

## Criminal Procedure, 1969 - is It a Means or an End?

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## CRIMINAL PROCEDURE, 1969 — IS IT A MEANS OR AN END?\*

By ERWIN N. GRISWOLD\*\*

### I.

While I was preparing for this lecture, I received from former colleagues of mine two new casebooks. One of these, by Lloyd L. Weinreb, is a very interesting and imaginative treatment of the substantive problems of criminal law. It presents these questions from a fresh point of view, in 578 not too tightly filled pages.

The other book came from Professor Livingston Hall, also of the Harvard Law School. It has been prepared by him and three other law school teachers. This is the third edition of their *Modern Criminal Procedure*. It is a remarkable, and literally a weighty volume. I put it on the scales, and it weighs nearly six pounds. It occupies 1,456 two-columned pages. Clearly, there is a great deal which can be learned by the current generation of law school students about criminal procedure.

This contrast between the two books may well serve as my theme for this lecture. The book on criminal procedure is about three times as long as the book on criminal law.

When I was in law school, I took a course on criminal law, and learned quite a bit about assault and battery, murder, rape, robbery, burglary, larceny and embezzlement, and something about various sorts of statutory crimes. As far as I can recall, there was no course on criminal procedure, although we did take up some matters about the administration of the criminal law in courses on constitutional law and evidence.

Now, I gather, there is not too much to be learned about criminal law. But there is a vast amount to be learned about criminal procedure, as is shown by the new book to which I have referred. This is really a very fascinating volume. It has a large amount of material, mostly from decisions of the Supreme Court of the United States, and many thoughtful discussions of this material, and many questions for the consideration of the students who will use it. In some ways, in its intricacy and detail, it reminds me of a casebook on taxation, or on bankruptcy. The field with which it deals clearly includes

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one of the growing points of the law. Students are very fortunate to have so comprehensive and thoughtful a guide in entering this burgeoning area.

But, is procedure an end in itself, or is it a means to another end, the enforcement of the criminal law and the administration of justice? Before going further, let me make it plain that I do not think that there is any clear and simple answer to the question I have just put. I am well aware of the fact that sound administration of the criminal law cannot be carried out except through procedures properly developed and applied. Like all questions worth asking in the law, this one is one of degree. We cannot have criminal law without criminal procedure; and criminal procedure without criminal law would be a waste of time. The problem is to find the proper balance. It is not an easy task, either to locate and define, or to administer and carry out.

In thinking about this problem, I recalled an observation of a scholar of the criminal law: "Indeed, the more refined and persistent becomes the analytic, juristic examination of its elements, the greater is the danger that the utilitarian function of the criminal law will be lost sight of and be replaced by a kind of intellectual game of chess."<sup>1</sup>

This passage was later quoted by Sir John Barry, Judge of the Supreme Court of Victoria in his introduction to a book by Morris and Howard called *Studies in Criminal Law*<sup>2</sup> and he made some observations there, from his own experience, about the plight of a trial judge. With us, the plight of the trial judge is real, too. I would add that with us the plight of counsel, both the prosecutor and defense counsel, is even greater than it is in the British countries where these two books appeared. If they are to do their jobs right, they must master a 1500 page, two-columned book on criminal procedure, and keep up, almost on a day-to-day basis, with current developments in the Supreme Court, as well.

In connection with my present work, I have ample opportunity to observe one facet of the administration of the federal criminal law. In preparation for this lecture, I reviewed all of the cases which were filed in the Supreme Court in forma pauperis during the October Term 1968, which closed last June. There were 504 of these cases on the Court's Miscellaneous Docket. Before going further, let me make it plain that I do not regard the review of these cases as having any statistical validity. I have made no effort to include the criminal cases on the Court's regular docket. There are some of these, but not a great many. Examination of the criminal cases on the Miscellaneous Docket does cover a very high proportion of the criminal cases which come to the Supreme Court seeking review. They at least show the type of issues which are raised. It may be, too, that the Chief Justice's law clerk and I are the only persons who read all the briefs for the government in these cases. I can at least say that they serve as the basis for my own observation and experience, which is really the subject matter of my talk today.

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1. L. RADZINOWICZ, IN SEARCH OF CRIMINOLOGY 181 (1962).

2. N. MORRIS & C. HOWARD, STUDIES IN CRIMINAL LAW XXVII (1964).

## II.

Of the 504 Miscellaneous cases in the October Term 1968, to which the United States was a party, fifty-eight were civil cases of one sort or another. This left 443 criminal cases. Of these, there were nine in which it is not possible to tell the nature of the charge. This leaves 434 cases, which are the subject of my comments.

The cases may first be divided by the type of crime involved. The most striking fact is that eighty-three out of these 434 cases, or nearly twenty per cent, involved bank robbery. There were also ten cases of post office robbery. Thus, the total of these two types of serious robbery is well over twenty per cent of the whole number. Here, I may make a parenthetical observation. If there is one crime where the defendants are relentlessly pursued, usually caught and convicted, and where they receive long sentences, it is bank and post office robbery. Yet, there seems to be a never-ending supply of persons who engage in this sort of activity. In this area, at least, it is not clear that vigorous law enforcement acts as an effective deterrent.

The other large category is that of narcotics. There were eighty-one cases involving prosecutions for sale of heroin, and other narcotics, such as morphine and cocaine. There were fourteen cases involving sales of marijuana. Turning to another problem, there were thirty-nine cases under the Dyer Act, for interstate transportation of stolen automobiles, and nineteen cases involving interstate transportation of forged checks, money orders, or stolen securities. There were twenty-three cases involving violation of the draft laws, fourteen cases of counterfeiting, eleven cases of mail fraud, ten cases of kidnapping, and six cases involving illegal liquor. There were also eighteen cases of murder and eighteen cases of robbery, mostly in the District of Columbia. There were three cases under the Mann Act. Beyond these, there were some thirty categories involving one or two cases, such as escape, false claims, reentry after deportation, putting explosives in the mail, misapplication of bank funds, and so on, down to the charge in one case of making coarse utterances in a national park.

## III.

Very little of significance can be obtained from these figures, I think. However, there is another aspect of the cases which I find striking. As I have indicated, there were 434 criminal cases, where the nature of the charge can be ascertained from the papers. Of these, however, only 308 were on direct appeal from a criminal conviction. The balance, or 135 cases which went through a district court, then through a court of appeals, and then to an effort to get into the Supreme Court, involved some form of collateral attack on a previous judgment of conviction. Thus, the number of cases involving collateral attacks — 135 — was forty-five per cent of the number of cases involving direct appeals — 308. Of the 135 cases, 102 involved motions to set aside a sentence under Section 2255 of Title 28 of

the United States Code,<sup>3</sup> which was enacted twenty-one years ago, in 1948, while the remaining thirty-three cases involved efforts to obtain other sorts of collateral relief, such as habeas corpus, writs of error coram nobis, complaints about failures to receive a transcript, motions for new trial on newly discovered evidence, mandamus to remove notations from record, motions for release because of improper computation of the term of sentence, motion to dismiss an indictment, suits against government agents for violation of rights, mandamus to obtain a special diet, and so on.

The 102 cases in which criminal defendants knocked on the door of the Supreme Court under Section 2255 may be further broken down as follows:

In seventy-four of these cases, this was apparently the first application made to the Court for post-conviction relief. However, there were fourteen cases in which this was the second application; in seven cases it was the third application; and there were three cases in which it was the fourth application, three in which it was the fifth application, and one in which it was the sixth application. Of the thirty-three cases raising questions of post-conviction relief through an application for habeas corpus or mandamus, or other relief, one was the second such application, and one was the fourth application.

Of course, these cases in the Supreme Court are simply the top of the iceberg. They represent only a small portion of the total number of cases which are brought into the federal courts seeking post-conviction relief under Section 2255 or through some other procedure. The Administrative Office of the United States Courts advises me that there were in the United States courts of appeals, 670 such applications from federal prisoners in the year ended June 30, 1969. This compares with 485 such applications in the previous year. The largest number, of course, is in the district courts. There were 3,612 petitions by federal prisoners in the federal district courts in the year ended June 30, 1969; and this figure is to be compared with 2,851 such applications in the previous year. It is clear that the number of these applications is large and that it is increasing.

In this connection, I may say that I am dealing here only with applications by federal prisoners. The number of applications to the federal courts by state prisoners is nearly three times that of the federal prisoners. The total figure for all such applications, from state and federal prisoners combined, for the year ended June 30, 1969, was 12,924. This is about a fifteen per cent increase over the total figure of 11,152 for the previous year.<sup>4</sup>

One thing is very clear from these figures. This is that the prisoners in penitentiaries have come to take their places among the largest law schools in the nation, and "jailhouse lawyers" are doing a very large business.<sup>5</sup> Whenever the Supreme Court of the United

3. 28 U.S.C. § 2255 (1948).

4. The figures, covering collateral review of both state and federal courts, in both the courts of appeals and the United States district courts are set forth in note 8, *infra*. These were compiled by and furnished through the courtesy of the Administrative Office of the United States Courts.

5. *Cf. Johnson v. Avery*, 393 U.S. 483 (1969).

States hands down a significant decision in the criminal law area, my office receives a large number of requests for copies of the opinion. These are often followed by requests for copies of cases cited in the opinion, and so on. A number of our prisons have built up substantial law libraries. Whether this is good penology or not, I do not know.

There is another incidental aspect of these applications to which reference may be made. This is the fact that the application under 2255 must be made in the court where the sentence was imposed.<sup>6</sup> Thus, if a man is sentenced in New York and sent to Atlanta, his application under Section 2255 is filed in New York. One of his hopes is that, at the very least, he will get a trip out of it. This possibility of seeing the outside is a considerable lure<sup>7</sup> and may well account for the filing of a considerable number of these petitions — along with the fact that the preparation of the petitions occupies some of the time which is available to those who are spending their days behind prison walls.<sup>8</sup>

6. *Id.*

7. "One of the gains to the [post conviction] applicant in seeking relief, even if he loses on the merits, is a day or more 'on the outside,' a fact that has not escaped the attention of the courts." A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES 69 (1967), *quoted in* L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1315 (1969). *See also* United States v. Hayman, 342 U.S. 205, 217 n.25 (1952).

8. PRISONER PETITIONS FILED IN THE UNITED STATES  
DISTRICT COURTS, FISCAL YEARS  
1964 THROUGH 1969

Type of Petition	Fiscal Years					
	1964	1965	1966	1967	1968	1969
Total all petitions.....	6,240	7,888	8,540	10,443	11,152	12,924
Petitions by federal prisoners....	2,098	2,559	2,292	2,639	2,851	3,612
U.S. Parole Board reviews.....	58	82	64	104	131	150
Motions to vacate sentence.....	972	1,244	863	958	1,099	1,444
Habeas corpus .....	882	974	1,017	1,045	1,045	1,373
Other prisoner petitions.....	186	259	348	532	576	645
Petitions by state prisoners.....	4,142	5,329	6,248	7,804	8,301	9,312
Habeas corpus .....	3,694	4,845	5,339	6,201	6,488	7,359
Other prisoner petitions.....	448	484	909	1,603	1,813	1,953

PRISONER PETITIONS FILED IN THE UNITED STATES COURTS OF APPEALS  
FISCAL YEARS 1965 TO 1969

Type of Petition	1965	1966	1967	1968	1969
Total .....	1,006	1,094	1,313	1,720	2,078
Petitions by Federal prisoners.....	422	382	421	485	670
Motions to vacate sentence.....	300	248	245	313	403
Habeas corpus .....	104	104	119	105	188
Other prisoner petitions.....	18	30	57	67	79
Petitions by State prisoners.....	584	712	892	1,235	1,408
Habeas corpus .....	571	668	792	1,069	1,197
Other prisoner petitions.....	13	44	100	166	211

Source:

Administrative Office of the United States Courts  
Washington, D.C., 20544 — October 13, 1969

## IV.

There is one matter of considerable importance which appears from examination of the something over 400 federal criminal cases appearing on the Supreme Court's Miscellaneous Docket during the October Term 1968, ended last June. This is the fact that a very high proportion — not all by any means, but a very high proportion — of the questions raised were essentially procedural; that is, they did not directly affect the question whether the defendant was guilty of the crime charged. For example, there were forty-four cases in which questions were raised with respect to illegal search and seizure, and sixteen cases involving the question of illegal arrest. There were thirty-six cases where there had been pleas of guilty, but efforts were made to review the consequent judgment of conviction on the ground that promises had been made to induce the guilty plea, or that it was otherwise coerced, or that the defendant acted upon incompetent advice of counsel. There were thirty-three other cases in which questions were raised with respect to the effective assistance of counsel. There were seventeen cases in which it was contended that the defendant had been denied a speedy trial. There were twenty-seven cases in which questions were raised because two or more defendants had been tried together and it was contended that this was, in one way or another, unfair. There were thirteen cases involving proceedings or evidence before the grand jury, or efforts to gain access to grand jury minutes. There were eight cases in which various questions were raised because the defendant was tried by the federal authorities while he was held by state authorities under another judgment, or where he was tried by state authorities while he was subject to a federal sentence. There were also seven cases where various questions were raised with respect to the computation of sentence. There were three cases where it was contended that there had been improper newspaper publicity during the trial.

Turning to matters which might be regarded as involving both substance and procedure, there were twenty-seven cases raising some question with respect to identification of the defendant, such as the use of photographs, lineups, or on-the-scene identification; and there were eleven cases involving contentions of entrapment. There were eleven cases involving questions of proper warning under the *Miranda* decision.<sup>9</sup> There were two cases in which it was contended that the government's closing argument was improper. There were four in which it was contended that the government had knowingly used perjured evidence, or had suborned perjury. There were two cases where it was contended that improper material had been included in the pre-sentence report considered by the judge, and one case where it was contended that the jury was improperly influenced because they had inadvertently seen the defendant in handcuffs when he was being led through a corridor to the courtroom.

These are mentioned simply by way of illustration. I am merely trying to give the flavor of the cases as one sees them going by in

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9. *Miranda v. Arizona*, 384 U.S. 436 (1966).

a rather continuous stream. It is apparent, I think, that a very considerable amount of time and thought are expended in these cases on matters which are essentially procedural rather than substantive. These are matters which may go to the fairness and propriety of the trial and I do not belittle them. To some observers, though, it may seem that they not infrequently have little to do with the question of the guilt or innocence of the defendant of the substantive crime charged.

## V.

Let me now make some observations with respect to some aspects of the consequences of two of the procedural developments of recent years. In doing this, I am fully aware of, and wholly in accord with the statement made by Mr. Justice Frankfurter a number of years ago in *McNabb v. United States*<sup>10</sup> where he said: "The history of liberty has largely been the history of observance of procedural safeguards."

Like all questions in the law worth discussing, however, the balance between substance and procedure is a question of degree. If we make of procedure an intellectual chess game, we may lose sight of the legitimate and necessary end of the criminal law. It is, of course, equally true that if we ignore proper procedures we may make the criminal law an instrument of tyranny. My own thought is that we need not accept either of these extremes. The problem is to find a proper balance.

### A. *Right to Counsel*

The recognition of an effective right to counsel in criminal cases was too long postponed. In the popular mind, this goes back to *Gideon v. Wainwright*,<sup>11</sup> decided in 1963. As far as criminal trials in the federal courts are concerned, however, it was established in *Johnson v. Zerbst*,<sup>12</sup> decided in 1938, more than thirty years ago. There can be no doubt that the presence of counsel has made a significant contribution to the administration of criminal justice. There can be no doubt, either, that this belated innovation has introduced some new problems. I will try to summarize some of these, though I do not have the opportunity here to discuss them fully.

There has been a vast amount of devoted work by many lawyers in representing indigent defendants in criminal cases. This is a burden, in my opinion, which practicing lawyers should not be called upon to carry at their own expense, except in unusual cases. More effective provision should be made, both state and federal, for the representation of indigent defendants on a systematic basis.

In the last few years, there has been a great expansion of the availability of lawyers through the Legal Aid agencies, and through offices established under the Office of Economic Opportunity. There is also the Criminal Justice Act,<sup>13</sup> which is quite effective in many

10. 318 U.S. 332, 347 (1943).

11. 372 U.S. 335 (1963).

12. 304 U.S. 458 (1938).

13. 18 U.S.C. § 3006A (1964).

federal courts, and there has been some development and improvement in state public defenders, or other organized defender agencies. However, some of this is transitory. We need to take further steps to see that representation is provided for defendants in criminal cases on a regularly established, systematic, and publicly financed basis.

Unfortunately, some lawyers are not as able as they might be, and a few are not adequately conscientious. Others, though working very hard, get involved in too many cases, and fail to make adequate preparation, or take some step that might have been pursued. The defendant is not merely entitled to counsel; he is entitled to the effective assistance of counsel.<sup>14</sup> If counsel undertakes the case, and then neglects it, should the defendant be the one to suffer? This is a real problem, though fortunately a relatively rare one. Perhaps bar associations should undertake a greater responsibility to admonish lawyers who are careless, or to take more serious steps in cases warranting that action.

Nevertheless, the fact that lawyers sometimes fail to do things that they should or could do has a collateral consequence. It means that no matter what a lawyer does, the defendant can always contend, either directly, or in a collateral post-conviction proceeding that he was denied the effective assistance of counsel. What are some of the results of this?

Because of the screening involved, both by the district attorney and by the grand jury, I think it a fair statement to make, simply as a factual matter, that a high proportion of persons who are charged with serious crimes are in fact guilty. Indeed, the whole system for the administration of criminal justice is built on that premise. We have never had the facilities to conduct trials of all persons charged with crime. The plea of guilty is normal, and is expected in a high proportion of cases.

However, since all defendants now have counsel, the proportion of pleas of guilty is considerably reduced. Many conscientious counsel feel that there is nothing to be lost for their client by going to trial. At the worst, he can be found guilty, and that only after considerable delay. Moreover, trials being what they are, there is considerable likelihood that there will be some error in the admission of evidence, or in the charge, or somewhere along the way in the proceedings, which will mean, at the very least, that there may be a new trial and the final evil day can be still longer postponed.

Moreover, what happens if counsel, having conscientiously reviewed the evidence, does advise his client to plead guilty? Then, there is a very considerable prospect that there will, in due course, be an application for post-conviction review, based on the contention that the defendant was denied the effective assistance of counsel.

Let us suppose, though, that counsel does advise a not guilty plea. There is then a trial, at which the defendant is convicted. Under our system, it now becomes almost automatic that there should be an appeal. Here, again, the failure to take this step may result in a con-

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14. *Powell v. Alabama*, 287 U.S. 45 (1932).

tention that the defendant was denied the effective assistance of counsel. Moreover, if there is an appeal, and the judgment of conviction is affirmed by the court of appeals, there is great pressure on counsel to file a petition for a writ of certiorari with the Supreme Court. Again, if he does not do this, the contention may be made that the defendant was denied the effective assistance of counsel.

In this, our practice is in great contrast to the British system. There, a question of appeal in a criminal case would be referred to counsel, who would be a barrister. He might be privately retained, or provided under the Legal Aid system. The barrister would review the matter, and if he felt that there was no basis for an appeal, he would say so. His professional reputation would be affected if he appeared in court on a case quite without merit. As a result, a relatively small number of criminal cases are appealed in Great Britain. With us, the tendency is all the other way. A lawyer's professional reputation might be affected if he did not take an appeal. Moreover, as a practical matter, he may have no effective choice. If he is assigned to represent the defendant, he generally has no practicable alternative except to go ahead and make what he can of such points as he thinks he can find in the record.

No doubt, we would be unable to import into our system the expertise and standing of the British barrister. It may well be, though, that we could find some way to make it more professionally acceptable to decline to proceed with an unwarranted appeal, and, going back to the earlier stage, to make it more professionally acceptable to recommend a plea of guilty in appropriate cases. Where the defendant is guilty, it may be in his interest to get the matter over with, and for him to accept whatever sentence may be involved; in order that he may sooner get his troubles behind him and be free to start out on a new path.

Needless to say, nothing that I have said is intended in any way to put any pressure on a lawyer to recommend a plea of guilty in any case where it is his professional judgment that such a plea should not be entered, or to refrain from taking an appeal where, in his professional judgment there is sound basis for an appeal. All I am trying to suggest is that there should be a greater opportunity to exercise such a professional judgment, and a willingness to exercise it.

### B. *Search and Seizure*

One of the most important developments in criminal procedure in recent years has been the reactivation of the fourth amendment with respect to search and seizure. There can be no doubt that this was long overdue, particularly in the field of state prosecutions. For example, I quote the following from the *New York Times* of April 28, 1965:

"The Mapp case was a shock to us," Deputy Police Commissioner Leonard Reisman, head of the department's legal bureau, said. "We had to reorganize our thinking, frankly. Before this nobody bothered to take out search warrants.

"Although the Constitution requires warrants in most cases, the Supreme Court had ruled that evidence obtained without a warrant — illegally if you will — was admissible in state courts. So the feeling was, why bother?"<sup>15</sup>

Similarly, Professor Yale Kamisar recorded the following statement from the Minneapolis Star:<sup>16</sup> "Joseph A. Hadley, head of the city attorney's criminal division from 1929 to 1954, said he could remember only two search warrants issued in that period. The city attorney's office has no record of any issued since 1954."

Surely, these practices were wrong. If the fourth amendment means anything, there should be the determination of an independent magistrate before a search is made. There should similarly be an independent determination before an arrest warrant is issued except in cases where the arresting officer himself has probable cause. The decisions of the Supreme Court, which have emphasized and enforced these basic rights are hardly subject to criticism.

Again, like all questions worth discussing in the law, there may be matters of degree. To me, for example, there is a clear difference between search of a home, on the one hand, and the search of an automobile, on the other, a greater difference than is, I think, recognized in the cases. Similarly, there is, it seems to me, real room to question how strong a case must be made in the affidavit seeking a search warrant. It may be remembered that ordinarily these affidavits are not prepared by lawyers, and it seems hard to feel that there is any reason that they should be prepared by lawyers, or treated as if they were. They are not pleadings. There should be no requirement either in form, or as a practical matter, that the whole case should be tried out in connection with the application for a search warrant.

Search warrants should not be a formality. We do not want a situation where they are signed up in blank, and left in a pad on the policeman's desk, as is sometimes said to be the case with subpoenas. On the other hand, the requirement should not be too technical. Time is often of the essence in these matters, and it is not feasible to prepare a search warrant application as if for trial. Particularly in rural areas, the magistrate may be far away, and not especially experienced in these matters. Of course, probable cause should not be found on mere assertion. On the other hand, perhaps it should be more clearly recognized that probable cause for a search warrant is something very different from sustaining the burden of proof at a trial.

There is another problem in connection with searches and seizures, when these are made in connection with an arrest. In the last Term, the Supreme Court held in *Chimel v. California*<sup>17</sup> that a search in connection with a lawful arrest may extend to the arrestee's person to discover and remove weapons, and to prevent the concealment of evidence on his person, and may extend to the area within the im-

15. N.Y. Times, Apr. 28, 1965, at 50, col. 1.

16. Kamisar, *On The Tactics of the Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L. REV. 436, 441 (1964), citing, Minneapolis Evening Star, Aug. 22, 1961, § 9A, col. 1.

17. 395 U.S. 752 (1969).

mediate control of the person arrested, meaning the area from which he might gain possession of a weapon or effect the destruction of evidence. Any further search, the Court held, required a search warrant.

Here there is a very real practical problem. Does the police officer have any power to maintain the status quo while he, or a colleague of his, is taking the time necessary to draw up a sufficient affidavit to support an application for a search warrant, and then finding a magistrate, submitting the application to him, obtaining the search warrant if it is issued, and then bringing it to the place where the arrest was made. It seems inevitable that a minimum of several hours will be required for this process, at the very best. Unless there is some kind of a power to prevent removal of material from the premises, or destruction of material during this time, the search warrant will almost inevitably be fruitless. Of course, if a search warrant is refused, the officers should leave the premises. May they guard the premises, and prevent egress and entry, and action within the premises, while the search warrant is being obtained? We do not know. There may well be room here, though, for a balance in determining the applicability of the fourth amendment. If a warrant is in fact obtained in such a case before a search is made, can it be said to be unreasonable under the fourth amendment if steps are taken to preserve the status quo?

## VI.

Our standards and requirements in criminal procedure have been greatly improved in recent years. I conclude by pointing out an important consequence of this development which has, I think, so far escaped general recognition. This is the great increase in the time which is now required to handle the average criminal case, from its beginning to its end, and the consequent increase in the manpower needed to conduct all aspects of our criminal law administration. I am not now talking about the overall elapsed time from arrest to conviction, though that is of great importance. What I am talking about is the aggregate amount of time in manhours actually required to be devoted to the consideration and handling of each case — not merely courtroom time, but overall time actually devoted to the case by all the personnel involved.

This starts with the police, or other law enforcement officers. They must be more thoroughly instructed as to their duties, and must understand the requirements of the *Miranda* warnings. They must devote time to the preparation of affidavits for warrants of arrest, or search warrants, often in consultation with an Assistant United States Attorney, or other lawyer, thus requiring the time of both police and lawyer. There is also the time involved in presenting the application for a warrant and getting it and executing it, and there is the time of the magistrate, who must study the application, and exercise his judgment.

Then we come to the indictment, and eventually the trial. Because the defendant has counsel, there are fewer pleas of guilty, more cases

are tried, and trials, of course, take the time of many people. Before the trial, however, there are now likely to be numerous pretrial motions, for the suppression of evidence, for discovery of one sort or another, and for the disclosure of statements taken by the government, and so on. Usually, these pretrial motions require a hearing utilizing the time of the judge, of an Assistant United States Attorney, as well as of counsel for the defendant, and of officials in the Clerk's office, and other employees. Perhaps most important — though this is often overlooked, and may surprise you — one of the most serious shortages is found in meeting the requirement of the attendance of a court reporter. Reporters are also generally required now for grand jury proceedings. In many cases, qualified reporters may be scarce, and considerable time may elapse before the reporter's transcripts are completed, without which, further steps, such as an appeal, cannot be advanced.

When the case comes to trial, many procedural questions are often raised, requiring a considerable amount of time at the trial. There may be examination and cross-examination about *Miranda* warnings, for example. If two or more defendants are involved, or if there is a question under the *Bruton* case,<sup>18</sup> there may be the need to have two or more trials, with consequent increase in the overall manhours involved. Other illustrations could readily be given.

If there is a conviction, then there is likely to be an appeal requiring time of counsel on both sides, and time and consideration from three judges. If the judgment is affirmed on appeal, there is likely to be a petition for a writ of certiorari.

Even if the judgment is affirmed on appeal, and certiorari is denied, there can be a motion for reduction of sentence under Rule 35 of the Rules of Criminal Procedure.<sup>19</sup> And there may be a motion for a new trial under Rule 33 of the Rules of Criminal Procedure.<sup>20</sup> In either case, there may be appeals from the denial of such motions, and these may lead to petitions for certiorari, and further proceedings.<sup>21</sup>

Then, if all appeals are ended unsuccessfully, there may be an application under Section 2255 of Title 28 of the United States Code for relief on a broad class of grounds.<sup>22</sup> Such motions may be repeated; and, as I have indicated, there may be appeals from the denial of such motions, and further petitions for certiorari.

It is not possible to get an exact figure as to what all of this means in the administration of the criminal law. Friends of mine who deal directly in these matters tell me that it takes from two to four times as much time in manhours now, overall, to handle the average criminal case through all of the proceedings available, as it

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18. *Bruton v. United States*, 391 U.S. 123 (1968).

19. FED. R. CRIM. P. 35.

20. FED. R. CRIM. P. 33.

21. *United States v. Birnbaum*, 373 F.2d 250 (2d Cir.), *rehearing denied*, 375 F.2d 232 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967), *motion for reduction of sentence denied*, (S.D.N.Y.), *aff'd*, 402 F.2d 24 (2d Cir. 1968), *cert. denied*, 394 U.S. 922, *rehearing denied*, 394 U.S. 994 (1969), *second motion for new trial denied*, (S.D.N.Y. 1969), *appeal pending* in the Second Circuit Court of Appeals, is a striking example, both as to the type of question, and the numerous hearings involved.

22. 28 U.S.C. § 2255 (1964).

did ten years ago. These estimates seem to me to be on the outside, one way or the other. I think a fair statement would be that it now takes, on the average, three times as much active consideration time to handle the average criminal case in the federal courts from beginning to end now as it did when we operated on a more rigid and less refined procedure.

Let me point out what this means. It means about three times as much judicial time for each criminal case, overall. Here is a considerable reason for congestion in the federal courts. Beyond that, it means about three times as much time of the Assistant United States Attorneys. This is a further reason for congestion in the federal courts. In some situations, a judge is available, but there simply is not an Assistant United States Attorney who has had time to prepare a case for trial. There has been a great increase in the number of appeals, and thus a great increase in the demands on the time of counsel and of the judges of the United States courts of appeals. And there are hundreds of these cases, as I have indicated, which come before the Supreme Court. A really troublesome aspect of the problem is with respect to court reporters. A good court reporter is a member of a highly skilled occupation. In many cases, it is necessary to wait for a reporter, and it may be very difficult to get prompt transcripts of court proceedings. This problem is the cause of considerable delay in the administration of the criminal law.

## VII.

The points I have suggested are intended to be illustrative only, and in no sense exhaustive. They do show, I think, that improvements in our criminal procedure bring some problems in their wake, which should be more clearly recognized. In discussing some of these problems, I have had two things in mind. My first objective has been to point out the inevitable cost of these developments, not in money, but in time and manpower — the time not only of judges, and lawyers on both sides, and clerks, but also of court reporters, and other personnel. This means that we need many more people simply to handle the same number of cases as were handled before. I believe that steps should be taken to increase our resources in manpower for the handling of these cases.

My second observation, in conclusion, is that in moving ahead we should keep in mind the risk that problems of criminal procedure may take on the guise of "a kind of intellectual game of chess." We should not only remember the objective of procedure in the sound administration of the criminal law itself, but we should constantly recognize that nearly all questions of procedure, particularly those with constitutional overtones, involve questions of balance and degree. Like all good things in the law, they should not be pushed to a dryly logical extreme. Criminal procedure, like criminal law, should be a matter of substance and not of form. When the proper balance is obtained, perhaps the casebooks on criminal procedure will not be three times as long as those on criminal law.