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Hon. Charles Longstreet Weltner

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CORRECTING ERROR WITHOUT A NEW TRIAL*

Charles Longstreet Weltner†

Appellate courts tend to view criminal trial error as either "harmful" or "harmless." Settling upon the specie usually controls the judgment; i.e., reversal and new trial usually follow a finding of harmful error, while affirmance follows harmless error.[1] I suggest that this viewpoint is unduly restrictive and inordinately costly, as alternatives exist for correcting harmful error *without* vacating conviction.[2]

In *Jackson v. Denno*,[3] the United States Supreme Court found that New York's procedure for determining the voluntariness of a confession had not afforded an adequate hearing on this issue dur-

† Justice, Supreme Court of Georgia. A.B., Oglethorpe University, 1948; LL.B., Columbia University, 1950; LL.D., Tufts University, 1967; M.A., Columbia Theological Seminary, 1983.

1. *See, e.g.*, Bryant v. State, 236 Ga. 790, 792, 255 S.E.2d 309, 311 (1976). *Cf.* Johnson v. State, 238 Ga. 59, 230 S.E.2d 869 (1976) (setting forth Georgia's standard for reversal upon a finding of nonconstitutional harmful error).

2. This idea has been in circulation at least since United States v. Shotwell Mfg. Co., 355 U.S. 233 (1957) (vacating an order for a new trial and remanding to the trial court for rehearing of a single evidentiary issue).

3. 378 U.S. 368 (1964).

ing Jackson's murder trial.[4] Although the New York procedure was found violative of due process,[5] the Court observed:

> It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. . . . [I]f . . . it is determined that Jackson's confession was voluntarily given, . . . we see no constitutional necessity for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty. . . . If the jury relied upon it, it was entitled to do so. Of course, if the state court, at an evidentiary hearing, redetermines the facts and decides that Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession's being admitted in evidence.[6]

The Court went on to say that requiring the state to hold a new trial "before the outcome of the new hearing on voluntariness [was] known would not comport with the interests of sound judicial administration and the proper relationship between federal and state courts."[7]

The same procedure was employed recently by the United States Supreme Court in *Waller v. Georgia*.[8] In *Waller v. State*,[9] the Georgia Supreme Court declined to apply retroactively its open courtroom rule of *R.W. Page Corp. v. Lumpkin*.[10] On certiorari, the United States Supreme Court addressed the question of whether the sixth amendment forbade the closing of the entire hearing on the motion to suppress.[11] Finding a sixth amendment violation, the Court considered "what relief should be ordered to remedy this constitutional violation."[12] Waller contended that a new trial on the merits should be ordered.[13] The Court disagreed. "Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the de-

4. *Id.* at 391.
5. *Id.*
6. *Id.* at 394.
7. *Id.* at 395.
8. 104 S. Ct. 2210 (1984).
9. 251 Ga. 124, 303 S.E.2d 437 (1983).
10. *Id.* at 126-27, 303 S.E.2d at 441. R.W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982).
11. Waller v. Georgia, 104 S. Ct. at 2214-17.
12. *Id.* at 2217.
13. *Id.*

fendant, and not in the public interest."[14] The Court concluded:

> In this case, it seems clear that unless the State substantially alters the evidence it presents to support the searches and wiretaps here, significant portions of a new suppression hearing must be open to the public. We remand to the state courts to decide what portions, if any, may be closed. This decision should be made in light of conditions at the time of the new hearing, and only interests that still justify closure should be considered. A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties.[15]

The Georgia Supreme Court has similarly remanded for *Jackson-Denno* hearings instead of reversing convictions.[16] Remand, rather than automatic reversal, has been ordered for in camera inspections by trial courts pursuant to *Brady* motions.[17] In *Tribble v. State*,[18] the court explained: "Our holding in this case should not be construed as requiring *reversal* of a conviction solely on account of the trial court's failure to conduct an in camera inspection. Assuming material information has not been wrongfully withheld, 'this error . . . [generally] could be cured by post-trial examination . . . .' "[19]

In *Smith v. Zant*,[20] the defendant claimed that a prosecuting attorney had made an agreement with the defendant's accomplice in exchange for testimony and had failed to correct false testimony relating to that agreement.[21] Remand was ordered for a hearing solely to determine the merits of the defendant's *Napue-Giglio*

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14. *Id.*

15. *Id.*

16. In each of the following cases, the Georgia Supreme Court remanded for a *Jackson-Denno* hearing and determination as to the voluntariness of the defendant's statement: Payne v. State, 249 Ga. 354, 360, 291 S.E.2d 226, 232 (1982); Cofield v. State, 247 Ga. 98, 109, 274 S.E.2d 530, 540 (1981); Pittman v. State, 245 Ga. 453, 455, 265 S.E.2d 592, 594 (1980); Lawrence v. State, 241 Ga. 36, 37, 243 S.E.2d 78, 79 (1978); and Pierce v. State, 238 Ga. 126, 129, 231 S.E.2d 744, 747 (1977).

17. A *Brady* motion is a request by the defendant for disclosure of exculpatory evidence in the possession of the prosecution. *See* Brady v. Maryland, 373 U.S. 83 (1963); Brown v. State, 238 Ga. 98, 231 S.E.2d 65 (1976). Remand was ordered for in camera inspections pursuant to such a motion in Rose v. State, 249 Ga. 628, 629, 292 S.E.2d 678, 680 (1982).

18. 248 Ga. 274, 280 S.E.2d 352 (1981).

19. *Id.* at 276, 280 S.E.2d at 354 (quoting, with ellipses, Rini v. State, 235 Ga. 60, 65, 218 S.E.2d 811, 814 (1975)).

20. 250 Ga. 645, 301 S.E.2d 32 (1983).

21. *Id.* at 646, 648-50, 301 S.E.2d at 33, 35-36.

claim,[22] thus obviating the need for a new trial unless the defendant's claim proved successful.

In a different situation, the Georgia Supreme Court ordered the record on appeal supplemented to reflect what had actually transpired in the trial court. A defendant's contention that he was tried "in prison garb" was found to be without merit after the trial court found, in an independent hearing, that the clothing worn was not discernible as "prison garb," although it was prison property.[23]

The defendant in *Dunn v. State*[24] claimed that he was improperly restricted on voir dire from asking whether a venireman belonged to any fraternal organizations. The court handed down an opinion reversing Dunn's murder conviction, but the state pointed out on motion for rehearing that the transcript filed with the appeal was incomplete. After the record was supplemented to show that the juror, in fact, had answered the question *before* the objection was made, Dunn's claim was rejected and the conviction was affirmed.[25]

In *Romine v. State*,[26] the trial court denied defendant's motion for continuance to secure the attendance of a witness who was unexpectedly absent from the sentencing hearing due to illness.[27] The defendant was sentenced to death. The record was supplemented, under Georgia's Unified Appeal Procedure for death cases,[28] to reflect that the witness could have been present had he realized the importance of his testimony and the necessity of testifying on *that* day.[29] The Georgia Supreme Court found that the denial of continuance was an abuse of discretion and consequently vacated the death sentence.[30] Perhaps a better result would have been to order the record supplemented, at the first instance, to establish exactly

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22. *Id.* at 652, 301 S.E.2d at 37. The term "*Napue-Giglio* claim" relates to the leading cases Napue v. Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1972). In *Napue*, the Supreme Court found a fourteenth amendment violation where the prosecutor failed to correct false testimony given by a prosecution witness, even though the testimony was relevant only to the credibility of the witness. 360 U.S. at 269. The witness falsely denied that the prosecutor had promised consideration in return for his testimony. *Id.* at 267-68. The Supreme Court reaffirmed and further defined its ruling in *Napue* when faced with similar facts 13 years later in *Giglio*.

23. State v. Pike, 253 Ga. 304, 320 S.E.2d 355 (1984).

24. 251 Ga. 731, 309 S.E.2d 370 (1983).

25. *Id.* at 732, 309 S.E.2d at 372.

26. 251 Ga. 208, 305 S.E.2d 93 (1983).

27. *Id.* at 216, 305 S.E.2d at 100-01.

28. Unified Appeal Outline of Proceedings, § IV(A)(5)(b), 246 Ga. A-5, A-14 (1980).

29. Romine v. State, 251 Ga. at 218, 305 S.E.2d at 102.

30. *Id.* at 218-19, 305 S.E.2d at 102.

what the testimony would be. If the testimony would have been inconsequential, then the denial of continuance would have been harmless.

We have stated too often to require citation that an accused is entitled to a fair trial, not a perfect one. It is not essential—indeed, it is subversive to justice—that a defendant should be accorded a new trial, with all its cost, delay, and frustration, because of some deficiency which has *not* deprived him of a fair trial. In that regard, the remand concept has been healthy for criminal justice, bringing it closer to that reality which the public expects and demands from a system which exists principally for the protection of the public.

I believe it to be the case that appellate courts have not yet explored fully the permissible and advisable limits of corrective action through remand. As an example, the Georgia Supreme Court unanimously vacated a death sentence and ordered a new trial in *Devier v. State*[31] because of a major disparity between the percentage of women on the grand jury list (18%) and the female population of the county (53%), which the court found to be in violation of Georgia Code section 15-12-40(a).[32] What was the harm? Doubtless, the requirement of the Code section was not met. Likewise wanting was the benefit of representative public bodies, including grand juries. But these are public benefits. How was Devier himself harmed? In view of the crimes charged (rape and murder of a twelve-year-old girl), what would be the likely action of a grand jury properly including an adequate representation of women when it considered indicting Devier? If we are permitted to speculate either way, I would suggest that such a grand jury would be *more* likely to indict him than the one which indicted him originally!

But the deficiency was one of substantial gravity, notwithstanding its apparent harmlessness to *this* defendant.[33] How might it be corrected, short of reversal and retrial?

Consideration of alternatives beyond the obvious could have suggested a better way. There remains a genuine question as to whether a defendant who has been convicted by a properly consti-

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31. 250 Ga. 652, 300 S.E.2d 490 (1983).

32. *Id.* The statute requires the jury commissioners to select "a fairly representative cross section of the intelligent and upright citizens of the county . . . ." O.C.G.A. § 15-12-40(a)(1) (1982).

33. Devier has been reindicted and again convicted and sentenced to death. Transcript at 1549, 1663, 1672-77, File No. 21286, State v. Devier (Floyd County Super. Ct. 1983) (appeal filed Jan. 6, 1984).

tuted trial jury should be permitted to attack grand jury composition. Justice Jackson addressed this quaere almost thirty-five years ago in *Cassell v. Texas*,[34] wherein he presented concisely an important principle of law, that "no conviction should be set aside for errors not affecting substantial rights of the accused."[35] In dissenting from the vacation of a conviction by reason of an improperly constituted grand jury, Justice Jackson stated: "This Court never has explained how discrimination in the selection of a grand jury, illegal though it be, has prejudiced a defendant whom a trial jury, chosen with no discrimination, has convicted."[36]

His observation has not been forgotten. In 1979, Justice Stewart, concurring in *Rose v. Mitchell*,[37] wrote:

> The respondents were found guilty beyond a reasonable doubt after a fair and wholly constitutional jury trial. Why should such persons be entitled to have their convictions set aside on the ground that the grand jury that indicted them was improperly constituted? That question was asked more than 25 years ago by Mr. Justice Jackson in *Cassell v. Texas* . . . . It has never been answered. I think the time has come to acknowledge that Mr. Justice Jackson's question is unanswerable, and to hold that a defendant may not rely on a claim of grand jury discrimination to overturn an otherwise valid conviction.[38]

If it is true that a defective grand jury procedure causes no genuine harm to the defendant in a particular case, how can the public interest in proper grand juries be preserved *and* the evil be corrected, short of retrial?

Easily. A remand can order a new trial—unless within a stated time a properly constituted grand jury should return a true bill of indictment charging the defendant with the same offense as that for which he was indicted previously.[39]

What would the result of such a procedure be? First, it would remedy, for the public's sake, defective composition of grand juries. Second, it would provide evidence as strong as can be mustered that, had the first grand jury been properly constituted, a

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34. 339 U.S. 282 (1950).
35. *Id.* at 299.
36. *Id.* at 301.
37. 443 U.S. 545 (1979).
38. *Id.* at 574-75 (footnote omitted).
39. This suggestion was advanced several years ago by Professor Stephen A. Saltzburg of the University of Virginia Law School. *See* Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265, 1289 n.104 (1978).

true bill would have been returned. Thus, while the original proceeding contained error too serious to be characterized as "harmless," an indictment properly returned after remand would establish that there had occurred no miscarriage of justice.

Whether such a disposition ultimately will be approved by a court of final resort is, of course, problematical. Whatever the final answer, this suggestion for correcting defective grand jury proceedings well illuminates the burden of my effort, which is this: appellate courts need to think of correcting error by remand, with affirmance to follow where error is corrected safely and where "no miscarriage of justice has actually occurred."[40]

40. This concept has not been developed in American appellate practice but is of great importance in the English appellate system. England's Criminal Appeal Act, 1968, ch. 19, § 2(1), authorizes the reversal of convictions where the verdict is considered to be "unsafe or unsatisfactory" and authorizes the affirmance of convictions—even though there is substantial error—where "no miscarriage of justice has actually occurred."