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RECENT TRENDS IN THE CRIMINAL LAW

RIGHT TO A FAIR TRIAL

Several recent decisions, resulting in reversed convictions, have considered prosecutorial errors during trial. In *United States v. Ott*, 489 F.2d 872 (7th Cir. 1973), the prosecution, in obtaining a stolen check conviction vigorously asserted to the trial court that a certain witness was not an informer; another prosecutor had recently argued in a search and seizure appeal that the same witness was a reliable informer.[1] The Seventh Circuit held that this misrepresentation, which would not have been discovered but for the alertness of an appellate judge during oral argument, was so grave that it required the reversal of the defendant's conviction.[2] Although the court noted that the original misrepresentation had resulted from good faith ignorance on the prosecutor's part, the court was particularly disturbed by the prosecutor's apparent willingness to let the misrepresentation continue, long after the pressure of trial had ended. "Notwithstanding admitted knowledge of the truth, and awareness of the argument advanced in this court by appellant, and with the benefit of the reflection that should attend the preparation of an appellate brief and oral argument," the court said, "the prosecutor was content to allow us to appraise the issue on the basis of a false premise."[3]

In *United States v. Newman*, 490 F.2d 139 (3d Cir. 1974), the defendant was convicted for violating federal wiretap laws. In reversing the conviction, the Third Circuit held that the totality of the prosecution's errors had deprived the defendant of a fundamentally fair trial.[4] Among the errors depriving the defendant of a fair trial was the prosecutor's statement in closing argument of a conclusion nowhere supported in the record—that a co-defendant was not testifying for the prosecution in exchange for plea-bargain leniency;[5] another error was the testimonial reference to another co-defendant's guilty plea.[6] The trial court's cautionary instruction to disregard these two errors was deemed insufficiently strong or specific to cure the harmful effect.[7] The court stated that it was not deciding the issue of whether any one of the errors independently would be sufficient to require a new trial; relying instead upon this "totality of the circumstances" approach, the court concluded that the errors had denied the defendant a fundamentally fair trial.[8] In applying the totality test, the court considered the "vast investigative resources of the United States Attorney's Office" and said it was unfair to permit the government to commit this type of error.[9]

The government's display to the jury of a suitcase full of hashish to bolster the credibility of one of its witnesses but irrelevant to the charges against two defendants — the Falleys — resulted in a reversal of the Falleys' convictions in *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973). The indictment charged the Falleys and three other defendants with importing hashish into the United States and of conspiring to violate a number of drug laws.[10] The government was certain that there was a smuggling conspiracy but it was unable to produce any hashish actually imported by the Falleys. A government informer and accomplice of the defendants testified that on two occasions he had smuggled hashish which he delivered to the defendants. In order to bolster the informer's testimony, the government introduced, over the objection of defense counsel, a suitcase full of hashish which the informer testified was to be delivered to one of the defendants only, and had nothing to do with the Falleys.[11] The Second Circuit said that while the hashish was relevant to show the informer's credibility, this relevance was outweighed by the prejudice which might have been engendered in the minds of the jury, which might easily have related the hashish to the Falleys.[12] Although a limiting instruction requested by the Falleys' counsel was denied, the court noted that even if it had been granted, it was highly questionable whether the admission of the suitcase would then have been proper.[13] Under the circumstances, the mere verbal

[1] 489 F.2d at 873.
[2] *Id.* at 875.
[3] *Id.*
[4] 490 F.2d at 147–48.
[5] *Id.* at 146.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 147–48.
[9] *Id.*
[10] 489 F.2d at 35.
[11] *Id.* at 36.
[12] *Id.* at 37.
[13] *Id.* at 38.

instruction by the trial court would not have undone the sensation created by the introduction into the courtroom, of the large quantity of illegal drugs, said the court.[14]

Another prosecutorial blunder, in a federal larceny trial, resulted in the reversal of the defendant's conviction in *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973). At the trial the Government elicited from several witnesses testimony designed to show that the defendant had been in possession of some of the stolen checks following the commission of the crime. One of the witnesses, however, was unable to make an in-court identification of the defendant.[15] The Government then attempted to salvage this identification by having the witness duplicate in court a previous out-of-court identification he had made from "mug shot" photographs. The Second Circuit held that the manner in which the photographs were introduced prejudiced the defendant's right to a fair trial because the jury may well have gotten the impression that these mug shot photographs had been taken in connection with the criminal charges against the defendant.[16] The courtroom controversy surrounding their introduction, in full view of the jury, strongly implied the photographs were, in fact, mug shots, said the court.[17] The demonstrable need on the part of the Government to introduce these photographs, while acknowledged by the court, did not overcome the court's concern for the possible prejudice resulting from the way in which the jury's attention was focused on these photographs. "Under the circumstances of this case, in which a crucial government witness failed to make an expected identification and in which the other evidence against appellant was not overwhelming, we believe," said the court, "that appellant was prejudiced." [18]

In considering a number of remarks made by certain prosecution witnesses in *Montgomery v. Commonwealth*, __ Va. __, 200 S.E.2d 577 (1973), the Supreme Court of Virginia said there is a class of prejudicial utterances that per se necessitate a mistrial. One of the utterances considered in *Montgomery* was that the defendant had admitted to having killed a man in prison; another was that the witness had known the defendant "since he got out of prison;" and the third was the relation of an overheard conversation about stealing some dynamite to blow up the jail. All three utterances were held to be irrelevant to the crime being tried and highly prejudicial to the defendant's right to a fair trial. The defendant's first degree murder conviction was reversed[19] even though the trial judge instructed the jury to disregard two of the remarks.[20]

The fair trial factor which kept prosecutors from obtaining convictions in the above cases was also partly responsible for the failure of the Senate Select Committee on Presidential Campaign Activities (popularly known as the Watergate Committee) to obtain court enforcement of its subpoena to the President for five White House tapes that were already turned over to the appropriate grand jury. Senate Select Committee v Nixon, 370 F.Supp. 521 (D.D.C. 1974). The United States District Court for the District of Columbia noted that the potential prejudice to the rights of Watergate figures facing prosecution as well as those that may face prosecution outweighed the pressing need claims underlying the Senate Select Committee's request for the listed White House tapes. Elaborating on this point the district court said:

> No one can doubt that, should the President be forced to comply with the subpoena, public disclosure of these tapes would immediately generate considerable publicity. While it is impossible, as the Special Prosecutor points out, to assess the precise impact of such publicity on the forthcoming judicial proceedings, the risk exists that it would bolster contentions that unbiased juries cannot be impaneled for trial.[21]

These cases evidence a strong judicial concern to preserve the courtroom as a forum where the parties involved can secure a fair trial. Government prosecutors or anyone else who might impair an accused's right to a fair trial would be well advised to heed a recent warning uttered in a dissenting opinion by Chief Judge Swygert of the Seventh Circuit who said: "Recently we have had before us an increasing number of appeals involving al-

[14] *Id.*
[15] 490 F.2d at 489.
[16] *Id.* at 495–96.
[17] *Id.*
[18] *Id.* In a dissenting opinion, Judge Friendly stated that the majority began with an overbroad statement of the "other crimes" rule, unfairly second-guessed the experienced trial judge's reasoned efforts to handle the unexpected crisis, and overstated the possibility, considered by the trial judge, that the jury might have thought the mug shots were taken in connection with another offense. *Id.* at 497–99.
[19] __ Va. __, 200 S.E.2d at 579.
[20] *Id.* at 578–79.
[21] 370 F.Supp. at 523.

leged improper remarks by Government counsel during their summations. Warnings as we gave in *United States v. Grooms*[22] seem not to have been heeded. . . . Accordingly, I think firmer and more drastic steps are called for." *United States v. Trutenko*, 490 F.2d 678, 682–83 (7th Cir. 1973). While this warning was directed specifically to a particular type of alleged prosecutorial misconduct, Chief Judge Swygert's admonition is equally applicable to other frequently committed errors impairing the right to a fair trial.

Right to Counsel

In 1972 the United States Supreme Court in *Argersinger v. Hamlin*[23] purported to resolve part of the ambiguity surrounding the right of indigents to appointed counsel that had existed in the state courts ever since the landmark decision in *Gideon v. Wainwright*.[24] Consistent with its chain of recent decisions,[25] the Court extended the right to counsel to include misdemeanants. The right to counsel guarantee, however, was not made absolute. In so doing, the Court shifted the burden upon lower courts to expand and clarify the right to counsel principles.[26]

Numerous lower courts have recently accepted the opportunity to develop and clarify the right to counsel guarantee. The Sixth Circuit in *Mitchell v. Johnson*, 488 F.2d 349 (6th Cir. 1973), held that a state may not, "agreeably to the Constitution, refuse to appoint counsel to assist an indigent defendant in the preparation of an application for discretionary direct appeal to the state supreme court when non-indigent defendants customarily employ counsel for this purpose." The court was not persuaded by the government's argument that because appellant had a previous appeal with the aid of counsel the constitutional right to counsel guarantee was satisfied. *Burns v. Ohio*[27] was cited by the court for the proposition that due process and equal protection guarantees may be violated when an indigent criminal defendant is disadvantaged at any stage of the appellate process. "The rights of an injustly convicted defendant should not be practically foreclosed merely because error has survived prior appellate review, if other defendants, similarly situated except for greater affluence, are afforded a better chance for another appeal," said the court.[28]

In *Hutchins v. State*, ___ Tenn. ___, 504 S.W.2d 758 (1974), the Tennessee supreme court construed a Tennessee statutory scheme for appeals by indigents as making no distinction between appeal and certiorari, and held that such scheme gave indigents the absolute right to assistance of counsel in pursuing both forms of post-conviction relief. In so holding, the court pointed to the current federal court policy which provides counsel for both indigent appellants and certiorari petitioners.[29]

In a case involving a parolee's habeas corpus petition challenging the legality of his parole revocation, one of the issues on appeal to the Indiana supreme court was whether the defendant parolee was entitled to representation by counsel in a parole revocation hearing. *Russell v. Douthitt*, ___ Ind. ___, 304 N.E.2d 793 (1973). In resolving the issue in the affirmative, the court expressed its unhappiness[30] with the United States Supreme Court rulings in this area in *Gagnon v. Scarpelli*[31] and *Morrissey v. Brewer*.[32] In its observations with respect to the appointment of counsel, the *Gagnon* Court stated as follows:

> We find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings,

[22] 454 F.2d 1308 (7th Cir. 1972).
[23] 407 U.S. 25 (1972).
[24] 372 U.S. 335 (1963).
[25] *See, e.g.*, Mempa v. Rhay, 389 U.S. 128 (1967) (probation revokee); United States v. Wade, 388 U.S. 218 (1967) (suspect at an identification line-up); *In re* Gault, 387 U.S. 1 (1967) (the juvenile); Miranda v. Arizona, 384 U.S. 436 (1966) (the "in-custody" suspect); Escobedo v. Illinois, 378 U.S. 478 (1964) (suspected offender); Massiah v. United States, 377 U.S. 201 (1964) (the indicted suspect subject to surreptitious interrogation).
[26] *See* Comment, *Argersinger v. Hamlin: For Better or For Worse?* 64 J. Crim. L. & C. 290 (1973); Note, *Sixth Amendment-Right to Counsel, Misdemeanor Prosecutions: Argersinger v. Hamlin, 403 U.S. 25 (1972)*, J. Crim. L.C. & P.S. 473 (1972).
[27] 360 U.S. 252 (1959).
[28] 488 F.2d at 351–52.
[29] This current policy in the federal courts is expressed in Doherty v. United States, 404 U.S. 28 (1971). *See* Justice William O. Douglas, concurring in the per curiam opinion of the court, quoted in *Doherty v. United States. Id.* at 29 from the Report on Criminal Justice Act, 36 F.R.D. 285, 291 (1965).
[30] ___ Ind. at ___, 304 N.E.2d at 794–95.
[31] 411 U.S. 778 (1973).
[32] 408 U.S. 471 (1972).

there will remain certain cases in which fundamental fairness—the touchstone of due prcoess—will require that the state provide at its expense counsel for indigent probationers or parolees.[33]

These statements, in their opinion, said the majority of the Indiana supreme court, "delude and only becloud the issue and create uncertainty as to what the law is." [34] In further criticism of the *Gagnon* case-by-case approach, the court stated that litigants ought not be subjected to the jeopardy and liability of uncertainty which may remain until the Supreme Court of the United States or of Indiana decides the matter on a case-by-case basis "the decision depending on the personal thinking of those who happen to be judges at the time." [35]

Another application of the *Gagnon* and *Morrissey* case-by-case standard led the West Virginia supreme court of appeals to conclude that two defendant parolees in *Dobbs v. Wallace*, 201 S.E.2d 914 (W. Va. 1974), were not entitled to an attorney at their revocation hearing. Although an attorney was provided to the defendants on a different theory,[36] this case serves to illustrate the divergent decisions resulting from the case-by-case standard, as foreseen by the Indiana supreme court.[37]

[33] 411 U.S. at 790.

[34] __ Ind. at __, 304 N.E.2d at 794.

[35] *Id.* The majority's observations about the case-by-case standard can readily be criticized as a firm grasp of the obvious: absent a firm and inflexible rule, the outcome of all cases is inherently uncertain. Concurring in the result, Justices Hunter and Prentice agreed that judicial opinions are not always crystal clear. However, they did not consider *Gagnon's* case-by-case standard as too unclear or intolerable. *Id.* at 795–96.

[36] The petitioners had also argued that they were denied their rights to equal protection of the law as guaranteed by the fourteenth amendment to the constitution. To support their argument, the petitioners quoted part of a state statute which read: "When a parolee is under arrest for violation of the conditions of his parole, he shall be given a prompt and summary hearing, at [sic] which the parolee and his counsel shall be given an opportunity to attend." The basis of their contention was that they were indigents and that, since the quoted statute afforded parolees with sufficient funds the right to hire counsel to represent them at their parole revocation hearing, the constitution mandated the appointment of counsel for them. In agreeing with these contentions, the court cited and relied on Cottle v. Wainright, 477 F.2d 269 (5th Cir. 1973) and Lane v. Attorney General of the United States, 477 F.2d 847 (5th Cir. 1973) where the respective courts had afforded assistance of counsel to defendants making analogous contentions as the defendants in the instant case. Two dissenting judges argued that the statute allowing retained counsel for solvent parolees could not possibly be interpreted as depriving insolvent parolees anything.

[37] *See* note 35, *supra*.

Considering the right to counsel in a context different from the above cases, the Alabama supreme court in *Davis v. State*, __ *Ala.* __, 291 So.2d 346 (1974), held that the sixth amendment also guaranteed a counsel of choice. The defendant's retained counsel had two trials scheduled before the same judge on the same day, but was not allowed to try them in succession. When the trial judge sent the defendant's case to another courtroom to be tried before another judge, the counsel of choice was not allowed to handle the simultaneous-scheduling dilemma in any reasonable way despite counsel's request. The Alabama court concluded that when the counsel of choice is present and desires to represent the accused and is not allowed to do so, the constitutional right to counsel is violated and reversal must follow.[38]

Right to Effective Assistance of Counsel

While the right to counsel guaranteed by the sixth amendment continues to be delineated by both federal and state courts, the right to effective assistance of counsel is rapidly surfacing as one of the most serious problems confronting the criminal justice system today.[39] Addressing itself to this matter, the Fifth Circuit in *United States v. Woods*, __ F.2d__, __ (5th Cir. 1973), said that "physical presence alone fails to satisfy the mandate of the Sixth Amendment." The court noted that "it is now firmly established that the right to counsel means no less than the right to effective counsel." [40]

These general comments by the Fifth Circuit are uncontroverted. The difficulty exists in devising a meaningful and practical standard to determine the infringement of this principle. Two federal courts recently grappled with this difficulty. First, the standard that a federal defendant had not received ineffective assistance of appointed counsel in violation of the sixth amendment unless the trial constituted "a farce and a mockery of justice" was re-examined by the Sixth Circuit in *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). The court reviewed all of the United States Supreme Court's holdings on effective assistance from *Powell*

[38] __ Ala. __, __ So.2d at __.

[39] Speaking to the National College of Criminal Defense Lawyers on January 4–6, 1974, Federal District Judge Robert R. Merhige, Jr. voiced agreement with the recent expressions by Chief Justice Burger that ineffective assistance of counsel is one of the criminal justice system's greatest problems today. 14 Cr. L. 2326.

[40] __ F.2d at __.

v. Alabama[41] to *McMann v. Richardson*[42] and concluded that the "farce and mockery" test should be abandoned as a meaningful standard for testing sixth amendment rights. In establishing a new standard, the Sixth Circuit followed the Fifth and District of Columbia Circuits' formulation requiring appointment of counsel "reasonably likely to render and rendering reasonably effective assistance." [43] In its discussion of this standard, the court said that "defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations." [44] In the other case, *Johnson v. Vincent*, 370 F.Supp. 379 (S.D.N.Y. 1974), the United States District Court for Southern New York granted a federal habeas corpus, vacating a state murder conviction, because of defendant counsel's ineffective appellate assistance. Applying a standard similar to the one set out above in *Beasley*, the district court said that anyone in the field would have known enough to raise on appeal the failure to give a lesser offense instruction, which was saved by objection at trial. The court noted that the defendant "would almost certainly have succeeded in obtaining a reversal of his conviction had it not been for his lawyer's misfeasance." [45] Conceding that this misfeasance stemmed not from neglect or indifference but from "sheer ignorance of the law," the court said the consequences to the defendant were nevertheless identical. Commenting on the appointment of defendant's counsel, the district court said it was "appalled that the representation of a convicted murderer, facing a minimum of fifteen years in prison, should be entrusted to a lawyer whose acquaintance with criminal law was so slight as to be non-existent." [46]

The merits of the analogous standards adopted in *Beasley* and *Johnson* remain to be tested further. Both standards attempt to gauge the ineffectiveness of counsel by examining his work to determine if it is within the normal range of competence of counsel in criminal cases. This approach suggests a case-by-case analysis of alleged ineffective legal representation; a corollary to this suggestion is the uncertainty that generally accompanies case-by-case approaches. However, as the courts continue to use these standards it can be reasonably expected that the "normal range of competence" will be more clearly defined.

[41] 287 U.S. 45 (1932).
[42] 397 U.S. 759 (1970).
[43] 491 F.2d at 696.
[44] *Id.*
[45] 370 F. Supp. at 387.

[46] *Id.* at 388. The defendant's attorney was associated with law firms whose practice consisted almost entirely of personal injury litigation. In the course of that practice, he had handled only one appeal. The entirety of his prior exposure to criminal law consisted of a one semester course at Columbia, and two or three criminal appeals he had undertaken on appointment. He admitted that none of these appeals involved a trial transcript; they were rather undertaken on behalf of prisoners who had entered guilty pleas and who then sought to contest the voluntariness of the plea or the severity of sentence.