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THE RELATIVE NATURE OF ABSOLUTE VIOLATIONS OF THE RIGHT TO DEFENSE AS GROUNDS FOR APPEAL

Non exemplis, sed legibus iudicandum est (C.7,45,13)

Books on the topic named in the title of this paper present a fairly uniform definition of grounds for appeal as defaults which, if found by the appeal body to be present, lead to certain procedural consequences for the appealed decision. Unlike appeal allegations, which are subjective claims of a party regarding defaults made by the court of first instance, they are, in a sense, objective.¹ The relation between these two terms is that only those allegations can be legally effective that make reference to the statutory regulations of appeal allegations, i.e. articles 438–440 of the Code of Criminal Procedure (CCP).²

The grounds for appeal, regardless of their effectiveness, can be divided into the following two groups:

- 1) relative grounds for appeal, which are defaults that lead to procedural consequences in the form of annulment or change of a verdict; however, this takes place only if the grounds were raised by the appealing party in the appeal allegations;
- 2) absolute grounds for appeal, which are defaults that always lead to procedural consequences in the form of annulment of a verdict, i.e. regardless of whether the appealing party raised them in the appeal allegations or not. The appeal body must consider them irrespective of the limits

¹ See: S. Waltoś, *Proces karny. Zarys systemu* [Penal process. An outline of the system], 10th ed., Lexis Nexis Warsaw 2009, p. 540.

² See: M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Polish criminal procedure. Basic theoretical assumptions], Warsaw 1984, p. 384; P. Piszczyk, "Postępowanie odwoławcze" [Appeal procedure], in: B. Bieńkowska, P. Kruszyński, C. Kulesza, P. Piszczyk (P. Kruszyński, ed.), *Wykład prawa karnego procesowego* [A lecture on the criminal procedure law], 3rd edition, Białystok 2004, p. 404.

of the appeal, the allegations raised, and the impact on the contents of the verdict. A verdict where absolute grounds for appeal are confirmed may be annulled during the session of the appeal body, without the need to arrange a hearing.

The absolute grounds for appeal mentioned in the books on this subject, in addition to those enumerated in art. 439 of the CCP, include the obvious unfairness of the verdict which leads to a change or an annulment of the verdict (art. 440 of the CCP) and erroneous classification of an act which requires the appeals court to correct it, irrespective of the limits of the appeal and the allegations raised, but without making any changes to the factual findings (art. 455 of the CCP).³

The process defaults that constitute grounds for appeal include violations of the right to defense. Having analyzed the scope of the right to defense, P. Wiliński has identified the following three basic degrees of violations of this right (in the order of decreasing gravity):⁴

- 1) absolute violations of the right to defense (1st degree violations regulated in art. 439 (1) of the CCP);
- 2) relative violations that influence the contents of the verdict (2nd degree violations regulated, among others, in art. 438 (2) of the CCP; and
- 3) relative violations that do not influence the contents of the verdict (3rd degree violations that are not gross and are the least harmful to the defendant from the process point of view).

As P. Wiliński has stated, whether a relative violation of the right to defense can influence the contents of a verdict (and, consequently, should be included in the 2nd or 3rd group of violations) depends not only on its nature but also on the circumstances of the case. Seeing certain ambiguities in the use of the term ‘gross violation’ with regard to absolute and relative violations, P. Wiliński found (based on his analysis of court verdicts) that the term ‘gross violation’ should apply to all violations that can be considered as 1st and 2nd degree violations, while it should not apply to those violations that, in the opinion of the court, could not influence the final verdict. He emphasized that these findings are important because of the provisions of art. 523 of the CCP which limit the scope of cassation to

³ See: S. Waltoś, *op. cit.*, pp. 542–544; J. Grajewski, *Przebieg procesu* [Course of the process], 5th edition, C. H. Beck, Warsaw 2012, pp. 312–315. On the other hand, P. Piszczek seems to be limiting the list of grounds for appeal to art. 439 of the CCP and finds the provisions of art. 440 and 455 to be only exceptions to the rule that the court is bound by the limits of the measure of appeal. See: P. Piszczek, *op. cit.*, pp. 414–419.

⁴ P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym* [The right to defense rule in the Polish criminal process], Zakamycze 2006, pp. 539–541.

absolute grounds for appeal and other gross violations of law, if they could have influenced the contents of a verdict.⁵

As a result, P. Wiliński's concept of three degrees of violations of the right to defense can be reduced to the proposition that the absolute nature of such violations can be ascertained by the appeals court or the Supreme Court according to the list presented in art. 439 of the CCP and that the relative nature of such violations can be ascertained by an arbitrary decision of the courts.

In this context, of note is the problem of proving that violations of the right to defense have influenced the contents of a verdict. As has been mentioned, the allegation of 'relative' violation of the right to defense is raised by the defendant and is adjudged by the court pursuant to art. 438 (2) of the CCP, i.e. "a breach of the procedural regulations if it could have influenced the contents of the verdict." Even if the defense (in particular the defense counsel) is able to prove the occurrence of a 'breach', proving the influence of this default on the contents of the verdict is highly problematic. An interesting example is the decision of the Appeals Court in Białystok of 27 April 2006 (II AKz 93/06, OSAB 2006/1/43) in which the court stated: "Failure to inform the defense counsel about the date of the session concerning prolongation of pre-trial detention, despite the fact that such a guarantee is provided for in art. 249 (5) of the CCP, and failure to act in accordance with the duty provided for in art. 117 (2) of the CCP – the activity shall not be performed (...) – constitutes gross violation of the suspect's right to defense. Because the aforementioned breach of process law is not included in the list of absolute grounds of appeal, it is subject to evaluation with regard to its impact on the contents of the verdict. The complaint does not indicate, besides the failure to inform the defense counsel, that the lack of his participation in the session influenced the status of the case to an extent that would disqualify the appealed verdict" (emphasis by C. K.).

According to W. Wróbel, interpretation of the law is clearly a part of courts' duties; however, in his opinion, "[a]llegations of law-making appear when courts derive from a legal provision a legal norm which, in the opinion of the critics, is not expressed in the provision in question. However, acceptance of such allegations depends on the assumption that there is only one possible way of interpretation of the provision in question and, conse-

⁵ P. Wiliński, *op. cit.*, pp. 541–548, and the court verdicts given there.

quently, only one possible outcome of such interpretation.”⁶ As. W. Wróbel has indicated, because of the often functional and technical nature of criminal process norms, supplementation of the lacking clear regulations is often allowed, among others by way of analogies. However, this cannot apply to norms that constitute guarantees, often more effectively than provisions of substantive law. In his opinion, “[t]hey must not be limited by way of any analogy and their expansion in this manner requires correlation with the principle of equal arms.”⁷

As for the opinion of W. Wróbel regarding the allegation of courts’ law-making, it must be stated that the interpretation of the phrase ‘breach of procedural regulations, if it could have any influence on the contents of the verdict’, is certainly unequivocal. However, it appears that the provisions of art. 438 (2) of the CCP only require finding that the influence of the default on the contents of the verdict was likely.⁸ As to the requirement, defined in the aforementioned court verdict, that the degree of influence “would disqualify the appealed verdict,” it appears to be an over-interpretation of the indicated relative grounds for appeal and, consequently, may constitute law-making.

Such a high likelihood cannot be required in evaluating the influence of a default on the contents of the appealed verdict, which S. Pawela defines, with reference to the previous CCP of 1969, as a hypothetical cause-and-effect relationship between the default and the contents of the verdict.⁹

On the other hand, S. Zabłocki indicates that when considering the influence of a specific violation of the process regulations on the contents of

⁶ W. Wróbel, “Prawotwórcze tendencje w orzecznictwie Sądu Najwyższego w sprawach karnych. Mity czy rzeczywistość?” [Law-making tendencies in the verdicts of the Supreme Court in criminal cases. Myths or reality?], in: *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci profesora Andrzeja Wąska* [In the circle of theory and practice of criminal law. Book dedicated to the memory of Professor Andrzej Wąsek], Lublin 2005, p. 386.

⁷ *Ibid.*, p. 389, and the resolution of the Supreme Court of 16 December 2003, KZP 35/03, OSNKW 2004, No. 1 item. 5, mentioned there. The opinion regarding creative interpretation of criminal law by the Supreme Court is also shared by P. Kardas; see: P. Kardas, “Kontrowersje wokół pojęcia ‘osoba pełniąca funkcję publiczną’. Rzecz o kreatywnej wykładni przyjmowanej w orzecznictwie oraz granicach zakresowych typu czynu zabronionego określonych w ustawie” [Controversies regarding the term ‘public official’. On the creative interpretation adopted in case-law and on the limits of the scope of the type of forbidden act defined in the statute], *CzPKiNP*, 2011, no. 1, p. 79 ff.

⁸ Information on the role of confirmation of likelihood in criminal process can be found in, e.g.: R. Kmiecik, E. Skrętowicz, *Proces karny. Część szczegółowa* [Criminal process. Specific part], 5th edition, Zakamycze 2006, p. 356.

⁹ S. Pawela, *Względne przyczyny odwoławcze* [Relative grounds for appeal], Warsaw 1970, p. 26.

a verdict, the so-called negative test is very useful. In his opinion, a confirmed process default may be considered as one that does not constitute grounds for challenging a verdict if the court reasonably concludes that the default was so unimportant that, if it did not take place, the verdict would have been the same as the one that was issued with the default in place.¹⁰

However, it appears that it is hard to make reliable predictions concerning, for example, the extent to which the aforementioned absence of defense counsel during a session in which the court makes the decision to prolong pre-trial detention affected the contents of the court's decision. What is more important is that in this situation the defense counsel is deprived of the very possibility to make verbal presentation of his position and to argue with the public prosecutor.

When evaluating the possible influence of violations of the right to defense on the contents of court verdicts, one must take into account how the right to defense is perceived. Pursuant to art. 42 (2) of the Constitution and to art. 6 of the CCP, it is believed that the right to defense in the Polish criminal process covers both the substantive aspect (as the sum of guarantees given to the defendant with regard to his defense in a process) and the formal aspect (the defendant's right to receive assistance of a defense counsel).

Of note is also the opinion of A. Murzynowski who emphasizes the importance to the defense of the defendant's right to use the assistance of a defense counsel which is often (inappropriately, in his opinion) referred to as formal defense.¹¹ Even though A. Murzynowski does not explain what such 'inappropriateness' means, one can assume that he agrees with the opinion expressed many years ago by M. Cieślak, who said that "in particular the term 'formal defense' may lead to the belief that what it means is purely formal performance of duties required pursuant to the principle of defense, which would be a pernicious error."¹² This opinion, formulated as early as in the 1950's, appears to point at the defense counsel's passive attitude in his defense of the accused. However, given the dramatically limited options of the defense in the contemporary criminal process, it is wrong to blame defense counsels only. Even though the quality of a defense coun-

¹⁰ S. Zabłocki, in: *Komentarz do art. 438 k.p.k.* [A commentary to art. 438 of the CCP], DW ABC, 1998.

¹¹ A. Murzynowski, *Istota i zasady procesu karnego* [The essence and principles of criminal process], 3rd edition, Warsaw 1994, p. 275.

¹² M. Cieślak, *Dzieła wybrane* [Selected works], vol. I, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2011, p. 126, note 6 and the literature mentioned there.

sel's work should be considered as one of the guarantees of due process,¹³ it must be stated that, in the context of the Polish criminal process system in 21st century, there are constraints on the effectiveness of the defense that are independent of the defense counsel's efforts. For example, if courts assess the frequently passive, out of necessity, role of the defense counsel as 'purely formal', thus devaluing the influence of the defense counsel's involvement on the outcome of the process,¹⁴ then it is inevitable that the importance of violations of the right to defense will become reduced.

Therefore, in the context of the subject of this paper, what deserves particular attention is the equivocal meaning of the term 'right to defense' and the resulting inconsistent evaluation of the consequences of its violations. The right to defense is nowadays considered to be an element of due process and its normative content goes far beyond the 1997 Code of Criminal Procedure (art. 6 of the CCP) and includes the 1997 Constitution (art. 42 (2)), art. 6 of the European Convention on Human Rights (art. 6 (3)), art. 14 (3) of the International Covenant on Civil and Political Rights (ICCPR) of 19 December 1966 (Journal of Laws of 1997, no. 38, item 167), and the evolving European law. Consequently, violations of the right to defense are interpreted by courts not only in the context of those acts of law but also in the context of the rich case law of the ECHR in Strasbourg, the ECJ in Luxembourg, and the case law of Polish courts. In particular the ECHR, with reference to the participation of a defense counsel in a criminal process (i.e. the so-called formal defense), uses such terms as 'effective defense' and 'real defense', thus creatively expanding the meaning of this term to cover not only entire court proceedings but also preparatory proceedings.¹⁵ Therefore, it is impossible to provide unequivocal definition of these terms, as their sources are not legal norms (to include international ones) because they were first used in the verdicts of European courts.

¹³ See, e.g.: C. Kulesza, "Jakość obrony formalnej jako warunek rzetelnego procesu (refleksje prawno-porównawcze)" [Quality of formal defense as a condition of due process (comparative law reflections)], in: J. Skorupka, ed., *Rzetelny proces karny: księga jubileuszowa Profesor Zofii Świdy* [Due criminal process: a jubilee book for Professor Zofia Świda], Warsaw, Oficyna a Wolters Kluwer business, 2009, pp. 145–167.

¹⁴ More information can be found in: C. Kulesza, "Od obrony formalnej do obrony realnej? Nowa rola obrońcy w projekcie reformy procedury karnej" [From formal defense to real defense], in: *Księga pamiątkowa ku czci Prof. J. Skupińskiego* [Commemorative book for the honor of Professor J. Skupiński], (accepted to be printed).

¹⁵ See, e.g.: C. Kulesza, "Developments of the European criminal justice systems: defence perspective", in: E. Plywaczewski, ed., *Current problems of the penal law and criminology / Aktuelle Probleme des Strafrechts und der Kriminologie*, Warsaw, Lex a Wolters Kluwer business, 2012, pp. 317–336, and the court verdicts mentioned there.

The Relative Nature of Absolute Violations of the Right to Defense...

The subject of this paper is limited to absolute violations of the right to defense which translate into absolute grounds for appeal defined in art. 439 (1) (10) and (11) of the CCP. These grounds are clearly linked to violations of the right to defense in both its formal and its material aspect and, according to the statute, they include:

item 10) – the defendant in a court proceeding had no defense counsel in a case defined in art. 79 (1) and (2) and in art. 80, or the defense counsel does not participate in the activities in which his participation is mandatory; and

item 11) – a case is adjudicated in absence of the defendant, when his presence is mandatory.

The absolute nature of all process defaults under art. 439 (1) of the CCP consists in the fact, as has been observed in the books on this subject, that the first regulation formulates an absolute legal assumption regarding their influence on the contents of the appealed verdict.¹⁶ Thus, unlike in the case of relative grounds for appeal, e.g. under art. 438 (2) of the CCP, not only is the appealing party (most often the defendant or his defense counsel) exempt from the duty to prove the influence but also the appeal court (or the Supreme Court) may prove or assume the lack thereof.¹⁷ In the case of relative violations, it is necessary to prove (or demonstrate the high likelihood of) not only occurrence of such a violation of the mandatory procedures but also to demonstrate the cause-and-effect (detrimental) relationship with the verdict. On the other hand, in the case of absolute grounds for appeal, proof (or demonstration of high likelihood) of such grounds is sufficient. This is because the essence of a legal assumption is such that if fact A takes place the statute requires that procedural consequence B be assumed which, in this case, means that the verdict must be annulled to the benefit of the defense (see art. 439 (2) of the CCP).

Moreover, it must be noted that the indication by the defense counsel, in the cassation motion regarding the verdict issued by the court of 2nd instance, of the presence of an absolute ground for appeal under art. 439 (1) of the CCP ‘opens the gate’ for the defense counsel to adjudication of this extraordinary means of appeal by the Supreme Court, thus freeing him from the limitations imposed by art. 523 (2) of the CCP (i.e. the premises for the penalty of a prison sentence without conditional suspension of its execution). If the defendant is penalized with a prison sentence with conditional suspen-

¹⁶ See, e.g.: S. Waltoś, *op. cit.*, p. 361.

¹⁷ See, e.g.: Verdict of the supreme court of 11 February 2009, II KK 256/08, Biul. PK 2009/4/5–6.

sion of its execution (or a more lenient penalty, e.g. a fine) and the defense counsel does not reasonably claim the occurrence of one of the grounds for appeal defined in art. 439 (1) of the CCP, then the cassation motion will not be accepted by the president of the appeals court (art. 530 (2) of the CCP).

Therefore, apparently unequivocal provisions of the aforementioned art. 439 (1) (10) and (11), which include such phrases as “the defense counsel did not participate in the activities” and “adjudicated during absence of the defendant, when his presence was mandatory,” should be interpreted in a consistent manner. Nevertheless, even a superficial analysis of the verdicts of the Supreme Court and appeals courts indicates that this is not the case. In the case of the ground for appeal under art. 439 (1) (10) of the CCP, this may be due to the ‘blanket’ nature of this regulation which makes reference to the legal norm derived from the provisions of art. 79 (1) and (2) and art. 80 of the CCP.

This substantiates a controversial proposition that restrictive interpretation of the aforementioned regulation pertaining to the right to defense by the Supreme Court and appeals courts may lead to non-statutory restrictions on the availability of cassation as an extraordinary means of appeal.

I. It must be noted that as far as the grounds for appeal under subparagraph 10 are concerned, courts use both extensive and restrictive interpretation, which sometimes leads to differences in verdicts. In order to verify the above proposition, verdicts of the Supreme Courts and appeals courts have been divided into categories in the context of their potential inconsistency. The verdicts were quoted on the basis of propositions selected by the LEX publishing company, which means that they may not take into account all the aspects arising from their substantiations.

1) According to the verdict of the Supreme Court of 22 April 2010 (II KK 268/09, OSNwSK 2010/1/881), violation in the form of the accused person’s lack of a defense counsel when defense is mandatory takes place when a single required defense counsel defends many defendants, even if their interests are contradictory (the same conclusion was expressed in the verdict of the Supreme Court of 7 December 2004 (IV KK 276/04, LEX no. 163269) and in the verdict of the Appeals Court in Lublin of 12 April 2011 (II AKa 45/11, LEX no. 895934)).

In the aforementioned verdicts, the courts use such terms as ‘reality of formal defense’ and ‘material defense’ as opposite to the sole presence of a defense counsel during a hearing, if the counsel is unable to actually undertake any action (see the verdict of the Supreme Court of 6 October 2010 (IV KK 82/10, OSNwSK 2010/1/1893), the verdict of the Supreme

Court of 15 January 2008 (V KK 190/07, OSNKW 2008/2/19), and the decision of the Supreme Court of 15 November 2006 (IV KK 188/06, OSNwSK 2006/1/2170)).

2) In its verdict of 8 June 2008 (III KK 419/03, OSNKW 2004/7–8/74), the Supreme Court indicated that preventing communication of the defendant with the defense counsel during the absence of other persons, during process activities that are important from the point of view of defense, may constitute an absolute ground for appeal under art. 439 (1) (10) in fine of the CCP if it is found that it is equivalent to lack of participation of the required defense counsel in the activities where such participation is mandatory.

On the other hand, in one of its verdicts (II AKa 169/08, KZS 2009/10/50), the Appeals Court in Kraków appears to have chosen a different approach, as it stated that not every restriction on contacts between the defendant and the defense counsel demonstrates that the defense counsel does not participate in activities where such participation is required and, consequently, such restriction is not equivalent to preventing substantive defense of the accused person (art. 439 (1) (10) of the CCP).

3) In its fairly uniform verdicts, the Supreme Court has assumed that the CCP does not provide for exemption of the defense counsel from the mandatory participation in any part of a hearing in cases where defense is mandatory (the verdict of the Supreme Court of 11 February 2009, II KK 256/08, Biul. PK 2009/4/5–6; decision of the Supreme Court of 27 February 2007, I KZP 38/06, OSNKW 2007/3/23).

– The Supreme Court makes a more restrictive interpretation of art. 439 (1) (10) in the same verdict of 2 March 2010 (III KK 307/09, LEX no. 583859) where it states that if the absence of a defense counsel who is subject to mandatory defense concerns only a small portion of the hearing related to one of the alleged offenses, in a proceeding that is complex both subjectively and objectively, and if the defense counsel participated in the hearing during adjudication of the remaining alleged offenses, then the appealed verdict has to be annulled only in the part pertaining to the specific offense. A similar position of the Supreme Court is visible in the verdict of 1 April 2005 (V KK 346/04, LEX no. 148226), where the Court observed that only if the court had been informed by the defense counsels about their division of duties, the interpretation would be permissible that in the scope of defense assumed by the defense counsel who did not exercise it in the situation described in art. 79 (1) and (2) of the CCP and in art. 80 of the CCP, the defendant was deprived of a defense counsel in the meaning of art. 439 (1) (10), first sentence, of the CCP.

4) In its analysis of the relationship between the defendant and the defense counsel, the Appeals Court in Katowice, in its verdict of 25 March 2011 (II AKa 449/10, LEX no. 846487), found that “[a] situation where the circumstances of a specific case indicate that the defense counsel of a defendant has filed an appeal contrary to the defendant’s will, intentions, and interest and has not undertaken all possible actions in this regard that are beneficial to the defendant, even though he could and was able to do so, must be considered as equivalent to a situation where a defendant has no defense counsel in a criminal process with respect to implementation of substantive defense, which constitutes an absolute ground for appeal in the meaning of art. 439 (1) (10) of the CCP.”

Yet another approach can be seen in verdicts which indicate that:

– “A rejection of a motion to change the court-appointed defense counsel substantiated by loss of trust of the defendant in the counsel does not deprive the defendant of defense (art. 439 (1) (10) of the CCP).” (verdict of the Appeals Court in Kraków of 24 November 2010 (II Aka 216/10, KZS 2010/12/48)).

– Moreover, the same Court, in its decision of 30 March 2009 (II AKo 26/09, KZS 2009/5/40) assumed, among other things, that the court is not required to determine whether the attorneys performing duties as the defense counsels have acted in accordance with the expectations of the defendants and that “[o]nly the visible and evident violations of the duties of the defense counsel may constitute grounds for the Court asking the defendant if his rights are not breached or issuing orders in situations provided for in the law.”

5) According to the verdict of the Supreme Court of 11 May 2010 (III KK 399/09, LEX no. 598845), a motion for compulsory appearance at an appeal hearing, depending on the Court’s decision, has to result in participation in the hearing of the defendant or, in the event of a refusal to grant compulsory appearance, in the requirement to appoint a defense counsel, whose participation in the appeal hearing becomes mandatory, even with the consequences (in the event of adjudication in the absence of a defense counsel) mentioned in art. 439 (1) (10) of the CCP (the same statement was made in the verdicts of the Supreme Court of 3 December 2007 (V KK 448/06, LEX no. 361429) and of 31 August 2005 (V KK 58/05, OSNKW 2005/11/113)).

– The Supreme Court appears to adopt a different position in its verdict of 4 February 2009 (III KK 290/08, LEX no. 486546) where it concluded that failure to perform the duty under art. 451 of the CCP does not constitute a breach under art. 439 (1) (10).

6) In its verdict of 19 September 2007 (III KK 130/07, LEX no. 310629.), the Supreme Court stated that the mandatory defense provided for in art. 79 (2) of the CCP becomes mandatory at the time of occurrence of circumstances that hinder the defendant's exercise of substantive right to defense and hearings without participation of a defense counsel in this situation constitute a breach of the provisions of art. 439 (1) (10) of the CCP (the same conclusion can be drawn from the verdict of the Supreme Court of 24 July 2007 (III KK 60/07, OSNwSK 2007/1/1716)).

– The Supreme Court appears to demonstrate a different approach in its verdict of 18 April 2012 (IV KK 366/11, Biul. PK 2012/5/18) where it assumes, among other things, that the mandatory defense requirement provided for in art. 79 (2) of the CCP becomes effective only when the court has issued a relevant decision (a similar conclusion can be drawn from the verdict of the Supreme Court of 7 September 2007 (II KK 30/07, OSNwSK 2007/1/1983) which provides that “the obligatory defense requirement becomes effective only when the court finds that the defendant (applicant) has to have a defense counsel”).

7) As for mandatory defense of a person suspected of being insane, according to the verdict of the Supreme Court of 13 April 2006 (V KK 123/06, OSNwSK 2006/1/848), a breach of art. 79 (1) (3) and art. 79 (3) of the CCP takes place only when the hearing is conducted without participation of the defense counsel, even though the court has had doubts regarding the defendant's sanity and when, given the materials gathered in the case, the court should have had such doubts. An allegation regarding a breach of this regulation and, consequently, the breach defined in art. 439 (1) (10) of the CCP, can be raised effectively in the event that the body conducting the process fails to respond to the presence of reasonable doubt (the same conclusion can be drawn from the verdict of the Supreme Court of 14 February 2005 (II KK 491/04, LEX no. 149603)).

– However, the Supreme Court is more often of the opinion that a breach of art. 79 (1) (3) and art. 79 (3) of the CCP takes place when a hearing is conducted without participation of the defense counsel, even though the court had doubts concerning the defendant's sanity (e.g. verdicts of the Supreme Court of 11 January 2012 (III KK 176/11, LEX no. 1119508), of 29 June 2010 (I KZP 6/10, OSNKW 2010/8/65), and of 2 March 2009 (LEX no. 495313)).

II. As for the ground for appeal under art. 439 (1) (11) of the CCP, it can also be concluded that the courts' interpretations of the regulation are different and, as a rule, restrictive.

1) As the Supreme Court stated in the substantiation of its verdict

of 6 April 2011 (III KK 216/10, OSNKW 2011/8/71), “[t]he breach defined in art. 439 (1) (11) of the CCP is of individual nature and does not have process consequences to other defendants in cases where many defendants are involved. Such breach should be subject to similar interpretations in objectively complex cases and lead to the consequence provided for in art. 439 (1) of the CCP only with reference to this objective part of the process to which the part of the hearing conducted in the absence of the defendant applied, provided that the circumstances of the specific process enable such a distinction.”

2) On the other hand, in its verdict of 3 March 2011 (III KK 294/10, LEX no. 785588), the Supreme Court indicated that “[t]he sense of the provision of art. 439 (1) (11) of the CCP which, due to its nature and the associated consequences, should be interpreted strictly, is unequivocal: only in the event of existence of the defendant’s duty to be present, his absence during adjudication of a case is considered as an absolute ground for appeal.”

3) The Supreme Court assumes in principle that initiation of process activities during a hearing where the defendant is absent, if none of the exceptional situations that enable continuation of the hearing in the absence of the defendant have taken place, constitutes an absolute ground for appeal defined in art. 439 (1) (11) of the CCP (verdict of the Supreme Court of 4 February 2009 (V KK 331/08, LEX no. 495323); verdict of the Supreme Court of 26 May 2004 (V KK 15/04, LEX no. 109510)). This rule applies also in situations where, due to a change from a summary trial to a regular trial, the presence of the defendant at the hearing becomes obligatory (see the verdicts of the Supreme Court of 5 June 2007 (IV KK 113/07, OSNwSK 2007/1/1231) and of 27 September 2004 (III KK 216/04, LEX no. 126701)).

4) In accordance with the above strict interpretation, the Supreme Court concluded that the ground for appeal under art. 439 (1) (11) of the CCP does not take place in situations where:

– an appeal hearing is conducted during the absence of a defendant participating in the trial on his own recognizance who has properly justified his absence and requested that the hearing be postponed (art. 117 (2) of the CCP) but whose presence is not mandatory because neither the appeals court nor the president of this court considered it to be necessary (art. 450 (2) of the CCP) (verdict of the Supreme Court of 3 March 2011 (III KK 294/10, Biul. PK 2011/5/50)).

– the main hearing is conducted during the absence of a defendant serving a prison sentence who has not informed the court about this fact

(verdict of the Supreme Court of 3 November 2010 (II KK 119/10, LEX no. 638477);

– the defendant has not been informed about the date of pronouncement of the verdict and, as a result, he is absent during the hearing when the verdict is pronounced (verdict of the Supreme Court of 1 August 2007 (IV KK 203/07, OSNwSK 2007/1/1773)).

To conclude the deliberations concerning the different (relative) interpretations of absolute violations of the right provided for in art. 439 (1) (10) and (11) of the CCP, let me make reference to the maxim whereby courts must adjudicate on the basis of laws and not on earlier cases, which is the motto of this article. As T. Stawecki was right in observing, courts often follow the principle of *clara non sunt interpretanda* (what is clear does not require interpretation), but they just as often ignore it without substantiating their decisions regarding interpretation. In his opinion, the rules regarding strict interpretation among others in substantive criminal law, and in particular the prohibition to perform extensive interpretation, “are usually officially declared but actually forgotten or ignored in cases pertaining to difficult legal and social matters.”¹⁸ In the case of interpretation of criminal procedure law, the reasons for tolerating violations of procedure may be opinions regarding the leniency of the penalties for violating the procedure and, in particular, for disciplinary misdemeanors, and even the personal attitudes of the judges towards the cases. In a disciplinary case adjudicated by the Supreme Court (SDI 33/11), a legal counsel was found guilty of offending the judges of the Supreme Court in his written statement by using the following phrases:

– “I submitted this appeal motion but one of the Supreme Court judges, during an in camera session, refused to accept it for consideration without any substantiation. This is a truly unconstitutional scandal,”

– “(...) give the boot to get rid of (...),”

– “(...) independence from reason in this case is as ubiquitous as in the other one.”

The legal counsel did not exercise restraint and tact towards the Supreme Court, thus committing the offenses defined in art. 64 (1) (2) of the Act on Legal Counsels in connection with art. 30 of the Legal Counsel’s Code of Ethics, and pursuant to art. 65 (1) (1) of the Act on Legal Counsels,

¹⁸ T. Stawecki, “O praktycznym stosowaniu hermeneutyki w wykładni prawa” [On the practical application of hermeneutics in legal interpretations], in: *Wykładnia prawa, Materiały z konferencji na WPiA UW z 27 lutego 2004 r.* [Interpretation of law. Materials from the conference held at the Faculty of Law and Administration of the Warsaw University on 27 February 2004, Warsaw 2004, p. 13.

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the disciplinary court adjudicated the penalty of admonition. In its decision of 10 January 2012, the Supreme Court rejected the accused legal counsel's cassation motion and found that adjudication of the appeal motion by the Supreme Disciplinary Court in the absence of the accused person cannot constitute an absolute ground for appeal defined in art. 439 (1) (10) of the CCP or in art. 439 (1) (11) of the CCP (SDI 33/11, LEX no. 1129167).

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