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Criminal Law Case Notes and Comments: Abstracts of Recent Cases

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accused has the same right as any other member of the public to be benefitted by experiments. From the start of a criminal prosecution the state will control the majority of the evidence, it being the party called to the scene of the crime. Even if the accused can obtain the subject matter of the test he may find it impossible to engage an expert to conduct an examination for him, as under the present set-up with regard to certain fields of scientific examinations the only competent experts in a given community are those employed by the local municipality, county, or state. Further, it is not the exception to find an accused possessed with inadequate funds to conduct experimental tests even if that possibility is open. What harm is done, therefore, by the accused being informed of results? Mere knowledge cannot change their effectiveness, and the accused may need knowledge of favorable results in order to prepare a case. Certainly there is less chance of harm resulting from an inspection of unimpeachable scientific results than might occur from the accused being furnished with a list of prosecution witnesses who are subject to human tampering, yet most states grant the right to such a list.²³

The consistent rejection by the courts of requests for inspection of experimental results makes it plain that legislative action will be necessary to accomplish this desirable objective. Such a statute should set forth clearly that upon request the accused is to be informed of any experimental or test results in the possession of the state. The only discretion which should be given to the judge is determination of the relevance of the experiment to the case. Such a statute is only the rational utilization of the same reasoning of fairness which years ago started the trend toward protection of accused citizens, an example of which is the right to a list of the prosecution's witnesses.²⁴

Abstracts of Recent Cases

F.B.I. Can Refuse to Reveal Secret Files.—The F.B.I. has many records which it does not want published for fear of revealing the identity of the informers who provided the information. Recently the question arose whether they could be forced to reveal those files. In the Federal court in Chicago, Roger Tuohy was trying to prove that his conviction several years ago was a frame-up. As part of his evidence he subpoenaed F.B.I. files. Special Agent McSwain was instructed by the Attorney General to decline respectfully to reveal them, and as a result McSwain was sent to jail by the trial judge for contempt of court. This has now been reversed in *United States ex rel. Tuohy v. Ragan*, 180 F. 2d 321 (7th Cir. 1950). The Circuit Court of Appeals found that in fact these records were privileged because of the chance that they would reveal the identity of informers. The court said that the Government could be forced to reveal this only to the extent that it had waived the privilege. In the Attorney General's regulations there was waiver to a certain extent because officers were instructed to cooperate with any court by going so far as to allow the judge himself to see any subpoenaed records to decide whether the need for them outweighs the dangers to informers and to law enforcement. In McSwain's case the judge had refused to look at the records for this purpose, and the higher court held that that was all the trial judge could demand. This decision by the Seventh Circuit is the latest statement upon this subject, since the Supreme Court failed to come to a decision on a similar question in *United States v. Cotton Valley Operators Committee*, affirmed without opinion by an equally divided court, 18 U.S. Law Week 3297, April 25, 1950. There an antitrust indictment had been

officers of the court, holding quasi judicial positions. It is their recognized duty, not only to prosecute the guilty, but also to protect the innocent."

23. 8 WIGMORE, EVIDENCE §2191.

24. See 6 WIGMORE, EVIDENCE §1863.

dismissed because of Government refusal to allow discovery of privileged files. It was hoped that the Supreme Court would state some guides on this thorny question, but lack of agreement resulted in making the Seventh Circuit's decision the best one on this question. Arguments by counsel in the *Cotton Valley* case are set out at 18 U.S. Law Week 3293, April 25, 1950.

Shall Courts of an Asylum State Prevent the Extradition of an Escaped Convict Who Claims the Demanding State Has Denied Him Due Process of Law?—The federal courts are in direct conflict upon the answer to this question. The most recent case was *Johnson v. Matthews*, 18 U.S.L. Week 2501 (C.A.D.C., May 9, 1950), where the court refused to decide whether or not the demanding state, Georgia, had or would accord the fugitive due process of law. The court felt that under the extradition statute and the Constitution the only questions open to it were: (1) has a crime been charged in the demanding state, (2) is this fugitive the person charged, and (3) was this fugitive in the demanding state at the time the alleged crime was committed? The court felt that if the fugitive must go to federal courts for protection from the state he should do so back in Georgia. Other courts when faced with the alternatives of returning an escaped convict to unconstitutional treatment, or freeing him among the law-abiding citizens of the asylum state, have felt it their duty to look into the convict's charges. The courts in *Johnson v. Dye*, 175 F. 2d 250 (3d Cir. 1949), and *In re Middlebrooks*, 18 U.S.L. Week 2388 (S.D. Cal. 1950), would not permit the asylum states to send the fugitives back to the Georgia chain gang because the practices of the prison authorities in Georgia constituted cruel and unusual punishment. These courts accepted the arguments of the fugitives that the Georgia courts would not protect them. It was on this point that the court in the *Matthews* case disagreed, for it felt that the role of the federal courts in the extradition process was limited to seeing that the states followed the required procedure and did not extend to consideration of the internal affairs of these states. It felt that the proper time for trying the charges of denial of due process was when the convict had returned to Georgia and if he is to be set free it should be in Georgia. (On *Johnson v. Dye*, see Volume 40, page 484 of this *Journal*.)
