] Other statutory awards: Purvis, $5,000, Laws of Mississippi 1920 ch. 20; Phillion, $5,000, Utah, Laws 1931 c. 64, p. 271; Brown, General Laws of Florida, 1929, I 1063-1064.

[26] California Penal Code (1941) §§ 4900-4906; Wisconsin Statutes 1943, Chapter 285, §285.05; North Dakota Revised Code of 1943, Vol. 1, §§12-5701-5706. In California the finding of the Board of Control becomes a recommendation for appropriation to the state legislature. The finding operates as a judgment against the state payable by the state treasurer in Wisconsin and North Dakota. While the boards are limited in awards to $5,000, there is actually no maximum recovery set in any of the above states, although to obtain greater compensation, an enabling act as in Campbell v. State would be required.