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Ninth Circuit Review—Introduction

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RECENT DEVELOPMENTS IN CRIMINAL LAW AND PROCEDURE IN THE NINTH CIRCUIT: PART I*

I. INTRODUCTION

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The task undertaken by the *Loyola Law Review* of analyzing and reviewing cases decided during the past year by the Ninth Circuit Court of Appeals in the area of criminal law is an important one which will inure to the benefit of all members of our profession. The rapidly changing nature of criminal law is often alluded to by writers and theoreticians, while practitioners in this area are quick to acknowledge the formidable task of keeping abreast of recent decisions.

Moreover, because this vast body of law evolves on a case-by-case basis it becomes of paramount importance for judges and lawyers to achieve and maintain a broad perspective with respect to its development. Such a frame of reference not only facilitates the ability to anticipate trends and future case development but also minimizes the possibility of anomalies occurring which might otherwise result from the seriatim nature of case development. An analysis of appellate court decisions is a valuable method of keeping abreast of recent legal developments as well as a vehicle by which insight and a frame of reference can be developed.

Potential weak points in our criminal justice system which up to now have largely remained dormant are being forced to the surface by the steadily increasing number of criminal cases with which the system must deal. In arenas both within and without the profession the current debate centers upon the quality of our criminal justice system. Of course, any such discussion must include the revelation that steadily increasing criminal caseloads are taxing the system to its limits at all levels. It is now commonly conceded that the federal judiciary from the Supreme Court to the United States Magistrates is overworked and that

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* This is the first of two parts dealing with Ninth Circuit decisions in the area of criminal law and procedure.

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this burden is a direct result of the ever-increasing number of criminal cases. The effect of this barrage of criminal cases is unmistakable. It manifests itself as a glut on the criminal justice system with potentially grave consequences. These consequences are by no means limited to the judiciary, as will attest any criminal investigator, prosecutor, public defender, probation officer, or prison official.

Although the inherent limitations on the Supreme Court's ability to deal with increasingly large numbers of criminal cases have been readily acknowledged for some time, it is only recently that an awareness has emerged that, due to a number of factors, federal courts of appeals show well-developed symptoms of the same malady. This, of course, is not to imply that state judiciaries are free from these concerns. Ominously, the most recent statistics from the Federal Bureau of Investigation clearly show that crime is on the increase; hence caseloads in the area of criminal law will continue to rise in the coming year. The only solace offered by these recent crime figures is that the rate of the increase in crime has fallen off to some small degree. However, the increase in crime continues unabated.

In the federal system we are undoubtedly on the threshold of major changes brought about in part by the enactment of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. These legislative changes, in some cases, are substantial and extend both to the substance and form of criminal practice in the federal courts. However, other enactments by Congress, such as the Speedy Trial Act, by virtue of their very existence attest to the widespread belief that the legal system has become increasingly unable to deal effectively and promptly with criminal cases.

All or some of the above have served to focus attention on the federal criminal justice system in general and the appellate level in particular. Proposed suggestions for reform to ease the burden of the court of appeals range from the elimination or curtailment of oral argument to dividing the geographical area which presently composes the Ninth Circuit. The courts themselves are also well aware of their present burden and have instituted a myriad of reforms.

According to some legal writers, an additional, though unstated reason for the growing emphasis which is being placed on reform and the quality of justice at the appellate level is that, due to the limitations on the Supreme Court, the courts of appeals are quickly becoming the final arbiters in an increasing number of criminal cases. Hence, the

opinions and positions of the courts of appeals which relate to major issues have achieved increased importance.

In reviewing the decisions of the Ninth Circuit, it is at once apparent that over the past year, despite problems caused by an increased caseload, the court has taken what may be considered major positions on some important and heretofore troublesome aspects of criminal law. In many instances these recent decisions have, in large measure, changed existing case law and in virtually all cases in these areas the court's opinions have spoken to controversial issues. When some of these recent opinions are considered, along with earlier decisions of the Ninth Circuit, certain trends can be discerned in a number of areas of criminal law.

One area of criminal law which has been the subject of great controversy in this and other circuits is the defense of insanity. In the future there is no doubt that the inevitable debate will continue regarding legal aspects of the insanity defense such as the appropriate standard to be applied, legal presumptions, issues of lay testimony, and burdens of proof.

However, while the discussion persists as to these legal issues as well as the omnipresent factual issues which are involved in the insanity defense, it has become increasingly apparent that the role of experts in criminal cases, particularly in the psychiatric area, has expanded to unsettling proportions. Not only have cadres of psychiatric experts become a fact of life in criminal cases where competency is at issue or where insanity is claimed as a defense, but these experts, with increased frequency, also have reared their heads in criminal trials where neither competency nor sanity is in issue. Psychiatric experts now attempt to offer their opinions on a number of issues unrelated to sanity or competency of the defendant, including the credibility of government witnesses and the defendant's inability, because of psychological factors, to act with specific intent.

The expanding role of psychiatric experts in criminal trials is in part the by-product of decisions of the Ninth Circuit in various areas, and, in light of some recent opinions of the Ninth Circuit, it seems that this trend may endure in the future.

One factor in the increased use of psychiatric experts in criminal cases is the relative ease with which such experts can be appointed under existing statutes as interpreted by the Ninth Circuit. Psychiatrists and psychologists are appointed as a matter of course in criminal cases upon a minimal showing of necessity, usually upon the request of an attorney.

Thus, a psychiatrist can be appointed in a number of ways for a variety of purposes. For example, an appointment of a psychiatrist or psychologist to act as a defense expert must be made for an indigent defendant under the Criminal Justice Act.[1] A psychiatrist can also be appointed by the court for any purpose under the Federal Rules of Criminal Procedure,[2] or pursuant to statute to determine the defendant's competence to stand trial.[3] Finally, the federal district court has the inherent power to appoint an expert to determine a defendant's sanity at the time of the offense.[4]

In addition to the ease with which a psychiatrist can be appointed, a contributing factor in the increasing amount of such expert testimony in criminal cases is the line of Ninth Circuit opinions which in effect requires the government to produce an expert if the defense offers expert testimony on the issue of insanity.[5]

However, the expanding role of the psychiatric expert in criminal cases is not solely attributable to the more frequent use of expert testimony in cases involving issues of sanity or competency. The increasing frequency of expert testimony is coupled with growing pressure upon, and the resultant tendency of, the Ninth Circuit to broaden the permissible scope of the psychiatrist's testimony, the effect of which is to introduce into a criminal trial more and more abstruse psychological concepts. In short, not only is psychiatric expert testimony becoming more frequent in criminal cases, but it is becoming more complicated and psychiatrists are being asked to formulate opinions in more difficult areas.

For example, in recent years, the Ninth Circuit has addressed itself to the issue of whether or not the expert testimony of a psychiatrist is admissible to negate the element of specific intent, even though insanity is not in issue. The court initially ruled that such testimony was not admissible, basing its holding in part upon an expressed doubt that the state of the developing art of psychiatry was such that testimony as to

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1. 18 U.S.C. § 3006(A)(e) (1970); United States v. Hartfield, 513 F.2d 254, 258 (9th Cir. 1975); United States v. Bass, 477 F.2d 723, 725-26 (9th Cir. 1973).

2. FED. R. CRIM. P. 28(a).

3. 18 U.S.C. § 4244 (1970); United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973); Meador v. United States, 332 F.2d 935, 936 (9th Cir. 1964).

4. United States v. Wade, 489 F.2d 258, 259 (9th Cir. 1973); United States v. Malcolm, 475 F.2d 420, 424 (9th Cir. 1973).

5. United States v. McGraw, 515 F.2d 758, 760 (9th Cir. 1975); United States v. Shackelford, 494 F.2d 67, 69-70 (9th Cir.), *cert. denied*, 417 U.S. 934 (1974); United States v. Cooper, 465 F.2d 451, 453 (9th Cir. 1972).

subtle gradations of specific intent had enough probative value to be admitted.[6] However, the court, again considering this issue, ruled that the admissibility of such evidence will generally be held to rest within the sound discretion of the trial court.[7] If the Ninth Circuit's most recent pronouncement marks a liberalizing trend in this area, one can expect to see psychiatrists testifying retrospectively not only as to the defendant's sanity, but also as to a whole host of other psychological and emotional infirmities which do not amount to insanity yet ostensibly have an untold effect on a defendant's ability to formulate specific intent to commit a crime.

Another avenue by which more complicated psychiatric testimony will be introduced in criminal trials stems from the Ninth Circuit's recent reaffirmation of its earlier ruling[8] that a defendant lacks substantial capacity to appreciate the wrongfulness of his conduct (hence legally insane) if he knows his act to be criminal, but commits it because of a delusion that it is morally justified.[9] It is apparent that such a standard invites expert testimony as to the existence and effect of delusions and goes well beyond the relatively straightforward issue of whether or not a defendant knew his actions were legally wrong.

As a result of many of these decisions, as well as from the very nature of the insanity defense, it is obvious that the psychiatric expert has become, and will continue to be, a fixture in criminal cases. Because expert testimony has been used increasingly in contexts other than that of insanity, the relevant and somewhat perplexing question that will face the court in the future is the extent to which such testimony will, and can, continue to be relied upon and whether or not such testimony is proper in criminal cases where sanity or competency is not in issue.

In addition to the defense of legal insanity, another area of criminal law which has been plagued by controversy from its inception is the defense of entrapment.[10] In past years the Ninth Circuit addressed

6. Wahrlich v. Arizona, 479 F.2d 1137, 1138 (9th Cir.), *cert. denied*, 414 U.S. 1011 (1973). *See also* United States v. Haseltine, 419 F.2d 579 (9th Cir. 1969), *rev'd on other grounds sub nom.*, United States v. Bishop, 412 U.S. 346, 351-54 (1973).

7. United States v. Demma, 523 F.2d 981, 986-87 (9th Cir. 1975); United States v. Barnard, 490 F.2d 907, 913 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). In *Demma*, the court also reiterated its earlier ruling that the trial court has discretion to admit the testimony of a defense psychiatrist on the issue of credibility of government witnesses. 523 F.2d at 986.

8. Wade v. United States, 426 F.2d 64, 73 (9th Cir. 1970).

9. United States v. McGraw, 515 F.2d 758, 760 (9th Cir. 1975).

10. *Compare* Sherman v. United States, 356 U.S. 369, 370 (1958) (Warren, C.J.), *with id.* at 378 (Frankfurter, J., concurring). *Compare* Sorrells v. United States, 287 U.S. 435, 438 (1932) (Hughes, C.J.), *with id.* at 453 (Roberts, J., dissenting).

itself to various aspects of the entrapment defense and, in a number of cases, the court made attempts to broaden the defense.[11] However, in many respects, this trend was halted when the Ninth Circuit's opinion in *United States v. Russell*[12] was reversed by the Supreme Court.

During the past year the Ninth Circuit again considered aspects of the controversial defense of entrapment and in the course of doing so made a major change in the existing law of this circuit.[13] The court sitting *en banc* ruled that a defendant in a criminal action may assert the defense of entrapment without being required to admit that he committed the offense or any of its elements.[14] Although this represents a radical alteration of the existing law in this circuit, the change is not as abrupt as it may appear at first blush. In retrospect, foreshadowing of the new rule can be discerned from events which occurred at the circuit level as early as 1973. At that time a panel of the court addressed this issue and reaffirmed the existing rule that a defendant must admit the elements of the offense before he could avail himself of the entrapment defense. However, the opinion in that case was later modified and the portion which ruled upon this particular entrapment issue was eliminated and was conspicuous in its absence.[15] Thus, rather than being an abrupt change of direction, it appears that the court's recent pronouncement in the area of entrapment was more akin to the final mutation in an evolutionary process.

With respect to future developments in this area, especially in the wake of the Supreme Court decision in *United States v. Russell*,[16] it seems that the bulk of controversial issues facing the Ninth Circuit will be factual ones, centering upon whether or not the government's actions violated due process. In making these determinations the circuit court will probably continue to use a bifurcated approach, first analyzing the facts of the case using the somewhat narrowed due process standard set out in *Russell*,[17] and then applying the appropriate entrap-

11. *See, e.g.*, Greene v. United States, 454 F.2d 783, 786 (9th Cir. 1971).

12. 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423, 436 (1973).

13. United States v. Demma, 523 F.2d 981, 986 (9th Cir. 1975), *overruling* Eastman v. United States, 212 F.2d 320 (9th Cir. 1954).

14. 523 F.2d at 982. The Ninth Circuit's new rule comports with that of some other jurisdictions. Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Crisp v. United States, 262 F.2d 68 (4th Cir. 1958). *See also* People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965).

15. United States v. Glassel, 488 F.2d 143, 146 (9th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974).

16. 411 U.S. 423 (1973).

17. *Id.* at 431-32.

ment standard.[18]

Another area of criminal law which has been the subject of great debate involves the existence and function of the grand jury. In recent cases decided in the state court, the grand jury system has been attacked to the extent that suggestions have been made to abolish it.[19] However, there is little, if any, indication that such a feeling exists on the federal side. The absence of this inclination may be attributed to a number of factors, not the least of which is the restriction placed upon the judiciary in this area by the constitutional requirement for the existence of the grand jury on the federal side.[20] An additional factor may be that the Supreme Court has recently reaffirmed the broad powers of the grand jury.[21]

Despite the fact that there is no indication that the Ninth Circuit desires to institute a comprehensive reform of the grand jury system, the court has evidenced a desire, through a number of its opinions, to exercise some degree of control over certain practices which occur before the grand jury. For instance, the court has been increasingly receptive to the concept of recording grand jury testimony if a timely motion is made.[22] However, the court has not altered the broad rule that absent a motion there is no requirement that grand jury proceedings be recorded or transcribed.[23]

That the court is willing to exercise some degree of control over grand jury practices and procedures is also evident from the increasing tendency of the court to intervene in grand jury proceedings on an ad hoc basis. When such an intervention has occurred, the court has used its broad powers under the due process clause to voice its opinion on certain practices or to respond to factual situations that it finds distasteful.[24] But the continuation of this trend toward intervention on a case-

18. *See* United States v. Lue, 498 F.2d 531 (9th Cir.), *cert. denied*, 419 U.S. 1031 (1974); United States v. Greenbank, 491 F.2d 184 (9th Cir.), *cert. denied*, 417 U.S. 931 (1974). *See also* United States v. Ladley, 517 F.2d 1190 (9th Cir. 1975).

19. *See generally* Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975).

20. U.S. CONST. amend. V.

21. United States v. Calandra, 414 U.S. 338 (1974).

22. United States v. King, 478 F.2d 494 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973); United States v. Prince, 474 F.2d 1223 (9th Cir. 1973); United States v. Thorensen, 428 F.2d 654 (9th Cir. 1970).

23. United States v. Antonick, 481 F.2d 935, 937 (9th Cir.), *cert. denied*, 414 U.S. 1010 (1973).

24. United States v. Wong, — F.2d — (No. 74-1636, 9th Cir. Nov. 23, 1974), *petition for cert. filed*, 43 U.S.L.W. 3392 (U.S. Nov. 22, 1974) (No. 635); United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).