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THE COURT OF LAST RESORT

Erle Stanley Gardner†

A few weeks ago a deputy of William B. McKesson, the District Attorney of Los Angeles County, entered his chief's office bearing disquieting information.

The office had convicted an innocent man.

The case had, on the surface, been a routine cut-and-dried holdup where a man had been shot. Fortunately, the wound had not proved fatal. Subsequently the police had picked up a suspect who had, of course, claimed his innocence and tried to establish an alibi. As is so frequently the case, the alibi had been supported only by members of the family. Opposed to this alibi, the district attorney's office had produced positive, eyewitness identification.

The jury brought in a verdict of guilty, and the defendant went up to San Quentin.

Then, some months later, an inadvertent remark by a gangster had put the police on the trail of a different suspect. It was discovered that considerable circumstantial evidence pointed to this suspect and when he was confronted with this evidence he confessed.

District Attorney McKesson, a former Superior Judge, was very much disturbed. Upon learning what had happened, his first concern, of course, was to make absolutely certain of the facts in the case. The eyewitnesses who had identified the innocent man were confronted with the second suspect and promptly picked this second suspect out of a line-up, a line-up which included the man who had been wrongfully convicted.

Judge McKesson promptly flew to Sacramento to interview Governor Goodwin J. Knight, and to expedite proceedings so that all "red tape" could be cut. Before the information as to what had happened had become public property, the man had been pardoned and released from San Quentin.

Now we come to the interesting and, as far as this article is concerned, the significant phase of the matter.

Paul V. Coates, the noted newspaper columnist, interviewed both the innocent man who had been released from San Quentin and one of the eyewitnesses whose positive identification had done so much to bring about a verdict of guilty.

Under date of September 26, 1957, the *Los Angeles Mirror-News* carried Paul Coates' column in which the columnist stated that he had

† See Contributors' Section, Masthead, p. 74, for biographical data.

tried to learn just how positive the witness had been when he had first identified the wrong culprit.

The witness, according to this published report, said that he had told the officers, "It's either that man or he's got a twin brother."

"Did you say that in court?" Coates asked the man.

The witness said, "No. In court you have to be positive."

"Were you?" Coates asked.

After a pause, the witness answered, "Yes, I was."

Now here we are getting to something which is the cause of so much trouble. The man stated, "In court you have to be positive."

Who told him so?

What rule is there that says "In court a witness has to be positive"?

Of course, we know that the witness who *isn't* positive is exceedingly vulnerable on cross-examination. The shrewd defense attorney stands up, points the finger of scorn and says, "If you aren't absolutely certain in your own mind, how do you expect your testimony to convince a jury beyond all reasonable doubt?"

Of course it isn't proper to frame the question in exactly those words, but that is the general idea which the cross-examining attorney manages to convey to the witness—and, of course, to the jury.

That perhaps is one reason why witnesses take the witness stand with the feeling that "In court you have to be positive."

This particular defendant was very, very lucky. He had been wrongfully convicted and sentenced to imprisonment for a period of from five years to life. Under the circumstances it would have been far more apt to have been life than five years.

But Judge McKesson, who has given a lot of thought to the possibility of courtroom error, particularly in the field of personal identification, was quick to acknowledge the error and take steps to rectify it.

Not all district attorneys would have done this.

Two or three weeks ago I was talking with Sam Dash, who when I first knew him had been one of the chief deputies of the district attorney's office in Philadelphia; then, later on, Sam Dash served as district attorney.

He told me about an old case where a man had been convicted of murder and sentenced to life. At the time the case had been tried the science of firearm-bullet identification such as we know it today was non-existent.

Some twenty-odd years after the man's conviction, the ballistic expert in the district attorney's office, finding himself with a little time on his hands, started prowling through the files of old cases, trying to find out

what effect modern science would have had on some of the old controversial trials. It was his theory that the science of ballistics, as now developed, would have saved the county many thousands of dollars years ago.

So he examined the bullet which had been received in evidence in the old murder case, and the weapon from which the bullet was supposed to have been fired, subjected the exhibits to modern scientific tests, and then found to his complete surprise that the fatal bullet couldn't possibly have been fired from the gun of the man who had been convicted of the crime.

There, again, the prosecutor's office was highly ethical. The case was reopened and the man was released.

I personally checked on a case in Philadelphia where an innocent man had been wrongfully convicted on the strength of eyewitness identification. The district attorney's office had learned that another prisoner had made the remark that he was responsible for the crime, rather than the man who was serving a term in prison. The district attorney's office investigated the facts, learned there had been a miscarriage of justice and proceeded to get the matter straightened out.

I talked with one of the witnesses who had been instrumental in making the identification. The witness consented to have the interview recorded on tape; it is a very significant recording, because the witness stated frankly that on seeing the suspect in the police line-up *"We were positive that he was the one who had committed the crime. But then, months afterwards, when we saw the man who had really committed the crime, we were even more positive he was the man."*

These are cases handled by district attorneys who have high standards of ethics and who are dedicated to the administration of justice, rather than piling up a record of convictions.

In Philadelphia serious felony cases are never closed as long as the prisoner is alive. In many jurisdictions, no sooner is the prisoner convicted and his appeal denied, than there is a rush to destroy the evidence in order to "clear the files."

My associates and I investigated one case where a man had been convicted of murder, and whose conviction subsequently turned out to be erroneous, only to find that the files had been "cleared" in a most alarming manner. The documents pertaining to the case were missing from the district attorney's office; all of the evidence was missing from the police files; the book of notes kept by the shorthand reporter covering the trial had been mutilated by having the pages relating to this particular trial cut out of the book. All the other pages were there intact.

When we tried to find the records of the preliminary hearing we found that there again the pages containing the evidence in this particular case had been cut from the shorthand notebook of the reporter—otherwise the book was intact.

Eventually, however, we found a record of one hearing that the persons who were so intent on "*clearing the files*" had overlooked, a hearing in a companion case in which certain witnesses, who had subsequently testified in the case we were investigating, had taken the stand. The shorthand notes of the testimony of that hearing still remained in the reporter's book and we were able to get a record of what had been said by some of the same witnesses who subsequently testified in the case in which we were interested.

Here again we would probably have been powerless if it hadn't been for an ethical district attorney. After an investigation this district attorney (the late Gerald K. O'Brien of Wayne County, Michigan) walked into court and told the judge, "Our office is going to file a motion for a new trial. If Your Honor grants that motion, I'm going to move to dismiss the case on the ground that I think this man is innocent."

In Michigan they have a procedure permitting a delayed motion for a new trial. In many states, however, a motion for a new trial must be made within a short time after the original conviction. It can only be made upon newly discovered evidence, and even so, that newly discovered evidence must relate to new matters and not be cumulative.

It is pretty difficult to find new evidence on behalf of a defendant which isn't "cumulative."

Take for instance a case mentioned by the late Judge Jerome Frank and his daughter, Barbara Frank, in their recent book entitled "Not Guilty." A man who had been convicted in 1938 had managed to produce evidence some twelve years later indicating that the conviction had been wrongful.

The court wrote a detailed opinion stating that it had no doubt an innocent man had been convicted and that a grave miscarriage of justice had taken place. The court stated that if it had the power it would set aside the conviction, but under the technical rules of procedure the court had become convinced that it had no jurisdiction to grant the application. The judge did rule, however, that there had been a grave miscarriage of justice and asked that a certified copy of his opinion, in which he was forced to deny any relief to the defendant purely on the ground of lapse of time, be sent to the United States Pardon Attorney.

The defendant applied for a pardon, waited for more than four years, and then received a ruling which stated curtly that the pardon had been denied.

But what about those district attorneys who aren't as conscientious, who aren't as openminded, who aren't as impartial, or who aren't as co-operative? Some of them may act in the best of faith but their minds are prejudiced.

Take, for instance, the case of one man who was convicted of murder and sentenced to life imprisonment. Some two years after this man had gone to prison the FBI not only came to the conclusion that he was innocent, but actually had a confession from the man who had committed the murder. The FBI, however, feeling that it was purely an investigative body which had no power to report to the public but only to the officials, passed the confession on to the prosecutor, who promptly branded it a hoax.

The innocent man remained in prison for another nineteen years. It wasn't until after the death of the prosecutor, and after years of work by a dedicated newspaper reporter, that the true facts came to light and the man was released.

How about cases where the authorities themselves conspire to bring about perjury in order to obtain a conviction in a case which has attracted some considerable attention?

Don't think for a moment there aren't such cases.

I call to mind one which was recently reported, where a man served twenty-two years in prison for a murder he didn't commit. It wasn't until after the death of the sheriff that two witnesses admitted they had committed perjury and made up their testimony out of whole cloth. It seemed the sheriff had forced them to testify to the guilt of an innocent man so the case could be solved.

It is very easy for a prosecutor to brand a person confessing to a crime "a phony" and the confession a hoax.

My associates and I worked on one case where an innocent man was wrongfully convicted. The man was subsequently released on the strength of information which we uncovered showing his innocence, but sometime before that release there had been a confession made by another person who claimed he had committed the murder. No attempt has ever been made to follow up on that confession with a prosecution.

Our procedure in criminal cases is fatally defective in that there is no adequate method by which the verdict of a jury can be reviewed on matters of fact.

Occasionally we hear someone assure the public that this man was "convicted by a jury of his peers. He appealed that conviction to the Appellate Court, which sustained the conviction. He then went to the State Supreme Court, which in turn sustained the conviction." Now all

this is very fine reading in the public press but it simply isn't a fair statement of what happens.

Once the jury has brought in a verdict of guilty, that verdict is as binding upon the Appellate Court and the Supreme Court as it is upon the defendant.

Juries just aren't that good.

Personally I am a great believer in the jury system, but no one can claim that juries are infallible.

In the book referred to, written by Judge Frank and Barbara Frank, some thirty-six cases are discussed where innocent men have been wrongfully convicted. The late Professor Borchard in his book, "Convicting the Innocent," listed another thirty-six cases. It wouldn't be very difficult at any time to dig up thirty-six new cases of men who had been wrongfully convicted. No one knows just how many innocent persons are wrongfully incarcerated, but anyone who looks into the matter realizes that there is a far greater number than the public is generally led to believe.

The question is what to do about it.

As long as there is no means of reviewing the verdict of a jury on questions of fact, we are going to have miscarriages of justice.

On the other hand, if we ever open the door to appellate procedures by which the verdict of a jury *can* be questioned and the defendant can, in effect, begin all over again, we are going to cause our courts, already staggering under the greatest case load in history, to become completely bogged down.

Even the way things are now, too many guilty persons escape the toils of the law. Many guilty persons are not even arrested. Many of those who are arrested take advantage of legal loopholes in the law to squirm their way out to freedom. In far too many instances, a harassed district attorney finds that he simply doesn't have the evidence necessary to convict the defendant of the crime which he knows the defendant has committed, so he makes a "deal" by which the defendant pleads guilty to some relatively minor crime and the prosecution is dropped on the major offense.

Even under our law, as it is, our courts find themselves bombarded with various and sundry petitions and pleadings from the so-called "prison lawyers."

These prison lawyers are a breed in themselves and present a most interesting problem. They are prisoners who have virtually unlimited time, a certain aptitude for concocting ingenious theories, and who haunt the prison libraries, take correspondence courses in law, pick up a

smattering of legal patter and procedure and write reams of meaningless jargon.

Given a typewriter and plenty of white paper, these prison lawyers with their almost unlimited leisure, can keep a court fully occupied. Their applications usually have one common trade-mark. They are unbelievably prolix. They cite innumerable cases which are not really in point, and they usually miss the real gist of the matter.

Many judges either assign these applications to some clerk or simply pay no attention to them. In many instances it would drive a judge completely crazy trying to find out what they're all about.

Yet, occasionally, one of these prison lawyers does hit on a meritorious point and it is interesting to note that enough of these petitions and applications for writs are read and acted on so that every now and then a judge will recognize the validity of a point raised and grant a new trial to a prisoner or turn him loose after a hearing on habeas corpus.

Quite obviously, if we should try to adopt any post-conviction remedies which would be at all worth while, the prison lawyers would have our courts completely swamped.

Yet until we do have some practical, logical means of rectifying the miscarriages of justice by practical post-conviction remedies we are going to have innocent men in prison.

I personally have been very much interested in the manner in which the British Home Office functions. I feel that if we are going to make justice really work in this country in criminal cases, we are going to be forced to come to something like the British Home Office.

My associates and I, who have been working on this matter for nearly ten years, are unanimous in feeling that we need some kind of a board or tribunal in each state which can be completely independent of the pardon and parole board, and which can reopen cases on matters of fact when the board feels called upon to do so.

In other words no prisoner should as a matter of right be able to have his case reopened, but he should as a matter of right be given an opportunity to petition this board, setting forth in a brief, factual statement, the grounds on which he contends he was wrongfully convicted.

It is to be taken for granted that virtually every prisoner will promptly file an application with such a board as soon as it is created. All prisoners want to get out and most of them feel that they have nothing to lose. Therefore, why not take a chance?

If, however, the petitions are completely factual; if they are brief; and if they do not present any legal points for consideration, it shouldn't be too hard to weed out the wheat from the chaff.

All technical petitions alleging legal errors can be presented to the courts. A board of this sort should function only for the purpose of reviewing the facts in cases where the board itself has reason to believe there may have been a miscarriage of justice.

Once we set up such boards in the various states, we are not only going to have a lot fewer miscarriages of justice, but we are going to have greater respect for our laws, because our laws are going to be more worthy of respect.

Some ten years ago I became associated with a group of individuals who had some experience in various departments of law enforcement, crime detection and the administration of justice. We advanced the theory that in this country the people themselves constituted the real "court of last resort," and that we needed to get the people generally to understand their responsibilities in order to improve the administration of justice.

There is a mistaken impression that our activities are directed *only* toward releasing innocent men who may have been wrongfully convicted.

Actually, we recognize that it is as great a miscarriage of justice when a guilty man is wrongfully acquitted as it is when an innocent man is wrongfully convicted. We are trying to improve the administration of justice by promoting better investigative work, upgrading investigative personnel, seeing that police officers get better compensation, studying the problems of penology, and trying to get people to take an interest in some of these more pressing problems which so vitally concern them.

One of our great problems is that of penology. We must define the scope of punishment, the place of rehabilitation. The average citizen has never clarified his thinking in regard to persons who have violated the law. His idea is that the man should be punished. He also believes in a vague sort of a way that prisoners should be rehabilitated. Back of all this thinking, however, there lies a vindictive desire to "get even."

Mixed in with all of this contradictory thinking is a complete indifference to what happens to the prisoner once the sentence has been passed, a reluctance to tax the producing economy to support law-breakers.

These problems are too complicated to admit of even cursory discussion in an article of this nature.

I mention them merely in order to point out that my associates and I have many interests other than those of the innocent person who has been wrongfully convicted.

Some few years ago we tried to clarify our objectives by listing ten

points which we felt would improve the administration of justice in the criminal field.

These points may be somewhat condensed as follows:

1. Preventing the conviction of innocent men and the escape of guilty men by better standards of proof so that jurors are not asked to rely upon inference and conjecture where proof should be available.

2. Bringing about a better understanding of police problems by the taxpayer so that police can be given more technical education and more economic security, relieving officers of both economic and political pressure; providing ample insurance for death in the line of duty, and seeing that officers are not called on to face 1958 living expenses on 1938 salaries. Only in this way can we attract competent personnel.

3. Letting competent medical examiners have the sole responsibility of determining cause of death in homicide cases.

4. Establishing boards which have the power to review *facts* in proper cases just as appellate courts review errors of *law*. These boards should have powers equivalent to those exercised by the British Home Office.

5. Putting power in the hands of the courts to see that the defense of each person accused of crime is adequately and competently conducted. This means furnishing impartial, competent experts for both sides, and seeing that competent, experienced, legal counsel represent the penniless defendant.

6. Adopting procedural changes which will eliminate technicalities by which the guilty escape, without at the same time weakening Constitutional safeguards.

7. Educating the public to a realization that the *professional* criminal is an avowed enemy of organized society, while the amateur criminal who errs because of weakness or environment is primarily a rehabilitative problem. Giving our professional penologists more co-operation, and paying more attention to their recommendations.

8. Promoting greater respect for our courts and American institutions. The contemptuous conduct of those attorneys who seek to belittle and disparage our courts is a breach of professional ethics and should be regarded as such. Every defendant is entitled to a vigorous, fearless defense, but attorneys supporting foreign ideology, who deliberately seek to undermine respect in our courts in order to try the courts instead of the defendants, should be subject to prompt, vigorous disciplinary action.

9. Bringing about greater respect for the organized legal profession. In addition to trying individual lawsuits, which are naturally sharply controversial, attorneys maintain organizations to safeguard the Constitutional rights of the people. This branch of legal activity is not properly appreciated. The organized Bar is entitled to greater public respect. Failure to respect the leadership of the Bar in matters in which it is expert is a dangerous tendency.

10. Bringing about a closer co-operation between the legal and medical professions so that attorneys can become more familiar with the function legal medicine can play in establishing proof, and so the medical profession can establish and enforce higher standards for the expert medical witness.

I mention these ten points because I don't want the impression to gain any more ground that our only goal is to try to aid innocent persons

who have been wrongfully convicted. Actually, it is only in an exceptional case that we can publicize what we consider to be a miscarriage of justice.

Thousands and thousands of applications pour in on us and have to be digested. From these thousands of applications there are many, many applications which appear to have considerable merit. We simply don't have the time, the facilities or the personnel to try to do anything in more than a very few striking and significant cases.

Quite obviously it is impossible for any group of private citizens contributing their time to take over the work which should be accomplished by full time boards or commissions in each of the various states.

We do feel that there must be some greater interest shown in post-conviction remedies on the part of our lawmakers if society is going to make its criminal justice completely respected and fully efficient.

It is extremely difficult to condense such a broad subject into the compass of an article. There is no simple or easy answer, but there is a great and pressing need for an answer of some sort.

Our criminal justice isn't the smooth-functioning, infallible machine which the people like to think it is. The ethical, dedicated district attorney can do a great deal to improve the administration of justice, and most of our prosecutors are keenly aware of their responsibilities along these lines and do the best they can.

However, here and there prosecutors who are interested primarily in building up a record of convictions undo much of the good accomplished by the conscientious prosecutors. Their reason for becoming prosecutors in the first place was primarily selfish. They intended to use the prosecutor's office as a political steppingstone and their real goal is to pile up a record to which they can "point with pride."

In the writer's opinion we are not going to achieve any really decisive victory in combating crime until we can upgrade our investigators and improve our investigating techniques (including some realistic adjustment of compensation so the best men can make a career out of law enforcement instead of being siphoned off into more profitable fields). We need to have post-conviction remedies which allow review of the factual mistakes of juries. And we need a better understanding of the problems of penology so that the 95% of prison inmates who will ultimately be released will be better men when they walk down the prison stairs than when they walked up. (Our present prison system has far too great a tendency to turn first offenders into repeaters and repeaters into hardened and embittered enemies of society.) It is time we took a good long look at the whole field of crime and law enforcement. And above all, it is

time that the bar as a whole realizes that the people as a whole hold the lawyers responsible for the administration of justice.

On many occasions after I have talked at bar association meetings I have had men come up to me, shake hands, and say, "I enjoyed your talk but I never tried a criminal case in my life and don't intend to, so I felt that what you said doesn't directly concern me. I specialize in corporate and probate work and don't know anything at all about what goes on in the criminal field. I do enjoy reading your stories, however, and was interested in meeting you."

Then the lawyer shakes hands again and moves on out of the room, completely satisfied that criminal justice doesn't concern him in the least.

The lawyer's position is entirely logical if he is willing to stand on his own two feet in a civic and legal vacuum. But if he deplores the fact that the bar is suffering as a whole from a deterioration in the field of public opinion, he had better wake up to the fact that the people as a whole hold lawyers as a whole responsible for the administration of justice in all its branches.

If we leave the field of criminal justice entirely in the hands of the prosecutors on one side, and on the other side in the hands of defense lawyers who are interested primarily in getting acquittal in individual cases we are going to find a steady and continuing deterioration in the field of public relations.

It is time the bar as a whole woke up to its responsibility to the people.

It is time that the more able members of the bar, who may have never tried a criminal case and who never expect to try a criminal case, devote some thought to what is happening in the whole broad field of criminal justice.