Thomas Arthur's Case Exposes the U.S. Legal System's Sordid Plea Bargaining Obsession

Justice:Denied Editorial
December 3, 2007

Thomas Arthur's case exposes the sordid underbelly of how the processing of a criminal case in the United States has evolved into a system that is not dissimilar from the operation of an assembly line.

An indicted or otherwise charged person begins their travail at the system's induction end and (unless their case is rejected as a defective for some reason) they exit at the other end stamped guilty or not guilty with as little interruption as possible to the smooth functioning of the process. This necessitates obtaining an overwhelming percentage of convictions by a guilty plea, since a trial clogs the system. The three most obvious factors pressuring a guilty plea are prosecutors overcharging a defendant with alleged crimes, judges who make prosecution favorable rulings, and the over-burdening and under-funding of court-appointed lawyers that most defendants rely on for representation.

A prosecutor's guilty plea offer for reduced charges is a no-brainer for most defendants when the alternative is a much more severe sentence after a likely conviction resulting from representation by an overmatched court-appointed lawyer. The fabulous success of this strategy is evidenced by the 96% of convictions obtained nationwide by a guilty plea.

The system's regularity of processing defendants is interfered with by the low percentage of defendants who insist on a trial at the peril of facing an enhanced sentence if they are convicted. That peril is magnified by the Byzantine rules governing the direct appeal and post-conviction appeal process that follows a conviction.

When Thomas Arthur protested his innocence and went to trial in 1991 for the 1982 murder of a man in Muscle Shoals, Alabama, he did so with a court-appointed lawyer paid the $1,000 mandated by Alabama law. Arthur received the representation $1,000 will pay for – which isn't much. Among other things his lawyer made no effort to investigate alibi witnesses that Arthur told him could establish that at the time of the murder he was more than an hour away in Decatur, Alabama. One thing the lawyer did do right was file a pre-trial motion for forensic testing of crime-related evidence that could exclude Arthur as being present at the crime scene. That evidence includes sperm, hairs, blood, and a bullet and bullet cartridges. The prosecutor opposed testing the evidence, and the trial judge denied the motion.

The prosecution's "star witness" was Judy Wicker. When interviewed at the crime scene, she told officers that her husband, Troy, was shot by a black man who beat and raped her. A rape kit that included semen collected from her was preserved. Suspicious circumstances led to Judy being charged with her husband's murder. At her trial she testified a lone black man committed the crime, just as she had told the police. The jury didn't believe Judy: she was convicted and sentenced to life in prison.

At the time of Arthur's 1991 trial his prosecutor was Wicker's former defense lawyer who had unsuccessfully tried to get her paroled. He made a deal with Wicker that if she testified that Arthur murdered her husband she would be released on parole. She was released within days after Arthur's conviction, and his sentence of death later that same day.

Again represented by an underpaid court-appointed lawyer, Arthur's conviction was affirmed on direct appeal. Alabama does not provide post-conviction legal counsel to death row prisoners, and Alabama's death row lacks a law library. So a death row prisoner without financial resources is dependent on finding a lawyer who will represent him (or her) *pro bono*. By the time Arthur found a law firm willing to represent him, Alabama's courts ruled the statue of limitations had expired for him to file a state post-conviction appeal, so his petition was dismissed as time barred. Likewise, the U.S. District Court ruled that the one-year time limit for filing a federal habeas corpus petition challenging his conviction had expired. In April 2007 the U.S. Supreme Court declined to review the dismissal of Arthur's habeas petition. Consequently, the merits of Arthur's post-conviction challenges to his conviction, which include the constitutional inadequacy of his trial counsel, have never been considered by any state or federal court.

On April 12, 2007, Arthur's lawyers filed a federal civil rights lawsuit (42 USC §1983) for an order compelling Alabama to do what they had refused since 1991 to do voluntarily – allow forensic/DNA testing of the case's evidence. Arthur's *pro bono* law firm was willing to have all the evidence tested at their expense. Testing the sperm collected from Judy Wicker could prove Arthur didn't rape her (or otherwise have sex with her), it could identify who did, and the other untested evidence could possibly also be linked to that same man – further identifying him as the actual murderer. That would prove Judy Wicker told the truth to the police and at her trial, and that she and Arthur had both been wrongly convicted.

The lawsuit was filed five days before Alabama Attorney General Troy King requested that the Alabama Supreme Court set Arthur's execution date. More than two months later, on June 22, Arthur's execution was set for September 27, 2007. Alabama opposed the DNA lawsuit, claiming it was a ploy to delay Arthur's execution. They also argued that testing the evidence was unnecessary because it would not directly prove his innocence of committing the murder. After the U.S. District Court agreed with Alabama and dismissed the lawsuit, the Eleventh Circuit affirmed the dismissal. Arthur's attorneys then filed a writ of certiorari in the U.S. Supreme Court.

While the Supreme Court was considering whether to review the dismissal of Arthur's DNA lawsuit, Alabama Governor Bob Riley ordered a 45-day stay six hours before Arthur's scheduled execution on September 27. The stay was to allow the state Department of Corrections time to revise its lethal injection protocol. The Alabama State Supreme Court subsequently set a new execution date of December 6, 2007. On November 26, 2007 the U.S. Supreme Court declined to review the dismissal of Arthur's DNA lawsuit.

So as this is written on December 3, 2007, Arthur is three days away from his scheduled execution for Troy Wicker's murder. The jury that convicted him did not make an informed decision. Their verdict was based on incomplete evidence because the prosecutor, with the trial judge's aid, successfully blocked forensic testing of the crime-related evidence by techniques available in 1991. Why did the prosecutor who bribed Judy Wicker to lie under oath want so desperately to prevent the testing of the evidence? Is there any reasonable explanation other than that he knew it would have excluded Thomas Arthur from being present at the crime scene? Furthermore, the only reasonable explanation for Alabama's continued opposition to the testing of that evidence by today's most sophisticated forensic/DNA techniques is the fear of what the result would be – the exclusion of Arthur, and the identification of the DNA profile of who in fact murdered Troy Wicker.

The U.S. Supreme Court is currently reviewing a challenge to the constitutionality of execution by lethal injection, so either the Court or Governor Riley may issue a stay of Arthur's execution pending the Court's decision in those cases sometime next year. [*JD* Note: The

Editorial cont. on p. 11

The national media has spent much ink and airtime on the efforts of people held as enemy combatants to get a federal court to consider their habeas corpus writ challenging the legality of their imprisonment. However, there is virtually no coverage of how the habeas/post-conviction "right" of millions of Americans convicted of a crime has been emasculated to the point that it is little more than a procedural formality to rubber-stamp their conviction and sentence. We have to thank law Professor Anthony Amsterdam for frankly addressing this grave problem.

Lady Justice's Blindfold Has Been Shredded

By Anthony G. Amsterdam

Without question, the American criminal justice system is now in an acute state of denial, epitomized by its fetish for finality. Over the past quarter century, legislatures and courts have created ever more rigorous barriers against corrections of mistakes and of violations of the fundamental rights of defendants in the criminal justice system, either on appeal or in postconviction proceedings. On the one hand, there is increasing insistence that violations of defendants' rights before and at trial are not enough to warrant setting aside a conviction and awarding a new trial unless the appellate or postconviction court thinks that the defendant is probably not guilty. Conversely, there is a remarkable unwillingness to take claims of innocence at all seriously. The fixation of courts on the issue of guilt or innocence almost always takes the form of denying claims of error because the judges believe that a convicted defendant is guilty, not of willingness to provide forums for the vindication of convicted persons who present colorable claims of innocence.

A key feature of this development is the wholesale abandonment of the rights-based theory of justice that was long supposed to be the glory of Anglo-American law. That theory posited that individuals have a body of legal rights protected by fundamental law. It said that when these rights were violated, a remedy would be forthcoming. As the ancient maxim put it, *ubi jus, ubi remedium* — where there is a right, there is a remedy. The laws of the land were supposed to prescribe our rights, including the ways in which government had to treat any criminal defendant. If anyone was treated in a way that violated these rights, the courts were supposed to provide appropriate redress.

This is still the way law is taught in law schools and described in treatises, but it bears no relationship to the way courts behave in criminal cases. I am not talking about individual judges. I am talking about something more systemic and radical. We have witnessed a subversion of the very idea that criminal defendants have rights. The blindfold that Lady Justice is supposed to wear to assure that cases are decided with indifference to the outcome has been shredded. Now, as a matter of law, judges are supposed to peep through the blindfold, survey the outcomes which their rulings would produce, and tip the scales to avoid unwelcome outcomes, most notably the releases or even the retrials of guilty-looking perps.

For example, most claims of error made to appellate courts today are rejected on the ground of harmless error, without a ruling on the merits. Suppose you get convicted at a trial at which your coerced confession is admitted into evidence or the prosecutor insinuates to the jury that your failure to take the stand means you're guilty. Your constitutional right against self-incrimination has unquestionably been violated. Do you get a new trial? Not necessarily, or even ordinarily. Doctrines of harmless error originally created to avoid appellate reversals for trivial failures to observe procedural formalities have now evolved into a broad blanket rule upholding convictions whenever appellate judges conclude that even the most indefensible violations of core constitutional guarantees didn't make a difference in the outcome. Theoretically, the test of harmless constitutional error is whether appellate judges can say beyond a reasonable doubt that the error did not contribute to the guilty verdict or sentence. But in practice, it much more often boils down to whether the appellate judges think that the prosecution's evidence of guilt was potent and the sentence well deserved.

One reason why the standard gets watered down in practice is that harmless error analysis is seldom written up in appellate opinions in a way that forces the authoring judge, or his or her concurring colleagues, or anybody else, to examine it critically. Most harmless error rulings on appeal are made without explanation or are explained in such cursory terms that even lawyers familiar with the record cannot understand them. And to the rest of the world, unfamiliar with the record, such rulings are completely opaque, immune to criticism, providing no guidance in subsequent cases. Rulings made under these conditions are unrestrained by precedent or methodological discipline; little wonder that they end up turning simply on the appellate judge's sense that, on a cold record, the defendant looks damned guilty.

But harmless error analysis is only one symp tom of a more pervasive trend toward result-oriented jurisprudence in criminal cases. Increasingly, courts are developing the very sub-

Amsterdam cont. on page 12

Editorial cont. from p. 10

U.S. Sup. Ct. issued a stay on December 5, one day before Arthur's scheduled execution.]

A stay, however, would have no effect on Arthur's conviction. Arthur's conviction resulted from a pop-gun defense by a grossly underpaid and ill-equipped court appointed lawyer, a prosecutor hell-bent on concealing the truth and getting Arthur's conviction by any tactic no matter how unethical or even illegal, and a judge all too eager to be a modern day Judge Roy Bean. Arthur's inability to get his conviction overturned is not because he doesn't have issues that compel the granting of a retrial that comports with basic notions of due process, but because with very few exceptions, state and federal judges worship at the alter of maintaining procedural regularity at the price of disregarding the substance of a defendant's claims. The hurdles a defendant must overcome to successfully challenge a conviction – no matter how shaky or insubstantial it may be – is indicated by the fact that the very considerable legal and investigative efforts for six years by the New York law firm representing Arthur *pro bono* have been for naught.

If Arthur had pled guilty to Troy Wicker's murder he would have been sentenced to life in prison. So his punishment for insisting on his innocence and going to trial was having his sentence upgraded from life to death. That was his "trial penalty." Consequently, Arthur is not facing execution by the State of Alabama because he was convicted of Wicker's murder, but because he demanded his constitutional right to a trial. Arthur's conviction, and his sentence, are products of this country's intolerance for the small percentage of people foolhardy enough to buck the assembly-line plea bargaining system by publicly asserting they are in fact not guilty.

Thomas Arthur's case exposes for anyone who cares to look, that the underbelly of the United States' legal system is sordid: Its obsession with extracting guilty pleas to keep the system smoothly operating is based on a fundamental disregard for the truth of whether a conviction is based on the reality of the person's guilt or innocence. Arthur may be actually innocent of Tony Wicker's murder, but the legal system doesn't care to find out as it hurtles toward his execution that every court, including the U.S. Supreme Court, has thus far sanctioned without considering if his conviction is actually legitimate.