TRUTH AND JUSTICE

Harmless Error: Is It Ever Really Harmless?

By JEFF DESKOVIC

"The Constitution entitles a criminal defendant to a fair trial, not a perfect one."

The above quote penned by Thomas Jefferson in a letter to James Madison from Paris on December 20, 1787 may have partially inspired Madison's response the following year. Madison in Letter 51 of the Federalist Papers declared: *Justice is the end* (purpose) *of government. It is the end of civil society. It ever has been, and will ever be pursued until it is obtained, or until liberty be lost in the pursuit.*

Today the debate continues, certainly in our state and federal appellate tribunals. The expression *harmless error* is frequently employed in the rulings of the New York State Supreme Court Appellate Division when confronted with an appeal from a criminal defendant alleging wrongful action, or mishandling by a court below believed to have negatively influenced the outcome of his case. The concept is meant to suggest that although the petitioner may be factually correct in his assertion that the trial court in some specific manner improperly dealt with his case, nevertheless, no harm was done, the outcome would have been the same had it not. And, therefore, *no harm, no foul*.

Unfortunately, all too often, appellate panels are in no good position to accurately assess how differently a trial might have turned out had the judge not committed the error, or permitted the wrongful act by the prosecution he/she permitted. As between those errors committed in the presence of the jury, and those outside of their presence, the former are clearly more outcome-determinative. Once a bell has been rung it can not be un-rung. And, as every prosecutor and defense attorney is well aware, all the admonishing and instruction offered by a judge after the fact is virtually useless when something truly prejudicial has been uttered or shown before the jury.

A trial court may commit any number of common errors. It may have permitted the presentation of hearsay testimony that should have been excluded. Perhaps it allowed the prosecutor to improperly vouch for a witness, or failed to exclude unconstitutionally obtained evidence, or issued erroneous jury instructions. Judges are only human after all, and are bound to make mistakes. An error of some sort in the course of a lengthy trial may be virtually unavoidable. The question is how should such errors be evaluated and dealt with? More to the point; how does the appellate court determine with a high degree of certainty that the error, or errors, confirmed to have been committed below could not possibly have affected the outcome?

All too often politics and colleagueship enter the equation, and defendants, however worthy their argument, are denied. It's merely a judgment call in any event, and appeals panels, including the United States Supreme Court, are famous for choosing the path of least resistance, or political consequence. When judges do that, they commit one of the more selfish, cruel, acts that can be committed against factually innocent incarcerated victims, and their loved ones. In most cases the petitioner has waited many months, even years, before receiving a response, only to be crushed by an indifferent court clearly disconnected from their sworn duty to bring about justice whenever possible.

Speaking of the High Court, it periodically addresses the issue; and. in recent years has, in fact, expanded the categories of errors that are subject to harmless error analysis, while at the same time establishing different standards of harmlessness for different errors and different kinds of review. Perhaps best remembered for invoking the Jeffersonian spirit was Chief Justice Renquist, who, writing for the majority in *Delaware v. Van Arsdall,* (1986), declared: "As we have stated on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one."

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