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Criminal Procedure--Instructions to Jury--Failure to Answer Jurymen's Question Held Not Necessarily Reversible Error (People v. La Marca, 3 N.Y.2d 452 (1957))

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While Justice Black's opinion indicates that courts-martial of civilian dependents for *all* crimes is unconstitutional,[19] Justice Frankfurter strictly limits himself to the facts of the case. He did state, though, that "the taking of life is irrevocable" [20] and that:

> It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.[21]

Justice Harlan specifically concurs ". . . on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents." [22] He argues:

> In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority.[23]

The instant case poses a difficult question: how to try military-connected civilians accused of crimes in foreign lands. To suspend completely the practice of allowing dependents to accompany military forces abroad would undoubtedly be bad for military morale. Yet it is imperative that a solution be found to the problem raised by the Court's decision in order that there will be no "crime without punishment." Among the possible solutions are: constitutional amendment; trial of such civilians by the foreign jurisdiction, as is the case with American tourists; trial of such civilians in the United States; or the establishment of civilian courts overseas.

CRIMINAL PROCEDURE — INSTRUCTIONS TO JURY — FAILURE TO ANSWER JURYMEN'S QUESTION HELD NOT NECESSARILY REVERSIBLE ERROR.—Defendant was convicted on counts of kidnapping and felony murder. Although his sole defense was insanity, the trial judge failed to answer the jury's question as to whether they must find for defendant if they believed him to have been insane part of the time during the commission of the crime. Section 427 of the New York Code of Criminal Procedure provides that information on a point of law desired by the jury must be given in open court.[1] The Court

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[19] Reid v. Covert, 354 U.S. 1, 7 (1957).
[20] *Id.* at 45 (concurring opinion).
[21] *Id.* at 45-46 (concurring opinion).
[22] *Id.* at 65 (concurring opinion).
[23] *Id.* at 77 (concurring opinion).

[1] "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct

of Appeals, in affirming the conviction, *held* that failure to answer the question posed was, if anything, beneficial to the defendant and therefore did not constitute reversible error. *People v. La Marca,* 3 N.Y.2d 452, 144 N.E.2d 420 (1957).

At common law, the giving of additional instructions to the jury, after it has retired and begun deliberations, is usually in the discretion of the trial judge.[2] Generally, pertinent requests from the jury will be answered if within the scope of the jury's function.[3] However, trial judges have declined to help recall testimony [4] or to answer questions because they were irrelevant or immaterial,[5] although it has been held that jurors should receive a positive instruction to put an irrelevant question out of their minds.[6] The Federal Rules of Criminal Procedure do not specifically cover this problem.[7] However, federal cases have held that, while additional instructions are in the court's discretion,[8] a trial judge should clear away jury difficulties "with concrete accuracy." [9]

A few states have statutes similar to New York's Section 427.[10] These statutes are largely concerned with the presence of the defendant or his counsel or both during additional instructions. They have not been construed to give an absolute mandate to the trial judge to answer questions.[11]

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them into court. Upon their being brought into court, the information required *must be given* after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant." N.Y. CODE CRIM. PROC. § 427 (emphasis added).

[2] See Allis v. United States, 155 U.S. 117 (1894); White v. Calder, 35 N.Y. 183 (1866). See also BOWERS, THE JUDICIAL DISCRETION OF TRIAL COURTS § 346 (1931).

[3] See United States v. Oppenheim, 228 Fed. 220 (N.D.N.Y. 1915), *rev'd on other grounds,* 241 Fed. 625 (2d Cir. 1917); Burrows v. Unwin, 3 Car. & P. 310, 172 Eng. Rep. 434 (K.B. 1828).

[4] Commonwealth v. Westwood, 324 Pa. 289, 188 Atl. 304 (1936).

[5] People v. Carnal, 1 Park. Cr. 256 (N.Y. 1851); Stratton v. Commonwealth, 263 S.W.2d 99 (Ky. 1953). A typical situation would be a request for information on punishment or the possibility of future pardon or parole. See Gibson v. State, 223 S.W.2d 625 (Tex. 1949).

[6] State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955).

[7] See FED. R. CRIM. P. 30.

[8] Tyrell v. United States, 200 F.2d 8 (9th Cir. 1952), *cert. denied,* 345 U.S. 910 (1953); Mendelson v. United States, 58 F.2d 532 (D.C. Cir. 1932).

[9] Bollenbach v. United States, 326 U.S. 607, 613 (1946).

[10] See CAL. PEN. CODE ANN. § 1138 (West 1956); OHIO REV. CODE § 2315.06 (1953); ORE. REV. STAT. § 17.325 (1953); TEX. CODE CRIM. PROC. art. 677 (1925).

[11] An Oregon court has declared: "It is to be noted that the mandatory obligation of the statute is that if any information as to the law is given by the trial court it shall be given in the presence of the attorneys or after due notice has been given to the parties or their attorneys. This statute does not in itself require the court to reinstruct a jury. It is, of course, necessary that the court state to the jury all matters of law which it thinks necessary for their information in giving their verdict." State v. Vaughn, 265 P.2d 249, 250 (Ore. 1954). *But see* State v. Kennedy, 72 Ohio App. 462, 52 N.E.2d 873 (1943).

In New York, application of Section 427 is similarly concerned with the giving of instructions in open court.[12] In recent years, however, Section 427 has been invoked as the statutory basis for an *obligation* on the part of the judge to answer a query by the jury.[13] In *People v. Cooke,*[14] the trial judge declined to answer the question whether a premeditated act to cause serious injury furnished intent to kill and instead re-read part of his original charge on intent. The conviction was affirmed on the ground that there had been no substantial prejudice to defendant's rights. In his dissent, Chief Judge Lehman asserted that Section 427 "leaves to the trial court no discretion whether or not to give the information." [15]

Subsequently, in *People v. Gonzalez* [16] and *People v. Gezzo,*[17] first-degree murder convictions were reversed on grounds of substantial error when the court did not answer jury questions. In the *Gonzalez* case, the court expressed agreement with the *Cooke* dissent's interpretation of the statute.[18] The trial judge had failed to answer questions suggesting jury confusion as to whether possession of a weapon indicated the requisite intent. Section 427 was held to require an answer from the bench to a "proper question" or to one on "a vital point." [19] In the *Gezzo* case, which presented a similar set of facts, the court qualified its language in the *Gonzalez* case by pointing out that ". . . of course, it is not the law that any failure by a

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[12] See, *e.g.,* People v. Shapiro, 3 N.Y.2d 203, 144 N.E.2d 12 (1957); People v. Kennedy, 57 Hun 532, 11 N.Y. Supp. 244 (Sup. Ct. 1890). The earliest cases considering § 427 referred to it as requiring notice to counsel of intent to give additional instructions and did not suggest that there was also imposed an obligation to answer. People v. Cassiano, 30 Hun 388, 1 N.Y. Crim. 505 (Sup. Ct. 1883); Cornish v. Graff, 36 Hun 160 (Sup. Ct. 1885). In the *Cassiano* case the trial judge in response to a jury question told the jurors, in the absence of counsel, that punishment for murder was not for their consideration. In reversing, holding counsel's absence prejudicial, the appellate court cited § 427 and noted that the furnishing of the information was "within the discretionary power of the court *even if it was not a legal right.*" People v. Cassiano, *supra* at 390, 1 N.Y. Crim. at 507 (emphasis added). While it is doubtful that information as to punishment may be given to the jury, [see State v. Daley, 54 Ore. 514, 103 Pac. 502 (1909)], it is of interest that, in citing § 427, the court in the *Cassiano* case asserted that there was no legal right to have the question answered.

[13] People v. Gezzo, 307 N.Y. 385, 121 N.E.2d 380 (1954); People v. Gonzalez, 293 N.Y. 259, 56 N.E.2d 574 (1944); *cf.* People v. Flynn, 290 N.Y. 220, 48 N.E.2d 495 (1943). Although the court did not cite § 427, it was noted in the *Gonzalez* case that the statute was considered in reaching the decision. People v. Gonzalez, *supra* at 262, 56 N.E.2d at 576.

[14] 292 N.Y. 185, 54 N.E.2d 357 (1944).

[15] People v. Cooke, 292 N.Y. 185, 193, 54 N.E.2d 357, 361 (1944).

[16] 293 N.Y. 259, 56 N.E.2d 574 (1944).

[17] 307 N.Y. 385, 121 N.E.2d 380 (1954).

[18] "The Legislature of this State has in section 427 made positive and absolute the requirement that 'the information required must be given.'" People v. Gonzalez, 293 N.Y. 259, 263, 56 N.E.2d 574, 576 (1944).

[19] *Id.* at 262-63, 56 N.E.2d at 576-77.

court categorically to answer any question propounded by a jury constitutes error." [20]

In the *La Marca* case, the Court distinguished the *Gonzalez* and *Gezzo* cases on their facts [21] and quoted from the *Cooke* majority opinion.[22] The psychiatrist for the defense had testified to the effect that defendant did not know his act was wrong until the day following its commission. Since, however, kidnapping is a continuing crime, the jury could find that defendant had persisted in the act after realizing its wrongful nature and had therefore become criminally responsible. The jury's question—"If one should belive [sic] that the defendent [sic] was insane part of the time during the commission of the crime must we find in favor of the defendent [sic]" [23]—could only be answered in the negative. Thus, reasoned the Court, no harmful inference could have been drawn by the jury: if a negative answer were assumed, that would have been correct; if positive, that would have incorrectly benefited the defendant. A clear rule thus emerges, distinct from any consideration of Section 427; only an implication arising from a judge's refusal to respond that is prejudicial to defendant's rights will require reversal.

The interpretation advanced by the dissent in the instant case places the emphasis upon the clause in Section 427, ". . . information required must be given . . ." [24] which it has taken out of context. This approach might unduly burden trial judges when confronted with irrelevancies from inexperienced jurors.

The Court has, in effect, applied the essence of Section 542 of the Code of Criminal Procedure: "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." [25] The result of the *La Marca* decision is to leave response to jury questions in the court's discretion.

FEDERAL JURISDICTION—STOCKHOLDER'S DERIVATIVE ACTION—HELD ANTAGONISM EXISTS WHEN MANAGEMENT IS ALIGNED

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[20] People v. Gezzo, 307 N.Y. 385, 396, 121 N.E.2d 380, 385 (1954), paraphrasing People v. Cooke, 292 N.Y. 185, 188, 54 N.E.2d 357, 359 (1944).

[21] People v. La Marca, 3 N.Y.2d 452, 462, 144 N.E.2d 420, 426 (1957).

[22] *Id.* at 461, 144 N.E.2d at 425. The *Cooke* majority opinion was written by Judge Desmond, who dissented in the instant case quoting the *Cooke* dissent.

[23] *Ibid.*

[24] *Id.* at 466-67, 144 N.E.2d at 429.

[25] N.Y. CODE CRIM. PROC. § 542. The court tacitly avoided the caveat of the *Cooke* dissent which said "no appellate court may disregard the error under section 542 of the Code of Criminal Procedure." People v. Cooke, 292 N.Y. 185, 193, 54 N.E.2d 357, 361 (1944).