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Criminal Law--Disqualification of Jurors

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overruling the old decision makes no reference that the application is to be prospective only, then the application is to have a retroactive effect. Because there have been no cases in West Virginia where an overruling was made to apply prospectively only, it would seem that West Virginia still follows the traditional view that overrulings by the courts have to be applied retroactively.

William Walter Smith

Criminal Law—Disqualification of Jurors

D was indicted for the receipt, concealment, and sale of heroin in violation of 21 U.S.C. § 174 (1959), convicted by a jury, and sentenced to fourteen years imprisonment. In *D*'s trial ten of the twelve jurors had served in previous cases of a similar nature in which the government had used the same witnesses who testified in *D*'s case. *D* contended that this raised a presumption of law that the entire jury was partial and prejudiced, thus depriving him of his right to a trial by an impartial jury as guaranteed by the Sixth Amendment. On appeal from district court conviction, *held*, affirmed by an equally divided court. Three judges were of the opinion that prior service by jurors in similar cases developed by identical witnesses is not prejudicial to *D* when the case arose out of separate, distinct, and independent actions. The three dissenting judges reasoned that a prospective juror or jurors, who have heard a similar but disconnected case based upon testimony of the same prosecuting witnesses, should be discharged for implied bias or prejudice. *Casias v. United States*, 315 F.2d 614 (10th Cir. 1963).

The courts are in disagreement in fact situations similar to those in the principal case. The federal courts and the majority of the state courts which have passed upon the point hold that prior service of jurors in similar cases where the same witnesses are used is not prejudicial to the defendant. In *Wilkes v. United States*, 291 F.2d 988 (6th Cir. 1923), the *D* was indicted for violation of the Reed Amendment. The court stated that the fact that some of the jurors had served in similar cases in which the same government witnesses were used did not entitle *D* to dismissal where it was shown that the jurors on their *voir dire* had stated they had formed no opinions about the guilt or innocence of the *D*. Similarly, in *State v. Mays*, 74 Ohio L. Abs. 43, 139 N.E.2d 639 (1956), the *D*

was prosecuted for violation of the Narcotics Act. Three of the jurors had served on a previous jury which had convicted another *D* of the same offense in which the same prosecuting witnesses were used. The court held that in the absence of the showing of actual partiality the jury would be competent to serve. The test to be used in determining actual partiality of the jurors was the answering of questions during their *voir dire* examinations. The courts used the subjective test in that it allowed the juror to decide as to his competency to serve. See *Harbold v. United States*, 255 F.2d 202 (10th Cir. 1958); *Lander v. State*, 148 Miss. 243, 114 So. 341 (1921); *State v. Russel*, 73 Mont. 240, 235 Pac. 712 (1925); *Fletcher v. Commonwealth*, 106 Va. 840, 56 S.E. 149 (1902).

The West Virginia Supreme Court has not passed on this point as presented in the instant case. However, in *State v. Carduff*, 142 W. Va. 18, 93 S.E.2d 502 (1956), the court passed upon facts similar to those in the instant case as pertaining to a grand jury. The court stated that where jurors have been carefully examined on their *voir dire* and state they are impartial towards the defendant, they are competent to serve. From this case it appears that West Virginia would follow the majority view and apply the subjective test in determining a juror's competency to serve in fact situations as presented in the instant case.

A smaller group of state courts hold that use of jurors who have served in previous cases of a similar nature in which the same prosecuting witnesses were used would be prejudicial to defendant. In *Priestly v. State*, 19 Ariz. 371, 171 Pac. 137 (1918), *D* was convicted of unlawfully selling intoxicating liquors. Five of the jurors in his case had served on a previous case similar in nature in which the same prosecuting witnesses were used. The jurors had stated through their *voir dire* examination that they could try *D*'s case fairly and impartially. The court held that this deprived *D* of a fair and impartial trial as guaranteed to him by the Sixth Amendment to the Constitution. The court stated that once the jurors had passed upon the credibility of the witnesses in a similar case upon substantially the same evidence and rendered a verdict on their oaths, it was not to be believed that they could sit in this case without these previously formed opinions influencing them. The jurors' answers to categorical questions, though intended to be truthful, are less convincing than the known nature and tendency of the human mind. The jurors' statements, during their *voir dire*,

that they are impartial towards the *D* is immaterial when determining their competency to serve. The court applies the ordinary reasonable man test and disqualifies these jurors as a class. See *Stephens v. State*, 52 Okla. Crim. 340, 5 P.2d 409 (1931); *Hardgroves v. State*, 61 Tex. Crim. 422, 135 S.W. 144 (1911); *Green v. State*, 54 Tex. Crim. 3, 111 S.W. 933 (1908).

In an analogous situation where the same transaction results in more than one offense, the courts are in agreement as to the incompetency of jurors to serve in two or more cases arising from the same transaction. The courts reason that once the jurors have passed upon the credibility of the prosecuting witnesses in the previous case, they cannot be considered as impartial towards the defendant. The jurors are held incompetent to serve even though they state during their *voir dire* examination that they are impartial towards the defendant. All courts apply this rule as a matter of course, reasoning that under similar circumstances an ordinary reasonable man would be partial. See *Everitt v. United States*, 281 F.2d 429 (5th Cir. 1960); *Crowden v. State*, 41 Ala. 421, 133 So. 2d 678 (1961); *Mon Quick v. State*, 53 Okla. Crim. 146, 8 P.2d 689 (1932).

The United States Supreme Court has not passed on the point as presented in the instant case. However, in the case of *Dennis v. United States*, 339 U.S. 162 (1950), the dissenting opinion by Justice Frankfurter laid down what appears to be a good rule when dealing with the bias or prejudice of a juror. The reason for disqualifying an entire class on the grounds of bias or partiality is the law's recognition that if circumstances of that class in most of the instances are likely to produce bias, consciously or unconsciously, it would be impossible to ascertain the impact of the circumstances on the mind of a particular individual.

It is difficult to see the distinction the majority of the courts are drawing in the two fact situations presented. In a fact situation similar to the instant case they apply the subjective test and allow the juror to decide his competency to serve. In a situation where the only difference is that two offenses arise from the same transaction, these courts apply the objective test, disregarding any consideration of actual bias or prejudice, and disqualify the jurors as a class. It seems that the objective test as used by the minority and as laid down by the Supreme Court when dealing with bias or prejudice would be the more logical of the two. The division of

the court in the instant case may indicate that in the future the federal courts will question more strenuously the qualifications of a juror who has served on a previous case of a similar nature in which the same prosecuting witnesses were used.

Fred Adkins

**Evidence—Competency of Husband and Wife to Testify
to Nonaccess During Time of Conception**

P, a married woman, accused *D* who was not her husband of being the father of her child. During the trial *P* testified over objection by *D*, that she had been separated from her husband for more than one year prior to the birth of the child, that she had seen him only four times during that period, and that on all of these occasions there were other witnesses present. The husband, also over objection by *D*, corroborated *P*'s testimony. *D* was convicted of bastardy. A motion to set aside the verdict and award a new trial was overruled. *D* appealed. *Held*, reversed and remanded. In a bastardy proceeding instituted by a married woman, in the absence of a statute authorizing the spouses to testify as to nonaccess, they were incompetent to testify to that fact. The admission of such testimony constituted prejudicial error. *State ex rel. Worley v. Lavender*, 131 S.E.2d 752 (W. Va. 1963).

The presumption of legitimacy of a child born in wedlock is one of the strongest known to law. *Bariuan v. Bariuan*, 186 Kan. 605, 352 P.2d 29 (1960). In the early days of the law there was a conclusive presumption of legitimacy of a child born in marriage. Therefore, testimony by the husband and wife as to nonaccess would have been immaterial. *Regina v. Murry*, 1 Salk. 122, 91 Eng. Rep. 115 (K.B. 1706). As time passed this ancient doctrine was repudiated, and it became possible to question the legitimacy of a child born in wedlock. *Pendrell v. Pendrell*, 2 Stra. 925, 93 Eng. Rep. 495 (K.B. 1732); 7 WIGMORE, EVIDENCE § 2063 (3d ed. 1940).

After the presumption became rebuttable a rule arose that a married woman was a competent witness to testify to the non-access of her husband during the time of conception. Because of interest, however, a wife's testimony uncorroborated by other