CRIMINAL PROCEDURE: NEGLIGENT SUPPRESSION OF EVIDENCE AS GROUND FOR NEW TRIAL IN FEDERAL CRIMINAL PROCEEDINGS

IN *United States v. Consolidated Laundries Corp.*[1] the Court of Appeals for the Second Circuit has expanded the scope of the public prosecutor's duty to secure a fair trial to defendants in criminal proceedings. A new trial was ordered on the finding that material evidence had been "negligently suppressed."

Consolidated arose as an antitrust prosecution against a number of linen supply companies in the New York City area. At the trial all the defendants were found guilty of a conspiracy to restrain and monopolize the linen supply business in violation of sections 1 and 2 of the Sherman Act.[2] The trial judge, sitting without a jury, relied heavily on the testimony of one Paul Ullman, the principal prosecution witness, who testified that his linen supply company had been forced out of business through the concerted efforts of the defendants. Defendants moved, pursuant to the Jencks Act,[3] for the production of all statements given to the Government by Ullman which were relevant to his trial testimony. This motion was granted by the trial judge. After the trial it came to light that the Government had in its possession certain statements by Ullman which had not been produced at the time of the trial court order. In the motion for a new trial defendants did not dispute that the Government had produced all the statements which it, in good faith, thought were in its possession. However, the newly discovered statements clearly impeached some of the testimony given by Ullman at the trial,[4] and defendants alleged that they were seriously prejudiced by denial of the opportunity to use these statements in their cross-examination of Ullman. Upon the district court's denial of a new trial, defendants took an appeal.

In the past it would have been necessary for the defendants either to have brought the statements forward as newly discovered evidence,[5]

[1] 291 F.2d 563 (2d Cir. 1961).

[2] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958).

[3] 18 U.S.C. § 3500 (1958).

[4] See 291 F.2d at 569-70.

[5] See Woollomes v. Heinze, 198 F.2d 577 (9th Cir. 1952), where statements by an eye witness to the crime became available after a trial in which the prosecution had refused to disclose a list of certain witnesses. The defense charged suppression of evi-

or to have alleged the willful suppression of evidence. In either event the defendant would have been left without relief on the facts of this case.

Traditionally the courts have not favored new trials on the grounds of newly discovered evidence.[6] Therefore, they have developed a rigid set of requirements which must be satisfied before a new trial will be granted.[7] These requirements have been outlined as follows:

> A motion based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of the trial, (2) that the evidence is material, not merely cumulative or impeaching, (3) that it will probably produce an acquittal, and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant.
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> A new trial, however, should be granted where the newly discovered evidence, although impeaching, is so conclusive as to destroy the credibility of a material witness against the defendant.[8]

The evidence subsequently brought forward in *Consolidated* was merely impeaching. Defendants would not have been able to show that the new evidence would probably produce an acquittal, nor could they have shown that the evidence would, as a matter of law, *destroy* the credibility of Ullman. Thus, as applied to this case, the inadequacy of the newly discovered evidence motion is obvious.

It is equally obvious that the defendants could not have successfully alleged the willful suppression of evidence. Although it is well settled that courts will consider evidence which was suppressed by the prosecution in a more indulgent light than they will view ordinary newly discovered evidence,[9] it is also settled that the evidence must be "knowingly" suppressed.[10] There was no claim by the defendants that the prosecution actually knew of the existence of the statements in question.

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dence, but the court held that "the affidavits disclose at most newly discovered evidence." *Id.* at 579.

[6] Orfield, *New Trial in Federal Criminal Cases*, 2 VILL. L. REV. 293, 324, and cases cited (1957).

[7] See, *e.g.*, United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954); United States v. Berkshire Fabricators Co., 17 F.R.D. 44, 46 (D.R.I. 1955).

[8] 4 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 2282 (1951).

[9] Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935); United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954).

[10] United States v. Rutkin, *supra* note 9; Application of Landeros, 154 F. Supp. 183, 185 (D.N.J. 1957). See 5 UTAH L. REV. 92 (1956); 2 VILL. L. REV. 293, 326 n.205 (1957).

Thus the defendants were left without relief within the framework of established grounds for new trial. However, the Second Circuit, regarding the motion as alleging the "negligent suppression of evidence,"[11] ordered a new trial. The court did not base its decision on a violation of due process, as was suggested by defense counsel,[12] but rather on its duty to supervise the correct administration of criminal justice in the federal courts.[13]

Although recognizing that there was "no authoritative case precisely in point,"[14] the court cited a number of cases as tending to support its conclusions.[15] In three of the four cases principally relied upon, however, willful suppression had been alleged.[16] The prosecution

[11] This term seems to have originated with reference to People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956), in Comment, 32 N.Y.U.L. REV. 607 (1957). However, the use of the term as applied to that case is misleading if it is understood in the sense employed in the instant case. In *Savvides* a witness for the prosecution falsely testified that there was no agreement that he was to receive lenient treatment for testifying against the defendant. A new trial was ordered because the assistant district attorney failed to inform the court that there was such an agreement. It is true that the prosecutor did nothing affirmatively to suppress evidence, but to say that his failure to speak up was mere negligence is to misjudge the nature of his breach. Failure to speak is the only way that matters within his own knowledge could be suppressed by the prosecutor. Thus where he knows that his silence will result in suppression of evidence it would seem that his conduct must be deemed willful.

[12] Defense counsel also suggested a violation of the Jencks Act, 18 U.S.C. § 3500 (1958), but a cursory inspection of that act will reveal that no such situation as that presented in the instant case was anticipated, nor is any remedy provided.

[13] Federal courts have adopted this basis for decision on a number of occasions when they have preferred to avoid the constitutional issue of due process. Jencks v. United States, 353 U.S. 657 (1957); McNabb v. United States, 318 U.S. 332 (1943); United States v. Heath, 260 F.2d 623 (9th Cir. 1958), *dismissing appeal from* 147 F. Supp. 877 (D. Hawaii 1957). Inherent in a judicial system is the duty of appellate courts to guarantee to each defendant a fair trial. This duty is seen by the federal courts as extending beyond the bare requirements of "due process." As was said in McNabb v. United States, *supra* at 340, "[W]hile the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' . . . which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' . . . ."

[14] 291 F.2d at 570.

[15] Napue v. Illinois, 360 U.S. 264 (1959); Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958); United States v. Heath, 260 F.2d 623 (9th Cir. 1958); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949).

[16] Napue v. Illinois, *supra* note 15; Curran v. Delaware, *supra* note 15; United States *ex rel.* Montgomery v. Ragen, *supra* note 15.

either knew of,[17] or was held with knowledge of,[18] the existence of the suppressed evidence and its relevance to the preparation of the defense. The court in *Consolidated* seemed to rely more on the language employed in these cases than on the holdings themselves.[19] In the fourth case, *United States v. Heath*,[20] the Ninth Circuit upheld a trial judge's refusal to allow a case to come to trial when he found that the Government had lost some papers which he considered essential to a fair trial. But here again there are clearly distinguishing features.[21] The most obvious is that *Heath* was not an attack upon a concluded trial. It seems beyond cavil that the problems and policy considerations involved in laying the ground rules for a particular trial are fundamentally

[17] Napue v. Illinois, 360 U.S. 264 (1959) (prosecutor failed to correct a witness's testimony which he knew to be false); Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958) (defendants gave police officers several statements concerning an alleged crime but the police destroyed all except one statement of each defendant).

[18] United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949). There the defendant, a Negro, was convicted of raping a white woman. A doctor's report which would have exculpated the defendant was not brought forward by the police at the trial. In a habeas corpus proceeding the federal court made a finding of fact that "[T]he prosecution either knew, or should have known, of Dr. Walter's examination and report—in fact they are charged with the knowledge." *Id.* at 390.

[19] Speaking generally of the prosecutor's duty, the court in United States *ex rel.* Montgomery v. Ragen, *supra* note 18, at 387, said, "It is [the prosecutor's] duty to bring forward all facts to the Court's and jury's attention so that a true consideration may be made in the interest of justice. A prosecutor is supposed to be an impartial representative of public justice. . . . It was and is the prosecuting attorney's duty to assist in giving a fair trial to a defendant."

Similarly, in Curran v. Delaware, 259 F.2d 707, 711 (3d Cir. 1958), the court said, "[W]e state that the trial of a capital case, or indeed any other trial, no longer can be considered properly a game of wits and skill. It is clear that men on trial for their lives are entitled to all pertinent facts relating to their defense and that no witness is entitled to constitute himself the judge of what the court shall hear."

[20] 260 F.2d 623 (9th Cir. 1958), *dismissing appeal from* 147 F. Supp. 877 (D. Hawaii 1957).

[21] It is important to note the posture in which the *Heath* case reached the Court of Appeals. The defendant had obtained an order of dismissal in the trial court and all that the appellate court did was refuse to reverse the trial judge's exercise of his discretionary power to control the proceedings of a trial. The fact that appellate courts are reluctant to reverse on matters within the discretion of a trial judge would seem to lessen the authority of *Heath* in a subsequent case where defendants are seeking to have a lower court decision reversed either as an abuse of discretion or for an error of law.

An appellate court will reverse the denial of a motion for new trial where it finds an abuse of discretion of an error of law. Orfield, *supra* note 7 at 345. Inspection of the reasoning in *Consolidated* reveals that it was on the latter ground that the new trial was ordered.

different from those where a previously terminated trial is under direct or collateral attack.[22]

In spite of the lack of precedent the court nevertheless granted the defendants relief, relying on the broad proposition that:

"The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction."[23]

The *Consolidated* decision is the outcome of an increasing recognition that criminal prosecutions are no longer genuine adversary proceedings.[24] The prosecutor has become recognized as a public official with a definite responsibility not only to the general public, but also to individual defendants.[25] In the past this view has gained judicial recog-

[22] An exhaustive treatment of the question touched on at this point is beyond the scope of this note. It should be noted, however, that when a pre-trial order of dismissal is reviewed a reversal will impose no undue burden on the defendant and no unnecessary public expense. The ordering of a new trial, on the other hand, works against the general policy of bringing an end to litigation and multiplies the cost to the public.

In addition, the appellate court is usually in a poor position to review a lower court's denial of a motion for new trial, because the trial judge is inevitably much closer to the case and has a more thorough acquaintance with the record. The same is not necessarily true where the trial judge has granted a dismissal before the case has come to trial. In that case it is not likely that the trial judge will be peculiarly well informed on the subject matter of the appeal and the record is likely to be relatively easy for the appellate court to handle.

[23] United States v. Consolidated Laundries Corp., 291 F.2d 563, 571 (2d Cir. 1961), *quoting language from* United States v. Zborowski, 271 F.2d 661, 668 (2d Cir. 1959). The *Zborowski* case, although decided within the limited context of disclosure of the minutes of grand jury hearings, foreshadowed to a certain extent the holding in the instant case. It is a practice of the Second Circuit for the trial judge to make the grand jury minutes available to the defense when he finds an inconsistency between a witness's grand jury and trial testimony. A new trial was granted in *Zborowski* because the trial judge refused even to read the minutes, but the court also stated that "the government should not have stood mute." *Id.* at 667. It was pointed out that the Government was in a much better position than was the trial judge to know the contents of the grand jury minutes and should have made the relevant parts available to the defense. However, the case gives no indication whether this obligation was more than a moral one.

[24] "[T]he trial of a capital case, or indeed any other trial, no longer can be considered properly a game of wits and skill." Curran v. Delaware, 259 F.2d 707, 711 (3d Cir. 1958). See 32 N.Y.U.L. REV. 607 (1957).

[25] See Berger v. United States, 295 U.S. 78 (1935); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949).

nition primarily in cases where the prosecutor has willfully suppressed evidence,[26] has knowingly used perjured testimony,[27] or has indulged in unconscionable conduct during the course of the trial.[28] Thus the courts have thought of the prosecutor's duty as a negative one—to refrain from conduct which would prejudice the defendant's case. On the other hand, the disclosure of exculpatory evidence has been thought of, at most, as a moral obligation.[29] The impact of *Consolidated* is to impose on the prosecutor an affirmative duty to "keep the evidence of which it [is] custodian in such manner that it [will] be available for use upon the trial by all parties."[30]

As yet the decision in *Consolidated* has but a limited application. The court seemed to require a clear showing of prejudice.[31] This may mean that in practice courts will be more reluctant to grant new trials where negligent suppression of evidence has been alleged than they have been when faced with an allegation of willful suppression.[32] Furthermore, since the constitutional issue was not decided, there is no direct effect on state court proceedings. Whether the Second Circuit would find a violation of due process if the same facts were presented in a collateral attack on a state court proceeding is a matter of speculation.

Although *Consolidated* seems to lay down a broad rule for the conduct of public prosecutors, it must be born in mind that this case actually involved only the failure of the prosecutor to produce state-

[26] Napue v. Illinois, 360 U.S. 264 (1959); Pyle v. Kansas, 317 U.S. 213 (1942); Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958); United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954).

[27] Pyle v. Kansas, *supra* note 26; Mooney v. Holohan, 294 U.S. 103 (1935); United States v. Rutkin, *supra* note 26.

[28] Berger v. United States, 295 U.S. 78 (1935). For a collection of state court cases, see 32 N.Y.U.L. REV. 607, 609 n.19 (1957).

[29] "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is doue. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." Canons of Professional Ethics of the American Bar Association, Canon 5 (1937). For a general discussion of disclosure of exculpatory evidence, and for recent developments indicating change in this area, see Note, 60 COLUM. L. REV. 858 (1960).

[30] 291 F.2d at 570.

[31] See 291 F.2d at 469-70 where the court discusses at some length the usefulness of the suppressed statements. Prejudice is ordinarily presumed where the prosecution has knowingly used perjured testimony or has willfully suppressed evidence. See 32 N.Y.U.L. REV. 607, 611 (1957).

[32] *Compare* United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961) *with* Napue v. Illinois, 360 U.S. 264 (1959).

ments pursuant to a court order. This means, of course, that it will be possible for other federal courts to restrict further application of the holding. However, if the language of the court is taken at face value it would appear that the judicial conception of the prosecutor's duty toward defendants will undergo further revision.[33]

[33] The discovery process in criminal procedure has come under attack by many defense lawyers as being far less than adequate. See generally *Developments in the Law—Discovery*, 74 HARV. L. REV. 942, 1051-63 (1961). This group will welcome *Consolidated* as a step toward alleviating the shortcomings of criminal discovery. Prosecutors, on the other hand, tend to feel that they are experiencing increasing difficulty in securing convictions. Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P.S. 395, 397 (1960). They may see this holding as making available to guilty parties additional methods of thwarting the expeditious administration of the criminal law.