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# Constitutional Law -- The Right to a Bifurcated Trial

Billy R. Barr

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tutional rights must not be shut off even by the imposing barriers of prison walls.

H. HUGH STEVENS, JR.

### Constitutional Law—The Right to a Bifurcated Trial

Congress, when passing the Federal Rules of Civil Procedure, recognized the likelihood that prejudice would result when certain issues were tried together and authorized the federal courts, in a civil suit, to order the separate trial of any issue to avoid that problem.<sup>1</sup> It would seem that the need to avoid prejudice in a criminal proceeding, where the life or liberty of the defendant is at stake, is even greater, but the Federal Rules of Criminal Procedure contain no comparable provision.<sup>2</sup>

The likelihood of this type of prejudice was so great in *Holmes v. United States*<sup>3</sup> that the defense counsel refused as a matter of trial tactics to raise the issue of the appellant's insanity at the time the crime was committed. The appellant, after being convicted, filed a motion under section 2255 of the Judicial Code<sup>4</sup> in the Federal District Court for the District of Columbia to have his sentence vacated alleging that his counsel rendered ineffective assistance because of his failure to assert the insanity defense.<sup>5</sup> Counsel testified that his experience led him to believe that such a defense would be a most "impractical approach or request to make of a jury," that a defense of insanity coupled with a defense on the merits would jeopardize both defenses, and that there would be great difficulty "without first admitting to the jury that the defendant Holmes was guilty of all counts before interjecting a defense of insanity."<sup>6</sup>

The appellate court found the "trial counsel's appraisal of the prejudicial effect of the insanity defense on the defense of not guilty was entirely reasonable," but that this did not mean that the insanity defense had to be abandoned. The court pointed out that the de-

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<sup>1</sup> FED. R. CIV. P. 42(b).

<sup>2</sup> Such procedure would not be inconsistent with the Federal Rules of Criminal Procedure which authorize courts, "If no procedure is specifically prescribed by rule . . . [to] proceed in any lawful manner not inconsistent with these rules or any specific statute." FED. R. CRIM. P. 57(b).

<sup>3</sup> 363 F.2d 281 (D.C. Cir. 1966).

<sup>4</sup> 28 U.S.C. § 2255 (1965) (Statutory equivalent of habeas corpus).

<sup>5</sup> 363 F.2d at 281.

<sup>6</sup> *Id.* at 282.

fense counsel could have made a motion for a bifurcated trial and that the district court, to avoid the prejudice, could have submitted the issue of guilt to the jury before the introduction of the evidence bearing on the insanity issue. The court stated:

Relevant considerations upon a request for bifurcation include the substantiality of Appellant's insanity defense and its prejudicial effect on other defenses. The court not only has a broad discretion considering bifurcation, but also prescribing its procedure . . . and even the impaneling of a second jury to hear the second stage if this is necessary to eliminate prejudice.<sup>7</sup>

The court denied retrospective collateral relief in this situation where the judgment had become final and bifurcation had not been requested at the trial level. It recognized, however, that the issue of prejudice was a serious one and could be averted in the future if the remedy of bifurcated trial were "adopted in the sound discretion of the trial court in the interest of justice."<sup>8</sup>

Although the United States Supreme Court has never considered the insanity situation presented in *Holmes*, it has recognized a due process argument where bifurcation was denied by a trial court in an analogous situation. In *Jackson v. Denno*<sup>9</sup> the court held that the New York procedure permitting the same jury to determine both the issue of guilt and also the voluntariness of a confession was unconstitutional, and that New York must provide the defendant with an "adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession" which meets the requirements of the due process clause of the fourteenth amendment.<sup>10</sup>

No United States Circuit Court of Appeals has ever required a bifurcated trial in a criminal case, but they have recognized the utility of the device. In *United States v. Curry*<sup>11</sup> the Court of Appeals for the Second Circuit recognized the power of the trial court to present the question of guilt to the jury and, after a verdict, to present to the same jury evidence pertaining to the sentence to be invoked.<sup>12</sup> In *Frady v. United States*<sup>13</sup> Judge McGowan, in a concurring opinion, advocated a bifurcated trial where a jury is to de-

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<sup>7</sup> *Id.* at 283.

<sup>8</sup> *Id.* at 284.

<sup>9</sup> 378 U.S. 368 (1962).

<sup>10</sup> *Id.* at 394.

<sup>11</sup> 358 F.2d 904 (2d Cir. 1966).

<sup>12</sup> *Id.* at 915.

<sup>13</sup> 348 F.2d 84 (D.C. Cir. 1965) (reversed on other grounds).

cide guilt and is also given the responsibility of deciding between a life sentence and death.<sup>14</sup>

Only a few states have taken affirmative steps toward providing for a split verdict or bifurcated trial. California,<sup>15</sup> Connecticut,<sup>16</sup> New York<sup>17</sup> and Pennsylvania<sup>18</sup> have by statute provided for varied bifurcation procedures, but not in the insanity situation. These statutes provide for bifurcation on the issues of guilt and punishment and are limited to capital offenses, usually murder. Louisiana seems to be the only state that has adopted a bifurcation procedure and later abandoned it. The Louisiana procedure provided for two different juries whenever the insanity defense was urged in a capital case. The reason advanced for doing away with this procedure was that the smaller parishes had trouble supplying the necessary number of jurors.<sup>19</sup>

In so far as can be determined, no state appellate court has, without statutory authority, found occasion to reverse a trial court for denying a bifurcated trial. However, a rather complex situation has developed in Texas due to a court interpretation of a state statute which provides that a defendant who is insane at the time of trial cannot be tried until he has recovered from his mental illness.<sup>20</sup> The state courts interpreted this provision as requiring a separate and preliminary hearing on this issue.<sup>21</sup> Practical experience showed that the issue of the defendant's present insanity was usually involved with the issue of whether he was sane at the time the crime was committed and that a jury trying the issue of the defendant's present insanity might also render a verdict on his sanity at the time of the crime.<sup>22</sup> Article 521 of the Texas Code of Criminal Procedure still expressly provides that evidence of the defendant's insanity at the time of the crime is admissible under a plea of "not guilty." The result is that two different juries pass on the defendant's sanity and if either finds him insane at the time of the

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<sup>14</sup> *Id.* at 91.

<sup>15</sup> CAL. PEN. CODE § 190.1.

<sup>16</sup> CONN. GEN. STAT. REV. § 53-10 (Supp. 1965).

<sup>17</sup> N.Y. PEN. LAW §§ 1045, 1045a (Supp. 1966).

<sup>18</sup> PA. STAT. ANN. tit. 18, § 4701 (1963).

<sup>19</sup> Bennett, *Louisiana Criminal Procedure—A Critical Appraisal* 14 LA. L. REV. 11 (1953).

<sup>20</sup> TEX. CODE CRIM. PROC. art. 46.02 (1965).

<sup>21</sup> *Morgan v. State*, 135 Tex. Crim. 76, 117 S.W.2d 76 (1938).

<sup>22</sup> *Id.* at 78, 177 S.W.2d at 77.

crime he is not guilty.<sup>23</sup> Most states have such a provision regarding the trial of a defendant who is insane at the time of trial, but it is not likely that any other state court would extend it to require a bifurcated trial as the Texas Courts did.

The issue of a bifurcated trial as presented in appellant's motion for collateral relief in *Holmes* can be expected to become a more frequent issue at the trial stage. A strong argument can be made that the denial of bifurcation in such a situation amounts to a denial of due process similar to the situation in regard to the voluntariness of confessions. This would seem to be especially true where the evidence bearing on the insanity issue operates practically as a confession to the commission of the act. For example, suppose a defendant is charged with murder and he urges the insanity defense and testifies that he had an irresistible impulse to kill the deceased or that he had heard auditory hallucinations which he believed to be the voice of God commanding him to kill the deceased victim. It would seem apparent that after a jury had found the defendant sane, this testimony could have no other effect than to convince the jury that he actually committed the crime. Even in situations where the evidence bearing on sanity has little or no relation to the subsequent issue of commission of the act, it would still seem to be highly prejudicial if the defense attempts to meet the burden of showing by expert testimony, voiced as hypothetical questions and answers, that the alleged insanity had a causal connection with the crime committed.

It is submitted that the authority to order a bifurcated trial should rest in the wide discretion of the trial court. But, as where similar discretionary functions are involved, the denial of such a motion, where there is substantial evidence of insanity and sufficient likelihood that the defendant will be prejudiced, should constitute reversible error readily rectified by the appellate courts.<sup>24</sup>

BILLY R. BARR

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<sup>23</sup> *Pena v. State*, 167 Tex. Crim. 406, 320 S.W.2d 355 (1959). However, the court held that there was no right of appeal from the preliminary hearing.

<sup>24</sup> It should be noted that the argument for setting the judgment aside in *Holmes* was based on the supposition that defense counsel had rendered ineffective assistance. Where reversal is sought on the grounds that the trial judge abused his discretion in not allowing the motion for bifurcation would the District of Columbia Circuit Court require more certainty that prejudice would result from the denial and/or greater substantiality of evidence pertaining to insanity to warrant reversal?