CRIMINAL LAW AND PROCEDURE

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The selection of notable decisions from a large number of those adjudicated is at bottom a subjective exercise. Thus the thirty-odd cases gleaned from the more than three hundred fifty reviewed may or may not be extremely significant, or even reasonably so. Nevertheless, those selected for comment appeared to be interesting from the hypothetical viewpoint of the practitioner of criminal law in federal courts.

I have made no attempt to classify the cases under narrow subject headings mainly for two reasons: the overwhelming number of *habeas corpus* petitions represented which dealt either with factual allegations or denials of hearings in earlier proceedings, and because of a probable lack of utility in the headings which would have been ultimately selected. Even so, an attempt has been made to group the cases having some degree of kinship.

Two appeals dealt with the question of effective assistance of counsel at trial. In *Gomez v. Beto*[1] the accused, a twice-convicted felon, was convicted of burglary and received a mandatory life sentence. After the denial of his direct appeal he petitioned for habeas relief in both state and federal court on the ground that his court-appointed attorneys did not investigate his alibi defense nor summon his alibi witnesses. In justification, one attorney testified that the witnesses were not subpoenaed because "he did not believe a person could remember that long ago,"[2] and also because of his belief in the insufficiency of the state's evidence to result in an adverse jury verdict. Noting that alibi was the only available defense, the court deemed the district court in error for having ruled as a matter of law that these undisputed facts did not constitute ineffective assistance of trial counsel.

In *Arrastia v. United States*,[3] action rather than inaction of counsel was complained of. After conviction of a non-parolable offense,[4] in response to his questions concerning an appeal, the accused was told mistakenly by his retained counsel that probably he would be eligible for parole "by the time an appeal could be perfected."[5] In consequence,

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1. 462 F.2d 596 (5th Cir. 1972).
2. *Id.* at 597.
3. 455 F.2d 736 (5th Cir. 1972).
4. 26 U.S.C. §§ 4705(a), 7237(d) (1954); *cf.* 21 U.S.C. § 801 (1970).
5. 455 F.2d at 739.

accused alleged his execution of a waiver of right to appeal which he would not have signed had he known of his ineligibility for parole. Observing that even good faith errors of retained counsel may result in a denial of due process of law, the court in reversing and remanding held out the availability of an out-of-time appeal in the event the petitioner proved a deprivation of the right to appeal by incorrect advice.

Three cases dealt with the conduct or composition of the jury. *Winters v. Cook*[6] presented the question whether counsel on behalf of his Negro client who was ignorant of his right when he pleaded guilty may waive the right to object to the composition of a jury on the ground of systematic exclusion of negroes. In a split decision the court held that while a voluntary plea of guilty waives known nonjurisdictional defects such as jury composition, this requires a personal decision by the accused. As the dissent observed, this decision modifies *Henry v. Mississippi*,[7] which would have allowed counsel to make such decisions except in special circumstances, by denying counsel that power in this instance. Consequently, the trial judge now must determine from the accused who wishes to plead guilty whether he himself knows that such an attack on the jury's composition may be made.

In *United States v. Sexton*,[8] a polled juror first answered: "I didn't vote either way," but being pressed, "Well, is it your verdict?," answered: "Yes, sir." The court required the entire jury to retire again and thereafter a unanimous guilty verdict was reported, but not before a mistrial motion had been made. Stressing the court's right to poll the jury, nevertheless the reviewing court considered the verbal exchange between trial judge and juror as requiring the juror to vote in open court. The better procedure, it suggested, would have been to announce that the verdict was unacceptable because not unanimous and to have returned the jury for additional deliberations.

United States v. Shafer[9] dealt with the impropriety of items not received into evidence being present in the jury room, *i.e.*, the sworn complaint of a customs agent who had no personal knowledge of the event detailed, a blackboard used by the prosecution in summarizing the testimony, and a hotel bill of an alleged co-conspirator apparently offered in corroboration of parol evidence of defendant's registration at a hotel whose records were not admitted. Excluding this case from the category of those in which the evidence is "so overwhelming that the

6. 466 F.2d 1393 (5th Cir. 1972).
7. 379 U.S. 443 (1965).
8. 456 F.2d 961 (5th Cir. 1972).
9. 455 F.2d 1167 (5th Cir. 1972).

non-evidentiary matter may be considered not prejudicial,"[10] the appeals court reversed. The burden is not on the defendant, the court observed, to show that an unadmitted document was read and considered in the jury room, a practical view when the opposite burden is posed.

Within the area of sentencing and punishment, several interesting cases were decided. A habeas petitioner was successful in obtaining a hearing on his claim that prison authorities arbitrarily failed to restore good time credit due him, a claim on which the district court had made no findings.[11] In another case, United States v. Brown,[12] the court racated a sentence which had been imposed in absentia after several continuances granted to allow the appellant to appear for sentencing. In remanding, the reviewing court stressed the distinction between presence at *trial* and presence for *sentencing*, the former being permissible according to circumstances while the latter is an absolute requirement except for the most extraordinary reasons and where the defendant's rights have been safeguarded, as when he has expressly waived his right to be present.

While a federal prisoner in Georgia, one Reed was convicted of a crime in the State of Connecticut, and a state detainer warrant was placed against him in the federal prison. Reed filed a habeas petition in the Connecticut federal district court, but that court denied him relief on jurisdictional grounds. Then Reed petitioned the federal district court in the district of his confinement, but that court also denied subject matter jurisdiction. The Fifth Circuit Court affirmed, citing 28 U.S.C. § 2255 (1970), for an expression of Congress' intent to spread the work load such cases impose, even though that statute applies only to prisoners sentenced in federal courts and agreeing with the Fourth Circuit that jurisdiction to hear such attacks on state detainer warrants properly lies with the sentencing district, albeit conceding concurrent jurisdiction with the district court of confinement.[13] The conflict is ripe for legislative resolution. The situation may be compared with that of a parolee whose parole is supervised by a receiving (foreign) state under the Uniform Act for Out-of-State Parolee Supervision. In *Dillworth v. Barker*,[14] the petitioner, having served a portion of a South Dakota sentence, was paroled under the act to Florida where he filed a habeas

10. *Id.* at 1170.
11. Lindsay v. Mitchell, 455 F.d2d 917 (5th Cir. 1972).
12. 456 F.2d 1112 (5th Cir. 1972).
13. Reed v. Henderson, 463 F.2d 485 (5th Cir. 1972).
14. 465 F.2d 1338 (5th Cir. 1972).

petition challenging his conviction. Recognizing the existence of concurrent jurisdiction with South Dakota's appropriate district court (because either of the state parole commissions could revoke the parole) the court nevertheless agreed with the district court's decision to decline its exercise on *forum non conveniens* grounds, pointing out the impracticability of requiring the district court of the receiving state to defend against a collateral attack on the sending state's conviction.

Among the other numerous appeals from denials of habeas petitions were several others deserving notice. The court refused to strictly apply the rule requiring exhaustion of state remedies in a case in which the petitioner showed that his seventeen month-old state petition had not been acted upon.[15] In contradistinction, however, another ruling declared petitioner's claim insufficient when he alleged that it would be fruitless to attempt exhaustion of state remedies. The court reiterated the rule of long standing, *i.e.*, *some* attempt must be made to have the state courts consider the facts underlying the claim for relief made the basis for a habeas petition.[16] In still another, the per curiam opinion appears inconsistent, for the court conceded its inability to make an "informed decision" on the petition but nevertheless remanded because the pleadings, though incoherent, indicated entitlement to relief.[17]

But in *Moye v. Highsmith*,[18] the grant of a habeas petition was affirmed on compelling facts. It was found that due process of law had not been extended to an indigent petitioner who had not been notified by the Georgia Court of Appeals that a pro se application for a rehearing would be acceptable to that court. Parenthetically, the Court of Appeals may have justifiably assumed that petitioner's court-appointed counsel who also represented him on appeal continued to do so for the purpose of filing a rehearing motion; the notice from that court to the petitioner concerning his right to file a motion, however, omitted any reference to his right to file it himself, and by coincidence his former lawyer apparently saw no grounds for a rehearing and thus felt he could not execute a "certificate of counsel" which ordinarily must accompany a petition for rehearing. Nevertheless, this failure to advise of the right to file the petition himself was held to be an omission of a constitutonal requirement.

The collateral estoppel doctrine was applied in *Wingate v. Wainwright*,[19] to reverse a denial of a habeas petition where it was

15. St. Jules v. Beto, 462 F.2d 1365 (5th Cir. 1972).
16. Jackson v. Caldwell, 452 F.2d 1068 (5th Cir. 1972).
17. Fryer v. MacDougall, 462 F.2d 1093 (5th Cir. 1972).
18. 460 F.2d 1388 (5th Cir. 1972).
19. 464 F.2d 209 (5th Cir. 1972).

shown that evidence of two previous robberies, for which the petitioner had been tried and acquitted, was introduced against the accused in his later trial for another robbery under the rule admitting evidence of other similar crimes to show intent, plan or scheme. Allowing such proof amounted to double jeopardy, the court held, because the state in each instance was "attempting to prove the defendant guilty of an offense other than the one of which he was acquitted"[20] by relitigating a settled issue of fact, notwithstanding that the offenses did not arise out of the same transaction and notwithstanding that petitioner was not being retried for the same offense. But another district court ruling on a habeas petition dealing with evidence at a trial was affirmed. In *Favre v. Henderson*,[21] a police officer for the prosecution testified over objection that the informant who had given him informaton on the petitioner previously had given him information resulting in convictions of others. The court agreed with the district court that the admission of this evidence violated the confrontation clause of the sixth amendment as applied to the states by the fourteenth amendment. Drawing the distinction between that Constitutional prohibition and the hearsay rule, the court relied upon *Dutton v. Evans*[22] for the formula which would equate a lack of confrontation: (1) the testimony contained an assertion of a past fact; (2) there was no evidence that the out-of-court declarants had personal knowledge of the crime or its participants; (3) the possibility existed that the statements were based on faulty recollection; (4) there was absent any showing of the circumstances under which the statements were made; (5) the evidence (of the statements) was extremely important; (6) other witnesses' testimony did not make a strong case against the defendant; (7) the statements were not admitted under a hearsay exception; (8) eye-witnesses to the crime were relatively unconvincing; (9) the defendant was precluded from subpoenaing the informers, or others who could have denied the truth of the informers statements. These factors fulfilled the purpose of the confrontation clause: "to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement'."[23]

It may be observed that the classical basis for the admission of hearsay under recognized exceptions is some guarantee of truthfulness, *i.e.*, "a satisfactory basis," hence, it also could have been said of this testi-

20. *Id.* at 213.
21. 464 F.2d 359 (5th Cir. 1972).
22. 400 U.S. 74 (1970).
23. 464 F.2d at 364.

mony that no such basis had been made, and this being so, the difficulty in drawing the distinction between the constitutional limitation and hearsay itself remains. Under either premise, however, the decision appears entirely correct.

An important decision on the Alabama procedure for determining mental capacity to stand trial was rendered in *Brinks v. Alabama*.[24] Under a plea in the state court of not guilty by reason of insanity, a court-appointed counsel filed a motion under the Alabama statutory procedure requesting a pretrial determination of mental capacity to stand trial. During the hearing the petitioner introduced lay evidence in the form of letters indicating mental abnormality and his counsel's own statement of like effect. Even though the state offered no evidence, the trial court refused to order a sanity investigation permitted by statute. After his conviction, petitioner filed a habeas petition claiming a denial of constitutional rights. In reversing the district court the appellate court agreed with petitioner. It noted that the applicable statutory language, "and the trial court shall have reasonable ground to doubt his sanity,"[25] created a reviewable standard for measuring the factual basis of the claim which the trial judge had no discretion to ignore, a position noted by the Fifth Circuit Court of Appeals as being contrary to the historical position of Alabama Courts.

A case involving a federal prosecution indicates a liberalizing trend in such matters as well. In *United States v. Varner*,[26] following a motion by the district attorney for commitment of the petitioner for a sanity hearing under 18 U.S.C. § 4244 (1970), the district court judge so ordered without a hearing. Then the petitioner filed a habeas petition which was set down for hearing, followed by a government motion opposing a hearing. In granting a temporary stay of the habeas proceeding, the court recognized the discretionary power of the district court to conduct its own hearing solely on the subject of the commitment motion and not to determime competency prior to examination and expert opinion. This power was recognized as part of the inherent power of the district judge to recall or revise his own orders. And in a third case dealing with the broad subject of insanity, the indigent accused moved under Federal Rule 17(b) for a subpoena addressed to a psychologist who allegedly had examined the defendant. Pointing out the power in the trial judge to weigh such requests on grounds of materi-

24. 465 F.2d 446 (5th Cir. 1972).
25. *Id.* at 449-50.
26. 467 F.2d 659 (5th Cir. 1972).

ality, relevancy, etc., nevertheless the trial court's knowledge of the defendant's previously unsuccessful attempt to procure a sanity witness and the absence of any delay to be caused by the request, together with the relevance of the proposed testimony, weighed heavily in causing the court to reverse the district court.[27]

The effectiveness of a waiver of *Miranda*'s right to counsel was questioned in *Cooper v. Griffin*,[28] in which two boys appealed from the denial of habeas petitions challenging their Georgia convictions. Whether their waivers were knowingly made had been the subject of an evidentiary hearing in the district court where the petitioners claimed that their limited mental capacities and lack of experience with criminal process rendered them incapable of a knowing waiver. Their proof consisted of testimony from parents and four special education teachers, and evidence of retardation, hopeless mental capability, and low I.Q. To counter this evidence the state called their appointed trial lawyer who testified that the defendants appeared to understand their conversations, and also called police officers who arrested and interrogated them. The officers stated that the boys appeared to understand the *Miranda* warnings, giving both oral and written waivers. Viewing the fact of unknowing waiver, as uncontradicted, the court pronounced itself as applying "a differing legal evaluaton of largely undisputed facts"[29] rather than disagreeing with the district judge on the facts themselves, and reversed the case.

Through a scholarly opinion[30] of Judge Brown in which he traced the apparently illogical application of the retroactivity doctrine, the court held that the *Leary v. United States*[31] holding must be applied retroactively. At bar was a 1961 conviction for illegal importation of marihuana, 21 U.S.C. § 176(a).[32] At that time, and until *Leary* was decided, possession of marihuana carried with it a statutory presumption of guilt; however, *Leary* invalidated the presumption and it now has been eliminated. The opinion is enlightening in both its survey of the retroactivity decisions and for its candid appraisal of the principal basis for the doctrine which is describd as "the purification of the fact-finding

27. United States v. Moudy, 462 F.2d 694 (5th Cir. 1972).

28. 455 F.2d 1142 (5th Cir. 1972).

29. *Id.* at 1146.

30. Vaccaro v. United States, 461 F.2d 626 (5th Cir. 1972).

31. 395 U.S. 6 (1969).

32. This section was repealed by Title III, § 1101(a)(2) of the Comprehensive Drug Abuse Prevention and Control of 1970, 84 Stat. 1291, effective May 1, 1971. Section 1010 is the successor to 21 U.S.C. § 176(a) (1964) but without the statutory presumption.

process."[33] Calling it a matter of balancing the factors in individual cases (and conceding imprecision), the opinion claimed support from three types of recently decided cases: (1) those "in which the Supreme Court has invalidated registration and taxation requirements imposed on gamblers, firearms dealers and marihuana traffickers" on the theory that "a person cannot be held criminally liable for failing to incriminate himself";[34] (2) the example of *North Carolina v. Pearce*,[35] applying retroactively the decision in *Benton v. Maryland*[36] that the double jeopardy provision of the fifth amendment applies to the states through the fourteenth amendment; (3) cases such as those requiring appointment of counsel at "critical stages". Otherwise defendants who do not know how to establish their innocence run the risk of conviction, and such a system which threatens a substantial number of innocent defendants with convictions "must be abandoned and retroactively uprooted."[37] Considering *Leary*, the court concluded, there is a possibility that the presumption of knowledge from possession may have resulted in a number of innocent people having been convicted and thus the prohibition against its evidentiary use would be applied retroactively.

CONCLUSION

Summation or general conclusion appears superfluous, for these cases speak for themselves and their very diversity pretermits such comment. An impression lingers, nonetheless, that the Fifth Circuit has tightened up the processes of district courts in law and procedure for the benefit of the accused. One might predict an increase in the number of fact-finding hearings on habeas corpus petitions and a trend toward expository inquiries on both guilty pleas and jury instructions, originating with the district court judges. For all that, or without it, the record of 1972 has been a positive one.

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33. 461 F.2d at 630.
34. *Id.* at 632.
35. 395 U.S. 711 (1969).
36. 395 U.S. 784 (1969).
37. 461 F.2d at 6321.