View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by The Catholic University of America Columbus School of Law

Catholic University Law Review

Volume 30
Issue 4 *Summer 1981*

Article 15

1981

Criminal Procedure

Joseph Longino

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation

Joseph Longino, *Criminal Procedure*, 30 Cath. U. L. Rev. 735 (1981).
Available at: https://scholarship.law.edu/lawreview/vol30/iss4/15

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

CRIMINAL PROCEDURE

I. JURISDICTION

A. Trial

In *In re United States v. Kember*,[1] appellants refused to testify when subpoenaed in a criminal trial. They challenged their contempt adjudication by a United States district court on the ground that the court lacked jurisdiction to proceed against the defendants in the criminal trial on charges arising under the District of Columbia Code. The defendants had originally been indicted on both federal and local offenses but were tried only on the local offenses under the terms of a British extradition order. Section 11-502(3) of the District of Columbia Code[2] empowers the United States District Court for the District of Columbia to try a local criminal offense if it "is joined in the same information or indictment with any Federal offense." In *Kember*, the United States Court of Appeals for the District of Columbia Circuit held that, as long as an indictment properly joins federal and local offenses under Rule 8 of the Federal Rules of Criminal Procedure,[3] Congress intended to give the federal court power to try the local offense regardless of any subsequent disposition of the federal offense. The defendants themselves could have challenged the power of the court to proceed and could have asserted that the exercise of that power constituted an abuse of discretion. However, the appellants, as witnesses, could challenge only the power of the court to proceed, since they were at a lesser risk than the defendants. Because the offenses charged alleged the same series of acts or transactions within the requirements of Rule 8(b),[4] the federal and local offenses were properly joined in the original indictment. The district court had the power to try the defendants, and no jurisdictional barrier blocked its demand for the witnesses' testimony.

In *Wilson v. United States*,[5] the District of Columbia Court of Appeals held that, for the purpose of resolving a post-conviction motion for the return of property, the United States represents the District of Columbia and its police department. The defendant had been indicted for the sale of

1. 109 DAILY WASH. L. REP. 1 (D.C. Cir. Nov. 24, 1980) (per curiam).
2. D.C. CODE § 11-502(3) (1973).
3. *See* United States v. Jackson, 562 F.2d 789, 793 (D.C. Cir. 1977).
4. *See* United States v. Hubbard, 474 F. Supp. 64, 87 (D.D.C. 1979).
5. 424 A.2d 130 (D.C. 1980).

a narcotic drug. He entered an *Alford* plea[6] to the lesser-included offense of narcotics possession and subsequently moved for the return of money seized from him at the time of his arrest. Because the United States did not file a timely opposition to the motion, the trial judge concluded that the United States had conceded. The judge refrained, however, from ordering the return of the money because he believed that the proper parties—the District of Columbia and its police—were not before the court. Remarking that the United States Court of Appeals for the District of Columbia Circuit had held that the district court has jurisdictional power and the duty to return property seized in connection with a criminal proceeding once the proceeding has ended and the property is no longer pertinent to a criminal prosecution,[7] the court reasoned that the same principle should apply to the superior court. The superior court has subject matter jurisdiction over such a motion under the property clerk statute,[8] and it has personal jurisdiction over the District of Columbia and its police, who are an arm of the United States in any criminal prosecution arising from a violation of the District of Columbia Code. The District police hold seized property as an agent for, and subject to the direction of, the trial court under whose authority the property was seized.[9]

B. Appellate

In *Brown v. United States*,[10] the District of Columbia Court of Appeals held that the 120-day period following sentencing, within which a motion for reconsideration of the sentence may be filed under Rule 35(a) of the Criminal Rules of the Superior Court of the District of Columbia, does not start to run again after denial of a motion to vacate, filed under section 23-110 of the District of Columbia Code.[11]. After being sentenced, the defendant filed a motion to vacate his sentence. The trial court's denial of the motion was affirmed on appeal, during which time the 120-day limitation period had run. The appellant nevertheless filed a motion for reconsideration of his sentence, noting that the rule permits reconsideration

6. North Carolina v. Alford, 400 U.S. 25 (1970) (there is no constitutional violation in accepting a plea from a defendant who claimed innocence where he desired to plead to a lesser offense to avoid the possibility of a substantially harsher penalty on a higher offense and where the trial court had received a summary of the state's case strongly indicating actual guilt).

7. United States v. Wilson, 540 F.2d 1100, 1103 (D.C. Cir. 1976).

8. D.C. CODE §§ 4-151 to -167 (1973).

9. *See* United States v. Wright, 610 F.2d 930, 938-39 (D.C. Cir. 1979); Goode v. Markley, 603 F.2d 973, 976 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1083 (1980).

10. 411 A.2d 631 (D.C. 1980) (per curiam).

11. D.C. CODE § 23-110 (1973).

within 120 days "after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal." He argued that the appellate court's affirmance of the trial court's rejection of his motion to vacate constituted such a mandate. The court rejected the appellant's argument, holding that collateral motions are not the direct appeal from "the judgment" contemplated by Rule 35(a). The court further observed that it had already held Rule 35(a) time periods to be jurisdictional,[12] and concluded that appellant's argument would obliterate the filing deadlines of Rule 35(a) since a motion to vacate a sentence, unlike a direct appeal, may be made at any time.

In *United States v. Jones*,[13] the government appealed the trial court's refusal to reconsider its order vacating the appellee's conviction and dismissing the indictment. The government "may appeal an order dismissing an indictment or information,"[14] but it must do so within ten days of the dismissal order.[15] The trial court's refusal to reconsider its initial order was not an order within the meaning of the statute. Thus, since the government failed to appeal the original dismissal order within ten days and since the requirement that an appellant file timely notice of appeal is mandatory and jurisdictional,[16] the District of Columbia Court of Appeals dismissed the appeal for lack of jurisdiction.

II. Pretrial Procedure

A. Search and Seizure

The District of Columbia Court of Appeals, in *Godfrey v. United States*,[17] refused to reverse the defendant's convictions for second-degree burglary and grand larceny on the ground that the police unconstitutionally seized the proceeds of the theft. The court held that, under the rule of *Rakas v. Illinois*,[18] Godfrey, a hotel housekeeping employee, had no legitimate expectation of privacy in stolen property that he had concealed in a plastic bag hanging from a maintenance cart that he left in the hallway upon entering a room. In *Godfrey*, the court overruled its 1975 decision in

12. McDaniels v. United States, 385 A.2d 180, 182 (D.C. 1978) (per curiam).

13. 423 A.2d 193 (D.C. 1980).

14. D.C. Code § 23-104(c) (1973).

15. D.C. Ct. App. R. 4 II(b)(1) and (2).

16. Brown v. United States, 379 A.2d 708, 709 (D.C. 1977) (per curiam); West v. United States, 346 A.2d 504, 506 (D.C. 1975).

17. 408 A.2d 1244 (D.C. 1979), *modified*, 414 A.2d 214 (D.C. 1980) (per curiam).

18. 439 U.S. 128 (1978) (mere occupancy of a searched automobile does not carry a legitimate expectation of privacy).

United States v. Boswell,[19] in which it had sustained the trial court's suppression of evidence obtained when a police officer inspected a blanket-covered television left in a hallway by the thief while he made a telephone call in an adjacent laundromat. In a concurring opinion, Judge Kelly argued for reaching the same result through traditional probable cause analysis. Hence, he found no need to overrule *Boswell*, finding no inconsistency between *Rakas* and *Boswell*.

In *Tucker v. United States*,[20] the District of Columbia Court of Appeals sustained the trial court's refusal to suppress, as the fruit of an illegal search, a gun used in obtaining a conviction for carrying a pistol without a license. The court stated that seizure of an object in plain view of an officer lawfully in a position to observe the object is a recognized exception to the fourth amendment's search warrant requirement.[21] The trial court properly found the gun to be in "plain view" even though the police officer saw it on the front seat of a car with the aid of a flashlight.[22]

The District of Columbia Court of Appeals reversed the trial court's order suppressing evidence seized by a private security guard, in *United States v. Lima*,[23] on the ground that the fourth amendment applies to intrusions upon a person's privacy by governmental officers but not, generally, to such intrusions by private parties. Citing *Wright v. United States*,[24] the court observed that searches and seizures by private security guards, such as the department store guard in this case, have traditionally been viewed as actions of private citizens not subject to fourth amendment proscriptions. The guard was neither licensed as a certified security officer nor commissioned as a special police officer, but even if she had been, her actions would not have been attributable to the government. Similarly, the codification of the common law power of citizen arrest in section 23-582(b) of the District of Columbia Code[25] does not make the private citizen a governmental agent for the purposes of making an arrest. Here, the government had no part in acquiring the contested evidence, which was seized by an employee acting for a private employer.

19. 347 A.2d 270 (D.C. 1975).

20. 421 A.2d 32 (D.C. 1980) (per curiam).

21. Crawford v. United States, 369 A.2d 595, 601 (D.C. 1977).

22. *Cf.* United States v. Lee, 274 U.S. 559, 563 (1927) (Coast Guard boatswain's observation of illegal liquor on deck of a suspect boat by use of searchlight is comparable to the use of a marine glass or field glasses and does not constitute a search).

23. 424 A.2d 113 (D.C. 1980) (rehearing en banc).

24. 224 A.2d 475, 476 (D.C. 1966).

25. D.C. CODE § 23-582(b) (1973).

B. Grand Jury

The District of Columbia Court of Appeals, in *In re Kelley*,[26] affirmed a trial court order enforcing a grand jury directive that the appellant appear in a lineup. The appellant was incorrect in contending that before the court can use its contempt power to enforce such a directive, the government must make a preliminary showing of a nexus between the person and the alleged crime. Because the grand jury acts as an impartial buffer between the government and the public while carrying out its investigative function, its proceedings enjoy a presumption of regularity.[27] Furthermore, under *United States v. Dionisio*[28] and *United States v. Mara*,[29] a grand jury subpoena is not a "seizure" under the fourth amendment, and once a person is before the grand jury, his fourth amendment rights are not violated by a directive compelling production of physical characteristics that he constantly exposes to the public.[30]

C. Extradition

In *Hagans v. United States*,[31] the District of Columbia Court of Appeals denied a new trial for a convicted robbery defendant who appealed on the ground that inculpatory statements he made to a police detective shortly after his arrest should have been suppressed. The defendant was arrested in Maryland pursuant to a warrant issued by the District of Columbia Superior Court. After being informed several times that he was entitled to an "extradition hearing" in Maryland to determine whether he could be returned to the District to face a felony murder charge, the defendant signed a written waiver of his right to such a hearing in the Forestville station of the Prince George's County Police Department. The defendant's reliance upon Maryland law, which requires that such a waiver be executed in the presence of a magistrate, was misplaced, for any person arrested on a superior court warrant outside the District is treated, for purposes of removal to the District, as if the warrant had been issued by the United States District Court for the District of Columbia. Therefore, the defendant's removal was governed not by Maryland law but by Rule 40(a) of the Federal Rules

26. 108 DAILY WASH. L. REP. 425 (D.C. Feb. 8, 1980).

27. United States v. Moultrie, 340 A.2d 828, 831 (D.C. 1975).

28. 410 U.S. 1 (1973) (no preliminary showing of reasonableness necessary to enforce a grand jury subpoena of voice exemplars).

29. 410 U.S. 19 (1973) (no preliminary showing of reasonableness necessary to enforce a grand jury subpoena of handwriting exemplars).

30. *Cf. In re* Melvin, 550 F.2d 674 (1st Cir. 1977) (because one has no more reasonable expectation of privacy in his face than in his voice, being forced to stand in a lineup does not constitute an unconstitutional "seizure").

31. 408 A.2d 965 (D.C. 1979).

of Criminal Procedure, which does not require that an arrestee waive his right to a removal hearing in the presence of a magistrate.[32]

III. Trial Procedure

A. *Statute of Limitations*

In *United States v. Brown*,[33] the government appealed the trial court's dismissal of the appellee's indictment for rape while armed and assault with intent to kill while armed. The lower court dismissed on the ground that the indictment was returned over five years after the offenses had occurred and was, therefore, barred by the statute of limitations. The government argued that the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970[34] rendered the federal statute of limitations[35] inapplicable to felonies prosecuted in the superior court because Congress failed to include a criminal statute of limitations. The District of Columbia Court of Appeals rejected the government's argument and upheld the trial court's dismissal. It reasoned that, by section 49-301 of the District of Columbia Code,[36] Congress chose to make its general laws applicable to the District of Columbia unless those laws were "locally inapplicable" or inconsistent with some other provision of the District of Columbia Code. The court further reasoned that, because Congress has embraced a "policy of repose" in the prosecution of crimes,[37] it is improbable that Congress could have intended, without explicitly so stating, that the passage of the Court Reform Act operate to abolish time limitations on criminal prosecutions in the District of Columbia courts.

B. *Collateral Estoppel*

In *United States v. Lima*,[38] the District of Columbia Court of Appeals denied the defendant's motion to dismiss on the ground of collateral estoppel. The defendant argued that her ownership of an allegedly stolen blouse was conclusively determined when, in a separate civil action, a jury awarded her damages for its conversion by a department store security officer. Since no appeal was taken from the judgment and since lack of ownership is an essential element of the offense of petit larceny, the defendant argued that the case against her was moot. She reasoned that the

32. *See* Fed. R. Crim. P. 5(a) and (c).
33. 422 A.2d 1281 (D.C. 1980).
34. Pub. L. No. 91-358, 84 Stat. 473 (1970).
35. *See* 18 U.S.C. § 3282.
36. D.C. Code § 49-301 (1973).
37. Bridges v. United States, 346 U.S. 209, 215-16 (1953).
38. 424 A.2d 113 (D.C. 1980) (rehearing en banc).

government was precluded from proving its charge by further litigation of the issue of ownership. Citing *Parklane Hosiery Co. v. Shore*[39] for the proposition that due process requires that a judgment not bind a litigant who was not a party or a privy with the opportunity to be heard, the court held that the government was not collaterally estopped from criminally prosecuting the defendant. The government was not a party to the civil action and, thus, had neither a full opportunity nor an incentive to have the issue of ownership determined on its merits.

C. Double Jeopardy

In *Powers v. United States*,[40] the District of Columbia Court of Appeals affirmed the trial court's denial of the defendant's motion to dismiss on double jeopardy grounds and remanded the case for trial. The first trial, on a charge of operating a disorderly house, had ended in a mistrial. The trial judge's illness had interrupted the jury's consideration of the testimony of the prosecution's key witness for nearly a week. The risk of jury contamination because of the recess, and time pressure on the jury to short-cut deliberation and expedite decision because it was close to the Christmas holiday and the end of the jurors' scheduled service, contributed to the declaration of mistrial. Notwithstanding the available alternative procedure of certifying a substitute judge under Rule 25(a) of the Criminal Rules of the Superior Court of the District of Columbia, the possibility of juror bias arising from the improper testimony given by the prosecution's witness justified the acting chief judge's declaration of a mistrial under the standard enunciated in *Arizona v. Washington*.[41]

D. Effective Assistance of Counsel

In *Johnson v. United States*,[42] the District of Columbia Court of Appeals reversed the trial court's denial of the defendant's motion for a new trial on the ground of ineffective assistance of counsel. The defendant was convicted of enticing and taking indecent liberties with a minor. His attorney failed to investigate a medical report and to secure and present the testimony of its author. The author was a physician who would have contradicted testimony by the complainant that the defendant penetrated her

39. 439 U.S. 322, 327 n.7 (1979).
40. 412 A.2d 1205 (D.C. 1980).
41. 434 U.S. 497, 516-17 (1978) ("manifest necessity" standard for declaring mistrial and discharging jury satisfied where "trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding").
42. 413 A.2d 499 (D.C. 1980).

vagina with his finger. Under *Angarano v. United States*,[43] a defendant's sixth amendment right to the effective assistance of counsel is violated if there has been gross incompetence of counsel that has blotted out the essence of a substantial defense. Trial counsel's conduct was grossly incompetent, and it could not be cured by his perfunctory issuance of an ineffective forthwith subpoena or by his arguing to the jury a negative inference from the government's failure to present medical testimony. The court broke new ground in holding that a substantial defense is blotted out by the loss of highly credible evidence that would have impeached the credibility of a key government witness.[44]

E. Prosecutorial Vindictiveness

The District of Columbia Court of Appeals formulated a framework for analyzing claims of prosecutorial vindictiveness in *United States v. Schiller*.[45] The trial court had dismissed in its entirety a twenty-six count consolidated indictment charging all seventeen defendants on all twenty-six counts. The defendants had sought the consolidation, eight of them having originally been indicted in a thirteen-count indictment, while the other nine had been indicted in a separate nine-count indictment. Concluding that *North Carolina v. Pearce*[46] and *Blackledge v. Perry*[47] stand for the principle that due process of law requires the elimination of even the appearance of vindictiveness from the operation of the legal process, the court announced a two-step approach for effectuating that principle. First, the trial court, upon motion, should review the accumulation of circumstances of record and decide whether the allegations as to a prosecutor's actions raise a realistic likelihood of prosecutorial vindictiveness. If they do, the government has the burden of answering or explaining the allegations. In the second step of the court's inquiry, the court should assess the adequacy of such a rebuttal by reference to several factors, including but not limited to (1) the nature of the case, (2) the status of the case, and (3) the nature of the right involved, the vindictiveness alleged, and the nature of the harm involved. In reversing the trial court's dismissal of the reindictment on the facts of the case before it, the court emphasized that its

43. 312 A.2d 295 (D.C. 1973).

44. *Cf.* Tillery v. United States, 419 A.2d 970 (D.C. 1980) (reversing first-degree murder conviction because gross incompetence of appellant's trial counsel in the preparation, investigation, and presentation of an insanity defense effectively blotted out a substantial defense, thereby depriving appellant of his sixth amendment right to effective assistance of counsel).

45. 424 A.2d 51 (D.C. 1980).

46. 395 U.S. 711 (1969).

47. 417 U.S. 21 (1974). *See also* Wynn v. United States, 386 A.2d 695 (D.C. 1978).

announced methodology was a flexible one that should be applied with care to each case in making a necessarily ad hoc factual determination.

F. Jury

In *Bowyer v. United States*,[48] the defendant, convicted of rape while armed, armed robbery, and first-degree murder, sought reversal on the ground that alternate jurors were retained after the jury retired to deliberate, in violation of Rule 24(c) of the Criminal Rules of the District of Columbia Superior Court. Since it had not previously construed this section of Rule 24(c), the District of Columbia Court of Appeals surveyed rulings in other jurisdictions on the consequences of a trial court's failure to follow the substantially similar command of Rule 24(c) of the Federal Rules of Criminal Procedure. Generally, other courts have concluded that, while the trial court's failure to discharge the alternate jurors at the time the jury retires is error, it is not reversible error unless there is some showing of prejudice.[49] Such prejudice exists where alternate jurors have been present during full jury deliberations.[50] In *Bowyer*, the alternate jurors, although retained, did not retire with the jury, nor was the case discussed at a lunch shared by the alternates and the jurors before the jury had reached its decision. Finding no prejudice to the defendant, the court refused to reverse the convictions. But it cautioned trial judges to comply scrupulously with Rule 24(c) in the future to avoid even the appearance of impropriety.

In *Wilson v. United States*,[51] the District of Columbia Court of Appeals affirmed the conviction for possession of narcotics of a defendant who sought reversal on the ground that the jury's verdict was coerced. In reviewing the validity of a jury's verdict, a court must look to the totality of circumstances to determine whether it was coerced.[52] The judge learned from a note sent to him shortly after deliberation began that the jury had not reached agreement. He urged the jurors to continue their efforts after lunch. Advised in a second note that the jurors had still not reached agreement and that a juror had attempted to leave the jury room, the judge reminded the juror of her duties. In addition, over the objection of the

48. 422 A.2d 973 (D.C. 1980).

49. United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973); United States v. Nash, 414 F.2d 234, 236 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969); United States v. Hayutin, 398 F.2d 944, 950 (2d Cir.), *cert. denied*, 398 U.S. 961 (1968).

50. United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978) (relying on United States v. Virginia Erection Corp., 335 F.2d 868, 872-73 (4th Cir. 1964)); United States v. Beasley, 464 F.2d 468 (10th Cir. 1972).

51. 424 A.2d 130 (D.C. 1980).

52. Jenkins v. United States, 380 U.S. 445, 446 (1965) (per curiam); Nelson v. United States, 378 A.2d 657, 661 (D.C. 1977).

defendant, the judge gave the entire jury a *Winters* instruction.[53] Late in the afternoon, the judge received a final note from the troublesome juror that both disclosed the division of the jury and suggested that she be removed or be given another day to decide. The judge excused the jury until the next morning. At that time it returned a guilty verdict. Because the *Winters* instruction was given well before the disclosure of the jury's numerical division and the judge had merely excused the jury without further instructions until the following day, the court of appeals held that the judge's decision to allow the jury to continue its deliberations was not an abuse of discretion that coerced its verdict.

IV. Appellate Procedure

A. Appointment of Counsel

In *Corley v. United States*,[54] the District of Columbia Court of Appeals held that the District of Columbia Criminal Justice Act[55] affords the assistance of counsel in criminal cases to anyone in the District of Columbia who is financially unable to obtain adequate representation in preparing a petition for a writ of certiorari to the Supreme Court. The petitioner's conviction for armed rape and armed kidnapping had been affirmed on appeal, and his petition for a rehearing *en banc* had been denied. Arguing that his appellate counsel informed him neither that his conviction had been affirmed nor that he had a right to petition for a writ of certiorari, petitioner himself subsequently submitted a petition for a writ of certiorari. The Supreme Court granted it, vacated the judgment, and remanded the case to the District of Columbia Court of Appeals to determine whether the District of Columbia Criminal Justice Act confers a statutory right to the assistance of counsel in filing a petition for a writ of certiorari. The Act provides that a "person for whom counsel is appointed shall be represented at every stage of the proceeding from his initial appearance before the Court through appeals."[56] Reasoning that the opportunity for Supreme Court review is an integral part of the total appellate process in a criminal case, the court held that the assistance of compensated counsel in the preparation of a petition for a writ of certiorari is within the intent and coverage of the statutory language.

53. *See* Winters v. United States, 317 A.2d 530, 534 (D.C. 1974) (en banc) (modifying the *Allen* charge, Allen v. United States, 164 U.S. 492 (1896)).
54. 416 A.2d 713 (D.C. 1980).
55. D.C. Code §§ 11-2601 to -2609 (Supp. V 1978).
56. *Id.* § 11-2603.

B. Delay of Retrial

In *United States v. Alston*,[57] the District of Columbia Court of Appeals held that, to the extent a constitutional deprivation can be premised on appellate delay, the proper evaluative framework is due process, not speedy trial. After more than thirty-three months on appeal, the court of appeals reversed the defendant's conviction for the misdemeanor of carrying a pistol without a license and remanded the case for a new trial. The trial court then dismissed the indictment on the ground that the inordinately long appeal period had deprived the defendant of his sixth amendment right to a speedy trial. The government appealed. Rejecting the proposition that there has been no "trial" within the meaning of the sixth amendment unless and until a defendant has received a fair trial, the court of appeals held that the sixth amendment is inapplicable to post-conviction appellate delay. However, if such a delay would prejudice the defendant upon retrial after reversal of a conviction, the fifth amendment right to due process might require dismissal of the indictment. Before trial, the focus is upon the sixth amendment right to a speedy trial; during appeal, the focus is upon the fifth amendment right to due process. A retrial violates due process if the appellant has suffered severe prejudice arising from governmental responsibility for delay during the appeal period. Finding no such prejudice in the case before it, the court reversed and remanded for reinstatement of the indictment.

V. PROBATION

In *Carradine v. United States*,[58] the District of Columbia Court of Appeals reversed the trial court that had revoked appellant's probation after he voluntarily appeared before the court to request more intensive psychotherapy than what he was receiving as an express condition of probation. The appellant had pleaded guilty to the charge of rape. The court had suspended execution of his sentence and placed him in a closely supervised five-year probation program, subject to periodic court review and extension as warranted. The *Morrissey-Gagnon-Douglas* trilogy[59] established that a probationer's fifth amendment right to due process is violated if the court revokes his probation without first determining that he is in "violation" of the express conditions of probation or of a condition so clearly implied that a probationer, in fairness, can be said to have notice of it. The

57. 412 A.2d 351 (D.C. 1980).

58. 420 A.2d 1385 (D.C. 1980).

59. Douglas v. Buder, 412 U.S. 430 (1973) (per curiam); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

appellant did not violate an express condition of his probation, and the maintenance or achievement of a particular level of mental stability was not an implied condition of his probation. The appellant's voluntary appearance in court seeking more intensive therapy did not constitute a violation of an implied condition that he get better; rather, it clearly showed his extra willingness to comply with the spirit, as well as the letter, of his probation. In reversing the trial court, however, the appellate court did not foreclose court-approved voluntary hospitalization or court-imposed modification of probation as warranted by the appellant's condition.

Joseph Longino