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United States Supreme Court Review of Tenth Circuit Decisions

Christine O'Connor

UNITED STATES SUPREME COURT REVIEW OF TENTH CIRCUIT DECISIONS

I. *UNITED STATES V. CRONIC*: SUPREME COURT REJECTS TENTH CIRCUIT'S INFERENTIAL APPROACH TO DECIDING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Introduction

In *United States v. Cronic*,[1] the Supreme Court unanimously reversed a Tenth Circuit decision[2] to vacate the defendant's conviction because he did not have the assistance of counsel guaranteed by the sixth amendment.[3] The Supreme Court held that counsel are to be presumed effective.[4] Absent extraordinary circumstances, a defendant may overcome this presumption only by pointing out specific errors made by counsel which undermined the adversarial process and prejudiced the right of the defendant to receive a fair trial.[5]

A. *Facts*

Defendant Cronic and two co-defendants were indicted on thirteen counts of mail fraud and unlawful use of a fictitious name.[6] The indictment charged Cronic and his co-defendants with "kiting" checks worth over $9,400,000 between banks in Tampa, Florida and Norman, Oklahoma. The checks were drawn on the accounts of Skyproof Manufacturing, Inc., a Florida firm which the indictment alleged was a front for the check-kiting operation.[7]

Cronic and co-defendant Cummings had both retained Levine, a private attorney, for trial.[8] The attorney withdrew as Cronic's counsel shortly before the trial date, due to a conflict of interest between Cronic and Cummings.[9] The trial court appointed new counsel for Cronic. Cronic stated that he had spoken with the appointed counsel and had found him helpful, but objected to the appointment because the new counsel specialized in real estate, had never had a jury trial, and had

1. 104 S. Ct. 2039 (1984). Justice Stevens delivered the opinion for the Court. Justice Marshall concurred in the judgment without opinion.

2. 675 F.2d 1126 (10th Cir. 1982).

3. The sixth amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed on the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

4. 104 S. Ct. at 2046 (citing Michel v. New York, 350 U.S. 91, 100-01 (1955)).

5. *Id.* at 2051.

6. 675 F.2d at 1127. The indictments were based on 18 U.S.C. § 1341 (1982) (mail fraud) and 18 U.S.C. § 1342 (1982) (unlawful use of fictitious name).

7. 104 S. Ct. at 2042 n.4.

8. Levine had represented Cronic, Skyproof and the co-defendant prior to trial. 675 F.2d at 1129.

9. *Id.*

previously handled only one federal criminal case.[10] The trial court replied that if Cronic wished to select his own lawyer, he could hire one, but that his appointed counsel was very bright and had been selected pursuant to normal screening procedures.[11]

New counsel requested a continuance of at least thirty days in order to properly prepare for the trial. Cronic's former counsel, Levine, supported this request, telling the judge that the new attorney would need at least thirty days to digest the enormous amount of government documentation gathered in the case.[12] The trial court agreed to continue the case, but only for a period of twenty-five days.[13]

The government plea-bargained with Cronic's two co-defendants and presented their testimony at trial in order to etablish that Cronic had conceived and engineered the entire check-kiting operation. The government's evidence at trial included the testimony of seventeen witnesses from four states and the government had access to thousands of documents collected over a four-year investigatory period.[14]

Counsel for Cronic put on no defense, but through cross-examination established that Skyproof was not a sham, but was actually an operating venture. Cross-examination also established the lack of written evidence demonstrating that Cronic had any control over Skyproof or had personally participated in withdrawals or deposits in the bank accounts.[15] Cronic did not testify because the trial court ruled that a prior conviction could be used to impeach his testimony.[16] At the conclusion

10. Brief for Appellee at 7, Cronic v. United States, 675 F.2d 1126 (10th Cir. 1982). Appointed counsel told Cronic that his prior federal criminal practice was limited to "involvement" in one other case. Counsel also told the jury that it was his first trial. 675 F.2d at 1129 n.2.

11. The trial judge responded to Cronic's objections to the appointment in the following manner:

> If you are getting around to saying you want to select your own lawyer, no way. You have got a good lawyer, and if you want your own, you go hire your own. This man was appointed under our system. We select qualified lawyers, he's qualified or I wouldn't have appointed him. He's very bright, and he was appointed from an alphabetical list all of whom are screened and we just don't do it any other way in this district.

Brief for Appellee at 23.

12. Levine stated that he was prepared to proceed on behalf of Cummings but that government documentation was "a foot and a half high, if not two feet high," that it construed "hundreds and hundreds of checks and thousands of entries," and that new counsel hadn't even seen it. Trial Record of Motion to Withdraw and New Appointment of Counsel, June 19, 1980 at 18, lines 7-9. Levine continued, "I would respectfully submit to your Honor that if counsel were to devote all of his working days, he might be able to be ready in 30 days, might be if he were to devote all of his time just to this case." Trial Record of Motion to Withdraw and New Appointment of Counsel, June 19, 1980 at 18, lines 15-18.

13. 104 S. Ct. at 2041-42; 675 F.2d at 1128.

14. 104 S. Ct. at 2041; 675 F.2d at 1128-29.

15. 104 S. Ct. at 2042-43.

16. *Id.* at 2042. Before the court questioned Cronic to establish whether he understood that he had the right to testify, the following exchange occurred:

> *The Court*: This young man, Colston, I think has done a tremendous job representing you.
>
> *Cronic*: I agree, certainly agree.
>
> *The Court*: You acted at one time that you weren't happy, but that was earlier when you hadn't seen him in action.
>
> *Cronic*: I am certainly glad you overruled me.

of the four-day jury trial, Cronic was convicted on eleven of the thirteen counts. He was later sentenced to 25 years imprisonment and fined $11,000.[17]

B. *The Tenth Circuit Opinion*

Cronic appealed on the grounds that he was denied effective assistance of counsel at trial, and that his sentence was based on erroneous information.[18] Cronic contended that his counsel was completely inexperienced in criminal law, that he had never tried a case before a jury, that he was thrust into a situation that was complex both factually and legally, that twenty-five days was not enough time to prepare for trial, that prior to trial Cronic met only once with his counsel, and that his counsel rarely raised objections during the trial and failed to tender any jury instructions to the court.[19] Cronic argued that all these factors, taken as a whole, constituted a denial of effective assistance of counsel.[20]

On appeal to the Tenth Circuit, the government cited *Dyer v. Crisp*[21] as establishing in the Tenth Circuit that "[t]he Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney."[22] The government's contention was that Cronic had not demonstrated that his counsel failed to meet this standard.[23]

The court of appeals stated that *United States v. Golub*[24] and *United States v. King*,[25] decided after *Dyer*, established that "when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel."[26] In *Golub*, the defendant appealed his mail fraud conviction, claiming he was denied adequate assistance of counsel at trial because his trial attorney had been unskilled in criminal law and had not had adequate time to prepare the defense.[27]

Trial Record of Proceedings on July 14, 15, 16, 17, 1980 at 568.

In his motion for new trial, however, Cronic explained his prior praise of counsel through an affidavit of a psychologist who indicated he had advised respondent to praise trial counsel in order to ameliorate the lawyer's apparent lack of self-confidence. 104 S. Ct. at 2043 n.6.

17. 675 F.2d at 1128.

18. The court of appeals decided the case on the effective assistance issue, and declared the erroneous information issue moot. 675 F.2d at 1128.

19. Reply Brief for Appellant at 5.

20. Reply Brief for Appellant at 3.

21. 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980).

22. 613 F.2d at 278. In order to prove ineffective assistance of counsel under the standard used by the Tenth Circuit prior to the *Dyer* decision, a defendant was required to show that the trial was a farce, a mockery of justice, shocking to the conscience of the court, or that representation was in bad faith, a sham or pretense, or without adequate time for conferences and preparation. *See* Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir. 1977), *cert. denied*, 434 U.S. 845 (1977); Johnson v. United States, 485 F.2d 240 (10th Cir. 1973).

23. 675 F.2d at 1128.

24. 638 F.2d 185, 187 (10th Cir. 1980).

25. 664 F.2d 1171, 1172-73 (10th Cir. 1981).

26. 675 F.2d at 1128.

27. 638 F.2d at 188.

Citing *Wolfs v. Britton*,[28] the *Golub* court applied the following five factors to determine whether inadequacy of representation could be inferred from the surrounding circumstances without proof of specific prejudice at trial: (1) the time allowed to investigate and prepare; (2) counsel's experience; (3) the severity of the offenses charged; (4) the complexity of the defense; and (5) counsel's accessibility to witnesses.[29] According to the *Golub* court, if application of these five criteria indicated that counsel simply had not had sufficient time to prepare for trial, ineffective assistance of counsel may be inferred by the court.

In *King*, the defendant was indicted for income tax evasion following a three-year investigation.[30] The defendant's attorney withdrew, and new counsel had twenty-seven days to prepare a defense for a eight-day trial involving approximately 200 witnesses and 5,000 exhibits.[31] After his conviction, King appealed on the grounds that he had ineffective assistance of counsel at trial due to the lack of time given his counsel for trial preparation.[32] The Tenth Circuit relied on the factors adopted in *Golub* to find a sixth amendment violation without looking to any specific errors made by counsel at trial.[33]

The Tenth Circuit in *Cronic* enunciated the *Golub-King* factors, and in applying them, compared Cronic's case to *King*.[34] The only material difference the court found between *King* and *Cronic* was that *King* was more complex.[35] The court noted, however, that "Cronic's case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on," and that if Cronic's case were simpler than King's, "this advantage was offset by his appointed counsel's total or near-total lack of relevant experience."[36] The court concluded that while an attorney's lack of relevant experience does not inevitably give rise to ineffective assistance of counsel, the *Golub-King* criteria required that Cronic's conviction be re-

28. 509 F.2d 304 (8th Cir. 1975).

29. 638 F.2d at 189. The Tenth Circuit found that although Golub's counsel had performed adequately at trial, he had not had adequate time to prepare in light of the complexity of the case, the geographical dispersion of witnesses and his unfamiliarity with criminal law. *Id.* at 188-89. Golub's convictions were reversed and a new trial ordered, but the government filed a motion for rehearing and tendered an affidavit from the trial court stating Golub had received above average assistance of counsel. Granting the motion, the Tenth Circuit stayed the motion for new trial and ordered an evidentiary hearing on whether the performance of Golub's counsel was inadequate, and whether he had been given adequate time to prepare. The trial judge found the performance adequate and that 'no prejudice resulted from the short preparation time. The Tenth Circuit reviewed these findings in United States v. Golub, 694 F.2d 207 (10th Cir. 1982), and applied the same five factors to determine whether the trial preparation time met the constitutional requirements. The Tenth Circuit held that Golub failed to show how he had been prejudiced by the short trial preparation time and that the facts of a particular case must demonstrate either that the defendant was actually prejudiced by the amount of time allowed for preparation or that there was a substantial threat of prejudice in order to show a sixth amendment violation. 694 F.2d at 215.

30. 664 F.2d at 1172.

31. *Id.*

32. *Id.*

33. *Id.* at 1173.

34. *Cronic*, 675 F.2d at 1129.

35. *Id.*

36. *Id.*

versed without finding any specific errors by counsel at trial.[37]

C. *The Supreme Court Decision*

The Supreme Court granted certiorari to decide whether the court of appeals had correctly interpreted the sixth amendment.[38] The court analyzed the sixth amendment by reviewing previous Supreme Court decisions addressing the right to counsel. The Court reaffirmed the importance of the right to effective counsel,[39] but held that absent extraordinary circumstances, defendants must point to specific errors committed by counsel at trial in order to show ineffective assistance.[40]

Citing *McMann v. Richardson*,[41] the Court stated "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel,"[42] noting that in previous decisions it has held that the Constitution guarantees "adequate legal assistance,"[43] "a fair trial, and a competent attorney,"[44] and "counsel acting in the role of advocate."[45] According to the Court, the purpose of the constitutional guarantee of effective assistance of counsel is to assure partisan advocacy on both sides of a case, and "to assure fairness in the adversarial criminal process."[46] The Court concluded that "[t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[47]

Although the burden is usually on the accused to demonstrate that specific errors of counsel undermined the reliability of the trial process,[48] the Court noted that there may be circumstances of such magnitude that no specific showing of prejudice is required.[49] The Court cited *Powell v. Alabama*[50] as a case where the actual performance of counsel at trial was not examined because under the circumstances, "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair."[51] In *Powell*, the defendants, indicted for capital offenses, were represented by a lawyer appointed on the first day of trial who had no chance to prepare the

37. *Id.*
38. 104 S. Ct. at 2042.
39. *Id.* at 2043-44.
40. *Id.* at 2046, 2051. *See also id.* at 2047 n.26.
41. 397 U.S. 759 (1970).
42. 104 S. Ct. at 2044 (quoting McMann v. Richardson, 397 U.S. 749, 771 n.14 (1970)).
43. 104 S. Ct. at 2044 (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).
44. 104 S. Ct. at 2045 (quoting Engle v. Isaac, 456 U.S. 107, 134 (1982)).
45. 104 S. Ct. at 2045 (quoting Anders v. California, 386 U.S. 738, 743 (1967)).
46. 104 S. Ct. at 2045 (quoting United States v. Morrison, 449 U.S. 361, 364 (1980)).
47. 104 S. Ct. at 2045.
48. *Id.* at 2046. *See also* United States v. McDonald, 723 F.2d 1288, 1297 (7th Cir. 1983); Mathews v. United States, 578 F.2d 1245, 1246 (7th Cir. 1975); United States *ex rel*, Korval v. Attorney General, 550 F. Supp. 447, 454 (N.D. Ill. 1982).
49. 104 S. Ct. at 2047.
50. 287 U.S. 45 (1932).
51. 104 S. Ct. at 2048.

case or familiarize himself with local procedure.[52]

In *Cronic*, the Supreme Court found that while the *Golub-King* factors would be relevant to an evaluation of a lawyer's effectiveness in a particular case, they did not rebut the presumption that Cronic's counsel was effective.[53] According to the Court, the *Golub-King* test could require a reversal "even if a lawyer's actual performance was flawless."[54] The Court stated that neither the amount of time the government spent investigating the case, nor the number of documents government agents reviewed during that investigation were necessarily relevant to the question of whether a competent lawyer could prepare to defend the case in twenty-five days.[55] The Court noted that Cronic's only bona fide defense was lack of intent, and that an intent defense was "entirely different" from the government's burden of presenting admissible evidence which would prove guilt beyond a reasonable doubt.[56]

Although the government had reviewed thousands of documents and records,[57] the Court reasoned that the government's organization of these documents and records "simplified the work of defense counsel in identifying and understanding the basic character of the defendant's scheme."[58] The Court also noted that none of the defense lawyers retained by Cronic had suggested that there was any reason to challenge the authenticity, relevance or reliability of the government's evidence.[59]

The Court also stated that while defense counsel's inexperience might aid in an evaluation of his actual performance, it did not justify a presumption of ineffectiveness absent an individual evaluation.[60] Likewise, the Court found that while the other factors applied by the court of appeals may be helpful in evaluating a particular attorney's performance, they do not identify circumstances which alone or in combination make it unlikely that Cronic received effective assistance of counsel.[61]

D. *Conclusion*

In *Cronic v. United States*, the Supreme Court flatly rejected the Tenth Circuit's inferential approach to determining whether the defendant's right to counsel had been violated. A court may no longer apply the five factors of *Golub* and *King* and infer from those circumstances that the defendant had not been provided with effective assistance of counsel.

What, then, is the standard? What does *Cronic* tell us about the sixth amendment guarantee to assistance of counsel? The Court repeated past pronouncements on the subject: the accused is entitled to a

52. *Id.* at 2047.
53. *Id.* at 2049.
54. *Id.* at 2043.
55. *Id.* at 2049.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 2050 n.34.
60. *Id.* at 2050.
61. *Id.* at 2050-51.

"reasonably competent attorney."[62] The Court also stated that the right to effective assistance of counsel is the right of the accused to require the prosecution's case to survive the "crucible of meaningful adversarial testing."[63] If an actual breakdown of the adversarial process occurs during the trial, the accused will effectively be denied his fundamental sixth amendment right. Generally, there will be no basis for finding such a breakdown unless the accused can show how specific errors of counsel prejudiced his right to a fair trial and undermined the reliability of the guilty verdict.

Although it rejected the inferential approach of the Tenth Circuit, the Court stated that circumstances may exist in a case which are so likely to prejudice the defendant's right to a fair trial that specific errors at trial need not be shown. Such circumstances include complete denial of counsel at a critical stage of the trial, or a complete failure on the part of defense counsel to subject the prosecution's case to meaningful adversarial testing.

An example of the latter situation arose in *Davis v. Alaska*,[64] in which the accused was denied the right of effective cross-examination.[65] The Court also stated that the sixth amendment right to counsel guarantee would be violated if surrounding circumstances were to indicate the likelihood that *any lawyer* could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into actual conduct at trial.[66] The Court cited *Powell v. Alabama*[67] as a case in which "[c]ircumstances of that magnitude" were found.[68] As mentioned previously, the facts and circumstances of *Powell* can only be considered extreme: The defendants' lawyer was appointed the day of trial in a highly publicized capital case. Only in the extraordinary case, therefore, may ineffective assistance be presumed from the surrounding circumstances.

Cronic stands for the proposition that the five *Golub-King* factors do not constitute the proper surrounding circumstances for presuming ineffective assistance of counsel. The five criteria applied by the Tenth Circuit in *Cronic* simply "do not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary."[69]

The effect of the *Cronic* decision will undoubtedly be widespread and detrimental to criminal defendants. Most certainly, incidences of new trials granted on the grounds of effective assistance of counsel will decrease. The convicted defendant will be placed in a position where she will have to demonstrate specific errors by counsel at trial or convince the court that the surrounding circumstances are of such magnitude that ineffective assistance of counsel may be presumed. In the wake

62. *Cronic*, 104 S. Ct. at 2044 (citing McMann v. Richardson, 397 U.S. at 770).
63. 104 S. Ct. at 2045.
64. 415 U.S. 308 (1974).
65. *Id.* at 318.
66. 104 S. Ct. at 2047.
67. 287 U.S. 45 (1932).
68. 104 S. Ct. at 2047.
69. *Id.* at 2051.

of *Cronic*, establishing circumstances of the proper magnitude may be an extremely difficult feat.

Cronic opens the door for trial judges to appoint inexperienced counsel a few days before trial—constitutionally. Such appointments are now almost sure to pass muster on review. Although the Court suggested in *Cronic* that it is "entirely possible that . . . courts should exercise their supervisory powers to take greater precaution to ensure that counsel . . . are qualified,"[70] no constitutional mandate exists.

Although the potential abuse by trial judges is frightening, there is also a possibility that trial courts will feel a sense of greater judicial responsibility after *Cronic's* green light. Only by making sure that counsel for the accused is experienced in pertinent areas of the law and has sufficient time to prepare for trial may judges preserve the vitality of the sixth amendment guarantee to assistance of counsel. The burden also falls upon the defendant's appellate counsel and the appellate courts to ensure that the sixth amendment guarantee to assistance of counsel retains its lifeblood. Although defendants and counsel on appeal may no longer argue that ineffective assistance of counsel can be inferred from surrounding circumstances, the *Golub-King* factors are still relevant when evaluating counsel's actual performance[71] and may be cited in order to buttress claims of specific errors by counsel at trial. Particularly in the close case, as where an appellate court is confronted with facts less compelling than *Powell* but more extreme than *Cronic*, persuasive recitation of the *Golub-King* factors may still convince the court that defense counsel was ineffective.[72]

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Arnold C. Macdonald

70. *Id.* at 2050 n.38.

71. Throughout the *Cronic* opinion, the Court states that although no inference of ineffective assistance of counsel can be drawn from applying the *Golub-King* factors, these factors may be relevant when evaluating the attorney's actual performance at trial. *See Cronic*, 104 S. Ct. at 2049, 2050 and 2051.

72. The authors gratefully acknowledge the assistance of Robbin Lego in preparing this article.

II. *McDONOUGH POWER EQUIPMENT, INC. V. GREENWOOD*: SUPREME COURT LIMITS RIGHT TO NEW TRIAL WHEN JUROR FAILS TO DISCLOSE DURING VOIR DIRE

In *McDonough Power Equipment, Inc. v. Greenwood*,[1] the Supreme Court reversed the Tenth Circuit Court of Appeals' decision[2] which had granted a new trial to the respondent Greenwoods because their right to peremptory challenge was prejudiced when the jury foreman failed to answer a voir dire question. The Supreme Court held that in order to obtain a new trial when a juror gives an incorrect response to a question on voir dire, a party must show that the question was material, the response was dishonest, and that a correct response would have provided a valid basis for a challenge for cause.[3]

A. *Background*

The case arose out of a products liability action in the District Court for the District of Kansas. Plaintiffs, Billy Greenwood and his parents, sued McDonough Power Equipment for damages sustained by Billy when his foot struck the blades of a riding lawn mower manufactured by McDonough.[4] During voir dire, plaintiffs' counsel asked prospective jurors the following question:

> Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain and suffering, that is you or any members of your immediate family?[5]

Ronald Payton, who later became the jury foreman, did not respond to this question.[6]

After a three week trial, the jury found for the defendant.[7] Shortly thereafter, the Greenwoods filed a motion with the district court for permission to approach the jury, contending that the jury foreman, Mr. Payton, failed to disclose that his son had been injured in an accident.[8] The district court denied the motion.[9] The following day, the Greenwoods filed a second motion for permission to approach the jury, and attached an affidavit from John Greenwood, asserting that as a Navy recruiter, Mr. Greenwood had reviewed the enlistment application of Payton's

1. 104 S. Ct. 845 (1984).
2. 687 F.2d 338 (10th Cir. 1982).
3. 104 S. Ct. at 850.
4. *Id.* at 846. A comprehensive factual recounting can be found in the Tenth Circuit's decision on remand, Greenwood v. McDonough Power Equipment Co., 731 F.2d 690, 691 (10th Cir. 1984).
5. 104 S. Ct. at 847 (citing Appellate's Brief at 19).
6. *Id.* The question had been asked of an entire panel.
7. *Id.*
8. *Id.*
9. *Id.*

son, in which Payton's son stated he had been injured when a truck tire exploded.[10] The trial court granted the second motion in part, allowing the plaintiffs to approach Payton for a limited telephone inquiry.[11]

The same day the motion was partially granted, but before the telephone conference call with Payton, the plaintiffs filed a motion for new trial alleging 18 grounds for error.[12] One of these grounds was the trial court's denial of respondents' motion to approach the jury.[13] The trial court denied the motion.[14] The telephone conference call to Payton was not made a part of the record, nor were the results of the call reported to the District Court.[15] The parties' appellate briefs contained differing versions of the telephone interview.[16]

B. *The Tenth Circuit Decision*

The Tenth Circuit reversed the case and ordered a new trial.[17] In doing so, it relied on the standard enunciated in *Photostat v. Ball*.[18] In *Photostat*, an action arising out of an automobile accident, prospective jurors misunderstood a voir dire question and unintentionally withheld information about their involvement in automobile accidents and their resultant claims.[19] The Tenth Circuit held that the failure of a juror to fully and truthfully answer questions propounded to the panel is reversible error upon a showing of probable bias of the juror and consequential prejudice to the unsuccessful litigant.[20]

In *McDonough*, the Tenth Circuit found the unrevealed information met the "sufficient cogency and significance" test of *Photostat*, indicating the probable bias of Payton by suggesting his particularly narrow concept of what constitutes a serious injury.[21] As the telephone call was not part of the record, the court of appeals discovered the nature of the withheld information from reading the different versions of the conference call in the appellate briefs.[22] The court accepted as true that Pay-

10. 687 F.2d at 341.

11. *Id.* The district court noted that it was "not overly impressed with the significance of this particular situation." 104 S. Ct. at 847 (citing Appellate's Brief at 89).

12. 104 S. Ct. at 847.

13. *Id.*

14. *Id.* The trial court found "the matter was fairly and thoroughly tried and that the jury's verdict was a just one, well supported by the evidence."

15. *Id.*

16. 687 F.2d at 341.

17. *Id.* at 343.

18. 338 F.2d 783 (10th Cir. 1964).

19. *Id.* at 784-85.

20. *Id.* at 787. The information withheld was of "sufficient cogency and significance" that the court believed counsel was entitled to know of it when he exercised his peremptory challenges.

21. 687 F.2d at 342-43.

22. *Id.* at 341. The Greenwoods' brief stated that Payton said "it did not make any difference whether his son had received a broken leg as the result of an exploding tire," that "having accidents are a part of life" and that "all his children have been involved in accidents." McDonough's brief stated that Payton "did not regard (his son's injury) as a 'severe' injury and as he understood the question (the injury) did not result in any disability or prolonged pain and suffering, and that as far as Mr. Payton is concerned, he answered counsel's question honestly, and correctly, by remaining silent." *Id.*

ton's concealment of the information was unintentional, but stated that good faith was irrelevant.[23] The proper standard is whether the average prospective juror would have disclosed the information, and whether a correct answer would have been evidence of probable bias on the part of the juror.[24]

C. *The Supreme Court Decision*

The Supreme Court granted *certiorari*[25] to correct the legal standard applied by the Tenth Circuit. Initially, however, the Court noted that the Tenth Circuit erred in addressing the merits, as the court of appeals should have remanded to the district court for a hearing on the new trial motion.[26]

Judicial economy was the paramount concern in the Court's reversal of the Tenth Circuit.[27] The Court, per Justice Rehnquist, indicated that the Tenth Circuit decision on the merits was outmoded in that it harkened to an era "when all trial error was presumed prejudicial"[28] and reviewing courts were considered "citadels of technicality".[29] The Court reasoned that the financial and temporal costs of trials to parties and jurors in light of the ever increasing caseload made it impossible to provide flawless trials for litigants.[30]

The Supreme Court assessed the Tenth Circuit's ruling in light of the federal harmless error statute.[31] Although this statute applies to appellate courts, it mirrors the harmless error principle of Rule 61 of the Federal Rules of Civil Procedure.[32] Both the statute and rule reflect a movement away from automatic reversal for error, and direct trial courts

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23. *Id.* at 343 (citing *Photostat*, 338 F.2d at 785).

24. *Id.*; 104 S. Ct. at 848 n.3.

25. 103 S. Ct. 3109 (1983).

26. 104 S. Ct. at 848 n.3. The Court stated: "in cases in which a party is asserting a ground for a new trial, the normal procedure is to remand such issues to the district court for resolution."

The court of appeals had considered the versions of the telephone call to Payton in the parties' appellate briefs to decide that the unrevealed information met the *Photostat* "significance and cogency" test. The Supreme Court found this action by the court of appeals highly unorthodox, stating "(a)ppellate tribunals are poor substitutes for trial courts for developing a record or resolving factual controversies." *Id.*

27. The Court concluded that "[t]o invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Id.* at 850. The standard applied by the Tenth Circuit was "contrary to the practical necessities of judicial management reflected in Rule 61 and § 2111." *Id.*

28. *Id.* at 848.

29. 104 S. Ct. at 848 (citing Kotteakos v. United States, 328 U.S. 750, 759 (1946) (quoting Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925))).

30. *Id.*

31. 28 U.S.C. § 2111 (1982). "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *Id.*

32. 104 S. Ct. at 849. Rule 61 provides, in pertinent part that "No error . . . or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every

to exercise discretion in determining whether the substantial rights of the parties and the essential fairness of the trial have been impaired.

The Court used the varied responses to the voir dire question to demonstrate that there is no average juror.[33] Consistent with the principles stated in *Smith v. Phillips*,[34] the Court stated that the right of the parties is to have "an impartial trier of fact."[35] By exposing personal biases, voir dire examination protects that right.[36] The most important safeguard in this process is that prospective jurors answer honestly.[37] The Court reasoned that the Greenwoods' substantial rights had not been impaired because Payton's answer to the question posed during voir dire, though mistaken, was honest. The Court held that the standard for a new trial in this situation requires first, a demonstration that a juror failed to answer honestly a material question on voir dire and, second, a showing that a correct response would have provided a valid basis for challenge for cause.[38] The standard articulated by the Supreme Court is more stringent than the Tenth Circuit standard. Having dismissed the validity of using the probable response of an average juror as a benchmark, the Court indicated that honesty in answering material questions is the determinative factor in deciding whether a juror is impartial. Furthermore, courts may only grant a new trial when the right to challenge for cause is impaired, not when the right to peremptory challenge is impaired.[39]

Both concurring opinions attempted to clarify the standard presented by the majority opinion. Justice Blackmun, joined by Justices O'Connor and Stevens, agreed that the proper inquiry is whether the defendant had the benefit of an impartial trier of fact; and, that in most cases, "the honesty or dishonesty" of a prospective juror's answer to a voir dire question will be "the best initial indicator of the degree of impartiality."[40] Blackmun stressed, however, that the decision to grant a post-trial hearing lies with the trial court's discretion based on factual circumstances from which bias is demonstrated or inferred.[41]

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stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

33. 104 S. Ct. at 849-50. Payton's belief that his son's injury was not an injury which "resulted in any disability or prolonged pain or suffering," *id.* (citing Appellate's Brief at 19), was contrasted with another juror's belief that her six-year-old son did suffer such an injury when he caught his finger in a bike chain, and a third juror's initial failure to respond, although her husband had been injured in a machinery accident. The Court reasoned that there can be no standard for an "average juror", as they come from varied backgrounds, and the statutory qualifications for jurors require only a minimal competency in the English language. *Id.* at 849 (citing 28 U.S.C. § 1865 (1982). Furthermore, the Court added that "such a standard is difficult to apply and productive of uncertainties." *Id.* at 850.

34. 455 U.S. 209 (1982).

35. 104 S. Ct. at 849.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 850.

40. *Id.* (Blackmun, J., concurring).

41. *Id.*

Justice Brennan, joined by Justice Marshall, concurred with the judgment based on procedural considerations,[42] but wrote to express his dissatisfaction with the standard adopted by the Court.[43] Brennan interpreted the majority opinion to mean that a new trial is never warranted if a juror answers voir dire questions honestly, but incorrectly. Brennan agreed that the court of appeals applied an erroneous standard, but felt the inquiry should focus on the bias of the juror and the resulting prejudice to the litigant.[44] Therefore, Brennan concluded, the correct standard would require a demonstration that the juror incorrectly responded to a material question on voir dire, and a showing that under the facts and circumstances of the particular case, the juror was biased against the movant.[45] Honesty and intent, according to Brennan, should merely be additional factors for the Court's consideration.[46] Thus, unlike the Tenth Circuit, Brennan felt intent was relevant, but discounted honesty's importance because it might not indicate implied bias.[47] Because of the possibility of implied bias, Brennan felt a court should consider two questions: whether there were any "facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant."[48]

D. *Analysis*

McDonough is another disconcerting example of the Supreme Court's tendency to decide cases on broader issues than the facts require.[49] Justices Brennan and Marshall agreed with the majority that the Tenth Circuit should have remanded the issue of juror bias to the district court for a hearing rather than deciding it on its merits.[50] The Tenth Circuit never stated that the district court abused its discretion in not ordering a new trial, nor did it confine its decision to a review of the

42. *Id.* (Brennan, J., concurring).

43. *Id.*

44. *Id.* at 851.

45. "One easily can imagine cases in which a prospective juror provides what he subjectively believes to be an honest answer, yet that same answer is objectively incorrect and therefore suggests that the individual would be a biased juror in the particular case." *Id.*

46. *Id.*

47. Brennan stated that "the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it' ". 104 S. Ct. at 851 (quoting Smith v. Phillips, 955 U.S. 209, 221-24 (1982)).

48. *Id.*

49. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3446-48 (Stevens, J., concurring in part and dissenting in part) (Fourth amendment case in which the Court acknowledged that it could have remanded the case to the court of appeals for reconsideration of the issue of probable cause in light of Illinois v. Gates, 103 S. Ct. 2317 (1983), yet voted it was within its authority to decide the broader question of whether to modify the exclusionary rule and, subsequently, reverse the court of appeals.); Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2595-2610 (Blackmun, J., dissenting) ("The District Court's action was a preliminary injunction reviewable only on an abuse of discretion standard; the Court treated the action as a permanent injunction and decided the merits, even though the District Court had not yet had an opportunity to do so." *Id.* at 2596.).

50. 104 S. Ct. at 848 n.3; *id.* at 851 (Brennan, J., concurring).

motion under the information available to the district court for its decision. The district court was in no position to exercise its discretion on the issue of juror bias, because the results of the telephone conversation with Payton were never reported to it.[51] Both appellate courts based their rulings on the assumption that Payton incorrectly answered a voir dire question. In fact, there is no indication in the record that the answer was incorrect. The courts relied on the parties' briefs to conclude that Payton gave an honest but incorrect answer.[52]

The Supreme Court recognized that a motion for a new trial is committed to the discretion of the trial court and that the Tenth Circuit should have remanded the case to the district court for a hearing on Payton's non-disclosure.[53] Despite this criticism, the Supreme Court asserted a new standard without any record of the facts in controversy. On remand, the Tenth Circuit followed the Supreme Court's new rule and ignored its criticism, dismissing the claim based on Greenwood's counsel's statement that Payton believed his answer was honest.[54] Thus, the issue in *McDonough* was appealed all the way to the United States Supreme Court, remanded to the Tenth Circuit, and then dismissed without any finding of the underlying facts.

The Supreme Court's new standard is, however, clearer and more objective than the tests announced by the Tenth Circuit in *Photostat*. It promotes judicial economy by reducing the chance that courts grant new trials due to insignificant mistakes in voir dire. Although the Supreme Court did not expressly overrule *Photostat*, it in effect accomplished as much. To obtain a new trial under *McDonough* a party must show that a correct and honest response would have provided a valid basis for challenge for cause. Because this standard is far more stringent than the *Photostat* test, the right to peremptory challenge has been severely limited. Ironically, the Supreme Court chose to limit this right in the interests of judicial economy in a case which should have been remanded to the district court at the appellate level based on procedural considerations.

Susan H. Klann

51. The Greenwoods contend that their efforts to make a more extensive post-trial record were "thwarted" and that "this was specifically pointed out to counsel for McDonough by one of the circuit judges at oral argument." Petition in Opposition to Certiorari at 15.

52. 104 S. Ct. at 848 n.3; 687 F.2d at 341.

53. The Court noted that "appellate tribunals are poor substitutes for trial courts for developing a record or resolving factual controversies." 104 S. Ct. at 848 n.3.

54. 731 F.2d 690 (1984).

III. Final Score: Board of Regents 3, NCAA 0—Supreme Court Affirms Tenth Circuit's Finding That NCAA Television Plan Constituted Restraint of Trade

A. *Introduction*

In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,[1] the Supreme Court upheld the Tenth Circuit's ruling[2] that the 1982-85 television plan of the National Collegiate Athletic Association (NCAA) for broadcasting its members' football games[3] violated section 1 of the Sherman Act.[4] More significant than the majority's holding that the plan constituted a horizontal restraint of trade,[5] however, was its application of the rule of reason[6] and its refusal to apply the per se rule.[7]

Antitrust litigants, already confused by the Supreme Court's recent inconsistent application of the per se rule,[8] will view the *NCAA* decision as further evidence of the Court's retreat from its "hardline" application of the per se rule in *Arizona v. Maricopa County Medical Society*.[9] *Maricopa*, *NCAA*, and *National Society of Professional Engineers v. United States*[10] were all authored by Justice Stevens. In *Maricopa* Justice Stevens relied on per se analysis, while in *NCAA* he clearly rejected the rule's applicability. In *Professional Engineers*, although Justice Stevens did not state the rule on

1. 104 S. Ct. 2948 (1984) [hereinafter *NCAA*].

2. Board of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983).

3. There are 850 colleges and universities within the NCAA, divided into Divisions I, II and III. 187 out of the 276 members in Division I have football teams. Divisions II and III have smaller sports programs but vote on all matters, including approval of the football television plans. 104 S. Ct. at 2954.

4. 15 U.S.C. § 1 (1982) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

5. 104 S. Ct. at 2971.

6. The rule of reason, first suggested in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), examines the surrounding circumstances which gave rise to the presumption of illegality to determine if the questioned business behavior is anticompetitive and violative of the antitrust laws. The classic adoption of the rule of reason appears in Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

7. The per se rule classifies certain categories of business behavior as antitrust violations without inquiring into circumstances surrounding the activity. The rationale behind the rule is that certain behaviors have been identified as anticompetitive with such regularity that analysis is no longer necessary to arrive at a decision as to its legality. This is so even if there are instances in which the rule is unfairly applied. *See* United States v. Topco Assocs., 405 U.S. 596 (1972); United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

8. Justice White refused to apply the per se rule in a case of apparently straightforward price-fixing in Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979). Three years later, Justice Stevens, writing for the majority in Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 351 (1982), stated that once activity has been characterized as price-fixing, there is no room for balancing procompetitive effects; the per se rule must be applied.

9. 457 U.S. 332 (1982).

10. 435 U.S. 679 (1978).

which he relied, he apparently used the rule of reason.[11] These three opinions, particularly *NCAA*, reflect the increasingly limited reliance on the per se rule in antitrust analysis.

This comment analyzes the Supreme Court's distinction between the per se rule and the rule of reason in examining the NCAA's alleged antitrust violations. As the Supreme Court has previously noted, the distinction between the two rules may not be critical. Under either rule, one evaluates the competitive effects of the restraint.[12] This comment suggests, however, that while abandonment of the per se rule appears to be consistent with the Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System*,[13] it may have been unnecessary in this case. The NCAA decision also illustrates the Court's increasing use of the Chicago school's[14] efficiency theory in analyzing alleged antitrust violations. The comment concludes by discussing the problems inherent in this method of antitrust analysis.

B. *Background*

For the past eight decades the NCAA, an unincorporated, nonprofit, educational association, has exerted almost complete regulatory control over the sports programs of its member colleges and universities.[15] There is little disagreement that most of the policies implemented by the NCAA have not only enhanced intercollegiate sports programs but have also been essential to such programs' existence.[16] A challenge to that consensus arose, however, in regard to the NCAA's control over the sale of television rights to football.[17]

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11. In *Professional Engineers*, the Court moved away from reliance on the "price-fixing" element as proof of a per se violation. The Court's inquiry, however, was a limited application of the rule of reason insofar as it only examined the anticompetitive impact of the restraint; the Court seemed reluctant to weigh procompetitive impacts.

12. If the restraint is clearly and always anticompetitive, the practice is banned under the per se rule. If it is less clearly anticompetitive, the restraint may be either labelled anticompetitive or procompetitive after analysis under the rule of reason. As Justice Stevens stated in National Soc'y of Professional Eng'rs v. United States, "In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint . . . ." 435 U.S. at 692.

13. 441 U.S. 1 (1979).

14. The Chicago school is a group of economists who favor a strict economic approach to antitrust analysis. Under this theory microeconomics provides the foundation for interpretation of the antitrust laws. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978). For an analysis of the Chicago school and, in particular, Judge Posner's disregard for objectives other than promotion of efficiency through competition, see Comment, *Changing Configurations of Antitrust Law: Judge Posner's Applications of His Economic Analysis to Antitrust Doctrine*, 32 DE PAUL L. REV. 839, 882-96 (1983).

15. The NCAA was founded in 1905. "The NCAA, in short 'exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity.'" *NCAA*, 104 S. Ct. at 2972 (White, J., dissenting) (quoting Association for Intercollegiate Athletics for Women v. NCAA, 558 F. Supp. 487, 494 (D.C. 1983), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984).

16. These policies include the regulation of recruiting and the establishment of standards for academic eligibility. 707 F.2d at 1153.

17. Football is the only area of amateur intercollegiate sports in which the NCAA has attempted to regulate television rights. 104 S. Ct. at 2954.

In 1951, based on studies by the National Opinion Research Center, the NCAA decided it was necessary to limit the number of televised football games in order to protect live attendance.[18] This goal was accomplished by a series of plans in which the NCAA sold exclusive television rights.[19] In 1981, the NCAA adopted a plan for 1982-1985 which awarded television rights to ABC and CBS.[20] The heart of the NCAA's plan was the payment of a recommended fee[21] by the networks to each member school for the right to televise its games. Importantly, the amount any team received for such rights bore no relationship to the size of the viewing audience or any particular feature of a game or team.[22] A much anticipated game between two prominent schools received the same fee as a game which attracted a far smaller audience. This fact was crucial to the Supreme Court's finding that the plan was anticompetitive.[23]

Dissatisfied with the television plans, in 1979 a small group within the College Football Association (CFA)[24] began to push for a greater voice in the creation of television policy for those schools with major football programs. When the CFA signed its own contract with NBC in August 1981, the NCAA threatened sanctions. In September, 1981, the CFA brought suit charging that the NCAA's control unreasonably restrained the trade of televising college football.[25]

18. The accuracy of the studies has been questioned. The district court found NCAA's reliance on the studies "either an ill-founded belief at best or, at worst, a deception employed to make the majority of the NCAA membership believe that they should control football television out of self interest." Board of Regents of Univ. of Okla. v. NCAA, 546 F. Supp 1276, 1296 (W.D. Okla. 1982).

As the Supreme Court noted, the concern is not about protecting attendance at games that are televised, but that fan interest in games shown on television may adversely affect ticket sales for games which are not televised. The Court stated, however, that the evidence simply did not lead to such a finding. Statistics from the 1984 college football season support the Court's conclusion. Although the *NCAA* decision resulted in a tremendous expansion in the number of Division IA games broadcast on network and cable television during 1984, live attendance at Division IA games actually increased over the 1983 pre-decision figures. In 1984, 25,783,807 spectators attended 606 Division IA games, for an average of 42,548 per game. In 1983, 25,381,761 spectators attended 602 games, for an average of 42,162 per game. Telephone interview with representative of NCAA Statistics Department, Shawnee Mission, Kansas (Jan. 15, 1985).

19. The television plans were approved by referendum votes of the NCAA's membership from 1952-1977. After 1977, the members voted only on the "Principles of Negotiation" which purportedly formed the basis of the plans. 546 F. Supp. at 1283.

20. 104 S. Ct. at 2956.

21. A representative of the NCAA set fees based on the different types of telecasts (e.g., national or regional). *Id.*

22. *Id.*

23. "Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference." 104 S. Ct. at 2963-64.

24. The CFA is an unincorporated voluntary association formed in June 1977. At the time the Supreme Court heard *NCAA*, the CFA was composed of 61 institutions of higher learning that had indicated commitments to major college football.

25. The CFA also obtained a preliminary injunction to prevent the NCAA from interfering with its contract with NBC. The effect of NCAA's threats, however, was sufficient to cause the CFA-NBC arrangement to fail. 546 F. Supp. at 1286-87.

C. *District Court Decision*

In a thorough decision,[26] Judge Burciaga, sitting by designation in the United States District Court for the Western District of Oklahoma, held that the football television controls constituted a horizontal restraint of trade, a group boycott, and a monopoly in the market of college football.[27] Demonstrating the current uncertainty regarding reliance on the per se rule, the district court held that the television plan violated section 1 of the Sherman Act[28] when examined under either the per se rule[29] or the rule of reason.[30]

The decision purported to lay to rest numerous contentions raised by the NCAA as to the inappropriateness of applying antitrust sanctions to a voluntary association. The NCAA argued that membership in the NCAA was voluntary and therefore plaintiffs could withdraw from the association if they were unhappy with the plan. The district court disagreed. Forming a rival group was "neither practical, feasible nor desirable,"[31] and, furthermore, plaintiffs wanted to remain in the NCAA. Therefore, the district court found that relief under the antitrust laws was appropriate.

The district court also labeled as "cavil" the NCAA's argument that college football was not a business and therefore merited a different type of antitrust analysis.[32] The district court noted that the purpose of the NCAA's television controls was to maximize football revenues of its member schools, and that the NCAA was very much a business, free to maximize revenues as long as the means were legal.[33] The court also dismissed the NCAA's argument that it did not possess market power. Defining the relevant market as live college football,[34] the court found the NCAA exercised monopoly power in that market.

The district court began its two-part analysis with a restatement of three principles which it apparently believes are unchallenged: first, that the intent of the Sherman Act is to preserve unrestrained economic competition;[35] second, that it is for Congress and not the courts to de-

26. Board of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982).

27. Both the district court decision and the Tenth Circuit Court of Appeals decision are described in greater detail in the Antitrust section of the *Tenth Annual Tenth Circuit Survey* (June 1, 1982—May 31, 1983), 61 DEN. L.J. 135 (1984). In particular, the reader is referred to that article for careful analysis of the Tenth Circuit's opinion. This comment focuses on the Supreme Court's review of that decision with respect to the application of the per se rule and the rule of reason, and with respect to the Court's reliance on output restriction theory.

28. 15 U.S.C. § 1 (1982).

29. 546 F. Supp. at 1311, 1313.

30. *Id.* at 1319.

31. The district court reasoned that, "[a]s a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program." *Id.* at 1288.

32. *Id.*

33. *Id.* at 1288-89.

34. *Id.* at 1297.

35. This belief is based, in turn, on the principle that unrestrained competition yields the greatest good for society. *Id.* at 1304. *See*, Northern Pac. R.R. v. United States, 356

termine if competition is the wisest policy for a specific industry or if it may, in fact, be ruinous;[36] and third, that price fixing, group boycotts and horizontal agreements among competing sellers to limit the availability of a product are unreasonable per se.[37]

The court based much of its analysis on *Broadcast Music, Inc. v. Columbia Broadcasting System*.[38] In *Broadcast Music*, the Supreme Court rejected the per se rule in spite of the presence of all the outward signs of traditional price fixing.[39] In *NCAA* the district court demonstrated literal price fixing on the part of the NCAA and held that a finding of literal price fixing does not automatically result in per se illegality.[40] The district court in *NCAA* found it necessary to inquire whether the restraint increased efficiency and rendered the market more competitive. Until this point in the decision, the district court appeared to be following the Supreme Court's rejection in *Broadcast Music* of the third principle which the district court had regarded as unchallenged—that horizontal agreements limiting product availability and price fixing are illegal per se.

The district court, however, then distinguished the NCAA television restraint from the blanket license in *Broadcast Music* on several grounds.[41] The district court also dismissed the NCAA's argument regarding the restraint's procompetitive features by reference to *Arizona v. Maricopa County Medical Society*,[42] wherein the Court held that the per se

U.S. 1 (1958). For a strong attack on the Supreme Court's interpretation of the Sherman Act to protect existing enterprises to the exclusion of social objectives and an attack on the Court's reliance on the "myth of cost supremacy over value," see Curran, *Antitrust and the Rule of Reason: A Critical Assessment*, 28 ST. LOUIS U.L.J. 745 (1984). See generally Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965), suggesting that "the sole appropriate value in this field of antitrust is the maximization of consumer want satisfaction," *id.* at 781. For a thorough analysis of contrary views, for example, see Justice Peckham's rule of reason analysis in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 390 (1897). Justice Peckham, as Judge Bork points out, believed the goals of the Sherman Act could properly include the social and political as well as the economic well-being of the nation.

36. 546 F. Supp. at 1304 (citing National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978)). Traditionally, if competition appears to be disastrous to an industry, the industry applies to Congress for a statutory exemption from the antitrust laws.

37. 546 F. Supp. at 1304. *See supra* note 7.

38. 441 U.S. 1 (1979).

39. In *Broadcast Music*, the defendants issued nonexclusive blanket licenses entitling licensees to use of the member composers' works. The Court determined that the blanket licenses would not always reduce output and restrict competition. The licensing was similar to the NCAA plan insofar as a single fee was charged with no relation to, for example, the number of times the composition would be used. The Court found not only that the restraints should not be accorded per se treatment but that they were likewise reasonable under the rule of reason.

40. 547 F. Supp. at 1305.

41. The grounds include: (1) in *Broadcast Music* a federal law had granted composers the right to copyright, and a market arrangement to protect a federally-created right did not logically appear to be a violation of the antitrust laws; (2) individual composers were free to make their own deals in spite of the blanket licensing; and (3) the arrangement in *Broadcast Music* was a necessary means of marketing the composers' work. Similar considerations were not found in *NCAA*. *Id.*

42. 457 U.S. 332 (1982).

rule applied in spite of procompetitive justifications.[43] Thus, unlike the Supreme Court in *Broadcast Music*, the district court did not find adequate grounds for rejecting the per se rule.

Having concluded that the television plan was a per se violation of the Sherman Act, the district court nevertheless proceeded to analyze the television plan under the rule of reason. Considering only the plan's impact on competitive conditions,[44] the court found the plan's contribution to the legitimate non-commercial goals of the NCAA was minimal and indirect. The district court found the clear and overriding effect of the plan was the suppression of competition in the marketing of games for television viewing. Furthermore, the court found no procompetitive benefits to offset or justify such anticompetitive restraints.[45]

D. *The Court of Appeals Decision*

On appeal, the Tenth Circuit affirmed the district court's two-part analysis in finding that the plan constituted a Sherman Act violation under either the per se rule or the rule of reason.[46] The Tenth Circuit held fast to the Supreme Court's reasoning in *Professional Engineers*[47] that noneconomic considerations cannot justify restraints that adversely affect competition, and added that even if such a justification was legitimate, any contribution to athletic balance by the NCAA's plan could be achieved by less restrictive means.[48] It found that, on its face, the television plan restricted output.[49] The Court of Appeals noted that in some circumstances ancillary restraints[50] will escape the per se rule.[51] It found in this case, however, that the NCAA television plan was not "an-

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43. *Id.* at 351.

44. 546 F. Supp. at 1314. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978), which states:

> The Rule of Reason . . . has been used to give the [Sherman] Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

45. The district court specifically found that the controls did not protect gate attendance as claimed or preserve a competitive balance among the schools. 546 F. Supp. at 1319.

46. *NCAA*, 707 F.2d 1147 (10th Cir. 1983). The court also affirmed the district court's grant of standing and reversed its finding that the controls constituted a per se group boycott.

47. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

48. 707 F.2d at 1154.

49. *Id.* at 1156. Output restriction is one approach to assessing efficiency. It is used widely by those who contend the sole purpose of the antitrust laws is to promote efficiency and consumer welfare. *See* Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV., 1140 (1981). The Court of Appeals concluded that there was a decrease in output based on the drop in viewership that accompanied the plan. 707 F.2d at 1153-54. The Supreme Court stated that "[b]y restraining the quantity of television rights available for sale, the challenged practices create a limitation on output." 104 S. Ct. at 2960.

50. A restraint is considered ancillary only when "[t]he parties [are] cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose." 707 F.2d at 1153 (quoting R. BORK, THE ANTITRUST PARADOX 279 (1978)).

51. 707 F.2d at 1152-53 n.6.

cillary to the rulemaking integration" because it did not increase the efficiency of the integration and was broader than necessary to achieve the procompetitive goals.[52]

E. *The Supreme Court Opinion* [53]

NCAA presented the Supreme Court with the opportunity to address the confusion surrounding the application of the per se rule and the rule of reason. It also afforded the Supreme Court the opportunity to determine the reasonableness of the alleged ancillary restraint by examining the nature, purpose and history of the television plan. Although addressing many of these issues throughout its opinion, the Court confined itself to a very narrow holding based primarily on the Chicago school's output-restriction approach.

Writing for the majority, Justice Stevens noted that some restraints are necessary to preserve amateur collegiate sports. Thus, rule of reason analysis was required to determine whether the challenged restraint, which appeared to violate the antitrust laws, actually enhanced competition.[54] In other words, the Court looked at the nature of the institution and decided that application of the per se rule was inappropriate. The Court conceded that the NCAA's agreement among competitors as to how they compete was the type of horizontal restraint which has often been presumed unreasonable.[55] The Court, however, elected not to apply the per se rule, reasoning that some horizontal restraints are necessary if the product is to be made available.[56] Moreover, the Court made clear that the basic thrust of the inquiry under either test is essentially the same—to determine the impact of the restraint on competitive conditions.[57] In this respect it is consistent with the lower court decisions.

Examining the effects of the NCAA restraints, the Court found that price was higher and output lower than they would be under normal market conditions.[58] It determined that both price and output were unresponsive to consumer preference, and thus the restraints failed to meet a primary goal of the Sherman Act.[59] Addressing the NCAA's as-

52. *Id.* at 1154.

53. *NCAA*, 104 S. Ct. 2948 (1984).

54. *Id.* at 2969.

55. *Id.* at 2959. Such restraints, limiting output and price fixing, are usually held to be illegal per se. *Id.* at 2960. The per se rule has traditionally been applied in spite of the occasional reasonableness of a restraint because of the probability that *most* restraints will be anticompetitive. The rule itself, in order to preserve judicial economy, precludes consideration of factors which may prove to have procompetitive effects.

56. The Court specifically stated it did *not* base its decision on lack of experience with this type of restraint or the NCAA's nonprofit status. *Id.* The Court thus took upon itself to inquire into the characteristics of the college football industry. It described the "vital role" the NCAA plays in preserving the character of college football and enabling "a product to be marketed which might otherwise be unavailable." *Id.* at 2961.

57. 104 S. Ct. at 2960 & n.21.

58. *Id.* at 2963-64.

59. *Id.* (citing Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979), which viewed the Sherman Act as a "consumer welfare prescription"). "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law." 104 S. Ct. at 2964.

sertion that the plan could not have an anticompetitive effect because it lacked market power, the Court noted that absence of proof of market power did not justify naked restrictions on price or output.[60] Furthermore, as the District Court so painstakingly demonstrated, the NCAA did possess market power.[61] The Supreme Court thus concluded that the effect of the NCAA's restraint upon the operations of the market placed a heavy burden on the NCAA to present an affirmative defense that justified the restraint.[62]

At this point the Supreme Court, distinguishing the facts before it from those in *Broadcast Music*, held that the NCAA television plan did not enhance competitiveness or produce any "procompetitive efficiencies" to prevent it from being found in violation of section 1 of the Sherman Act.[63] The Court made short shrift of the NCAA's concern with protecting live attendance. In addition to the fact that the record indicated the plan simply did not protect live attendance, the Court noted that it could not accept a justification based on the fear that the product itself might not attract enough customers.[64] Furthermore, the Court agreed with the district court that the television restraints did not help maintain competitive balance and that, if the restraints were removed, many more games would be televised in a free market.[65]

F. *The Dissent*

Justice White, joined by Justice Rehnquist, maintained that the television plan was not fundamentally different from the other "anticompetitive" aspects of NCAA self-regulation such as fixing the number of coaches, regulating recruitment and determining the number of games to be played. Justice White attacked the majority as being caught up in "commercial antitrust rhetoric and ideology."[66] His primary disagreement was with the majority's finding that the plan had a substantial anticompetitive effect. First, Justice White specifically disagreed with the idea that output should be measured by the number of televised games. Rather, the Justice maintained, output should be measured by the size of the actual television audiences; the Justice found that audience size was actually enlarged by the plan.[67] Second, he charged that respondents failed to prove that it was the reduction in the number of televised

60. 104 S. Ct. at 2965.
61. *Id.* at 2965-67.
62. *Id.* at 2967. The effect, as previously noted, was to raise price and reduce output.
63. *Id.*
64. *Id.* at 2968-69. *See also supra* note 18.
65. *Id.* at 2970.
66. *Id.* at 2974 (White, J., dissenting).
67. *Id.* at 2975. Compare Justice White's dissent, which deplores the majority's measurement of price and output and proposes that the measure is not the reduction of games shown locally and regionally but the increase in total audience as a result of greater network coverage, with Judge Logan's statement in the Tenth Circuit's opinion: "We doubt on its face the argument that the output may be properly characterized as viewership . . . . An argument that total viewership is enhanced by restricting the sale of broadcasting rights is speculative." 707 F.2d at 1154.

games that increased the price.[68] Traditionally, reductions in the market result in higher prices for the same product. Justice White argued, however, that the NCAA had created a new product (exclusive television rights) that was more valuable than games marketed individually.[69] Third, he found the redistribution of revenues a "wholly justifiable, even necessary" aspect of the intercollegiate athletic system.[70]

Justice White also argued that the NCAA's program of self-regulation was "essentially noneconomic."[71] He attacked the Tenth Circuit's and the district court's view that *Professional Engineers*[72] precluded reliance on policy considerations when analyzing a restraint's impact on competition.[73] Finally, the Justice attempted to distinguish *Professional Engineers* based on the fact the engineers were engaged in "standard, profit-motivated commercial activities," as contrasted with the "primarily noneconomic values pursued by educational institutions."[74]

G. *The Consequences of the Majority's Decision*

The Supreme Court's *NCAA* decision immediately evoked widespread speculation that it spelled disaster for smaller colleges and would lead to the demise of college football.[75] Justice White's concern that the television plan was part of the "essentially noneconomic" regulation of collegiate sports and should not be examined by the same antitrust criteria applied to business enterprises has been echoed by many sportspersons.

The Supreme Court, however, arrived at the only conclusion as to the anticompetitive effects and nature of the plan that would be consistent with the Court's prior interpretation of the Sherman Act. It was clear to the Court, regardless of the general defensibility of restrictions on college sports, that the NCAA's television plan interfered with the schools' basic freedom to sell their games at whatever price obtainable. Justice Stevens effectively answered every attempt by the NCAA to jus-

68. 104 S. Ct. at 2975-76 (White, J., dissenting).

69. *Id.* at 2976. The Justice suggested that the price rise might more properly be attributable to the increase in output. *Id.*

70. *Id.*

71. *Id.* at 2977.

72. 435 U.S. 679 (1978).

73. 104 S. Ct. at 2978 (White, J., dissenting). The lower courts based this view on language in *Professional Engineers* that the purpose of antitrust analysis "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." 435 U.S. at 692.

74. 104 S. Ct. at 2978 (White, J., dissenting).

75. *See, e.g.*, Taaffee, *The Supreme Court's TV Ruling: Will the Viewer Benefit Most*, SPORTS ILLUSTRATED, July 9, 1984, at 9. Taaffee worried that, although the Court theoretically "established an open market in which the schools could peddle their games independently," the decision had actually created chaos in which the "only certainty is that college football is going the way of college basketball, with games proliferating all over the dial." *Id.* at 9. He also expressed the widespread fear that the decision meant that the TV networks and a handful of top schools would be better off financially, but that the less prestigious schools were bound to suffer. *Id.*

tify the restraint and portray itself as incapable of violating the antitrust laws.

It is unclear, however, whether it was necessary for the Supreme Court to reject the per se rule in evaluating the anticompetitive effects of the television plan. The Court's decision to apply the rule of reason was based on the Court's recognition that other horizontal restraints were necessary in the college football industry. None of the NCAA's other restraints, however, involved price fixing, a restraint to which procompetitive justifications have not traditionally been allowed.[76] Arguably, the Court could have held, regardless of the fact some restraints enhanced competition within the NCAA, that the restraint's price fixing effect clearly distinguished the television plan and justified a finding that it automatically violated the Sherman Act. This analysis would have been consistent with Justice Steven's 1982 *Maricopa*[77] opinion.

The *NCAA* decision, which moves away from the per se rule and toward the rule of reason, is consistent, however, with the decisions in *Broadcast Music*, *Professional Engineers*, and *Continental T.V. v. GTE Sylvania*.[78] Perhaps the Supreme Court chose to apply the rule of reason not because the anticompetitive effects of the plan were unclear, but because the Court felt that application of the per se rule to the NCAA, a voluntary association, would be inherently unfair.[79] The rule of reason, however, was not created by the courts as a way to avoid Sherman Act liability, but as a method of evaluating anticompetitive effects when a restraint clearly does not interfere with the freedom to make such fundamental decisions as to whom and at what price to sell. As pointed out again by Judge Burciaga in October, 1984,[80] the NCAA clearly coerced

76. *But see* Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979), holding that an apparent case of price fixing resulting from a blanket licensing agreement should not be treated as a per se violation of section 1 of the Sherman Act.

77. 457 U.S. 332 (1982). *See supra* note 42 and accompanying text.

78. 433 U.S. 36 (1977). In *Sylvania*, the Court held that non-price vertical restrictions should be analyzed under the rule of reason. The Court further held that such vertical restrictions could contemporaneously reduce intrabrand competition and have a *beneficial* effect on interbrand competition.

79. The Court noted that it is Congress, not the Courts, that must create exemptions to the antitrust laws. *See supra* note 36 and accompanying text. Thus the Court's application of the rule of reason may have been a response to its inability to carve an antitrust exemption for the NCAA. *See also* Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802 (1981). The note criticizes the courts' failure to arrive at a systematic application of antitrust concepts to associations (such as amateur athletic associations) which are concerned primarily with objectives other than the maximization of profits. The note maintains that the only justification for "anticompetitive" practices is solving market failures. In a purely competitive market, education and amateurism would not be supplied, as they would not coincide with profit-maximizing goals.

80. Board of Regents v. NCAA, 601 F. Supp. 307 (W.D. Okla. Oct. 31, 1984) (memorandum opinion partially granting defendant's amended motion to modify the court's judgment). Any misgivings about the application of the antitrust laws to voluntary associations such as the NCAA will be allayed by a reading of Judge Burciaga's memorandum opinion. The opinion makes very clear that no evidence was presented to the court demonstrating a " 'voluntary' relinquishment" of television rights by members. *Id.* at 310. The court also sharply reprimanded the NCAA for its persistence in trying to test the court's resolve and attempting to "reimpose the very activity this Court, as well as the appellate courts, have found to be illegal." *Id.* at 310.

member schools into assigning their rights to telecast football games and interfered with their freedom to decide to whom and at what price to sell those rights. In light of such obvious anticompetitive conduct, it does not seem possible that any surrounding circumstances could justify such a restraint. It seems clear that Justice Stevens should have applied per se analysis.

In addition, the Supreme Court's reliance on the Chicago school's efficiency theory may also have been unnecessary. The Court held it was the television plan's limitations on output (and the subsequent harm to consumer welfare) that violated the Sherman Act.[81] There are, however, three problems with the Court's formulation. First, given the inconclusiveness of the statistics presented regarding television audience and stadium attendance, the Court's reliance on a statistical approach which measures anticompetitive effect in terms of numbers of televised games and their effect on live gate attendance is subject to criticism.[82] There are numerous factors that go into game attendance, only one of which is television programming. Factors such as weather conditions, the closeness of conference standings, and other contemporaneous events occurring in the community also have a direct effect on a fan's decision to attend a college football game.

Second, the Court did not have to rely solely on output-restriction theory to find a violation of the Sherman Act. The output-restriction test is not the only method of evaluating the efficiency of a restraint. Focusing on the enhancement of the competitive process itself, regardless of economic statistics,[83] the Court could have found that the mere elimination of individual schools from the competitive process violated the Sherman Act. Indeed, the Court noted in its opinion that one of the anticompetitive effects of the plan was that "[i]ndividual competitors lose their freedom to compete."[84] The Court in its holding, however, ignored this simple and direct effect on the competitive process among the schools themselves and held that it was the curtailment of output and effect on consumer preference that violated the Sherman Act.[85]

Third, the opinion notes that the district court did not find that the

81. "Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference," the NCAA has violated the Sherman Act. 104 S. Ct. at 2971.

82. *See supra* notes 18 and 67. Justice White criticized the majority's measurement of output in terms of the number of televised games. The Justice, however, simply would have substituted another measure of output and thus does not go beyond the output-restriction model of the majority.

83. *See* Fox, *supra* note 49 at 1169. Ms. Fox soundly rejects the view that antitrust should be limited to efficiency objectives. *Id.* at 1178.

84. 104 S. Ct. at 2963. In admitting harm to individual competitors, the Supreme Court began to move away from the school of thought that believes antitrust law is only rightfully concerned with harm to competition, not harm to competitors. *See generally* Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979). Schwartz objects to "the dogma that the antitrust laws protect 'competition not competitors,' because the goals of justice and the antitrust laws sometimes demand protection of competitors." *Id.* at 1076.

85. *Id.* at 2971. *See also* note 81 for a direct quotation of the Court's holding.

television plan "produced any procompetitive efficiencies."[86] This implies that if the plan *had* increased output and reduced price, the inquiry would have gone no further and the restraint would have been allowed. If this were the case, the other goals of antitrust law such as protection against concentration of economic power, protection of the process of competition in itself and the promotion of justice would be rendered useless.[87]

This is not to say that efficiency has no place in antitrust analysis;[88] however, it is only one antitrust goal, not the exclusive one. Antitrust also restrains entities such as the NCAA from abusing their market power[89] and protects individual competitors such as the member NCAA schools in their ability to freely compete in the television market.

These other goals were inadvertently met as a result of the Supreme Court's *NCAA* decision. The NCAA is being restrained from coercing its member schools to market their football games through the NCAA's plan. The Supreme Court's formulation of its holding solely in terms of output-restriction theory and effect on consumer welfare, however, was unnecessarily narrow. The Court, although aware of the plan's violation of the spirit of the antitrust laws, felt compelled to rely on modern efficiency theory as the basis of its holding. As discussed above, this approach unfortunately moves the Court toward a narrow economic-based theory of antitrust analysis.

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86. 104 S. Ct. at 2967.

87. "This conception of antitrust would prohibit almost nothing at all . . . ." [E]conomic analysis keyed solely to 'efficiency' and 'consumer welfare' has revealed with stark simplicity that there will be very little remaining of antitrust.' " Fox, *supra* note 49, at 1145-46 (quoting Rowe, *New Directions in Competition and Organizational Law in the United States*, in ENTERPRISE LAW OF THE 80's, at 177, 201 (Rowe, Jacobs & Joelson eds. 1980)).

88. *See* Fox, *supra* note 49, for an excellent analysis of other approaches to the measurement of efficiency, approaches which incorporate some of the other goals of antitrust.

89. *See* Schwartz, *supra* note 84. Schwartz finds clear evidence of congressional purpose to create procedural protection for competitors which "serves the very useful role of preventing abuse of power when the growth of power cannot be checked." *Id.* at 1076. Schwartz sees a clear congressional exercise of "supervision over fair procedure and justice in economic relationships" in a number of areas of business. *Id.* at 1079. For example, Schwartz points to banking regulation as "subordinat[ing] 'efficiency' considerations to considerations of excessive concentrations of power when it seeks to prevent banks and bank holding companies from extending their operations into 'non-banking' business." *Id.* at 1077.