

## Absent Showing of Prejudice, Indictment and Conviction of Criminal Defendant by Unlicensed Prosecutor May Stand

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The issue of whether a buyer's nonreliance on a seller's representations effectively removes them from the contract of sale was sidestepped by the New York Court of Appeals in *CBS*. Application of the UCC as an analogical tool to nongoods sales suggests that when a buyer acquires reason to disbelieve a seller's representations in the course of their commercial relationship, the representations cannot remain a part of the basis of the bargain. Unless an express warranty is acknowledged by both parties, one does not come into existence. To allow otherwise would permit a nonrelying party to "have its cake and eat it, too."<sup>33</sup>

*Svetlana M. Kornfeind*

*Absent showing of prejudice, indictment and conviction of criminal defendant by unlicensed prosecutor may stand*

The due process clause of the fifth amendment,<sup>1</sup> and the sixth amendment right "to be informed of the nature and cause of accusation,"<sup>2</sup> are vital components of a fair trial.<sup>3</sup> If a criminal defendant is convicted, any infringement upon the fairness guaranteed at trial may warrant reversal unless the evidence of guilt is strong enough to render the resulting prejudice harmless.<sup>4</sup> However, if the

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<sup>33</sup> See *id.* at 507, 553 N.E.2d at 1003, 554 N.Y.S.2d at 455 (Bellacosa, J., dissenting).

<sup>1</sup> See U.S. CONST. amend. V. The fifth amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.* The United States Supreme Court has proclaimed that "fair play" is the essence of due process. *Galvan v. Press*, 347 U.S. 522, 530 (1954). Although many jurisdictions have held that the fifth amendment does not restrict state action, see *Pitt v. Pine Valley Golf Club*, 695 F. Supp. 778, 781 (D.N.J. 1988), the Southern District of New York has intimated that the right to a fair trial exists in the states through the fourteenth amendment's due process clause. See *Mishkin v. Thomas*, 282 F. Supp. 729, 737 (S.D.N.Y. 1968).

<sup>2</sup> See U.S. CONST. amend. VI. The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." *Id.*

<sup>3</sup> See 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 17.4(b) (1986 & Supp. 1989). "The essential guarantee of the due process clause is that the government may not imprison or otherwise physically restrain a person except in accordance with fair procedures." *Id.* The defendant's physical liberty is protected in a number of ways: the fourth amendment requires that an arrest be based on probable cause; the eighth amendment prohibits excessive bail; the sixth amendment guarantees a speedy trial; and the fifth amendment places the burden upon the prosecution to prove guilt beyond a reasonable doubt. See *id.*

<sup>4</sup> See *People v. Crimmins*, 36 N.Y.2d 230, 241-42, 326 N.E.2d 787, 794, 367 N.Y.S.2d 213, 222, *aff'd in part, rev'd in part*, 38 N.Y.2d 407, 343 N.E.2d 719, 381 N.Y.S.2d 1 (1975). In *Crimmins*, Judge Jones articulated the nonconstitutional harmless error test:

violation is of constitutional magnitude,<sup>5</sup> the conviction will be reversed, regardless of the weight and nature of the proof presented at trial.<sup>6</sup> In New York, the indictment process safeguards the defendant's right to due process by requiring that he be informed of the charges against him.<sup>7</sup> Recently, in *People v. Munoz*,<sup>8</sup> the Appellate Division, First Department, held that the presentation of a case by an unlicensed assistant district attorney ("ADA") before a

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[E]very error of law (save, perhaps, one of sheerest technicality) is, *ipso facto*, deemed to be prejudicial and to require a reversal, unless that error can be found to have been rendered harmless by the weight and nature of the other proof. . . . As with the standard, "beyond a reasonable doubt," recourse must ultimately be to a level of conviction. What is meant here, of course, is that the quantum and nature of proof, excising the error, are so logically compelling and therefore forceful in the particular case as to lead the appellate court to the conclusion that "a jury composed of honest, well-intentioned, and reasonable men and women" on consideration of such evidence would almost certainly have convicted the defendant.

*Id.* However, it is important to note that once the court has convinced itself of the defendant's guilt to this degree, it must further inquire whether, notwithstanding the proof of guilt, "the error infected or tainted the jury" in any prejudicial manner. *Id.* at 242, 326 N.E.2d at 794, 367 N.Y.S.2d at 222. *But cf.* *People v. Crimmins*, 38 N.Y.2d 407, 425, 343 N.E.2d 719, 732, 381 N.Y.S.2d 1, 13 (1975) (Fuchsberg, J., dissenting) (appellate court too remote to decide whether error affected result).

<sup>5</sup> See *Crimmins*, 36 N.Y.2d at 237-38, 326 N.E.2d at 790, 367 N.Y.S.2d at 218. The court applied the constitutional standard of harmless error established by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). See *Crimmins*, 36 N.Y.2d at 237, 326 N.E.2d at 791, 367 N.Y.S.2d at 217; see also *infra* note 6 (discussion of *Chapman*).

<sup>6</sup> See *Chapman*, 386 U.S. at 24. The *Chapman* Court held that a prosecutor must prove beyond a reasonable doubt that a federal constitutional error was harmless. *Id.* In *Crimmins*, the court applied this doctrine, stating that if an appellate court finds that a constitutional error has denied a defendant the right to a fair trial, the conviction must be reversed, regardless of whether the error materially affected the defendant's conviction. See *Crimmins*, 36 N.Y.2d at 238, 326 N.E.2d at 791, 387 N.Y.S.2d at 218.

Although the *Chapman* Court declined to hold that federal constitutional errors require reversal per se, see *Chapman*, 386 U.S. at 22, the Court did state that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23 (citing *Gideon v. Wainwright*, 372 U.S. 335, 335 (1962) (defendant's sixth amendment right to counsel is basic to fair trial); *Tumey v. Ohio*, 273 U.S. 510, 522 (1926) (defendant's right to have Judge free from any conflict of interest is basic to fair trial)).

<sup>7</sup> See N.Y. CONST. art. I, § 6 ("no person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury"); *People v. Iannone*, 45 N.Y.2d 589, 593, 384 N.E.2d 656, 659, 412 N.Y.S.2d 110, 113 (1978) (requiring indictment as essential element of due process). The *Iannone* court noted that the right to an indictment by a grand jury is based solely on the New York Constitution because the fifth amendment grand jury provision is not applicable to the states. See *id.* at 593 n.3, 384 N.E.2d at 659 n.3, 412 N.Y.S.2d at 113 n.3 (citing *Hurtado v. California*, 110 U.S. 516, 538 (1883)).

<sup>8</sup> 153 A.D.2d 281, 550 N.Y.S.2d 691 (1st Dep't), *appeal denied*, 75 N.Y.2d 922, 554 N.E.2d 78, 555 N.Y.S.2d 41 (1990).

grand jury and at trial was not sufficiently prejudicial to render the ensuing indictments<sup>9</sup> and convictions of two criminal defendants erroneous per se.<sup>10</sup>

In *Munoz*, the defendants, David Munoz and Elmer Sanchez-Medina, appealed their convictions of criminal possession and criminal sale of a controlled substance in the first degree.<sup>11</sup> The ADA had presented the case before the grand jury and prosecuted the case before the Supreme Court, New York County.<sup>12</sup> Although the ADA was a law school graduate and had prosecuted cases for the Kings County District Attorney and the New York Special Narcotics Prosecutor cumulatively for thirteen years,<sup>13</sup> he neither passed the New York State Bar examination,<sup>14</sup> nor had he ever been admitted upon waiver pursuant to a reciprocity agreement with another state.<sup>15</sup> Despite the defendants' contentions that the presentation of their case by an unlicensed ADA was harmful error as a matter of law, rendering their indictments defective per se,<sup>16</sup> and their adverse trial determination reversible, the Appellate Division, First Department, affirmed their convictions.<sup>17</sup>

Writing for the court, Justice Carro acknowledged that an indictment secured by a grand jury without jurisdiction over the subject matter requires a dismissal of the indictment.<sup>18</sup> However, he concluded that the office of the district attorney had jurisdiction over the subject matter,<sup>19</sup> and the ADAs, as appointees of the district attorney, had similar authority regardless of their qualifications.<sup>20</sup> The court held that the rule requiring per se invalidation

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<sup>9</sup> See *id.* at 282, 550 N.Y.S.2d at 693.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 281, 550 N.Y.S.2d at 691. The defendants were convicted of selling 3.6 pounds of cocaine to undercover police officers. See *id.* at 285, 550 N.Y.S.2d at 694.

<sup>12</sup> *Id.* at 283, 550 N.Y.S.2d at 691-92.

<sup>13</sup> See *People v. Lucas*, N.Y.L.J., Mar. 14, 1990, at 26, col. 6 (Sup. Ct. Kings County, Mar. 6, 1990).

<sup>14</sup> See *Munoz*, 153 A.D.2d at 283, 550 N.Y.S.2d at 692.

<sup>15</sup> See *id.* The office of the district attorney fired the ADA in March of 1989, when it was revealed that he was not a licensed attorney. See *id.*

<sup>16</sup> *Id.* at 283, 550 N.Y.S.2d at 693.

<sup>17</sup> *Id.*

<sup>18</sup> See *id.* at 283, 550 N.Y.S.2d at 692 (citing *People v. Dunbar*, 53 N.Y.2d 868, 871, 423 N.E.2d 36, 37, 440 N.Y.S.2d 613, 614 (1981)).

<sup>19</sup> See *id.* at 283, 550 N.Y.S.2d at 693; CPL § 190.25(3)(a) (McKinney 1982).

<sup>20</sup> See *Munoz*, 153 A.D.2d at 283-84, 550 N.Y.S.2d at 693. The court noted that no New York statute expressly forbids an unlicensed ADA from presenting a case before a grand jury, and pointed out that New York Judiciary Law section 478 authorizes the practice of law for certain unlicensed law school graduates. See *id.*; see also N.Y. JUD. LAW § 478 (Mc-

of an indictment obtained by an unauthorized person did not apply,<sup>21</sup> and absent evidence of prejudice, the indictments should stand.<sup>22</sup> Similarly, in light of the overwhelming proof of the defendants' guilt, the court determined that no reversible error was committed at trial, and upheld the convictions.<sup>23</sup>

It is submitted that current New York law mandates that an ADA be a licensed attorney before he may be considered an authorized person before the grand jury and therefore, that the *Munoz* court erred in not concluding that the indictment was invalid as a matter of law. It is further suggested that prosecution by an attorney who has not been admitted to the New York State Bar is prejudicial per se, and that the court should have reversed the convictions of the *Munoz* defendants, notwithstanding the evidence of their guilt.

New York Judiciary Law section 460 requires that all persons practicing law or holding themselves out to the public as having the authority to practice law be properly examined and licensed.<sup>24</sup>

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Kinney Supp. 1990); *infra* note 24 (discussion of § 478).

<sup>21</sup> See *Munoz*, 153 A.D.2d at 284-85, 550 N.Y.S.2d at 693. Criminal Procedure Law section 210.20(1)(c) states that a court may, upon motion of the defendant, dismiss the indictment if it is within the meaning of CPL section 210.35. CPL § 210.20(1)(c) (McKinney 1982). Section 210.35(5) states that an indictment is defective if it fails to conform with the requirements of CPL section 190 and prejudices the defendant, thereby threatening the integrity of the proceedings. See *id.* § 210.35.

<sup>22</sup> See *Munoz*, 153 A.D.2d at 285, 550 N.Y.S.2d at 693. The court applied the revised "risk of prejudice" rule. *Id.* See generally *People v. DiFalco*, 44 N.Y.2d 482, 487, 377 N.E.2d 732, 736, 406 N.Y.S.2d 279, 283 (1978) (history of "risk of prejudice" rule).

<sup>23</sup> See *Munoz*, 153 A.D.2d at 285, 550 N.Y.S.2d at 693. The court applied the nonconstitutional harmless error test. See *supra* note 4 and accompanying text (discussion of nonconstitutional harmless error test).

<sup>24</sup> See N.Y. JUD. LAW § 460 (McKinney Supp. 1990). Section 460 requires that "[a]n applicant for admission to practice as an attorney or counsellor in this state, must be examined and licensed to practice as prescribed in this chapter." *Id.* Section 478 reads, in pertinent part: "It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law [sic] for a person other than himself in a court of record in this state . . . or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner." *Id.* § 478; see *Jemzura v. McCue*, 45 A.D.2d 797, 797, 357 N.Y.S.2d 167, 168 (3d Dep't 1974) (person not licensed to practice as attorney in New York, or elsewhere, is not qualified to appear as counsel for anyone other than himself, in any court of this state), *appeal dismissed*, 37 N.Y.2d 750, 337 N.E.2d 135, 374 N.Y.S.2d 624 (1975).

Three noteworthy exceptions to section 478 allow the practice of law by an unlicensed attorney. See N.Y. JUD. LAW § 478 (McKinney Supp. 1990). According to section 478, the restrictions do not apply to: (1) officers of societies for the prevention of cruelty; (2) law school graduates or law students who have completed two semesters of law school, who have twice consecutively taken the bar exam, but have not been notified that they have failed the bar a second time, and who are acting under the supervision of a legal aid organization

Thus, a district attorney, a publicly elected officer, whose primary duty is the prosecution of crimes cognizable by the courts, should be subject to this licensing requirement.<sup>25</sup> It is submitted that an ADA, who must be able and qualified to "perform the powers and duties of the office of district attorney" in the event of absence or

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under a program approved by the appellate division of their department; and (3) law school graduates or law students who have completed two semesters of law school, who meet the bar exam qualifications denoted in (2) and who are acting under the supervision of the state or a subdivision thereof or of any agency or officer of the state under a program approved by the appellate division of their department. *See id.* The *Munoz* court did not hold that the ADA was within one of these exceptions, but rather supported its decision with distinguishable authority involving an unlicensed attorney who fell clearly within one of the exceptions. *See Munoz*, 153 A.D.2d at 283-84, 550 N.Y.S.2d at 693. In holding that the ADA was authorized to appear before the grand jury, the court relied on *People v. Garret*, Index No. 3689/89 (Sup. Ct. N.Y. County Aug. 14, 1989), for the proposition that an ADA need not be licensed to be authorized. *See id.* In *Garret*, the unlicensed ADA who presented the case to the grand jury was awaiting admission to the bar, and under New York Judiciary Law section 478(3), was not required to be licensed. *See Garret*, Index No. 3689/89; *see also* N.Y. JUD. LAW § 478(3) (McKinney Supp. 1990). The *Munoz* court also drew support from *People v. Dunbar*, 53 N.Y.2d 868, 423 N.E.2d 36, 440 N.Y.S.2d 613 (1981). *See Munoz*, 153 A.D.2d at 283, 550 N.Y.S.2d at 692. In *Dunbar*, the court held that failure to comply with a waiver of nonresidence requirement, imposed by the Nassau County Administrative Code, did not deprive a duly appointed special assistant district attorney of jurisdiction to present a case before the grand jury. *Id.* at 870-71, 423 N.E.2d at 37, 440 N.Y.S.2d at 614. However, in *Munoz*, it was never alleged that the ADA was licensed to practice in any jurisdiction. *See supra* notes 14-15 and accompanying text. Since the ADA in *Dunbar* was in fact a licensed attorney in a jurisdiction other than the one in which he was appointed, it is suggested that the possibility of prejudice in *Munoz* is much more egregious than that in *Dunbar*. *See infra* note 33.

In addition, the court in *Munoz* stated that "no statute expressly forbids the presence of an unadmitted Assistant District Attorney in the Grand Jury." *Munoz*, 153 A.D.2d at 284, 550 N.Y.S.2d at 693 (emphasis added). It is suggested, however, that the notion that the prosecutor who presents the case to the grand jury must be licensed is statutorily mandated.

<sup>25</sup> "The majority of States where there exists no explicit constitutional or statutory provision requiring that a prosecutor be admitted to practice law hold that admission to the Bar is a prerequisite to the holding of the office of prosecutor." *People v. Jackson*, 145 Misc. 2d 1020, 1021, 548 N.Y.S.2d 987, 988 (Sup. Ct. Kings County 1989), *rev'd on other grounds*, 558 N.Y.S.2d 590 (App. Div. 2d Dep't 1990); *see, e.g., Elliot v. Benefiel*, 405 Ill. 500, 503, 91 N.E.2d 427, 428-29 (1950) (implicit in title and duties of state's attorney that he be licensed to practice law). There is also New York authority which supports this view. *See, e.g., In re Sposato*, 180 Misc. 933, 938, 43 N.Y.S.2d 426, 429 (Sup. Ct. Onondaga County 1943) (implicit in New York's statutory and constitutional law is requirement that one be duly admitted attorney in order to seek office of district attorney).

A review of the prosecutor's duties indicates the need for compliance with the licensing standards. *See* N.Y. COUNTY LAW § 927 (McKinney 1972). "It shall be the duty of the district attorney of the respective counties of New York [and] Bronx . . . to prosecute all crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed." *Id.* The prosecution of felonies necessarily requires that the prosecutor make presentations to the grand jury. *See supra* note 7.

incapability of the district attorney, must also be licensed.<sup>26</sup> Without proper licensing, an ADA is not a proper person before a grand jury, and any resulting indictment is void per se.<sup>27</sup>

A defendant's right to a fair trial requires that any encroachment on the guaranteed indicia of fairness be specially considered.<sup>28</sup> Any potential impropriety is subject to review under the constitutional harmless error standard, which, at a minimum, requires review of prejudice independent of any evidence regarding the defendant's guilt.<sup>29</sup> It is submitted, therefore, that due to a prosecutor's role in the judiciary<sup>30</sup> and his status as a quasi-judi-

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<sup>26</sup> New York County Law section 930 gives the district attorney the power to appoint ADAs. See N.Y. COUNTY LAW § 930 (McKinney 1972). Although New York County Law section 702 does not apply directly to the First Department, see *id.* § 2, section 927, in describing the duties of the district attorney, states that the district attorney "shall perform the duties prescribed in section seven hundred," *id.* § 927. Therefore, reading section 927 to include section 702, the duties of ADAs in counties of the First Department include all of "the powers and duties of the office of district attorney." *Id.* § 702. If the district attorney must be licensed to properly perform his duties, see *supra* notes 24-25 and accompanying text, it follows that an ADA must be equally qualified. See NATIONAL PROSECUTION STANDARDS § 3.1(c) (Nat'l Dist. Attorneys Ass'n 1977) ("[a]ssistant prosecutor shall have completed an accredited law school and shall be a member of the state bar in good standing").

<sup>27</sup> See *People v. DiFalco*, 44 N.Y.2d 482, 485, 488, 377 N.E.2d 732, 734, 736, 406 N.Y.S.2d 279, 281, 283 (1978). Considering whether an indictment was defective upon a mere showing of "risk of prejudice" to the defendant, the court held that "the crucial nature of the prosecutor's role vis-a-vis the Grand Jury, particularly in view of his discretionary authority, mandates a finding that prejudice to the defendant is likely to result from the presence of an unauthorized prosecutor before the Grand Jury." *Id.* at 485, 377 N.E.2d at 734, 406 N.Y.S.2d at 281. "[T]he presence of one unauthorized must, at the very least, be deemed to create the possibility of prejudice, as a matter of law." *Id.* at 488, 377 N.E.2d at 736, 406 N.Y.S.2d at 283.

<sup>28</sup> See *supra* notes 1-3, 6 and accompanying text.

<sup>29</sup> See *supra* note 6 and accompanying text.

<sup>30</sup> See *People v. Zimmer*, 51 N.Y.2d 390, 393, 414 N.E.2d 705, 707, 434 N.Y.S.2d 206, 207 (1980). Writing for the court in *Zimmer*, Judge Fuchsberg reasoned that "a District Attorney carries [a] . . . sensitive burden [in that] he must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness." *Id.* (citations omitted).

Despite subsequent reversal by the Appellate Division, Second Department, Judge Beldock, in *People v. Jackson*, enumerated a list of persuasive factors to support the view that a conviction should be reversed per se where the prosecutor is unlicensed. See *People v. Jackson*, 145 Misc. 2d 1020, 1029-31, 548 N.Y.S.2d 987, 993-94 (Sup. Ct. Kings County 1989), *rev'd*, 558 N.Y.S.2d 590 (App. Div. 2d Dep't 1990). This list included the fact that: (1) a prosecutor may have more control over an individual's freedom than any other public official; (2) a fraud is committed on the court by the unlicensed practitioner; (3) an unlicensed practitioner is not an officer of the court and is not bound to the ethical standards of an officer of the court; and (4) "[a]s the late Justice Brandeis stated in *Olmstead v. United States*, 277 U.S. 438, 485, . . . 'If the Government becomes a lawbreaker . . . it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution.'" *Id.*; see *United States v. Ott*, 489 F.2d 872, 874 (7th Cir.

cial<sup>31</sup> county officer,<sup>32</sup> his conduct at trial necessarily implicates fairness. Furthermore, given the inherent discretion in the role of a prosecutor, and the varying level of judicial supervision, it is suggested that prosecution by an unlicensed attorney impairs the integrity of the proceeding and cannot be considered harmless.<sup>33</sup> Consequently, by applying the constitutional harmless error standard, it appears that the *Munoz* convictions should be reversed as a matter of law.

Although a finding of harmful error will not always "result in fatal consequences to the People,"<sup>34</sup> courts are often hesitant to reverse a manifestly fair conviction.<sup>35</sup> Following *Munoz*, the decision by the New York Supreme Court, Kings County, in *People v. Lucas*,<sup>36</sup> illustrates the judicial hesitancy to reverse a conviction,

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1973) ("deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal . . . is inconsistent with fair administration of justice"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1, 3-3, 7-13 (1989) (public prosecutors held to higher standard of ethical conduct than other advocates). "Where the prosecutor is recreant to the trust implicit in his office, he undermines the confidence, not only in his profession, but in government and the very ideal of justice itself." PROFESSIONAL RESPONSIBILITY: REPORT OF THE JOINT CONFERENCE, 44 A.B.A. J. 1159, 1218 (1958).

<sup>31</sup> See *People v. Kyser*, 52 A.D.2d 1072, 1072, 384 N.Y.S.2d 332, 334 (4th Dep't 1976).

<sup>32</sup> See *Fisher v. State*, 10 N.Y.2d 60, 61, 176 N.E.2d 72, 73, 217 N.Y.S.2d 52, 53 (1961).

<sup>33</sup> The court in *Munoz* applied the nonconstitutional harmless error test and stated that "in a closer case, we might have been inclined to reverse, [but] any error here was harmless, in light of the overwhelming proof of guilt." See *Munoz*, 153 A.D.2d at 285, 550 N.Y.S.2d at 693. Some commentators have distinguished between evidentiary errors, which are analyzed under the harmless error test, and errors that result from violations that remove the substantive protection of a right, which automatically require a new trial. See W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 26.6, at 996 (1985); Survey, *Appellate Division Holds Defendant Not Entitled to Conviction Reversal Although Denied His Right To Counsel at Suppression Hearing*, 63 ST. JOHN'S L. REV. 645, 649-50 n.24 (1989).

<sup>34</sup> See *People v. Crimmins*, 36 N.Y.2d 230, 241, 326 N.E.2d 787, 793, 367 N.Y.S.2d 213, 221 (1975). The *Crimmins* court weighed the consequences to the people against any prejudice to the defendant and concluded that reversal "does not result in fatal consequences to the People; they are put to a new trial, but the defendant does not go free." *Id.*

<sup>35</sup> Although the cost of a new trial and the burden on the people should not limit the defendant's right to a fair trial, they are factors that cannot be ignored. Also, the unavailability of witnesses and the possible memory lapses of those available may force a prosecutor to dismiss the charges against the defendant. See Survey, *Criminal Defendant is Per Se Entitled to Vacatur of His Conviction When Represented by an Attorney Whose License is Subsequently Revoked*, 63 ST. JOHN'S L. REV. 162, 168 n.27 (1988) (citing *Solina v. United States*, 709 F.2d 160, 169 (2d Cir. 1983)). "Reversal is an ill-suited remedy for prosecutorial misconduct; it does not affect the prosecutor directly, but rather imposes upon society the cost of retrying an individual who was fairly convicted." *People v. Roopchand*, 107 A.D.2d 35, 36, 485 N.Y.S.2d 332, 333 (2d Dep't), *aff'd*, 65 N.Y.2d 837, 482 N.E.2d 924, 493 N.Y.S.2d 129 (1985) (citations omitted).

<sup>36</sup> See N.Y.L.J., Mar. 14, 1990, at 26, col. 6 (Sup. Ct. Kings County Mar. 6, 1990).

even upon a finding of prejudicial error.<sup>37</sup> In *Lucas*, the court analyzed the “fairness of the trial, not the culpability of the prosecutor”—a standard less protective of the defendant’s rights than the constitutional harmless error test.<sup>38</sup> Thus, it is suggested that where the integrity of the prosecution has been called into question, the prosecution should bear the burden of proving an absence of prejudice, and the defendant should be protected by the standard most protective of his rights—the constitutional harmless error standard.<sup>39</sup>

John R. Marcil

*Appellate Division recognizes preconception tort liability in favor of DES granddaughter*

American courts uniformly recognize a child’s right to sue for injuries sustained prior to birth,<sup>1</sup> yet only a minority of jurisdictions have been willing to extend prenatal tort liability<sup>2</sup> to include

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 27, col. 1. The court adopted the rationale in *Munoz*, see *supra* note 23 and accompanying text, regarding the application of the nonconstitutional harmless error test. *Id.* “In order to prevail on a post-trial motion to set aside a verdict a defendant must prove by a preponderance of the evidence some error or misconduct, and that the claimed error or misconduct created a substantial risk of prejudice.” *Id.*; see *People v. Rhodes*, 92 A.D.2d 744, 745, 461 N.Y.S.2d 81, 83 (4th Dep’t 1983).

<sup>39</sup> See *supra* note 27 and accompanying text. It is submitted that an unlicensed attorney deceives the court, the defendant, and the public. If the implicit trust given to the office of the district attorney is assured by proper qualifications, licensing and oaths, an individual who fails to provide such assurances should not benefit from a presumption that no unfairness occurred. At a minimum, the burden should be on the people to show that prosecution by an unlicensed attorney did not prejudice the defendant. Justice should be the ultimate goal; it may be assured by a retrial, or merely approximated by upholding a conviction.

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<sup>1</sup> See Robertson, *Toward Rational Boundaries of Tort Liability For Injuries to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1402. American jurisdictions achieved unanimity in recognizing prenatal tort actions when the Alabama Supreme Court decided *Huskey v. Smith*, 289 Ala. 52, 265 So.2d 596 (1972). Robertson, *supra*. In *Huskey*, the court recognized and overruled Alabama’s position as the only remaining state denying recovery for prenatal tort injuries. See *Huskey*, 289 Ala. at 54, 265 So. 2d at 597-98.

<sup>2</sup> W. KEETON, D. DOBBS, R. KEETON & D. OWENS, *PROSSER AND KEETON ON TORTS* § 55, at 367 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]. The area of prenatal injuries can be