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Criminal Law—Right to Speedy Trial

Richard Brocklebank

George M. Gibson

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epileptic seizure. Where evidence supported every element of the crime, corroborative privileged statements by the defendant's doctor before the grand jury did not require dismissal of the indictment. The case differed from *People v. Decina*⁸⁷ in that privileged testimony was not introduced at the trial.

Right To Counsel

The Code of Criminal Procedure not only provides that a defendant has a right to counsel, but also that he must be afforded a reasonable opportunity to obtain such counsel.⁸⁸

In *People v. Marincic*,⁸⁹ the Court held, reversing the City Court of Watertown and the County Court,⁹⁰ that a conviction of petit larceny could not be upheld where the lower court informed the defendant of her rights under section 699 and then, without waiting for any reply, immediately asked the defendant how she pleaded, and accepted a plea of guilty.

Section 699 specifically provides that "a magistrate must allow the defendant a reasonable time to send for counsel, and adjourn the proceedings for that purpose."⁹¹ This section is not satisfied if the defendant is merely informed of his right to counsel.⁹² He must be afforded a real opportunity to obtain such counsel.⁹³

The Law Revision Report of 1940, which resulted in the enactment of section 699, makes it clear that the defendant must be given a reasonable opportunity to request counsel before being told to plead.⁹⁴ Since the lower court did not comply with either the spirit or the language of the statute, the Court of Appeals properly reversed the conviction.

Right To Speedy Trial

During the last term of the Court of Appeals, two problems concerning the defendant's waiver of his right to a speedy trial were adjudicated.

In *People v. White*,⁹⁵ although four years had elapsed from the filing of the indictment to the time of trial, counsel for the defense not only acquiesced in

87. See note 71 *supra*.

88. N.Y. CODE CRIM. PROC. §699.

89. 2 N.Y. 2d 181, 158 N.Y.S.2d 569 (1957).

90. 152 N.Y.S. 2d 382 (County Ct. 1956).

91. N.Y. CODE CRIM. PROC. §699(2).

92. *People v. Pahner*, 296 N.Y. 324, 73 N.E.2d 533 (1947).

93. *People v. McLaughlin*, 291 N.Y. 480, 53 N.E. 2d 356 (1943).

94. REPORT OF LAW REVISION COMMISSION 1940, p. 95.

95. 2 N.Y.2d 220, 159 N.Y.S.2d 168 (1957).

adjournments and delays but also failed to raise the point until the appeal in the Appellate Division. The Court held that such conduct constituted a waiver. A defendant cannot participate in a trial and save his objection of undue delay to challenge an adverse verdict.

In *People v. Chirieleison*,⁹⁶ the defendant, after completion of a prison sentence, was held for trial on a five-year old charge. After denial of his motion to dismiss the indictment and the dismissal of his appeal by the Appellate Division upon the ground that the order was intermediate and not appealable,⁹⁷ the defendant pleaded guilty to a lesser crime. Holding that the indictment should have been dismissed when the motion was first made, the Court said that the defendant's subsequent plea of guilty may not be deemed a waiver.

The weight of precedent gives credence to the decisions reached in the above instances. In *People v. Perry*,⁹⁸ defendant's attorney consented to postponement of the trial. The court in holding this conduct to be a waiver of the defendant's right to a speedy trial said, as did the court in *Beavers v. Hanbert*,⁹⁹ that the right of a speedy trial is necessarily relative and may be waived; it depends upon the circumstances. In *People ex rel Ianik v. Daly*,¹ the defendant's acquiescence in postponement of the trial was held to be a waiver. In *People v. Russo*,² the defendant sought to have the conviction vacated alleging that he had been deprived of his right to a speedy trial. The court in denying the defendant's motion replied that the defendant's failure to raise the objection at the time of trial constituted a waiver.

While it is well settled that an indicted person has a right to a speedy trial,³ he is not affirmatively obliged to seek such a trial.⁴ If the prosecution delays in procuring a trial, the defendant may raise the objection that he has not been granted a speedy trial and move for the dismissal of the indictment.⁵

Public Trial

In interpreting statutory provisions the spirit and purpose of the statute and the objectives sought to be accomplished by the legislature must be borne in

96. 3 N.Y.2d 170, 164 N.Y.S.2d 726 (1957).

97. N.Y. CODE CRIM. PROC. §517; In re Montgomery, 126 App. Div. 72, 110 N.Y. Supp. 793 (1st Dep't 1908), *appeal dismissed*, 193 N.Y. 659, 87 N.E. 1123 (1908); *People v. Reed*, 276 N.Y. 5, 11 N.E.2d 330 (1937).

98. 196 Misc. 922, 96 N.Y.S.2d 517 (County Ct. 1949).

99. 198 U.S. 77 (1905).

1. 30 N.Y. Crim. Rep. 47, 142 N.Y. Supp. 297 (Sup. Ct. 1913).

2. 3 Misc. 2d 916, 155 N.Y.S.2d 765 (County Ct. 1956).

3. N.Y. CODE CRIM. PROC. §8.

4. *People v. Prosser*, 309 N.Y. 353, 130 N.E.2d 891 (1955); *Petition of Provoo*, 17 F.R.D. 183 (1955), *aff'd on motion*, 350 U.S. 857; 6 BUFFALO L. REV. 53 (1956).

5. N.Y. CODE CRIM. PROC. §668.

mind.⁶ But the ordinary meaning of the words used, and the grammatical construction should be adhered to unless it is at variance with that legislative intent.⁷

The Court in *New York Post Corp. v. Leibowitz*,⁸ by statutory interpretation, found that mandamus was an appropriate remedy to obtain a copy of the charge to the jury, on the grounds that the judge had a duty to make them available upon request. This duty was found by holding that a charge to the jury was a "decision" within the meaning of the constitutional mandate requiring that judicial opinions or decisions be free for publication.⁹ The right of the plaintiff newspaper to the charge to the jury was found in the Public Officers Law¹⁰ and the Judiciary Law.¹¹ The former requires a person having custody of records or papers in a public office to make transcripts of them upon request and payment of a fee. The latter dictates that a court stenographer must write out the minutes of a proceeding if requested by the judge of the court or by a person legally entitled thereto. The Court found that the notes of the stenographer were records, and that the stenographer was a person in public office within the meaning of the Public Officers Law. From this the Court concluded that anyone upon request and payment of a fee is entitled to a copy of the stenographer's notes, and that the stenographer, under the Judiciary Law, is required to write out the notes of the proceeding requested. The Court felt that any other interpretation of these statutes would result in a conflict with the constitutional requirement of free publication of judicial decisions.

There is no doubt that one of the basic freedoms of our society is a public trial, nor is there any doubt that complete press coverage insures that a trial will be public.¹² That a newspaper be entitled, as a matter of right, to a charge to the jury does not seem to raise any serious objections, but the reasons the Court advances as a basis for this right are not entirely persuasive. The Court seems to hinge this right upon the conclusion that a charge to the jury is a "decision" under the Constitution. The cases they cite hold that a charge to the jury may become the law of the case if not objected to by either party or if affirmed upon appeal.¹³ But the law of a case is not necessarily a decision, rather it is usually an instruc-

6. *People v. Ryan*, 274 N.Y. 149, 8 N.E.2d 313 (1937); *River Brand Rice Mills v. Latrobe Brewing Co.*, 305 N.Y. 36, 110 N.E.2d 545 (1953).

7. *United States v. Montgomery Ward*, 150 F.2d 369 (4th Cir. 1945); *Surace v. Sanna*, 248 N.Y. 18, 161 N.E. 315 (1928).

8. 2 N.Y.2d 677, 163 N.Y.S.2d 409 (1957).

9. N.Y. CONST. art. VI, §22, states:

. . . all laws and judicial opinions or decisions shall nevertheless be free for publication by any person.

10. N.Y. PUBLIC OFFICERS LAW §66.

11. N.Y. JUDICIARY LAW §301.

12. *Snyder v. Massachusetts*, 291 U.S. 97 (1934); Note, 6 TEMP. L.Q. 381 (1932).

13. *Lenard v. Home Owners Loan Corp.*, 297 N.Y. 103, 75 N.E.2d 261 (1947); *Buchin v. Long Is. Ry.*, 286 N.Y. 146, 36 N.E.2d 88 (1941).

tion, a jury charge, or a ruling made on a former appeal,¹⁴ and its effect is limited to a court of co-ordinate jurisdiction.¹⁵ Nor does the law of the case necessarily involve reaching a conclusion, as does a decision.¹⁶ Even if it is assumed that a charge to the jury is a decision there is no authority given for the contention that the Constitution intended to apply to decisions not filed in the office of the clerk of the court. Therefore it seems questionable whether mandamus should lie on the grounds that the judge had a duty to make the charge available.

The Court also seems to be reaching too far in calling the stenographers' notes records in a public office. The statutes provide a means for having the notes written out and filed with the clerk of the court;¹⁷ until this is done they can hardly be termed as records.¹⁸ Further to say that the stenographers' notes are records and thereby requiring the stenographer to write them out upon anyone's request seems to defeat the purpose of section 301 of the Judiciary Law, since that section requires the court stenographer to write out the notes of a proceeding only if the judge of the court so directs, or if required to do so by a person entitled by law to a copy. Section 300 of the Judiciary Law defines persons entitled to a transcript as being the party, his attorney, the judge, and in criminal cases, the prosecuting attorney. The interpretation that the Court placed upon these statutes seems to go beyond their ordinary meaning, and the intent of the legislature. The "right" given to the plaintiff to obtain a copy of the minutes of a proceeding, thought not objectionable in itself, lacks adequate definition. Is the "right" only available to one who seeks it for publication purposes, or is it available to anyone for any purpose? Is the "right" to be available in cases where the court excludes the general public for purposes of preserving the public decency? If such a right is to be created the power to create it lies in the legislature, where it can be adequately defined and controlled, and not in the courts.¹⁹

Trial—Right Of Defendant To Be Free Of Shackles

Section 10 of the Code of Criminal Procedure²⁰ codifies the common law²¹

14. *Mann v. Simpson & Co.*, 286 N.Y. 450, 36 N.E.2d 658 (1941); *Douglas v. Manfree Realty Corp.*, 263 App. Div. 998, 33 N.Y.S.2d 423 (2d Dep't 1942); *Walker Memorial Baptist Church v. Saunders*, 173 Misc. 455, 17 N.Y.S.2d 842 (Sup. Ct. 1940).

15. *Walker v. Gerli*, 257 App. Div. 249, 12 N.Y.S.2d 942 (1st Dep't 1939).

16. *Lambros v. Young*, 145 F.2d 341 (D.C. Cir. 1944).

17. N.Y. JUDICIARY LAW §13.

18. *People v. Clurman*, 290 N.Y. 242, 48 N.E.2d 505 (1943); *American District Telegraph Co. v. Woodbury*, 127 App. Div. 455, 112 N.Y. Supp. 165 (3d Dep't 1908); *Goldsmith v. Hubbard*, 183 Misc. 889, 52 N.Y.S.2d 871 (Sup. Ct. 1945).

19. *International News Service v. Associated Press*, 248 U.S. 215 (1918); *Crowley v. Lewis*, 239 N.Y. 264, 146 N.E. 374 (1925); *Briggs v. Partridge*, 64 N.Y. 357 (1876).

20. N.Y. CODE CRIM. PROC. §10 provides:

. . . [N]or can a person charged with a crime be subject, before conviction, to any more restraint than is necessary for his detention to answer the charge.

21. COMMISSIONERS ON PRACTICE AND PLEADINGS, REPORT 10 (1850).

in directing that a person charged with a crime shall be free from shackles during his trial except to the extent deemed necessary by the trial court.

In *People v. Mendola*,²² the Court of Appeals unanimously reversed the Appellate Division²³ and held that the trial court had not committed an abuse of discretion, as a matter of law, in permitting the defendant to be handcuffed during his trial for a previous escape from prison. Defendant was admittedly desperate and had said that he would have escaped even if he "had one day to go." The Court pointed out that it might have been a better practice for the trial court to have heard testimony bearing on the necessity of the handcuffs, but held that in any event the record contained sufficient evidence to justify that court's action in refusing to order the handcuffs removed.

The case was remanded to the Appellate Division to give them an opportunity to exercise their discretion under section 527 of the Code of Criminal Procedure.²⁴ On subsequent determination²⁵ it was held that a new trial was necessary in the interest of justice. It would seem that much of the procedural difficulty involved in this type of case could be eliminated if the appellate court, in the first instance, would, whenever possible, rest its reversal both on the law and on the ground that it was necessary in the interest of justice, as was done in *People v. Strewl*.²⁶

Recantation

Recantation, as applied within the scope of the law of perjury, is the renunciation or withdrawal of a prior statement made before a tribunal.²⁷ It has been recognized for centuries as a defense to the crime of perjury.²⁸

People v. Ezaugi,²⁹ sets forth the criterion which the defendant must meet to apply this defense. The defendant in the instant case had intentionally testified falsely before a grand jury. After having left the witness stand, he discovered that the truth regarding his testimony was, and had been known all during the proceeding to the officials conducting the grand jury hearing. The defendant

22. 2 N.Y.2d 270, 159 N.Y.S.2d 473 (1957).

23. 1 A.D.2d 413, 151 N.Y.S.2d 278 (4th Dep't 1956).

24. N.Y. CODE CRIM. PROC. §527 provides:

. . . And the appellate court may order a new trial if it be satisfied that . . . justice requires a new trial . . .

25. 3 A.D.2d 811, 160 N.Y.S.2d 232 (4th Dep't 1957).

26. 246 App. Div. 400, 287 N.Y. Supp. 585 (3rd Dep't 1936), *appeal dismissed* 271 N.Y. 607, 3 N.E.2d 207 (1936).

27. *Llanos-Senarillos v. United States*, 177 F.2d 164 (9th Cir. 1949).

28. *King v. Jones*, 1 Peake's Rep. 51 (N.P. 1791); *King v. Carr*, 1 Sid. 418 (K. B. 1669).

29. 2 N.Y.2d 439, 161 N.Y.S.2d 75 (1957).

reappeared before the grand jury on the next day, repudiated his previous testimony, and related the events as they actually transpired.

The Court of Appeals, upon weighing all the facts in this case, concluded that such a recantation was but a calculated effort to escape the consequences of perjury prosecution, and refused to apply the recantation doctrine to cover this type of situation. The Court established the criterion that a recantation to be an effective defense against perjury, must be prompt, committed before harm is done to the inquiry, and before the recanter has reason to believe the truth has been discovered. The defendant failed to meet the last requirement, and the majority of the Court affirmed his conviction.

The dissent stated that a grand jury investigation, has for its sole purpose, the discovery of the truth, and every inducement should be made to the witness to aid in its elicitation.³⁰ The inducement would be destroyed if a witness could not correct a false statement except by running the risk of a perjury prosecution.

This decision does not, as the dissenters hold, almost eliminate the practical usage of the recantation rule. The defendant, by his actions, made unavailable the recantation defense. His recanting was not prompt, and although obviously lying, he refused to change his testimony during this initial appearance on the witness stand, while given every opportunity to do so. In *People v. Gillette*,³¹ upon which the dissent strongly relies, the alleged incorrect statements were immediately corrected in the succeeding interrogation. This defense has also been upheld when then erroneous statements were made on direct examination and corrected on cross examination.³² The majority in affirmance has sensibly refused to stretch the recantation defense to cover a defendant in cases where he waits too long in presenting his recantation to the court.

Sentence—Multiple Punishment

In view of N.Y. Penal Law section 1938,³³ it has frequently been held that a court may not impose consecutive sentences where the same act is the basis for convictions obtained on a multiple count indictment.³⁴ However, in *People*

30. *People v. Gillette*, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908).

31. Note 30 *supra*.

32. *People v. Brill*, 100 Misc. 92, 165 N.Y. Supp. 65 (Sup. Ct. 1917); *People v. Glass*, 191 App. Div. 483, 181 N.Y. Supp. 547 (2d Dep't 1920).

33. N.Y. PENAL LAW §1938 provides:

An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of these provisions, but not under more than one; and a conviction or acquittal under any one bars a prosecution for the same act or omission under any other provision.

34. *People v. Repola*, 280 App. Div. 735, 117 N.Y.S.2d 283 (1st Dep't 1952), *aff'd without opinion* 305 N.Y. 740, 113 N.E.2d 42 (1953).

ex rel. Mauer v. Jackson,³⁵ where the defendant pleaded guilty to the offenses of attempted robbery in the first degree and assault in the first degree, the Court of Appeals held that concurrent sentences could be imposed.

The Court rested their decision on dual grounds. It was first held that robbery, and assault with the intent to kill are separate acts which may command separate punishments, thus rendering section 1938 inapplicable. Here it was pointed out that although a simple assault merges with the act of robbery,³⁶ an assault with the intent to kill is a separate and distinct act since such an intent is not a necessary element of the crime of robbery.³⁷

Secondly, and most notably, the Court held that concurrent sentences do not impose a double punishment on the defendant.³⁸ The Court felt that such sentences merge into a single punishment measured by the sentence for the highest grade offense. It was pointed out that section 1938 condemns only multiple punishment and is silent as to multiple convictions and concurrent sentences.

Defendant contended that concurrent sentences effected a double punishment since his chances for parole would be injured.³⁹ The Court rejected this, saying that even without concurrent sentences the record of multiple convictions would appear on defendant's record.

The practical effect of the above decision is to restrict the operation of section 1938 to cases involving consecutive rather than concurrent sentences. It is also noteworthy that this interpretation helps to insure against the defendant going unpunished if an error is found in the conviction for the highest degree crime.

Appeal And Error

Section 542 of the Code of Criminal Procedure states, "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

35. 2 N.Y.2d 259, 159 N.Y.S.2d 203 (1957).

36. *Zovick v. Eaton*, 259 App. Div. 585, 20 N.Y.S.2d 477 (3rd Dep't 1940); *Richardson v. Morhaus*, 182 Misc. 299, 43 N.Y.S.2d 221 (Sup. Ct. 1943).

37. N.Y. PENAL LAW §2124 provides:

Robbery in first degree. An unlawful taking or compulsion, if accomplished by force or . . . when committed by a person:

1. Being armed with a dangerous weapon

38. This is an apparent reversal of the Court's former position in affirming lower court cases holding contra: *People v. Nelson*, 309 N.Y. 231, 128 N.E.2d 391 (1955); *People v. Goggin*, 281 N.Y. 611, 22 N.E.2d 174 (1939).

39. This argument has been accepted in other jurisdictions. *People v. Craig*, 17 Cal.2d 453, 110 P.2d 403 (1941).

Under this section the question of substantial rights is not the abstract question of guilt or innocence; a guilty man being in any event entitled to a fair trial.⁴⁰ Error affects substantial rights when it can be said that it tended to influence the verdict.⁴¹

In the cases of *People v. Ochs*⁴² and *People v. Mendes*,⁴³ the Court reversed convictions and ordered new trials on the grounds that in each case the substantial rights of the defendants had been affected. In both cases the Court felt that although the evidence was sufficient to find the defendants guilty, they had been deprived of a fair trial. In the former case the Court held that it was improper for the trial judge to include in the charge to the jury his opinion on the credibility of the defendant as an interested witness. In the latter case the Court held that it was improper for the trial judge to question defendant's witnesses in such a manner as to indicate a communicable disbelief of their testimony.

In the case of *People v. LaMarca*,⁴⁴ the Court affirmed a conviction on the grounds that the errors alleged were technical and not reversible errors. The Court held that although it may be error for a trial judge to fail to answer a question propounded by the jury,⁴⁵ after a full and proper charge has been given, that error will not be reversible unless there is a serious prejudice to the defendant's rights in the failure or refusal to answer the question. The Court also held that it was not error for the trial judge to fail to charge as to lesser degrees of homicide, since such a charge need not be given in a felony murder prosecution unless called for by the evidence.

The purpose of section 542 of the Code of Criminal Procedure is to do away with reversals upon technical errors which really had not affected the result,⁴⁶ or infringed upon the fundamental right to a fair and impartial trial.⁴⁷ Not only error, but harm to the defendant, must be shown to justify the reversal of a judgment of conviction.⁴⁸ Where the trial judge makes direct comments which are unfair and prejudicial to the defendant, the defendant is clearly not given a fair trial.⁴⁹ Whether a defendant is deprived of a fair trial because of

40. *People v. Sobieskoda*, 235 N.Y. 411, 139 N.E. 558 (1923).

41. *People v. Gerdvane*, 210 N.Y. 184, 104 N.E. 129 (1914).

42. 3 N.Y.2d 54, 163 N.Y.S.2d 671 (1957).

43. 3 N.Y.2d 120, 164 N.Y.S.2d 401 (1957).

44. 3 N.Y.2d 452, 165 N.Y.S.2d 753 (1957).

45. N.Y. CODE CRIM. PROC. §427; *People v. Gonzales*, 293 N.Y. 259, 56 N.E.2d 574 (1944).

46. *People v. Cummins*, 209 N.Y. 283, 103 N.E. 169 (1913); *People v. Bailey*, 215 N.Y. 711, 109 N.E. 1086 (1915).

47. *People v. Becker*, 210 N.Y. 274, 104 N.E. 396 (1914); *People v. De Martino*, 252 App. Div. 476, 299 N.Y.Supp. 781 (2d Dep't 1938).

48. *People v. Youns*, 151 N.Y. 210, 45 N.E. 460 (1896); *People v. Patrick*, 182 N.Y. 131, 74 N.E. 843 (1905).

49. *People v. Corey*, 157 N.Y. 332, 51 N.E. 1024 (1898); *People v. Scaringi*, 241 App. Div. 883, 271 N.Y. Supp. 1079 (2d Dep't 1934).

questions asked by a trial court is a closer issue, as indicated by the dissent in *People v. Mendes*. It is often a necessary and proper function of a trial judge to take part in the examination of a witness to elicit significant facts, to clarify issues or to facilitate the orderly progress of the trial.⁵⁰ But the trial judge must refrain from asking questions in such a way as to disclose his opinion on the merits or indicating a doubt on his part as to credibility of witnesses.⁵¹ Under section 427 of the Code of Criminal Procedure a trial judge may not decline to answer jury's request for further instructions, but not every failure to answer jury's questions constitutes reversible error.⁵² It is only where the court fails to give information requested on a vital point, or where the failure to answer does substantial harm to the defendant, that an appellate court may not disregard the error.⁵³

Coram Nobis

The writ of error coram nobis will be granted upon a showing that a conviction was obtained by coercion, fraud, misrepresentation, or in any situation where the defendant has been convicted without a preservation of his constitutional rights, and this does not appear on the record.⁵⁴ It is also a proper remedy to void a conviction where it is established that the defendant had been mentally incompetent at the time of his arraignment.⁵⁵ In *People v. Sullivan*,⁵⁶ *People v. Smyth*,⁵⁷ *People v. Silverman*,⁵⁸ and *People v. Shapiro*,⁵⁹ the Court of Appeals added both clarity and confusion to the problems surrounding the ancient writ.

In *People v. Sullivan*,⁶⁰ defendant contended that the failure of the trial clerk to ask him, after his plea of guilty, whether he had legal cause to show why judgment should not be rendered, was such a denial of due process as to permit use of the writ of error coram nobis.⁶¹ The Court denied this claim, and declared that

50. *People v. Ohanian*, 245 N.Y. 227, 157 N.E. 94 (1927.)

51. *People v. Mulvey*, 1 A.D.2d 541, 151 N.Y.S.2d 587 (4th Dep't 1956); *People v. Pecoraro*, 177 App. Div. 803, 164 N.Y. Supp. 1058 (2d Dep't 1917); *People v. Kachadourian*, 116 N.Y.S.2d 486 (County Ct. 1952).

52. *People v. Gezzo*, 307 N.Y. 385, 121 N.E.2d 380 (1954); *People v. Lay*, 279 N.Y. 737, 18 N.E.2d 686 (1938).

53. *People v. Gonzales*, 293 N.Y. 259, 56 N.E.2d 574 (1944); *People v. Shapiro*, 285 N.Y. 581, 33 N.E.2d 250 (1941); *People v. Wilkie*, 286 App. Div. 835, 142 N.Y.S.2d 271 (1st Dep't 1955).

54. *People v. Sadness*, 300 N.Y. 69, 89 N.E.2d 188 (1949). See 1 BUFFALO L. REV. 272 (1952) for a good discussion of the history of the writ of coram nobis in New York.

55. *People v. Boehm*, 309 N.Y. 362, 368, 130 N.E.2d 897, 900 (1955).

56. 3 N.Y.2d 196, 165 N.Y.S.2d 6 (1957).

57. 3 N.Y.2d 184, 165 N.Y.S.2d 737 (1957).

58. 3 N.Y.2d 200, 165 N.Y.S.2d 11 (1957).

59. 3 N.Y.2d 203, 165 N.Y.S.2d 14 (1957).

60. See note 56, *supra*.

61. Defendant relied upon section 480 of the CODE OF CRIMINAL PROCEDURE which declares:

When the defendant appears for judgment, he must be asked by the clerk whether he has any legal cause to show why judgment should not be pronounced.

where only "the validity of the sentence is in question, the defendant is limited"⁶² to other forms of appeal. In reaching its result, it stated that, before entertaining a motion for a writ, it was first necessary to determine the *nature* of the underlying error, such as conviction through coercion, or fraud.⁶³ Second, and more important, it viewed the writ itself as an emergency measure, a tool of the court used in the exercise of discretion, when *all* other avenues of judicial relief were closed to a defendant. To be successful, the defendant must satisfy the two criteria formulated by the Court. Since the defendant in *People v. Smyth*⁶⁴ could not produce evidence of his mental incompetence at the time of arraignment, he could not demand a writ by demonstrating that the nature of the error allowed for the use of the writ.

Both of these standards were applied in *People v. Shapiro*,⁶⁵ where the Court affirmed an order denying a motion to vacate judgment through an attempted use of the writ, since errors of fact were apparent on the face of the record, *and* another means of appeal was available, although not taken by counsel.⁶⁶ The result in the *People v. Silverman* case was not so satisfying. There the contention of the defendant that the trial court improperly assigned counsel to him, and refused to grant counsel of his own choosing, was held to be error of such a nature as to entitle him to a hearing on his motion.⁶⁷ Although the Court examined the nature of the underlying error, and found for the defendant, it did not satisfy the other criterion set forth in the *Sullivan* case; that is, the unavailability of *any* other avenue of judicial relief by way of appeal, since the Court found the error to be obvious and a regular appeal would lie.⁶⁸ Because a post-conviction remedy was available, the writ should have been denied, even though the nature of the error allowed for a use of the writ of error coram nobis.

If the Court in the *Sullivan* decision meant that a defendant need only meet *one* of the criteria set forth, then the decisions are consistent. But, there was great emphasis placed upon the extraordinary quality, the emergency use, of coram nobis, and the need to meet that criterion along with the other relating to the nature of the mistake. Even a desire to treat each case according to its own equities can not satisfactorily explain the misapplication or non-application of the two standards established in the *Sullivan* case. A contrary result in the case of *People v. Silverman* would have established much sounder footing for future case problems

62. *People v. Sullivan*, 3 N.Y.2d 196, 198, 165 N.Y.S.2d 6, 9 (1957).

63. *Id.* at 198, 165 N.Y.S.2 at 9. For a discussion of the types of cases where relief has been afforded, and which provide the basis for the narrow use of the writ, see 1 BUFFALO L. REV. 274 (1952), and cases cited therein.

64. 3 N.Y.2d at 186, 165 N.Y.S.2d at 739.

65. See note 59 *supra*.

66. *People v. Shapiro*, 3 N.Y.2d 203, 204, 165 N.Y.S.2d 14, 15 (1957).

67. *People v. Silverman*, 3 N.Y.2d 200, 165 N.Y.S.2d 11 (1957).

68. *Id.* at 201, 165 N.Y.S.2d at 13.

involving coram nobis where both the nature of the writ and its emergency application are brought into dispute.

Parole Violation

The Correction Law, section 219, provides that if any prisoner, who has been paroled from a state prison commits and is convicted of a crime in another state, which if committed in this state would be a felony, he shall upon his return to this state be confined in prison to serve the remaining portion of the maximum sentence from which he had been paroled.⁶⁹ The Court held (4-3) in *People ex rel. Watkins v. Murphy*,⁷⁰ a habeas corpus proceeding, that section 218 of the Correction Law,⁷¹ which provides that a parole board should declare a prisoner to be delinquent whenever there is reasonable cause to believe he has violated his parole, does not terminate the prisoner's parole so as to immunize him from the penalty imposed by section 219.

The defendant, a parolee from a New York prison, had been declared delinquent from such parole in accordance with section 218. A month later he was arrested, convicted and sentenced to a term in a Texas prison for the commission of a crime, which all of the Court agreed would be a felony if committed in this state. Upon being released from the Texas prison, he was returned to New York to serve the remainder of the maximum sentence from which he had originally been paroled.

When a prisoner is paroled, he is in fact being permitted to serve part of his sentence outside of prison.⁷² As of the time he is declared delinquent from this parole however, his sentence stops and the "time owed shall date from such delinquency."⁷³

The dissenting judges upheld the defendant's contention that he did not commit the crime while he was on parole for he had previously been declared delinquent thereby terminating his parole. As soon as the parole is declared delinquent, he assumes the status of an escaped convict.⁷⁴ Therefore, since he is no longer lawfully out of prison, he cannot be said to be a charge of the Board of Parole;⁷⁵ nor can he be said to be on parole within the meaning of section 219 if he is no longer on parole within the meaning of section 218.

The majority however views the parolee as a prisoner on parole and until

69. N.Y. CORRECTION LAW §219.

70. 3 N.Y.2d 163, 164 N.Y.S.2d 719 (1957).

71. N.Y. CORRECTION LAW §218.

72. *People ex rel. Rainone v. Murphy*, 1 N.Y.2d 367, 153 N.Y.S.2d 21 (1956).

73. N.Y. CORRECTION LAW §218.

74. *Hutchings v. Mallon*, 245 N.Y. 521, 157 N.E. 842 (1927).

75. *Dote v. Martin*, 294 N.Y. 330, 62 N.E.2d 217 (1945).