CRIMINAL LAW DIGEST

Third Edition

STATE, FEDERAL, CONSTITUTIONAL LAW AND PROCEDURE

1989 Cumulative Supplement No. 2

WG&L
WARREN, GORHAM & LAMONT

CRIMINAL LAW DIGEST

Third Edition

STATE, FEDERAL, CONSTITUTIONAL
LAW AND PROCEDURE

1989 Cumulative Supplement No. 2

JAMES A. DOUGLAS
Member of the New York Bar
Lecturer, New York University

DONALD S. BENTON
Member of the New York Bar

WARREN, GORHAM & LAMONT
Boston • New York

ISBN 0-7913-0444-2
Library of Congress Catalog Card No. 75-311316

PRINTED IN THE UNITED STATES OF AMERICA

How to Use This Supplement

This supplement updates the third edition of the *Criminal Law Digest* with over 1,500 digests of significant criminal law cases decided since publication of the main volume. It covers both state and federal law—substantive and procedural—as well as constitutional guarantees.

The supplement's organization follows that of the third edition; section numbers used to identify topical areas in the supplement correspond to those in the main volume, and the sequence of sections has been preserved. New topics developed by cases decided since the third edition's publication have been incorporated into the supplement and have been assigned new section numbers reflecting the topical organization. Cases discussed in the *Criminal Law Bulletin* are noted with a citation at the end of the case digest. The citation includes the volume and page number of the *Bulletin* in which the case discussion may be found.

Reader aids include a Table of Contents listing every section and subsection in this supplement, a Cumulative Table of Cases, and a Cumulative Index. The Cumulative Table of Cases and the Cumulative Index are keyed to section numbers and refer to both main volume and supplement entries. They supersede the Index and Table of Cases in the main volume.

Also included is a Table of Updated Case Citations that brings the citations of cases in the main volume up-to-date.

Supplement Table of Contents

PART II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

7. JURISDICTION AND VENUE

8. PRELIMINARY PROCEEDINGS

9. INDICTMENT AND INFORMATION

10. PRETRIAL MOTIONS

11. DISCOVERY

12. GUILTY PLEAS

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

15. JURY

SELECTION

INSTRUCTIONS

DELIBERATION

VERDICT

16. POST-TRIAL MOTIONS

17. SENTENCING AND PUNISHMENT

SENTENCING

PUNISHMENT

18. APPEAL AND ERROR

19. PROBATION, PAROLE, AND PARDON

PROBATION

PAROLE

20. PRISONER PROCEEDINGS

21. ANCILLARY PROCEEDINGS

CONTEMPT

EXTRADITION PROCEEDINGS

JUVENILE PROCEEDINGS

COMMITMENT PROCEEDINGS

Part III—FEDERAL CRIMES

22. VALIDITY OF CRIMINAL STATUTES

23. CONSTRUCTION AND OPERATION OF CRIMINAL STATUTES

24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

25. CAPACITY

26. PARTIES

27. DEFENSES

Part IV—FEDERAL PROCEDURES

28. JURISDICTION AND VENUE

29. PRELIMINARY PROCEEDINGS

30. INDICTMENT AND INFORMATION

31. PRETRIAL MOTIONS

32. DISCOVERY

33. GUILTY PLEAS

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

WEIGHT AND SUFFICIENCY

35. THE TRIAL

38. SENTENCING AND PUNISHMENT

SENTENCING

PUNISHMENT

39. THE APPEAL

40. PROBATION AND PAROLE

41. PRISONER PROCEEDINGS

42. ANCILLARY PROCEEDINGS

CONTEMPT

DEPORTATION

DEPRIVATION OF CIVIL RIGHTS

EXTRADITION

Part I—STATE CRIMES

1. VALIDITY OF CRIMINAL STATUTES IN GENERAL

§ 1.00 Statute held not void for vagueness

Minnesota After her arrest, defendant challenged the statute that she had violated, which makes it a misdemeanor to intentionally interfere with a peace officer while the officer is engaged in the performance of his official duties. Defendant claimed that the statute was unconstitutionally vague on its face in violation of the due process clause of the Fourteenth Amendment.

Held, reversed and remanded for trial. The court said that a statute is void if it lacks sufficient definiteness so that ordinary people cannot understand what conduct is prohibited, and if it encourages arbitrary or discriminatory enforcement. As interpreted by the court, the statute clearly prohibits intentional physical obstruction or interference with a peace officer in the performance of his duties. The court determined that persons of common intelligence did not need to guess at whether their conduct violated the statute. Furthermore, no evidence was presented indicating that the statute had been enforced in an arbitrary or abusive manner. Therefore, the court concluded that the statute should not be voided. Finally, the court said it was unlikely that a substantially more precise standard could be formulated that would not risk nullification in practice because of easy evasion. State v. Krawsky, 426 N.W.2d 875 (1988).

Ohio Defendants were convicted of violating the Ohio Pyramid Sales Act, which provided that "No person shall propose, plan, prepare, or operate a pyramid sales plan or program." Although not challenging the definition of a pyramid sales plan, they asserted that the words "plan" and "prepare" in the above-cited section were used in an unconstitutionally vague manner. The lower court agreed and dismissed the indictments before trial; the intermediate appellate court affirmed the dismissals, but on the ground of overbreadth, not vagueness, as it found that the statute might encompass and penalize noncriminal conduct.

Held, affirmed in part, reversed in part and remanded. The Ohio Supreme Court found that

> [where an enactment is questioned] on the ground that it is unconstitutionally overbroad it is extremely difficult to find unconstitutionality absent a particular state of facts to which the challenged statute may be applied. To find that a statute is facially overbroad—distinguishable from an ascertainment of vagueness —in effect is to hold that under no

> reasonable set of circumstances could any person lawfully be prosecuted thereunder. It is difficult to so hold especially in view of the strong presumption in favor of the constitutionality of legislation and the judicial obligation which exists to support the enactment of a law-making body if this can be done.

A conviction under the Pyramid Sales Act, it continued, required proof of

> some movement or act toward the execution of a pyramid sales plan or scheme. The determination of whether and when such a movement or act has been performed can only be made by the trier of fact. It is not, however, a question of the facial constitutionality of the subject statutes.

Accordingly, the court found the statute facially sufficient. State v. Beckley, 448 N.E.2d 1147 (1983), 20 CLB 68.

Oklahoma Defendant was convicted of communicating false rumors. A bumper sticker affixed to his car bore the name of an individual and the word "prostitute." The statute in issue provided that "Any person, who shall willfully, knowingly, or maliciously repeat or communicate . . . a false rumor or report of a slanderous or harmful nature, or which may be detrimental to the character or standing of such other person . . . shall be deemed guilty. . . ." On appeal, he argued that the statute was void for vagueness and overbreadth.

Held, conviction affirmed. The court first found that the false rumors statute survived the vagueness test because an ordinary person of common intelligence would be able to ascertain its meaning. As to overbreadth, defendant had argued that the statute could be read so as not to require falsity, that there was no apparent requirement of knowledge of falsity even if falsity was required, and that the statute did not limit itself to communications of facts as opposed to communications of ideas. The court, however, pointed out that declaring a statute facially invalid should be done only as a last resort and that a statute that regulates a substantial number of situations validly should not be invalid on its face, particularly where the statute is susceptible to a narrowing construction. The court read this statute as proscribing the willful, knowing, or malicious communication of a false rumor or report, and found that this implied a knowledge of the falsity of the rumor and was limited to the communication of facts. Pegg v. State, 659 P.2d 370 (Crim. App. 1983).

Pennsylvania Defendant was convicted of hindering apprehension or prosecution and of criminal conspiracy to hinder apprehension or prosecution. During an investigation of illegal drug trafficking, the district attorney filed three applications, which were later approved, for orders of authorization to intercept telephone conversations of certain individuals. Defendant, whose name was not among those specifically listed in the applications, was arrested after his voice or name was intercepted during three different conversations. On appeal, defendant alleged that 18 Pa. Cons. Stat. Ann. § 5718 of the Wiretapping and Electronic Surveillance Control Act was unconstitutionally vague in that it does not provide defendant with fair notice of the time period in which officers may use recordings as evidence of a crime.

Held, affirmed. Section 5718 stated

that in order to authorize evidentiary use of recordings pertaining to crimes not mentioned in an original wiretap authorization, an application must be made to a judge of the superior court "as soon as practicable." The "as soon as practicable" language of the statute was held not void for vagueness in violation of due process. The Superior Court of Pennsylvania found the statute set a reasonable limit on the amount of time in which law-enforcement officials may seek to use recorded conversations as evidence of criminal activity without arbitrarily limiting the amount of time law-enforcement agencies have to complete their investigations and determine whether the recorded conversations pertain to some type of criminal activity. The court rejected defendant's contention that "as soon as practicable" meant that the application must be made as soon as possible after the conversation is recorded. The "as soon as practicable" language obligated law-enforcement officers to make their application sufficiently far in advance of defendant's trial to give the judge adequate time to consider the application and to give the defendant a minimum of ten days' notice about the evidentiary use of the recorded conversations at his trial. Because defendant was aware four months in advance of trial that the tapes containing his conversations would be offered into evidence, he suffered no prejudice from the district attorney's twenty-six-month delay in filing the final report listing his name and the contents of his recorded conversations. Commonwealth v. Hashem, 525 A.2d 744 (1987).

Washington Defendant was convicted under Washington's "harassment" statute. After making death threats that included a promise to blow up another's house, defendant was arrested and subsequently convicted. Defendant then challenged the statute, contending that it should be voided under the constitutional doctrine of "void for vagueness." Defendant's complaint focused on the phrase "without lawful authority" contained in the statute.

Held, affirmed. The court stated that the due process doctrine of "void for vagueness" has two principles. First, criminality must be defined with sufficient specificity to put citizens on notice as to what conduct they must avoid. Second, legislated crimes must not be susceptible to arbitrary and discriminatory law enforcement. The court said that none of its decisions have ever established that the concept of "lawfulness" is unconstitutionally vague. People of common intelligence did not need to guess at what a statute means by "lawful," nor did the court have to search for instances in which an individual may threaten injury to another with "lawful authority." The court felt that neither it nor the legislature should have to delineate such situations. It refused to void a legislative enactment merely because all of its possible applications could not be anticipated and was especially unwilling to do so in this case, where defendant's conduct fell squarely within the statute's prohibitions. At no time during litigation did defendant ever suggest that he had any "lawful authority" to engage in the conduct that resulted in his conviction, or even that he was uncertain about his authority. The court also said the law was not arbitrarily enforced. The court found that the meaning of "lawful authority" is readily ascertainable from objective sources of law, and, therefore, it could not agree that the phrase allows prose-

cution according to "personal predilections." State v. Smith, 759 P.2d 372 (1988).

§ 1.05 Statute held void for vagueness

U.S. Supreme Court Plaintiff was arrested and convicted for violating a California statute requiring persons who loiter or wander on the streets to provide "credible and reliable" identification and to account for their presence when requested by a police officer. Plaintiff brought suit for declaratory and injunctive relief challenging the statute's constitutionality. The California Court of Appeal has construed the statute to require a person to provide such identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." The District Court held the statute unconstitutional and enjoined its enforcement, and the Ninth Circuit affirmed.

Held, affirmed. The statute was unconstitutionally vague under the due process clause by failing to clarify what was contemplated by the requirement that a suspect provide "credible and reliable" identification. The Court noted that the statute, as drafted, vested virtually complete discretion in the hands of the police to determine whether the suspect had satisfied the statute. Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855 (1983), 20 CLB 58.

Arkansas Defendant was convicted of nine felony counts that included capital felony murder. Defendant raped and murdered a young woman during a crime spree that lasted several hours. He was sentenced to death under a statute that prescribed death when "the capital murder was committed in an especially heinous, atrocious, or cruel manner." Defendant appealed his sentence because he believed this statute to be unconstitutionally vague and without guidelines to channel a jury's discretion in deciding whether an aggravating circumstance existed.

Held, sentence set aside and reduced. The court said that although it could adopt language to interpret the general assembly's purpose in adopting the statute, if it began to adjudicate this issue in each case at this level, it was likely to wind up displaying the very sort of inconsistency proscribed by the Constitution. It believed that the words "especially heinous, atrocious, or cruel" could mean nearly anything and concurred that the jury had received no guidance whatever in defining them. The court could not give them meaning after the fact of the sentencing, and to do so would constitute raw legislation. The court refused to usurp the power of the legislature and held the statute as it existed to be too broad and vague to be sustained under the Eighth and Fourteenth Amendments to the U.S. Constitution. Wilson v. State, 751 S.W.2d 734 (1988).

Illinois Defendants were charged in separate actions with violations of the Illinois Drug Paraphernalia Control Act (the Act) (Ill. Rev. Stat. ch. 56 1/2, pars. 2101 through 2107, 1985). Their cases were consolidated for trial, and on their motions to dis-

miss, trial court held the Act to be impermissibly vague and therefore unconstitutional. The state appealed.

Held, affirmed. In *Village of Hoffman Estates v. Flipside, Hoffman Estate, Inc.* (1982), 455 U.S. 489, 102 S. Ct. 1186 (1982), the U.S. Supreme Court considered a vagueness challenge to a local drug paraphernalia ordinance which made it unlawful to sell any items that were "designed or marketed for use with illegal cannabis or drugs" without first obtaining a license. The Court upheld the ordinance finding the use of the phrase "marketed for use" to encompass a scienter requirement; a retailer cannot market items for a particular use without intending that use. While the definitional section of the Illinois Drug Paraphernalia Act describes drug paraphernalia as that which is "peculiar to and marketed for use" with drugs, the penalty section of the Act only requires that a seller "reasonably should have known" an item to be drug paraphernalia. Thus, whereas the Illinois legislature apparently intended that scienter be included in the definition of drug paraphernalia, the penalty section allows for convictions based upon the constructive knowledge of the seller. As a result, the court determined the Act to be unconstitutionally vague. People v. Monroe, 515 N.E.2d 42 (1987).

Indiana Defendants were indicted for neglect of dependents. The pertinent part of the statute under which defendants were indicted defined neglect as "knowingly or intentionally" placing a dependent "in a situation that may endanger his life or health." Defendants argued that the word "may" made the statute unconstitutionally vague. The trial court dismissed the indictment on the ground that the relevant section of the statute was too vague to be enforceable.

Held, dismissal of indictment reversed and case remanded. The Indiana Supreme Court ruled that the statute was unconstitutionally vague, but that its meaning could be construed through a less literal reading, specifically the elimination of the word "may." The court stated that:

> [A] court in reading a statute for constitutional testing, may give it a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent. . . . The purpose of the statutory provision here is to authorize the intervention of the police power to prevent harmful consequences and injury to dependents.

In this case, defendants had been accused of neglecting dependents by placing them in insanitary conditions, which not only "may" have endangered them but posed a real risk to their safety. Although the word "may" made the statute too broad to interpret literally, the statute's intent was clear. Rationally, the meaning of the statute was obvious, that is, to place a dependent in a life-threatening situation constitutes neglect. State v. Downey, 476 N.E.2d 121 (1985).

Nevada Sheriff appealed after charges against defendant were dismissed. Defendant, an attorney, acquired information that led him to believe a child was being abused. He did not report this to the police until two weeks later. He was charged with a misdemeanor under the statute that requires all professionals to "immediately" report cases of suspected child abuse. At

issue in this case was the definition of "immediately."

Held, affirmed. The court determined that the term was unconstitutionally vague because the prosecutor was given sole authority to define it. With this authority, the prosecutor, not the court, would decide whether every report was made quickly enough. Sheriff, Washoe County v. Sferrazza, 766 P.2d 896 (1988).

§ 1.15 Severability of statutes (New)

Oregon Defendant was convicted of prostitution under a Portland city ordinance that provided for a minimum penalty for that offense. There was no minimum penalty for prostitution under Oregon state criminal law. Prior to trial, defendant moved to dismiss the charge on the ground that the city ordinance defining and prohibiting prostitution and the minimum penalty provision were incompatible with state law. The court granted defendant's motion to dismiss, and the city appealed. The court of appeals agreed with the trial court's ruling that the city's mandatory minimum penalty provision was invalid; however, it found that the invalid penalty provision was severable from the issue of the legality of the city ordinance defining and prohibiting prostitution. Accordingly, the Court of Appeals reversed the trial court's dismissal and remanded the case for trial. Both defendant and the city appealed.

Held, affirmed. The Supreme Court ruled the minimum penalty provision in the city ordinance was incompatible with state law, but that the penalty provision was severable. The Court, citing Ivancie v. Thornton, 443 P.2d 612, cert. denied, 393 U.S. 1018 89 S. Ct. 623 (1968), recognized the principle of statutory construction—that an unconstitutional part of a statute may be excised without destroying a separable part—and stated that this principle may be applied to a city ordinance as well. In this case, the court ruled there was nothing in the relevant city ordinance indicating that the City Governing Council intended that if the mandatory minimum penalty were held to be unconstitutional, the provision defining and prohibiting prostitution would be invalidated. The prohibitory ordinance, stated the court, was "not so essentially and inseparably connected with and dependent upon the mandatory minimum penalty provision, that it is apparent from the text or the legislative history that it would not have been enacted without the mandatory minimum provision." Further, "the prohibitory ordinance is neither incomplete nor incapable of being executed absent the mandatory minimum provision. . . ." City of Portland v. Dollarhide, 714 P.2d 220 (1986).

2. CONSTRUCTION AND OPERATION OF CRIMINAL STATUTES

§ 2.00 Legislative intention as controlling

Florida Defendant was convicted of aggravated assault and possession of a firearm without a license. On appeal, the district court reversed defendant's conviction of possession of a firearm without a license because the state had not proved at trial that defendant did not have a license. The district court held that the lack of a license is an essential element of the

crime, and, by not introducing any evidence on this issue, the state had failed to meet its burden of proving each element of the offense beyond a reasonable doubt.

Held, affirmed. The Florida Supreme Court affirmed and found that for a statutory exception to constitute a defense, it must be in a clause subsequent to the enacting clause of a statute. The court concluded that the "without a license" provision is not "an exception in a subsequent clause." Rather, "without a license" is a prepositional phrase contained in the enacting clause of the statute. Therefore, the district court correctly held that "the absence of a license is an essential element of the crime of possession of a firearm without a license." The court added that a court's main guide in construing a statute is the legislature's intent, and general rules of statutory construction are designed to help courts ascertain the intent of the legislature. An examination of the statutory section in question did not disclose anything to indicate that characterizing the lack of a license as an element of the offense would be contrary to legislative intent regarding the statute. State v. Robarge, 450 So. 2d 855 (1984).

Rhode Island Defendant was convicted of transporting individuals for indecent purposes and of other sexual offenses. He appealed the conviction for transportation, arguing that it should be vacated because the legislature amended the statute defining the offense while prosecution was pending against him. Specifically, the legislature added the requirement that the proscribed conduct be performed "for pecuniary gain." The additional element of "pecuniary gain" was not attributable to defendant's conduct in the counts for which he was indicted. The state argued that the general savings clause in the General Laws of Rhode Island saved the indictment from the repeal or amendment of the transportation statute.

Held, conviction vacated. A caveat to the general savings clause, that it should not be applied when doing so would lead to a construction inconsistent with the manifest intent of the general assembly, applied to this indictment. The legislative history of the transportation statute and its amendment showed that the legislature's concern was with deriving support or maintenance from prostitution. There was never an intention to use the statute to outlaw the transportation of minors for sexual offenses that are not committed for pecuniary gain. The court then noted that other criminal statutes address that offense. State v. Babbitt, 457 A.2d 1049 (1983).

§ 2.05 Statute broadly construed

Kentucky Defendant pleaded guilty to a charge of first-degree burglary committed by knowingly and unlawfully entering a building with intent to commit a crime; while in immediate flight therefrom, he was armed with a deadly weapon, a shotgun. In fact, he stole the shotgun and left the premises with it. He was not armed with a deadly weapon when he entered the premises. The Kentucky statute provides: "When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a class A, B, or C felony and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, such person shall

not be eligible for probation, shock probation or conditional discharge." Upon the basis of this statutory provision, defendant's motion for probation was denied. On appeal, defendant raised the following question: Does possession of a firearm obtained during the commission of a burglary constitute use of a weapon so as to preclude eligibility for probation, shock probation, or conditional discharge?

Held, reversed. The Supreme Court of Kentucky construed the meaning which should be given to the phrase "use of a weapon" in the statute to be ambiguous in that it is subject to two entirely different, but nevertheless logical, interpretations. Defendant contended that mere possession of a weapon constitutes being "armed" with a weapon, but "use" of a weapon contemplates that it be employed in some manner in the commission of an offense. The commonwealth contended that the possession of a weapon involves its use, and that the intent of the legislature was to deter the involvement or presence of weapons in the commission of crimes. Since the court could not determine the meaning the legislature intended to give the phrase "use of a weapon," defendant was entitled to the benefit of the ambiguity. Because it was not shown that a weapon was used in any manner to further the commission of the offense, the trial judge was found to be in error in his belief that probation was precluded by the statute. Haymon v. Commonwealth, 657 S.W.2d 239 (1983).

§ 2.10 Statute narrowly construed

North Carolina Two defendants appealed their convictions of disseminating obscenity. The first was convicted of five counts after selling one officer two pieces of obscenity at a time and another officer three pieces at a time. The second was convicted of three counts for selling one officer three pieces of obscenity at a time. Defendants contended that the legislature did not establish guidelines for how to establish the number of counts that one should be charged with in the sale of obscenity, and claimed the court should have ruled in favor of lenity.

Held, conviction reversed and remanded. The court found the law concerning the dissemination of obscenity ambiguous because it does not specify how the counts should be numbered. The court, citing Bell v. United States, 349 U.S. 81, 75 S. Ct. 620 (1955), which states that an ambiguity in the law should be resolved in favor of lenity, determined that each sale, not each item sold, constituted one count of dissemination of obscenity. In this case, the court determined that the first defendant should have been convicted of only two counts considering he made only two sales, and the second should have been convicted of only one count. State v. Smith, 373 S.E.2d 435 (1988).

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 3.00 Arson

Nebraska Defendant was convicted of attempted arson for setting fire to paper goods and articles of clothing during a disturbance at a county jail in which he was confined; the fire filled the area with smoke and caused scorching of the paint. On appeal, he argued that the crime of attempted arson requires proof of an intent to burn a structure, which cannot be demonstrated where, as here, the structure is constructed of fireproof material.

Held, conviction affirmed. The Supreme Court of Nebraska rejected defendant's contention, finding it clear from the evidence that defendant intended to damage the jail and that he accomplished that result. The arson statute, it noted, required only damage to a structure as the result of fire, not a burning of the structure itself. A building need not be combustible to be damaged by fire, continued the court; scorching and smoke produced by a fire could be sufficient to cause damage, it said, suggesting that the evidence against defendant would have been sufficient to sustain a conviction for the completed crime of arson as well as the attempt. State v. Hohnstein, 328 N.W.2d 777 (1983), 19 CLB 485.

Wyoming Defendant was found guilty of the offense of first-degree arson pursuant to a pre-1983 Wyoming statute that provided that "Any person who willfully and maliciously sets fire to or burns . . . any dwelling house . . . shall be guilty of arson in the first degree." At trial he sought to raise the defense of diminished capacity. The court refused to give several proposed defense instructions that were based on the defense theory that defendant's capacity was diminished to the point where he was unable to form the specific intent that is an element of the crime of first-degree arson. Instead, the court gave an instruction on mental illness and mental deficiency, since defendant had entered a plea of not guilty by reason of mental illness or deficiency. The defendant was found guilty and he appealed.

Held, verdict affirmed with sentence modified on other grounds. The Supreme Court of Wyoming stated that first-degree arson was not a specific intent crime under the pre-1983 statute. The words "willfully and maliciously" describe the act to be committed rather than an intention to produce a specific result by committing that act. Jurisdictions that recognize the defense of diminished capacity usually restrict it to specific intent crimes, although the Wyoming court questions the rationale for this restriction. Because a statute

existed defining the circumstances under which a person by reason of mental illness or deficiency was not responsible for criminal conduct, the court considered that the mental element necessary for commission of a crime was established and declined to usurp the powers of the legislature by enlarging on it. Dean v. State, 668 P.2d 639 (1983).

§ 3.10 —Aggravated assault

New Mexico Defendant was charged with aggravated assault upon a peace officer and battery upon a peace officer. The charges arose out of an altercation between defendant and a plainclothes police officer. At defendant's first trial, which ended in a mistrial, conflicting testimony was offered regarding whether defendant was aware that the victim was a police officer when he allegedly committed assault and battery upon him. It was not made clear through testimony whether the police officer had identified himself as such when defendant allegedly grabbed him, opened a knife, and displayed it. In response to a question from the jury, the trial court instructed the jury that they must find that defendant knew the victim was a police officer when he allegedly assaulted the police officer in order to convict him of the charges. After the jury was unable to reach a verdict, a mistrial was declared. Prior to retrial, the court denied the state's motion to conform the instructions to the jury to the uniform jury instructions and stated that it intended to give the jury additional instruction requiring a finding of knowledge on defendant's part as to the identity of the victim.

Held, permanent writ of control issued to forestall court's additional instruction. The New Mexico Supreme Court found that knowledge that the victim was a peace officer was not a required element of the crimes of aggravated assault and battery upon a peace officer. The court stated that it believed that the New Mexico Legislature did not intend to make knowledge that a victim was a peace officer a required element of aggravated assault upon a peace officer or of battery upon a peace officer. The court cited United States v. Feola, 420 U.S. 671, 684, 95 S. Ct. 1255 (1975), which analyzed a federal statute similar to the New Mexico state statute in question. In *Feola*, the U.S. Supreme Court ruled that the federal statute requires only an intent to assault, not an intent to assault someone known to be a federal officer. In this case, the New Mexico Supreme Court stated that its legislature, like Congress, "meant to extend maximum protection to peace officers, and did not intend to undercut that protection by imposing an unexpressed requirement of knowledge that the victim was a peace officer." The only intent required to sustain the convictions in this case was that of conscious wrongdoing. Rutledge v. Fort, 715 P.2d 455 (1986).

§ 3.28 Bank-related crimes (New)

North Dakota Defendant was charged with issuing checks without sufficient funds. The trial court judge dismissed the criminal complaint on the ground that a 1981 bad check statute, as amended in 1983 to provide a payment defense, previously had been ruled unconstitutional, in effect decriminalizing the activity prohibited by the statute. The state appealed the dismissal.

Held, reversed and remanded for further proceedings. The North

Dakota Supreme Court concluded that the 1983 amendments did not repeal, but instead amended and reenacted the 1981 bad check statute by adding unconstitutional language. The unconstitutional provision to provide a payment defense was found to be inseverable, thus rendering the 1983 statute a nullity and thereby leaving intact the 1981 statute until its valid repeal or amendment. State v. Clark, 367 N.W.2d 168 (1985).

§ 3.35 Bribery

New York Defendant, a court clerk, told an undercover agent posing as a gypsy cab driver that he could get a traffic summons for driving an uninsured vehicle dismissed if he were paid $100. After the agent agreed, defendant instructed him how to plead to the charges, and allegedly accepted the $100 in bribe money. Defendant then took the agent to the courtroom and assisted him in pleading and obtaining receipts for the small fines. The "uninsured" ticket was dismissed, not through any act of defendant, but because it was invalid on the face. Defendant was tried and convicted of bribe receiving in the second degree. He appealed, one of his arguments being that the statute prohibits solicitation or receipt of money to influence judgment or action and that, because his position as court clerk did not give him the authority to affect the disposition of the agent's tickets, he could not have been guilty of bribe receiving in the second degree.

Held, affirmed. Penal Law § 200.10 defines the crime as follows:

> A public servant is guilty of bribe receiving in the second degree when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will therefore be influenced.

The statute requires no act beyond the agreement or understanding, therefore, the defendant's inability to influence the disposition of traffic tickets did not necessarily remove his conduct from that proscribed by it. If the briber sought to affect his judgment or action in his capacity as a public servant and within the "colorable" authority of the public position he held at the time of the bribe offer, the crime was committed. Defendant was within these parameters. People v. Charles, 61 N.Y.2d 941, 462 N.E.2d 118, 473 N.Y.S.2d 941 (1984).

§ 3.45 Burglary

Colorado Defendant was charged with burglary of a dwelling and theft for taking a bicycle from the garage attached to a private residence. The trial court granted defendant's motion to dismiss the burglary charge on the ground that the garage was not a "dwelling" within the meaning of the burglary statute, which defined the term as a "building which is used, intended to be used, or usually used by a person for habitation." The state appealed.

Held, reversed and remanded. The Supreme Court of Colorado directed reinstatement of the charge. The statutory definition of a dwelling, it held, comprehended an entire building. It explained:

> There is no room in the language of that clearly worded statute to exclude from the meaning of dwelling those parts of a residence that are not "usually used by a person for habitation." Moreover, at least some

> of the usual uses of a residential garage, including storage of household items, are incidental to and part of the habitation uses of the residence itself.

Accordingly, it found that the burglary charge had been dismissed improperly. People v. Jiminez, 651 P.2d 395 (1982), 19 CLB 392.

Indiana Defendant was convicted of burglary and sentenced to fourteen years' imprisonment after being arrested in a house rented by a third party. The renter, who was in the process of moving, was not staying in the house at the time of the robbery, but had paid the rent to the day he finished moving. Defendant claimed there was insufficient evidence to establish that he broke into a domicile.

Held, affirmed. The court said that although neither the renter nor his spouse intended to sleep in the residence on the night of the break-in, nor was there any evidence that they intended to stay there for the week remaining on their lease, the fact remains that they had maintained their home at that address, that they still had the right to sleep in the house, and that a portion of their goods was still there. They obviously intended to retain the right of dominion, and it was clear from the evidence that they intended to return to the premises. The court noted that the legislature had recently provided an increased penalty for burglarizing a place of human habitation because of the potential danger to the probable occupants of the building. The court maintained that even though occupants of a house were in the process of moving therefrom, reason dictated that it nevertheless be considered a dwelling or place of human habitation. Adopting the reasoning of Starns v. Commonwealth, 597 S.W.2d 614 (Ky. 1980), the court stated that the case had carried out the intent of the legislature in protecting the lives and property of the persons moving from the premises. Byers v. State, 521 N.E.2d 318 (1988).

South Dakota Defendant was convicted of burglary for stealing property from the open cargo "box" of a pickup truck. On appeal, he disputed that the reaching into such an open, uncovered area constituted "entry into a structure" within the meaning of the burglary statute. The term "structure" was statutorily defined as "any house, building, out-building, motor vehicle, watercraft, aircraft, railroad car, truck, trailer, tent or other edifice, vehicle or shelter, or any portion thereof. . . ."

Held, conviction affirmed. The Supreme Court of South Dakota rejected defendant's argument that the burglary statute protected only fully enclosed spaces. The absence of a physically confining barrier, it held, did not remove the truck's cargo area from the ambit of the statute, noting that "the legislature manifested its intention to protect more than enclosed structures by including 'any portion thereof' in its definition of structure." State v. Cloud, 324 N.W.2d 287 (1982).

Utah Defendant was convicted of burglary and possession of burglary tools. At an earlier trial, the jury could not reach a verdict, resulting in a mistrial. At that trial, defendant's motion to suppress a damaged padlock from evidence was denied. At the second trial, no such motion was made and no objection was made to the introduction of the padlock and other tools, which an

expert testified were commonly employed as burglary tools. On appeal, defendant alleged error in the first trial in admitting the padlock into evidence over objection.

Held, affirmed. The second trial was separate from the first, and so was not affected by the ruling on the admissibility of evidence in the first trial. Because defendant made no motion to suppress at the second trial, the claim of error in admitting them in evidence was not reviewable for the first time on appeal. State v. Lloyd, 662 P.2d 29 (1983).

§ 3.55 —Necessity for breaking and entering

North Carolina Defendant, convicted of burglary, argued on appeal that the evidence of a "breaking" into the subject premises was insufficient to sustain the conviction. At trial, it was established that the rear door of the premises had been locked for the night and further secured by a two-by-four braced under the doorknob. The following morning, it was discovered that the lock had been pried open; however, the two-by-four was still in place and the door was no more than two inches ajar.

Held, affirmed. The Supreme Court of North Carolina noted that "any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress . . ." amounts to a "breaking." Even if defendant was interrupted or abandoned his criminal purpose before actually entering the premises, it continued, the act of dislocating the door from its locked position completed the offense. State v. Myrick, 291 S.E.2d 577 (1982), 19 CLB 79.

§ 3.70 Conspiracy

New Jersey Defendants were convicted of conspiracy to commit robbery and robbery, with separate and consecutive sentences imposed for both offenses. The crimes of which they were convicted involved two separate incidents, one involving a cafe robbery and the other a motel robbery. The crimes were also committed by two other persons, whose trial was separated from that of defendants. Defendants were convicted of involvement in the motel robbery, but acquitted of participation in the cafe robbery. On appeal, they argued that the crimes of conspiracy to commit robbery and robbery should have been merged into the completed crime of robbery.

Held, conviction affirmed. The New Jersey Supreme Court found that the conspiracy conviction should have been merged into the substantive, completed crime of robbery. Under the New Jersey Criminal Code, offenses will not merge if a proven conspiracy has criminal objectives beyond the particular offense proven. In this case, however, there was no evidence that the conspiracy had other criminal objectives than the completed robbery of which defendants were convicted. State v. Hardison, 492 A.2d 1009 (1985).

§ 3.80 Drug violations

Georgia Defendants were convicted of keeping or maintaining a dwelling or other structure or place used for keeping or selling controlled substances, a felony punishable under the Georgia Controlled Substances Act by imprisonment for not more than five years or a fine of not more than $25,000 or both. They were convicted of using a double-wide house trailer located on a used car lot as such a dwelling. The trailer was used as their home, and they owned the used

car lot on which it rested. When the premises were searched pursuant to a warrant, law enforcement officers found, among other things: scales, three boxes of ziplock plastic bags, a bag of brown paper bags, a canister of lactose containing a quantity of cocaine equivalent to less than one part per million, a pocketbook containing 3 ounces of marijuana, a grocery bag with numerous empty prescription bottles in it, and two baggies inside a decorative wood stove containing a residue of marijuana totaling 2.7 grams. Defendants were also convicted of the misdemeanor possession of less than an ounce of marijuana, but they were not convicted of possessing any other drugs. On appeal, defendants argued that the trailer was not maintained as a place for keeping or selling controlled substances.

Held, conviction reversed. The Georgia Supreme Court declared that in order to support a conviction for maintaining a residence or other structure or place for keeping or selling controlled substances, the evidence must show that one of the purposes for maintaining such a structure is the keeping of a controlled substance. The mere possession of limited quantities of a controlled substance within the residence or structure is insufficient to support such a conviction. Although drugs and drug paraphernalia were found in the residence, defendants were not convicted of possessing anything other than less than one ounce of marijuana, and there was no evidence of any drug use in the trailer. Under the circumstances, the evidence was insufficient to find that defendants had knowingly engaged in continuing conduct in which they kept or maintained their trailer for use as a place for keeping or selling controlled substances. Barnes v. State, 339 S.E.2d 229 (1986).

§ 3.85 —Possession

Kansas Defendant was charged with possession of cocaine. Following a preliminary hearing in which the magistrate found probable cause, defendant moved to dismiss and stipulated that, after being involved in a car accident, she suffered injuries and was taken to a hospital where she consented to the drawing of her blood, and that cocaine was found in the blood sample. The state had no direct evidence of how or when the cocaine was introduced into her system, and the possession charge was based solely on the blood test. The trial court granted defendant's motion to dismiss and the state appealed.

Held, judgment affirmed and case dismissed. The court noted that the possession statute in issue was similar to the Uniform Controlled Substances Act, and pointed out that, although the Act does not define "possession," courts have construed possession as having control over a place or thing with knowledge of and the intent to have such control. The court pointed out that once a controlled substance is within a person's system, his power to control or possess that substance is at an end because he cannot control the body's assimilation process. Thus, evidence of a controlled substance after it has been assimilated does not establish possession within the Uniform Controlled Substances Act. The court also pointed out that, although discovery of a drug in a person's blood is circumstantial evidence tending to prove prior possession of the drug, it is not sufficient by itself to establish guilt beyond a reasonable doubt. State v. Flinchpaugh, 659 P.2d 208 (1983).

New York The People appealed the court's decision to dismiss defendant's charge of seventh-degree criminal possession of a controlled substance. Defendant contended the amount of cocaine found in his possession was so insignificant that it was unusable and, therefore, did not support the charge. The People objected, claiming that because cocaine was in fact present, they had established a prima facie case.

Held, reversed and complaint reinstated. The court noted that the legislature did not associate any amount with seventh-degree possession, nor was its intention limited to punishing only amounts to be used. The court refused to contradict the legislature and establish a minimum amount for seventh-degree possession. Therefore, considering that cocaine is a controlled substance, the court held defendant could be tried for possession, even though the amount found was not usable. People v. Mizell, 532 N.E.2d 1249 (1988).

Texas Defendant, convicted of possession of heroin, argued on appeal that the evidence of "possession" was insufficient to sustain the verdict. At trial, it was established that defendant was among fifteen people in an apartment when police officers executed a search warrant at the premises. During the search, capsules containing heroin were found in a wastebasket in the kitchen; defendant had been nearest the wastebasket when the officers entered.

Held, conviction reversed and defendant ordered acquitted. The Texas Court of Criminal Appeals, en banc, said that to establish unlawful possession of a controlled substance such as heroin, two elements must be proven: (1) that the accused exercised care, control, and management over the contraband and (2) that the accused knew the matter possessed was contraband. While possession need not be exclusive, and evidence showing that the accused jointly possessed the substance may serve as the basis for a conviction, the court observed that more than mere presence at the scene is required to make an individual party to joint possession. Here, found the court, only "close proximity" connected the drugs to defendant; this circumstance, it held, was not sufficient to sustain the conviction. Oaks v. State, 642 S.W.2d 174 (Crim. App. 1982), 19 CLB 490.

Virginia Defendant argued on appeal that the evidence was insufficient to sustain his convictions for possessing drugs with intent to distribute. At trial, police officers testified that they observed defendant receive cash from an associate, after which he motioned to a third party, who handed over an object which defendant then delivered to the party from whom he had received cash. After observing several similar transactions, defendant and associate were arrested and one Preludin pill was found on associate's person. Only cash was found on defendant's person, grouped in amounts corresponding to the street value of a Preludin pill. Associate testified against defendant at trial to the effect that defendant had given him a number of pills and instructed him to return them as requested by defendant.

Held, affirmed. The Virginia Supreme Court rejected defendant's argument that he could not be convicted of constructively possessing drugs simultaneous with actual possession by another. It found from the evidence that defendant clearly knew of the presence and character of the

pills and that they were subject to his dominion and control. Accordingly, the court affirmed defendant's conviction. Archer v. Commonwealth, 303 S.E.2d 863 (1983), 20 CLB 65.

§ 3.100 Endangering morals of a minor

New Mexico Defendant was convicted of two counts of criminal sexual penetration of a minor, five counts of contributing to the delinquency of a minor, and three counts of criminal sexual contact with a minor. Defendant was seventeen years and eight months old at the time of the sexual offenses of which he was convicted, and the victim was a twelve-year-old boy. The case, initially assigned to children's court as a delinquency proceeding, was transferred to a district court for criminal prosecution, in which court defendant was convicted. On appeal, defendant argued that the charges of contributing to the delinquency of a minor should have been dismissed because, as a matter of law, no minor can be convicted of that offense, and defendant was a minor at the time that he was charged and convicted.

Held, conviction affirmed. The New Mexico Supreme Court ruled that a minor may be tried and convicted of contributing to the delinquency of a minor. As long as the case was properly transferred from children's court to the district court, as it was, defendant, a minor, could be prosecuted and convicted of contributing to the delinquency of another minor. The court stated that they believed the state legislature did not intend to exclude acts of minors against other minors when it defined contributing to the delinquency of a minor as "*any person* committing any act, or omitting the performance of any duty, which act or omission causes, or tends to cause or encourage the delinquency of *any person* under the age of eighteen years." State v. Pitts, 714 P.2d 582 (1986).

§ 3.115 —Child abuse

New Mexico Defendant, the mother of two children aged five years and six months, lived with one Eddie Lucero, father of the six-month-old child. She had given birth to the oldest child when she was sixteen years old and, subsequent to the death, two years later, of the oldest child's father, had met and begun living with Eddie. Eddie and defendant were never married; neither party was employed and both lived on defendant's public assistance income. Defendant, however, testified that she would never give him any of her money and that, as a result, Eddie beat her. After defendant gave birth to Eddie's child, Eddie began hitting the oldest child. Defendant admitted knowledge of this, although she denied actually seeing the abuse take place. Defendant claimed that she could not contact the police, nor could she get help for the oldest child, because Eddie threatened them both. Defendant was convicted of child abuse. She appealed on the ground that the relevant statute was unconstitutional because it imposed strict liability for endangering a child's life or health or for letting a child be tortured, cruelly confined or cruelly punished.

Held, conviction sustained. The Supreme Court of New Mexico agreed that the statute provided criminal sanctions for a defendant's unlawful acts without requiring proof of criminal intent and, accordingly, provided strict criminal liability. However, it stated, the legislature "may forbid the doing

of an act and make its commission criminal without regard to the intent of the wrongdoers" and "the general presumption is in favor of upholding such a statute." The rationale for a strict liability criminal statute, explained the court, is that public interest, or the potential for public harm, is the subject matter of the offense and that it is so great as to override individual interests. The public interest inherent in preventing cruelty to children, held the court, justified the strict liability aspect of the child abuse statute. State v. Lucero, 647 P.2d 406 (1982), 19 CLB 180.

§ 3.120 —Child neglect

California After defendant's daughter died of meningitis because she received no medical care, defendant was charged with involuntary manslaughter and felonly child endangerment. The charges arose because defendant, a member of the Church of Christ, Scientist, chose to use prayer rather than medical care to treat her daughter's illness. Defendant requested a writ of prohibition and a stay that was refused and she appealed. She claimed that the Penal Code section dealing with misdemeanor liability for children says "other remedial care" may be used to care for a child. Defendant claimed that prayer is an allowable form of remedial care.

Held, affirmed. Although defendant was not liable for the Section 270 misdemeanor, she was liable for the felony charges. The court agreed with the defendant and said that "other remedial care" could refer to prayer. They also noted that Section 270 was drafted to require parents to provide their children with adequate care so as not to burden the state. This statute differs from the manslaughter statute that was established to protect human life. Although she could not be charged with the misdemeanor because she did provide remedial care, she did not protect that child from bodily harm as called for by the felony manslaughter statute. Therefore, defendant could be charged with felony child endangerment. Walker v. Superior Court (People), 763 P.2d 852 (1988).

Oregon Defendant left her two children, ages twenty-two months and eight years, alone to attend a Halloween party at a tavern several blocks away. She left home at around 9:30 P.M. Between 10:45 and 11:00 P.M., friends stopped at her house and observed the older child watching television. Defendant stayed at the tavern until 2 A.M. and drank eight or nine beers during the evening. She returned to her house and found it filled with heavy smoke. Both children died from asphyxiation. Defendant was convicted by a district court of child neglect as defined in ORS 163.545. The Court of Appeals reversed because it found no substantial evidence to support the verdict.

Held, reversed. The Oregon Supreme Court reversed and reinstated the verdict. Under the statute,

> [A person] having custody or control of a child under 10 years of age commits the crime of child neglect if, with *criminal negligence,* he leaves the child unattended in or at any place for such period of time as may be likely to endanger the health or welfare of such child [*emphasis added*].

There is both a physical element, leaving a child, and a mental state or culpability of the defendant, constituting the criminal negligence. For a de-

fendant to be guilty of the crime of child neglect, there must be sufficient admissible evidence of both the physical and mental segments of the statute.

Moreover, the determination of criminal child neglect is based on a totality of the circumstances in respect to both the factual element of a child's being unattended and the culpability element. There is no requirement such as a "recognized or unrecognized dangerous condition in defendant's home," which the Court of Appeals thought necessary under the statute. Viewing the facts in totality of the circumstances, there was sufficient evidence in this case for a jury to find the defendant guilty of child neglect. At a minimum, she left her twenty-two-month-old child and eight-year-old child with no supervision for a period of five hours on Halloween night in a home containing unlit matches and flammable materials. State v. Goff, 686 P.2d 1023 (1984), 21 CLB 187.

§ 3.130 Firearms violations

Ohio Defendant was arrested for driving under the influence of alcohol and was found to be carrying a loaded pistol. Subsequently, he was charged with carrying a concealed weapon and was sentenced to imprisonment without probation under an enhancement statute which prohibited probation ". . . when . . . , the offense was committed while the offender was armed with a firearm. . . ." On appeal, defendant argued that the enhancement statute was ambiguous and must be construed strictly against the state, claiming that the statute's use of the word "armed" rather than "in possession of" connoted possession with intent to use, rather than mere possession.

Held, judgment affirmed. The court held that the word "armed" must be accorded its usual and ordinary meaning, which, according to Webster's dictionary, is "furnished with weapons . . . ; fortified, equipped." Thus, it found, "armed" has the same meaning as "in possession of." The court stated that the legislature's obvious intent was to deter the use of deadly weapons in the commission of offenses, and held that the fact that application of the statute to the offense of carrying a concealed weapon gives rise to a tautologous result did not render the statute ambiguous. State v. Carter. 444 N.E.2d 1334 (1983).

§ 3.140 —Dangerous and deadly weapons

Indiana Defendant was convicted by a jury of criminal confinement for abducting the complainant "while armed with a deadly weapon." At trial, it was established that he forced the complainant into his van at gunpoint, blindfolded her, and drove her around for several minutes before releasing her unharmed. The gun, a .177-caliber pellet gun resembling a .45-caliber automatic, was recovered at the time of his arrest. Defendant argued on appeal that the pellet gun, which fired metal pellets by means of compressed gas, was a "toy" and not a deadly weapon which, by statutory definition, included any "weapon which in ordinary use is readily capable of causing serious bodily injury which includes 'serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of a bodily member or organ.' "

Held, affirmed. The Supreme Court of Indiana stated that while "different conclusions can be reached as to whether or not the weapon is deadly,

it is a question of fact for the jury to determine from a description of the weapon, the manner of its use and the circumstances of the case." Here, it found, the jury verdict was not contrary to the evidence, from which it could be inferred that the pellet gun, if discharged at a person at close range, could cause "extreme pain and even the loss or impairment of hearing or sight." Glover v. State, 441 N.E.2d 1360 (1982), 19 CLB 390.

§ 3.145 Forgery

Delaware Defendant was convicted of forgery pursuant to a statute which read, in pertinent part, as follows:

> A person is guilty of forgery when, intending to defraud, deceive or injure another person, or knowing that he is facilitating a fraud or injury to be perpetrated by anyone, he:
>
> * * *
>
> Makes, completes, executes, authenticates, issues or transfers any written instrument which purports to be the act of another person, whether real or fictitious, who did not authorize that act. . . .

At trial, it was established that he attempted to cash a check purportedly endorsed by the payee, knowing that it was in fact endorsed by a third party who had stolen it and requested that defendant cash it. The liquor store clerk to whom defendant presented the check, however, refused to cash it and returned it to defendant. On appeal, it was argued that defendant had not successfully "transferred" the check and accordingly could not be convicted of the crime of forgery.

Held, conviction affirmed. The Delaware Supreme Court concluded that "physical delivery of the check for cashing is sufficient under the forgery statute to constitute transferring the instrument." While the term "transfer" was not defined in the statute, the court, in reviewing the legislative history, concluded that it was intended to equate with the familiar concept of "uttering," i.e., the "offer of a check to a person . . . whether it be accepted by that person or not." Accordingly, the court ruled that defendant's delivery of the check for cashing amounted to a transfer and was thus sufficient to make out the crime. Bailey v. State, 450 A.2d 400 (1982), 19 CLB 273.

§ 3.180 —Proximate cause

Mississippi Defendant, convicted of manslaughter, argued on appeal that the evidence was insufficient to prove that the victim's death was caused by a criminal agency. At trial, a physician had testified that death resulted from "an overwhelming infection secondary to [the victim's] injuries," the injuries being gunshot wounds inflicted several days earlier.

Held, affirmed. The Supreme Court of Mississippi concluded that in a homicide prosecution, an accused's unlawful act need not be the sole cause of death. It is sufficient, said the court, if the accused's actions contributed to the victim's death; an accused would not be relieved from criminal responsibility if his actions contributed to the victim's death, it explained, even if other contributing causes were present. Here, the court found that the evidence established the gunshot wounds as a "substantial contributing cause of death." Holliday v. State, 418 So. 2d 69 (1982), 19 CLB 182.

§ 3.195 Vehicular homicide

California Defendant appealed his convictions of manslaughter and felony drunk driving, contending that state law forbids separate sentences for the two crimes when they are related. He argued that when a defendant in a single incident commits voluntary manslaughter to one victim while driving drunk, resulting in injury to another, he commits only one act and may receive only one punishment. State law, he contended, mandates that when more than one person is injured in a single drunk driving incident, defendant can only be sentenced for one act of drunk driving.

Held, conviction affirmed. The court noted that the legislature had intentionally separated vehicular manslaughter from the vehicle code, thereby separating it from the drunk driving violation. The court stated that in acts of violance directed at more than one person, defendant can be sentenced for each victim. The court said that vehicular manslaughter was a violent crime. Therefore, defendant can be charged separately for the two crimes. If the two victims had only been injured, defendant could only be charged with one count of felony drunk driving. People v. McFarland, 765 P.2d 493 (1989).

Kansas Defendant's motion for dismissal of one count aggravated vehicular homicide was granted, and the state appealed. While intoxicated, defendant drove into the rear end of a pickup truck, where a pregnant woman was riding. The woman subsequently miscarried due to injuries sustained during the collision. The state contended that the fetus was "a human being" within the meaning of Kansas's aggravated vehicular homicide statute. Defendant contended, however, that the facts did not support a cause of action under which he could be legally convicted.

Held, affirmed. The court said that in a civil case, the meaning of "human being" can be construed liberally, but in a criminal case, with its punitive effect, the word must be strictly construed. The term "fetus," therefore, does not fall within the definition of a human being under criminal statutes unless the term is so defined by the legislature. Since there was no statute by the legislature to so define the fetus, the court refused to usurp legislative power in the interest of due process and the separation of powers. State v. Trudell, 755 P.2d 511 (1988).

§ 3.200 Manslaughter

Pennsylvania Defendant was convicted of involuntary manslaughter for her "failure to comply with an alleged duty to seek medical assistance . . . for her husband, when he was stricken with a diabetic crisis which proved fatal." Defendant's husband, a thirty-four-year-old diabetic, had publicly pronounced his desire to discontinue a seventeen-year regimen of insulin treatments in the belief that God would heal his condition. At trial, it developed that the deceased, defendant, and a co-defendant had entered into a pact to enable the deceased to resist the temptation to self-administer insulin. The deceased's condition worsened and after several days, he died of diabetic ketoacidosis. The jury verdict was set aside by the trial court but reinstated by an intermediate appellate court.

Held, order reversed and defendant discharged. The Pennsylvania Supreme Court stated that defendant had no duty to seek medical attention for her spouse under the circumstances of

the case. While recognizing that other jurisdictions had recognized a limited spousal duty to seek medical attention when a stricken spouse unintentionally became helpless, it found that here the deceased had rationally and consciously denied himself medical aid. Thus, "assuming that one spouse owes the other a duty to seek aid when the latter is unwillingly rendered incompetent to evaluate the need for aid, or helpless to obtain it, that duty would not have been breached under the facts presented." As, under the circumstances, no duty was present and breached, defendant's failure to seek medical assistance could not serve as the basis for criminal liability, concluded the court. Commonwealth v. Konz, 450 A.2d 638 (1982), 19 CLB 273.

Nevada Defendant, after meeting the victim in this case, visited him at home, robbed him at gunpoint, and then fired several shots at him, wounding him at least three times. Defendant had claimed at trial that he shot out of fear and had no intent to kill. He was convicted of robbery and "attempted involuntary manslaughter" as a lesser-included offense of the original charge of attempted murder. On appeal, defendant contended that his conviction for "attempted involuntary manslaughter" had to be reversed because that particular crime was nonexistent.

Held, reversed. Logically, it is impossible to attempt to commit an involuntary act. The crime of attempt requires that the accused formulate the intent to commit the crime. Without proof of the element of intent, a conviction for attempt cannot stand. However, involuntary manslaughter is by definition an unintentional killing. Because there is no such criminal offense as an attempt to achieve an unintended result, the crime of "attempted involuntary manslaughter" is impossible logically. Bailey v. State, 688 P.2d 320 (1984).

§ 3.203 —Attempt (New)

Maryland Defendant was convicted of attempted manslaughter, assault, carrying a handgun, and use of a handgun in the commission of a crime of violence. On appeal, defendant contended that this conviction and sentence for attempted voluntary manslaughter was invalid, because no such crime exists under the common law of Maryland.

Held, conviction affirmed. The court of appeals found that Maryland has adopted the common-law concept that the crime of attempt consists of intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation. The crime of intent is an adjunct crime, the court continues; it cannot exist by itself, but only in connection with another crime. Furthermore, it is not an essential element of a criminal attempt that there be a failure to consummate the commission of the crime attempted. The crime of attempt expands and contracts and is redefined commensurately with the substantive offense. Therefore, it is applicable to many crimes, statutory or common law. Cox v. State, 534 A.2d 1333 (1988).

§ 3.210 —Malice, premeditation

Tennessee Defendant was convicted of first-degree murder. On finding his recently estranged wife and her paramour engaged in sexual relations in his home, defendant fired a single shot, which struck the paramour in the left hip. The victim died sixteen days later

of a massive infection caused by the wound. Defendant had never met the victim before the shooting. Defendant appealed his conviction of murder.

Held, modified and remanded. The Tennessee Supreme Court stated that the killing of a seducer or adulterer under the influence or in the heat of passion constitutes voluntary manslaughter and not murder, in the absence of evidence of actual malice. Defendant discovered his wife, with whom he was trying to reconcile, in flagrante delicto with another man in defendant's own home. The court found that any reasonable person's passions would have been aroused by this discovery. Since the necessary elements of malice and premeditation were absent from the case and defendant acted under legally sufficient provocation, the court held this to be a classic case of voluntary manslaughter. State v. Thornton, 730 S.W.2d 309 (1987).

Virginia Defendant was convicted of driving while under the influence of alcohol and three counts of second-degree murder for deaths resulting from injuries sustained in an automobile collision. On appeal, the question presented for determination was whether driving while under the influence of alcohol, resulting in the death of three persons, can supply the requisite element of implied malice to support a conviction of second-degree murder.

Held, conviction reversed and remanded. The majority of the Virginia Supreme Court found that under state common-law principles, malice is an element of all degrees of murder; malice, however, is not inferable from recklessness. Under Virginia law, the presence of malice separates the offenses of murder and manslaughter. The court noted that the common theme running through definitions of malice is a requirement that a wrongful act be done willfully or purposefully, and this requirement of volitional action is inconsistent with inadvertence. Therefore, in Virginia, where the legislature has not seen fit to change the common-law distinctions between volitional and inadvertent conduct, a drunk driver who causes a fatal accident may be convicted of no more serious an offense than manslaughter. The court majority adds that intoxication is not without relevance, however, because it is a factor used to determine a defendant's degree of negligence and, accordingly, the appropriate sentence to be imposed. Applying these principles, the majority found the evidence insufficient to support a finding of implied malice; therefore the trial court erred in instructing the jury that it might find defendant guilty of second-degree murder. Essex v. Commonwealth, 322 S.E.2d 216 (1984).

§ 3.220 Murder

Alabama Defendant was convicted of recklessly causing the death of her infant daughter by withholding food and medical attention from the child. The statute under which defendant was charged provided that "a person commits the crime of murder if: 'Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person.'" Defendant contended on appeal that there should be a reversal because, inter alia, reckless murder was a crime of "universal malice" while the criminal acts charged

against her were directed solely at her deceased child.

Held, reversed and remanded. The Court of Criminal Appeals found that the statute required conduct showing an extreme indifference to human life in general and not toward a particular individual only; the reckless homicide statute, continued the court, applies to cases where an accused has no deliberate intent to kill or injure a particular victim, (e.g., shooting a firearm into a crowd). Although defendant's conduct

> evidence[d] an extreme indifference to the life of her child, there was nothing to show that the conduct displayed an extreme indifference to human life generally. Although the defendant's conduct created a grave risk of death to another and thereby caused the death of that person, the acts of defendant were aimed at the particular victim and no other. Not only did the defendant's conduct create a grave risk of death to only her daughter and no other, but the defendant's actions (or inactions) were directed specifically against the young infant.

Therefore, the evidence did not support a conviction for reckless murder. Northington v. State, 413 So. 2d 1169 (1982), 19 CLB 80.

New Jersey Defendant appealed her conviction of capital murder. She claimed the death penalty was improperly imposed because the murder was not "by her own conduct." Defendant stated the facts showed that another, not she, inflicted the blow that caused the victim's death.

Held, conviction reversed and remanded. The court noted that the statute governing the death penalty defines "own conduct" very narrowly. The statute allows the death penalty only in cases where the defendant is the triggerman or hires one. The facts in this case clearly showed that while defendant persuaded another to inflict the physical abuse that led to the victim's death, she did not inflict the abuse herself, nor did she pay the abuser. Therefore, within the confines of the law, defendant did not cause the victim's death "by her own conduct." State v. Moore, 550 A.2d 117 (1988).

South Carolina Defendant was convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. After being found guilty of murder, the jury recommended that he should die by electrocution. Defendant appealed from these convictions and sentence. The prosecuting attorney made it clear that he was not prosecuting defendant on the theory of felony murder. He maintained that defendant and another aided and abetted each other in the commission of a planned robbery and that the hand of one was the hand of the other. The judge charged the law of common law murder applicable in South Carolina. Defendant argued that the trial court erred in denying his motion to strike armed robbery as an aggravating circumstance. The trial judge, in the penalty phase of the trial, instructed the jury that the only statutory aggravating circumstance that they were to consider was the murder that was committed while defendant was in commission of the crime of robbery while armed with a deadly weapon, which is a statutory aggravating circumstance pursuant to the South Carolina Code.

Held, conviction affirmed. The Supreme Court of South Carolina decided that under the common law rule of

murder no distinction is made between murder and felony murder; therefore a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder. Defendant was equally responsible for the stabbing death of the victim, even though he did not actually strike the fatal blows. Defendant and his cohort entered the store armed and did commit a robbery. As a direct result of their joint actions in committing the armed robbery, the victim was killed. Consequently, there was no error in the trial judge's denial of defendant's motion to strike armed robbery as an aggravating circumstance. State v. Yates, 310 S.E.2d 805 (1982), vacated, 106 S. Ct. 218 (1985).

§ 3.240 —Malice, premeditation

Colorado Defendants were charged in separate cases with various types of murder. The trial courts dismissed the extreme indifference counts on the grounds that the extreme indifference murder statute was indistinguishable from the second-degree murder statute and therefore unconstitutional. They concluded that prosecution under the former statute violated defendants' rights to equal protection of the laws under the Colorado constitution. The people appealed.

Held, reversed and remanded. The Supreme Court of Colorado, en banc, ruled that the amended extreme indifference murder statute did not violate equal protection, since the statutory changes reaffirmed the element of cold-bloodedness or aggravated recklessness that provided sufficient basis for distinguishing extreme indifference murder from second-degree murder. The majority of the court found that the reference to "circumstances *evidencing an attitude of universal malice*" in the amended statute established a sufficient distinction between the two degrees of murder. The majority stated

> What has consistently exercised the legislature in proscribing extreme indifference murder is aggravated recklessness, not that practical certainty of death which is at the heart of the second-degree murder statute. The charge of extreme indifference murder is more blameworthy than the second-degree murder charge, because the defendant's conduct demonstrates that his lack of care and concern for the value of human life generally [is] extreme, and that the circumstances of his actions evidence that aggravated recklessness or cold-bloodedness which has come to be known as "universal malice."

People v. Jefferson, 748 P.2d 1223 (1988).

Washington Defendant was charged with aggravated murder in the first degree for the robbery and death of a taxicab driver. The victim had suffered multiple stab wounds in addition to a six-inch slit that nearly severed his voice box and jugular vein. Defendant argued that although the evidence may have indicated an intent to kill in the frenzy of a struggle, it provided no basis from which a jury could infer that premeditation had occurred. The superior court granted defendant's motion to dismiss the aggravated first-degree murder charge, finding that "use of a knife to inflict more than one wound, in and of itself, is not probative of premeditation, but . . . can only be probative of intent to kill." The state appealed.

Held, reversed and remanded. The Washington Supreme Court stated that "specific intent to kill and premeditation are not synonymous, but separate and distinct elements of the crime of first degree murder," and that sufficient evidence existed to prove both elements present in this case. Additionally, this case involved the procurement of a weapon, an attack from behind and the presence of a motive (robbery), all of which indicated premeditation on defendant's part. State v. Ollens, 733 P.2d 984 (1987).

§ 3.250 Felony murder

California Defendant was convicted of first-degree murder, kidnapping for the purpose of robbery, and robbery of two victims. On appeal, defendant contended that the court failed to instruct in accord with Carlos v. Superior Court, 672 P.2d 862 (Cal. 1983), that intent to kill was an element in the felony-murder special circumstance.

Held, trial court affirmed. The court reversed its decision in *Carlos,* holding that intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abettor rather than the actual killer, intent must be proved before the trier of fact can find the special circumstance to be true. The court reexamined its reasoning in *Carlos* in light of subsequent U.S. Supreme Court cases clarifying the role intent plays in felony-murder cases. The California court had reasoned that the holding in Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3378 (1982) mandated that under the Eighth Amendment, intent must be found for both the actual killer and the felony-murder aider and abettor before the death penalty may be imposed. Subsequently, the U.S. Supreme Court in Cabana v. Bullock, 474 U.S. 376, 106 S. Ct. 689 (1986) stated that Eighth Amendment requirements are satisfied when the death penalty is imposed on a person who *"in fact killed,* attempted to kill, or intended to kill." In this case, all the evidence showed the defendant actually killed his victims or did not participate in the crimes at all, therefore, the court did not err in failing to instruct on intent. People v. Anderson, 742 P.2d 1306 (1987).

Illinois Defendant was convicted of murder. He had raped and severely beaten victim, an eighty-five-year-old woman, who died five weeks after the attack. After the attack, the victim was moved to a nursing home and died of asphyxiation when she was unable to expel food aspirated into her trachea during her feeding by nursing home staff. Trial court found that defendant, through his criminal acts, had set in motion the chain of events culminating in victim's death, and defendant appealed.

Held, conviction affirmed. The court found that the intervening cause of asphyxiation did not diminish defendant's criminal responsibility. Although a completely unrelated intervening cause of death may relieve a defendant of criminal liability, defendant may be found guilty of murder if his criminal acts contributed to the death. Asphyxiation is not a foreseeable consequence of rape and battery; however, defendant's felonious actions contributed to victim's demise when his actions led to the victim's depression and refusal to eat, a nasal feeding tube could not be used due to facial injuries, and a broken rib limited lung capacity and prevented the victim from expelling the food. He was therefore, guilty of felony-murder. People v. Brackett, 510 N.E.2d 877 (1987), 24 CLB 271.

§ 3.265 Intoxicated driving

New Hampshire Defendant was charged with negligent homicide for causing the death of another person by operating a motor vehicle while under the influence of intoxicating liquor. At a hospital after the incident, defendant was given a blood-alcohol test that showed him to be under the influence of intoxicating alcohol. He was subsequently arrested and charged. At trial, defendant moved to suppress the result of the blood-alcohol content test, on the ground that the state failed to comply with the informed consent prerequisites to admissibility of the test as evidence. The state, on the other hand, argued that the requirements did not apply to felonies outside the motor vehicle code.

Held, question answered affirmatively and remanded. The New Hampshire Supreme Court found that the prerequisites of the informed consent law applied to defendant, even though he was charged with a felony offense, negligent homicide. A New Hampshire state statute regarding the administration of sobriety tests provides that before any such test is given, the law-enforcement officer must (1) inform the arrested person of his right to have a similar test or tests made by a person of his own choosing; (2) afford him an opportunity to request such additional test; and (3) inform him of the consequences of his refusal to permit a test at the direction of the law-enforcement officer. The law goes on to state that "if the law-enforcement officer fails to comply with the provisions of . . . [the statute], the test shall be inadmissible as evidence in any proceeding before any administrative officer and court of this state." In this case, before the administration of the test, the investigating officer did not inform defendant of his rights and opportunities and of the consequences of his consent or refusal to take the test. Thus, the result of the test could be suppressed. State v. Dery, 496 A.2d 357 (1985).

New Jersey Defendant was convicted of driving with a blood-alcohol concentration of 0.10 percent or more in contravention of state statute. One hour after defendant was stopped and arrested, he was administered two breathalyzer tests in which his blood-alcohol level was shown to be 0.11 percent. On appeal, defendant asserted that he was entitled to an acquittal because the state had failed to prove that his blood-alcohol concentration was 0.10 percent or more at the time he was actually operating his vehicle.

Held, conviction affirmed. The court ruled that a defendant may be convicted under the state drunk driving statute when a breathalyzer test that is administered within a reasonable time after the defendant was actually driving his vehicle reveals a blood-alcohol level of at least 0.10 percent. Because the blood-alcohol level at the time of the breathalyzer test constitutes the essential evidence of the offense, further extrapolation evidence is not probative of the statutory offense. Therefore, evidence gained from expert testimony extrapolating the test results to demonstrate a lower blood-alcohol level at the time of actual driving is not relevant and is not admissible. State v. Tischio, 527 A.2d 388 (1987), 24 CLB 271.

§ 3.270 —Scientific tests

Alaska Defendant appealed his conviction for driving while intoxicated. After defendant's test result showed a blood alcohol level in excess of 0.10,

defendant was informed he could have an outside test to confirm this. Defendant agreed and named the hospital of his choice. While in transit there, the officers driving defendant were informed that the state did not have a contract with defendant's hospital, and they were instructed not to honor defendant's request. Defendant claimed the Intoximeter test should not have been admitted because he could not offer his own test to prove innocence.

Held, reversed. The court said the statute provides the arrestee the right to an additional test by a person of his or her own choosing. It says nothing about contractual relationships between the state and qualified facilities for a blood test. The state argued that defendant's remedy is in the statute: "the fact that the person under arrest sought to obtain an additional test and . . . was unable to do so is . . . admissible as evidence." The court concluded, however, that where the police deprive a defendant of his or her statutory right to an independent blood test, the results of the defendant's Intoximeter test must be excluded. An independent test can help a defendant present a defense in a trial when he believes the Intoximeter was inaccurate. The court also hoped this exclusionary rule would serve to deter future illegal police conduct. Ward v. State, 758 P.2d 87 (1988).

Arkansas Defendant was convicted for driving while intoxicated (DWI). After police stopped defendant's car, defendant was observed to stagger somewhat. Although no bottles or cans containing intoxicating liquor were found in the vehicle, defendant was given three "field" tests for sobriety that he did not perform as instructed, and then a portable breathalyzer test (PBT) that was negative, although the arresting officer claimed that defendant did not take the test properly. The trial court granted the motion forbidding any reference to the test because a PBT is not admissible against a defendant in Arkansas.

Held, reversed and remanded. The court, citing Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973) said that the exclusion of critical evidence denied defendant a trial in accord with traditional and fundamental standards of due process. Since defendant was neither given a breathalyzer test nor offered a chance for a blood test, the negative result of the PBT could have shown he was not drinking, and, therefore, was critical to his defense and a fair trial. The court emphasized that the test results were not admissible by the state to prove the charge of DWI because, although the PBT can detect the presence or absence of alcohol, it cannot measure the exact blood alcohol level. Therefore, it cannot be used to prove guilt but can be used to prove innocence, because the chances of an incorrect negative reading are one in 10,000. The fact that the test results were necessary for defendant to receive a fair trial led the court to conclude that the trial court should have admitted the test results into evidence. Patrick v. State, 750 S.W.2d 391 (1988).

Hawaii Defendant appealed the dismissal of his motion to suppress evidence of his intoxication obtained as a result of a breath test. Defendant claimed that the use of a "Beam Attenuator" in verifying the accuracy of the Intoxilyzer violated state law. The state law requires that the breath test must be verified against a suitable

reference sample of known alcohol concentration.

Held, affirmed. The court noted that the rules for verification say a lens can be used for confirming intoxication. A lens is defined as something that can affect electromagnetic radiation. The court explained that the definition of "lens" was broad enough to include a quartz crystal, which can also affect electromagnetic radiation. "Beam Attenuator" is a trade name for a quartz crystal. The court stated that because the lens contained no alcohol, the reference sample of alcohol would be zero. Thus, the use of the "Beam Attenuator" did not violate state law. State v. Christie, 766 P.2d 1198 (1988).

Kansas Defendant was arrested after a high-speed automobile chase and charged with driving while under the influence of alcohol. He was stopped by a state highway patrolman, who gave defendant a breathalyzer test. The police officer used a gas chromatograph intoximeter field breath indium encapsulation system, also called a "crimper box," to obtain a sample. As a result of the test, defendant was arrested and charged. Prior to trial, defendant moved to suppress the evidence obtained as a result of the breathalyzer test on the ground that the police officer who administered the test was not certified to do so. The state argued that the statutes and regulations concerning certification apply only to those persons actually analyzing the breath sample and to the equipment actually used in the analysis, not to the trooper and to the device used to collect the sample. The trial court granted defendant's motion to suppress, and the state appealed.

Held, appeal sustained and case remanded. The Kansas Supreme Court declared that a law enforcement officer collecting breath samples with an indium encapsulation system does not have to be certified each year under Kansas law. The court stated that it was not the intent of the legislature nor of the State Secretary of Health and Environment when they promulgated the rules and regulations governing certification and periodic testing to require law enforcement officers collecting breath samples by the use of a "crimper box" to be so certified. The mere taking of a breath sample by the use of indium encapsulation is a simple, mechanical procedure, and police officers are instructed on how to obtain the sample. Rather, it is the analysis of the sample that is subject to the strict requirements. State v. Huninghake, 708 P.2d 529 (1985).

Minnesota After respondent's driving while intoxicated (DWI) conviction was reversed, the commissioner of public safety appealed to the Supreme Court of Minnesota. Respondent had been stopped by the police and had consented to a breath test. Two breath samples were taken according to the proper procedure and then were tested twice. The test determined that the blood alcohol level was 0.09. The correlation between the two samples was 88 percent, which is less than the 90 percent recommended by the Bureau of Criminal Apprehension (BCA). Although the machine found nothing wrong with the test, the officer requested a second test, and respondent, thinking this was standard procedure, consented. The correlation for this test was 99 percent, and the blood alcohol level was determined to be 0.10. Respondent was convicted on the basis of the second test. At

issue was whether the second test was admissible when the first sample was adequate, since there was no indication by the machine that the sample was deficient.

Held, affirmed. Although the BCA recommends that the correlation between the samples be 90 percent, it is only a recommendation and not law. The statute requires only that the test be administered properly as determined by the machine, not the officer. The court stated that correlation was a commendable goal but did not have the force of law. If high correlation was desired, it should have been made a requirement in the statute. Under the present facts, a driver need not submit to a second test when the first was reliable and adequate. Young v. Commissioner of Pub. Safety, 420 N.W.2d 585 (1988).

Nebraska Defendant was convicted of failing to stop at a clearly marked stop sign and of driving while under the influence of alcohol. Leading to the arrest, the state patrol trooper observed defendant's vehicle weaving, accelerating rapidly, and failing to stop at the intersection of two highways. After stopping defendant, the officer noticed that defendant staggered, had an odor of alcohol on his breath, slurred his speech, and had trouble taking his license from his wallet. Subsequently, defendant failed several sobriety tests and a preliminary breath test. At the police station, defendant was given a test on an Intoxilyzer Model 4011 AS, which gave a reading of defendant's blood-alcohol level as .164 of one percent, above the .10 legal limit. On appeal, defendant argued that the court erred in admitting as evidence the inaccurate test result from the Intoxilyzer machine, which, according to defense counsel's witness, a pharmacologist, assumed alcohol in a human's breath to be at an arbitrary average standard and, in the worst-case scenario, carried a 52.38 percent margin of error.

Held, affirmed. The Nebraska Supreme Court, although affirming the convictions, held that the Intoxilyzer test failed to establish that defendant had "ten-hundredths of 1 percent by weight of alcohol in his blood" and therefore failed, by itself, to establish that he was "under the influence." The state failed to contradict the testimony of the pharmacologist about the unreliability of the Intoxilyzer machine. Applying State v. Bjornsen, 271 N.W.2d 839 (1978), which held that any test result subject to a margin of error has to be adjusted so as to give defendant benefit of that margin, the court accordingly reduced defendant's Intoxilyzer result by 52.38 percent, from .164 to .086 of one percent. Even in discarding the test result, however, the remaining evidence supported the conclusion that he was under the influence of alcohol while driving. No basis supported reversing the conviction. State v. Burling, 40 N.W.2d 872 (1987), 23 CLB 500.

West Virginia After failing three sobriety tests, including the Horizontal Gaze Nystagmus (HGN) test, defendant was arrested and subsequently convicted of driving under the influence of alcohol. Over the defense counsel's objection, the trial court had qualified the arresting officer as an expert in the area of the HGN test. Defendant appealed, arguing that the court erred in permitting that officer to testify as to the results of the HGN test.

Held, reversed and remanded. The

court stated that in order for a scientific test to be initially admissible, there must be general acceptance of the scientific principle that underlies the test. However, where the reliability of the test cannot be judicially noticed, its reliability must be demonstrated before the expert can testify concerning the test. The court noted that the state had offered no evidence to demonstrate the reliability of either HGN tests or the scientific principle upon which the HGN test is based, nor had the officer who testified addressed the scientific reliability of the test. The court added that one of the dangers inherent in expert testimony in regard to scientific tests is that the jury may not understand the exact nature of the test and the particular methodology of the test procedure, and may accord an undue significance to the expert testimony. Therefore, the court concluded that disclosure of the methodology, scientific reliability, and results of the HGN test, as well as evidence of whether accepted test procedures had been followed by qualified personnel in a particular case, should be introduced to prove the scientific reliability of the test. State v. Barker, 366 S.E.2d 642 (1988).

Wisconsin Defendant was convicted of operating a motor vehicle while under the influence of an intoxicant. She was stopped by police in the early hours of the morning and arrested. After her arrest, she was brought to a police station and given a breathalyzer test, which indicated an alcohol concentration of 0.24 percent, more than twice the legal limit for intoxication. Defendant thereupon requested that she be given another test, because she could not believe the results of the first test. She requested either a blood or urine test, but the police failed to administer an alternative test for intoxication, even though a state statute gave defendant that right. The police also refused to release defendant on bail until early that afternoon, and she was, therefore, never able to secure an alternative test. Before trial, defendant moved that the charge be dismissed, due to the failure of the police to administer the second test, but the trial court refused. On appeal, defendant argued that the police's failure to provide her with an alternative test or to allow her to secure her own test for determining alcohol concentration violated her due process rights by denying her access to material evidence. Defendant claimed that an alternative test might have provided her with exculpatory evidence, and that the police's refusal to provide her with such a test, in effect, denied her the opportunity to present a defense.

Held, conviction affirmed. The Wisconsin Supreme Court found that the police's refusal to give defendant a second alcohol concentration test did not violate her due process rights and the charge against her should not be dismissed, since defendant failed to show that an alternative test would have been exculpatory. The court cited California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528 (1984), which established that the constitutional validity of a drunk driving conviction, when the state failed to permit a second alcohol concentration test, depended on the likely value of the second test. In *Trombetta,* the United States Supreme Court held that the value of a second test should be evaluated in the light of the state's evidence of guilt. When there is ample evidence of guilt and the "missing" evidence has a low probability of being exculpatory, the

omitted evidence is not considered material in the constitutional sense—that is, the missing evidence would not likely affect the judgment of the fact trier. In the instant case, there was sufficient evidence, including the breathalyzer test and physical signs, that defendant was driving under the influence of intoxicants, and defendant did not make a plausible argument that an alternative test would have been exculpatory. The state's requirement to administer an alternative test was statutorily mandated but not constitutionally required. As such, the proper remedy for the state's failure was suppression of the administered test results but not dismissal of the charge. State v. McCrossen, 385 N.W.2d 161 (1986), cert. denied, 109 S. Ct. 148 (1986).

§ 3.275 Kidnapping

Nevada Defendant, convicted of battery and kidnapping, argued on appeal that the evidence was insufficient to make out the separate offense of kidnapping. At trial, it was established that defendant and two companions forced the complainant into their pickup truck and drove her to a deserted area, where they slashed her with a knife and pushed her to the ground, knocking her unconscious. She regained consciousness, alone, several hours later.

Held, affirmed. The Supreme Court of Nevada ruled that "[a] separate charge of first-degree kidnapping is proper if the movement of the victim is not merely incidental to the associated offense and it results in substantially increased risk of harm." Here, the uncontroverted evidence that the complainant was left unconscious in an abandoned spot was sufficient to support the jury's findings that the movement was more than incidental to the battery and substantially increased the risk of harm to her. It thus concluded that the kidnapping conviction was justified. Curtis D. v. State, 646 P.2d 547 (1982), 19 CLB 178.

§ 3.280 —Forcible removal

Colorado Defendant and his wife formed a partnership called Clayton Realty Company with Thomas and Donna Lee Gray. The Grays assumed a $40,000 debt and contributed $20,000 in return for a 50 percent share of the partnership. On February 13, 1981, defendant and his wife entered into another partnership with Evan and Consuelo Jones to form ERA Clayton Realty. Ten days later, the first partnership was dissolved, with defendant agreeing to pay the Grays $300 a month for ten years. Defendant made five payments to the Grays directly from ERA Clayton Realty's partnership account. Defendant was charged with felony theft in paying off personal debt to his former partnership account with funds from his active partnership account, which was specifically restricted in the latter's partnership agreement. The court ruled that a partner cannot be charged with theft of partnership property, since it is not a "thing of value of another" as provided in state statute. On appeal, the People argued that an unauthorized taking of partnership property by one of the partners constitutes theft.

Held, affirmed. The Colorado Supreme Court, en banc, held that theft as defined by statute or under common law did not include a partner's unauthorized taking of partnership property. Citing People v. McCain, 552 P.2d 20, 22 (1976), which found "that in the absence of statute a co-

owner of property cannot ordinarily be guilty of theft and, further, that joint owners . . . and members of a voluntary association having an interest in its funds cannot commit larceny of such funds," the court concluded, in the instant case, that without specific statutory authority, the unauthorized taking by a partner of partnership assets is not a crime. There is a need for caution in extending criminal liability to partnership disputes, and criminal statutes should be construed in favor of the accused in order to give all persons fair notice of what constitutes a criminal act. Without a statutory definition of a crime that includes taking things of value that belonged jointly to a partnership, the interpretation of the partnership agreement is best left to a civil court or to arbitration, as required by the agreement. From there the aggrieved partners have adequate remedies under the Uniform Partnership Law. People v. Clayton, 728 P.2d 723 (1986), 23 CLB 393.

Kansas Defendant was convicted of aggravated kidnapping and rape of his fifteen-year-old daughter, who was in his legal custody. In the trial, it was established that the defendant, on the night of the crime had awakened his daughter and led her upstairs, where he told her he had killed her mother and was going to rape her. He pulled a knife, led her into another room where he obtained a gun, and forced her back to her bedroom, where she was raped. Defendant then handcuffed his daughter, taped her head, and placed her in the back seat of a car. After driving around town, defendant brought the victim back to their home and raped her again. He next handcuffed her, locked her in the trunk of the car and, after driving for two hours, released her and drove her to a coffee shop, where he called his wife and told her that their daughter had run away the night before. After being picked up and transported safely in her mother's car, the victim told her mother what had happened, and the latter informed the police. The defendant, on appeal, argued, among other things, that the aggravated kidnapping charge and conviction were not permissible because, in absence of a court order, he had legal custody of his daughter.

Held, conviction affirmed. The Supreme Court of Kansas held that defendant could be convicted of aggravated kidnapping of his daughter, regardless of his legal custody of her. In 1969, the state deleted from its kidnapping statute the phrase "without legal authority," so that kidnapping was broadened to mean the taking or confining of any person by force, threat, or deception with the intent to hold the person for specified purposes. Defendant's contention that every caring parent who disciplines a child could be guilty of kidnapping was not justified, since the statute is a general one that requires a specific intent on the part of the accused to commit one of its prohibited acts. Parents may discipline their children without violating the statute. However, a parent who intends to inflict bodily injury to the child cannot, under the guise of parental discipline, bind the child with handcuffs, place the child in the trunk of a car, and move the child for the purpose of rape, as the defendant was convicted of doing. State v. Carmichael, 727 P.2d 918 (1986), 23 CLB 398.

§ 3.285 Larceny

Hawaii Defendant, convicted of theft for stealing a calculator from the counter of a dry cleaning store, argued on appeal that there was a fatal variance between the pleading and the proof at trial. Although the indictment stated that the calculator was the property of Setsuko Yokoyama, doing business as Kalakaua Kleaners, it developed at trial that Kalakaua Kleaners, a corporation, was the actual owner.

Held, conviction affirmed. The Hawaii Supreme Court ruled that particular ownership of the property stolen is not an element of the crime of theft. It was not disputed, said the court, that the calculator was not defendant's but was the property of another and: "It has long been settled that where the offense is obtaining control over the property of another, proof that the property was the property of another is all that is necessary and the naming of the person owning the property in the indictment is surplusage." Accordingly, the court found no fatal variance between the charge and the proof. State v. Nases, 649 P.2d 1138 (1982), 19 CLB 272.

Idaho Defendant and another were observed taking money from parking meters and were summarily arrested. Police obtained a search warrant for their auto and recovered approximately $46 from the glove compartment, $65 from a suitcase on the rear seat, and $183 from a bag in the trunk. The recovered money, all of which was in the form of loose change, was aggregated and defendant was charged and convicted of grand larceny for stealing in excess of $150. On appeal, he contended that it was error to aggregate the monies.

Held, affirmed. The Supreme Court of Idaho stated

> The general rule regarding aggregation of values is that before the state can aggregate amounts taken from the same person in separate incidents for the purpose of charging grand larceny, it must show that the amounts were obtained pursuant to a common scheme or plan that reflected a single, continuing larcenous impulse or intent.

Here, it found, defendant had a key that fit the parking meters, was seen taking money from several, and admitted coming to town for that purpose. This evidence was sufficient to establish that the money was stolen "pursuant to a common scheme or plan reflecting a single, continuing larcenous impulse or intent." Accordingly, concluded the court, it was proper to aggregate the monies. State v. Lloyd, 647 P.2d 1254 (1982), 19 CLB 179.

Indiana Defendant was convicted of two counts of theft for the unauthorized use of a computer for his own purposes. Defendant was employed by the city of Indianapolis as a computer operator. In that capacity, he had access to a computer terminal and a portion of the computer's information storage capacity to use in performing his duties. While still employed in this position, defendant became involved in a private sales venture, and began using the computer and its "library" to store records associated with his private venture. Eventually defendant was discharged from his post for unsatisfactory job performance and for engaging in his personal, private business activities during office hours. He subsequently

was charged with nine counts of theft for the use of the city's computer for personal interests. On appeal, defendant argued that he did not commit theft, since he took no property or value away from the city of Indianapolis by the use of its computer facilities.

Held, conviction reversed. The Indiana Supreme Court found that defendant's use of a city-leased computer for personal gain did not constitute theft, in that he did not take any value or property away from the city by his actions. The court ruled that there was insufficient evidence that defendant's conduct removed any part of the value of the computer, since the computer service was leased to the city at a fixed charge, regardless of how much it was used. The tapes or discs used by defendant for personal gain were erasable and reusable, and defendant's use of the computer for his own venture did not interfere with its proper use by others. Although defendant did benefit from the use of the city's computer services, he did not deprive the city of any of its property, and thus did not commit theft. State v. McGraw, 480 N.E.2d 552 (1985).

§ 3.325 —Printed matter

Florida The city of Miami sought injunctive relief to stop defendants from distributing eight allegedly obscene magazines. Defendants argued that the city had not presented expert testimony to establish the community standards of Dade County, as required by law; nevertheless, the circuit court issued permanent injunctions to stop the distribution. On appeal, defendants argued that since they had no right to a jury trial, the trial judge, acting as a fact finder, had to be apprised of the contemporary community standards by evidence presented by the governmental body, in this case the city of Miami, seeking to establish the alleged obscenity. Defendants argued that Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973), which established guidelines for identifying and regulating obscenity, required that expert testimony be presented when a judge sits as the trier of fact. In *Miller,* the United States Supreme Court held that the First Amendment does not protect obscene publications. To determine what is obscene, the fact trier must decide whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest. In the instant case, defendant argued that *Miller,* framed in terms of jury determination, demonstrated that the United States Supreme Court endorsed the argument that a jury is inherently more capable than a judge to determine the contemporary community standards. Since defendants were not entitled to a jury trial, they argued that the trial judge, acting as a fact finder, could not rely on his own standard of prurient interest, but had to look to the average person in the community.

Held, decision quashed and remanded. The Florida Supreme Court ruled that evidence of the contemporary community standards in Miami was not required to assist the trial judge in an injunction proceeding in determining whether an average person would consider the magazines obscene. The court stated that it could find no basis for distinguishing between the competence of a judge and a jury in determining the contemporary standards in the community in which they sit. The fact trier, whether judge or jury, is assumed to be inherently familiar with contemporary

community standards and, thus, capable of applying them. City of Miami v. Florida Literary Distrib., 486 So. 2d 569 (1986), cert. denied, 107 S. Ct. 248 (1986).

§ 3.330 Obstruction of justice

South Dakota Defendant, convicted of obstructing a law-enforcement officer, argued on appeal that the evidence was insufficient to sustain the conviction because he did not forcibly interfere with the officer. Defendant had been part of a crowd of approximately twenty-five people observing police subdue and arrest several other individuals for disturbing the peace. Some of the persons in the crowd became unruly and police attempted to break up the mob. An officer approached defendant and told him to move; defendant replied that "he had a right as a citizen to be there." The officer repeated his direction twice more and defendant then took a few steps backwards, remaining in the vicinity for an additional five to seven minutes. An information was subsequently filed, charging defendant with obstructing the officers.

Held, affirmed. The Supreme Court of South Dakota ruled that the crime of obstructing a police officer did not apply only to situations where the obstruction was accomplished by the use of direct force on the officer. It stated that a threat to use "violence, force, physical interference, or obstacle would be sufficient to establish a violation of the statute." Here, in a face-to-face confrontation, defendant refused to obey the officer's direct order and move from the officer's path; the court found that this refusal amounted to a physical interference with the officer's attempt to disperse the unruly mob and preserve the peace and, therefore, was sufficient to establish the obstruction charge. State v. Wiedeman, 321 N.W.2d 539 (1982), 19 CLB 176.

§ 3.350 Prostitution

Massachusetts Defendant was convicted of engaging in common, indiscriminate sexual activity for hire and advertising the business of massage without being licensed. A police officer who came into contact with an advertisement placed by defendant phoned her and arranged for a massage costing $30. During the massage, defendant massaged the officer's genitals in an act of masturbation. At this point, the officer placed defendant under arrest for masturbation. The trial court denied defendant's motion to dismiss, on the ground that the bill of particulars did not allege an offense, and convicted her. On appeal, defendant argued that she did not engage in sexual activity, that the prohibition of her activities interfered with her constitutional right to privacy, and that the prostitution statute was vague.

Held, affirmed. "Sexual activity," as it is defined by Massachusetts precedent construing the prostitution statute, includes defendant's conduct as well as coitus and oral-genital contact. Therefore, defendant, who did not argue that her acts were not common, indiscriminate, or for hire, engaged in prostitution. Defendant's conduct was not protected by the right of privacy under the U.S. Constitution because it was performed for profit. The decision to engage in the business of sex for money is not the type of intimate, personal decision protected by the right of privacy. Finally, the prostitution statute was not unconstitutionally vague as applied to the genital massage administered by defendant. Although the statute and the case law construing

it do not expressly apply to defendant's conduct, they indicate to an individual of common intelligence that such conduct is prostitution. Commonwealth v. Walter, 446 N.E.2d 707 (1983).

§ 3.353 Racketeering (New)

Georgia Defendants were convicted of violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act based on predicate offenses of commercial gambling. Evidence was obtained pursuant to twelve surveillance (wiretap) warrants issued by a local judge upon application by the Fulton County district attorney. Defendants contended that the warrants were invalid because the Fulton County district attorney and judge, in furthering a multicounty gambling investigation that was centralized in Fulton County, were without authority to apply for and issue surveillance warrants as to telephones located outside Fulton County in seven neighboring counties. To avoid detection of the tapes, the district attorney decided to use an inductor coil instead of jumper wires to tap into defendants' telephone lines. The coils had to be installed in the terminal box closest to the tapped phone. However, the conversations were then transmitted back to the investigators' Fulton County listening post where they were tape-recorded.

Held, affirmed. The Georgia Supreme Court found that the federal Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–2520, as well as the Georgia RICO Act, authorized issuance of these warrants by the Fulton County judge. The court ruled that there was no jurisdictional problem here and emphasized that the listening post was located in the county where the warrants were issued. The Georgia RICO Act looks to the physical placement of the device used for "overhearing, recording, intercepting, or transmitting sounds." Here the court concluded that the "device" is not the coil but the tape recorder. Thus, the district attorney and local judge were authorized to apply for and issue the warrants in question, and the trial court did not err in denying defendants' motions to suppress. Evans v. State, 314 S.E.2d 421 (1984), 21 CLB 83.

§ 3.355 Rape

Virginia Defendant was convicted of marital rape. The couple was married on June 20, 1981. One child was born of the marriage, a son. In September 1982, the couple began to experience marital difficulties and did not engage in voluntary sexual relations for a period of six months from September 1982 through March 1983, when the attack occurred. The husband moved out of the marital abode in mid-February 1983. From that time there was neither sexual nor social contact between the parties. At the time the husband moved out, the parties discussed obtaining a legal separation. They planned to visit a lawyer to institute divorce proceedings, but the wife decided to postpone the visit. Prior to the attack, the husband filed suit to secure custody of the child. Finally, about three weeks before the alleged offense, the husband, a naval enlisted man, began living aboard ship in port. Earlier, the Virginia Supreme Court ruled in Weishaupt v. Commonwealth, 315 S.E.2d 847 (1984), that a husband could be prosecuted for raping his wife if, prior to the incident, the wife had conducted herself "in a manner that establishes a de facto end to the marriage." On appeal, the question presented was whether, under the

evidence, the commonwealth established beyond a reasonable doubt the elements necessary to sustain a conviction for marital rape.

Held, conviction reversed and final judgment. The majority of the court this time held that the wife's marital conduct during the six-month period before the assault was "equivocal, ambivalent, and ambiguous." Evaluating the foregoing circumstances, the court felt that although the wife subjectively considered the marriage fractured beyond repair when the parties separated in February, this subjective intent was not manifested objectively to the husband in view of the wife's vacillating conduct so that he perceived, or reasonably should have perceived, that the marriage was actually ended. Kizer v. Commonwealth, 321 S.E.2d 291 (1984).

§ 3.365 —Consent

Virginia Defendant was indicted for rape, and he moved to dismiss the indictment on the ground that, pursuant to common-law principles, a husband cannot be convicted of raping his wife. The trial court rejected defendant's argument and denied the motion. The jury found defendant guilty of attempted rape, and he was sentenced to two years in prison. On appeal, defendant contended that the trial court erred in failing to dismiss the indictment.

Held, affirmed. The Supreme Court of Virginia affirmed the conviction, recognizing for the first time that, under certain circumstances, a wife unilaterally can revoke her implied consent to marital sex, thereby making her husband criminally liable for any future attempts at intercourse. In arriving at this conclusion, the court majority rejected defendant's argument that Hale's rule, the so-called "marital exemption" found in English common law, bars a husband's conviction for rape or sexual assault. The majority also found the rule to be repugnant to recent state court decisions recognizing the independence of women and not comporting with Virginia's no-fault divorce law. Accordingly, the court held that a wife unilaterally can revoke her implied consent to marital sex where there is continuous separation by the wife from the husband for a substantial period of time, no sexual intercourse during the period, and additional objective evidence supporting an intention by the wife permanently to separate from the husband. Weishaupt v. Commonwealth, 315 S.E.2d 847 (1984), 21 CLB 80.

§ 3.375 Robbery

Indiana Defendant was convicted of robbery and confinement, both felonies under state law. At trial, evidence was adduced that defendant and two other assailants entered the victim's car and confined him there, demanded his money, took his watch, and struck the victim several times. The victim fought back with a knife and stabbed defendant. On appeal, defendant requested a review of the serious injuries which he sustained in the course of the robbery as mitigation of the offense.

Held, conviction affirmed. The Supreme Court of Indiana stated that defendant cannot escape criminal liability due to the injuries he sustained during the commission of an offense. When one undertakes the commission of a robbery, said the court, he assumes the risk of encountering a victim who fights back. Marshall v. State, 448 N.E.2d 20 (1983).

Kansas Defendant was convicted of murder in the first degree, aggravated

kidnapping, and aggravated robbery. Before deliberating, the jury was instructed to consider that since prior force (the murder) made it possible for defendant to take property from the victim without resistance, whether such act of force would support the taking by force element of aggravated robbery. Defendant contended that the trial court erred because, during those instructions, the jury should have been permitted to decide whether the act of taking the purse was sufficiently remote from the homicide to render the offense of taking the purse theft rather than robbery.

Held, reversed as to kidnapping, affirmed as to murder and robbery. The court said that although it is the duty of the trial court to instruct the jury, not only as to the crime charged but as to all lesser crimes of which the accused might be found guilty under the information or indictment and upon the evidence adduced, this duty does not arise unless there is evidence supporting the lesser offense. The court said that the fact that prior force made it possible for defendant to take property from the victim's body without resistance was sufficient for a conviction of the crime of robbery. Because of the evidence of the crime and given the instruction to the jury, the court believed that the conviction for robbery was well supported. State v. Patterson, 755 P.2d 551 (1988).

New York Defendant was indicted for robbery, stealing money and jewelry from the complainant at gunpoint. At trial, defendant admitted going to the complainant's apartment on the occasion in question, but testified that he stole only cocaine from the complainant when she refused to sell him drugs on credit; he also denied that he was armed. Over defendant's objection, the trial court charged the jury that they could return a verdict of guilty on the robbery charge if they found that defendant forcibly stole drugs, rather than money and jewelry, from the complainant. Defendant was convicted of the robbery and contended, on appeal, that the trial court's charge amounted to an improper amendment of the indictment in that it modified an essential element of the crime.

Held, affirmed. The Court of Appeals stated that the particular nature of the property stolen is not an essential element of the crime of robbery; robbery, it stated, requires merely the forcible taking of "property." Here, it stated, the indictment comported with statutory and constitutional standards of due process and fair notice, by informing defendant that he was accused of forcibly stealing property from a named person at a specific time and place. These allegations were supported by the prosecution's proof at trial; defendant had no grounds for complaint that he was misled as to the property stolen, since any variance between the pleading and the proof was created when defendant voluntarily took the stand and admitted that he had committed a "different version" of the crime charged. Accordingly, the New York Court of Appeals affirmed defendant's conviction. People v. Spann, 438 N.E.2d 402 (1982), 19 CLB 174.

§ 3.380 —Armed

Connecticut Defendant was convicted of the armed robbery of three restaurants. At trial, employees of the restaurants testified that during the course of the crimes defendant held a long bulging object, which they assumed was a gun, under his sweatshirt. De-

fendant took the stand in his own behalf and admitted to one of the robberies but claimed that the object he carried was a hammer. On appeal, he asserted that the evidence was insufficient to convict him under the statute, which provided that an armed robbery is committed by the display or threatened use of what is represented by words or conduct to be a firearm.

Held, conviction affirmed. The Connecticut Supreme Court found that the witnesses' observations satisfied the state's burden of proof. It was apparent, said the court, that the jury "exercised their right not to believe the accused's version of [the robbery] and chose to believe the state's evidence that eyewitnesses assumed he was carrying some sort of firearm." State v. Bell, 450 A.2d 356 (1982), 19 CLB 275.

Indiana Defendant was convicted of armed robbery. On appeal, he argued that there was insufficient evidence to convict him and that a jury instruction regarding evidence of flight after the crime was improper. Defendant and his brother drove to a gas station. When the brother pointed a gun at the attendant, the latter opened the cash drawer and stepped back. Defendant then started taking money from the cash drawer. He and his brother then left the station and, after several minutes of driving, were spotted by a police car. Either defendant or his brother took off at a high rate of speed and avoided capture for a short period of time. In support of the insufficiency claim, defendant pointed out that he did not speak while in the gas station, did not threaten the use of force, and did not carry a weapon. Defendant objected to the jury instruction on flight because there was no evidence that he was driving the car at the time.

Held, affirmed. There was sufficient evidence that defendant was a full participant in an armed robbery. Defendant was aware of his brother's use of a gun and threats to rob the gas station as he grabbed money from the cash drawer. The jury instruction on evidence of flight was proper, even though the evidence did not disclose whether defendant or his brother drove the car after the robbery. From the substantial evidence that defendant and his brother committed the crime in concert, one could reasonably infer that the attempt to avoid capture was also a joint enterprise. Hunn v. State, 446 N.E.2d 603 (1983).

§ 3.390 Sex crimes

"Incest: How Psychology Can Help the Defense," by David Hazelkorn and Gene Harbrecht, 24 CLB 3 (1988).

Hawaii The state appealed the dismissal of an incest count charged against defendant on the ground that it failed to allege the state of mind necessary to establish the offense. Incest, the state claimed, is a general intent crime that does not call for the explicit allegation of a wrongful intent. Defendant argued that the absence of a statement that the act was intentionally committed was fatal in light of a recent amendment to the Hawaii incest statute in which the definition of "sexual intercourse" was changed to "[s]exual intercourse in its ordinary meaning or any *intrusion or penetration,* however slight, of any part of a person's body, or of any object, into the genital opening of another person. . . ." In defendant's opinion, if an indictment charging incest does not express a requirement of intent, totally innocuous

or accidental acts could be punished under the statute.

Held, reversed and remanded. The literal application of the statute suggested by defendant would cause an absurd or unjust result and is clearly inconsistent with the statute's purposes and policies. The statute must be construed in a reasonable manner to cover coitus in the ordinary sense and those intrusions or penetrations of another person's body that are considered inherently and essentially evil. The charge of incest, which was drawn in the language of the statute, gave reasonable notice of the facts and informed defendant of all elements of incest. Despite the absence of a specific allegation of intent, incest was charged in the indictment as an offense where intent can be inferred because "sexual intercourse," under the circumstances alleged, could only have been a willful act. State v. Torres, 660 P.2d 522 (1983).

Nebraska Defendant was charged with the first-degree sexual assault of his wife and filed a plea in abatement. The district court sustained the plea on the grounds that under common law a husband could not be found guilty of raping his wife, and common law applied in Nebraska. Because defendant was the victim's legal spouse at the time of the alleged sexual assault, the court quashed the information and abated the prosecution. The state, on appeal, argued that the court erred in finding that the information for sexual assault failed to state a cause of action where the victim was the wife of defendant.

Held, exception sustained and case remanded for further proceedings. The Supreme Court of Nebraska found that any basis for an implied consent upon which a common-law rule of spousal exclusion was applicable under the former rape law was effectively abrogated by enactment of the current sexual-assault statute. Although Nebraska's former rape statutes never defined rape as the unlawful carnal knowledge of a woman, no case had ever held that the common-law spousal exclusion is the law in Nebraska, and not one of the justifications for the exclusion has any merit in modern society. Moreover, a common-law spousal exclusion to a rape prosecution is immaterial because the state no longer has a rape statute. The first-degree sexual assault statute, adopted in 1975, applies to "any person who subjects another person to sexual penetration . . . by force, threat of force, expressed or implied, coercion, or deception," regardless of the familial relation to, or gender of, the victim. State v. Willis, 394 N.W.2d 643 (1986).

North Carolina Defendant, an adult, was convicted of a sex offense for engaging in a sex act with a child who was twelve years, eight months old at the time of the incident. The statute under which defendant was charged stated that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act: (1) [w]ith a victim who is a child of the age of 12 years or less. . . ." Defendant argued on appeal that the age element of the statute had not been satisfied because the victim, having passed his twelfth birthday was no longer "of the age of twelve years or less."

Held, judgment arrested. The North Carolina Supreme Court agreed with defendant's interpretation of the statute and rejected the state's contention that one is twelve years old until reaching one's thirteenth birthday. It found that the language of the statute did not evi-

dence a clear legislative intent to extend protection to children who had passed their twelfth birthday but not reached their thirteenth birthday. Thus, following the principle that "criminal statutes are to be construed strictly against the state and liberally in favor of the defendant," the court arrested the judgment. State v. McGaha, 295 S.E.2d 449 (1982), 19 CLB 272.

4. CAPACITY

§ 4.00 Alcoholism and drug addiction

Court of Appeals, 7th Cir. Defendant was convicted of two counts of murder by a state court in Indiana. He appealed to the Indiana Supreme Court, arguing that the state failed to present evidence sufficient to rebut his defense that he was insane at the time the crime was committed. His insanity, he claimed, resulted from his ingestion of an excessive amount of heroin and valium on the day of the crime and the days immediately preceding. The Indiana Supreme Court affirmed the conviction, finding that all the facts and circumstances surrounding the shootings were sufficient evidence to sustain the trial court's conclusion that defendant was sane at the time he fired the gun. A petition for writ of habeas corpus filed with the federal district court was denied. Defendant appealed.

Held, affirmed. The defense of voluntary intoxication was available to defendant under Indiana law because specific intent is an element of the crime he committed—first-degree murder. For the defense to succeed, defendant must have been so intoxicated as to be incapable of entertaining the required specific intent. In addition, defendant's ingestion of alcohol or drugs must have been abused to the point that it had produced a mental disease preventing him from appreciating the wrongfulness of his conduct or conforming his conduct to the law. The state met its burden of proving defendant's sanity with sufficient evidence that defendant was not suffering from mental disease at the time of the offense and that, even if he was, he was nonetheless capable of appreciating the wrongfulness of his conduct and conforming it to the law. Evidence establishing sanity included defendant's acts of feeling for his victim's pulse, seeking assistance for his own injuries, going armed to the victim's apartment, and concealing the murder weapons. The Seventh Circuit then held that the jury could credit the testimony of a lay witness attesting to defendant's sanity over that of expert witnesses who testified that defendant had suffered from toxic psychosis. Greider v. Duckworth, 701 F.2d 1228 (1983).

Massachusetts Defendant was convicted of murder in the first degree. On the day he killed his wife, defendant, an alcoholic, drank heavily, took valium, and smoked marijuana. At trial, defendant attempted to introduce the opinion of a psychiatrist regarding his criminal responsibility. The trial judge ruled that there was insufficient foundation for him to admit the psychiatrist's opinion and defendant appealed.

Held, reversed. In Commonwealth v. McHoul, 226 N.E.2d 556 (1967),

the Supreme Judicial Court of Massachusetts stated that lack of criminal responsibility is established if at the time of criminal conduct a person lacks substantial capacity either to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law because of a mental disease or defect. The psychiatrist, a specialist in the field of alcoholism, had diagnosed defendant as an alcoholic suffering from organic brain syndrome, a mental disease or defect apart from the alcoholism. Even though defendant was unaffected by organic brain syndrome when alcohol-free, the psychiatrist believed that organic brain syndrome existed on the day in question and was the cause of defendant's lack of criminal responsibility at the time. The court held that the voluntary consumption of alcohol would not excuse defendant's conduct; a jury may find, however, the defendant lacked the substantial capacity necessitated by criminal responsibility if he suffered from an underlying latent mental disease or defect apart from alcoholism and had no reason to know that his consumption of alcohol would activate the underlying illness. The court determined that the jury should have been permitted to hear the psychiatrist's testimony, and the case was remanded. Commonwealth v. Brennan, 504 N.E.2d 612 (1987).

New Hampshire Defendant appealed his conviction for reckless second-degree murder, claiming that the trial court erred when it refused to allow his defense of voluntary intoxication. Defendant claimed that the intoxication prevented him from having the mental state necessary for "extreme indifference" to human life, which is needed for proving reckless second-degree murder. Defendant defined "circumstances manifesting extreme indifference" to be a frame of mind.

Held, conviction affirmed. The court held that "extreme indifference," rather than being a frame of mind, is the deviation from standard social norms. Defendant's behavior, while drunk, was far from established social norms; for example, he smeared fecal matter and blood on the victim's body. Although alcohol may have effected his frame of mind, it could not exculpate him. The court determined that it was the duty of defendant to stay sober if his drunken behavior could be harmful to others. State v. Dufield, 549 A.2d 1205 (1988).

New Jersey Defendant was convicted of murder, possession of weapon without permit, and possession of weapon with purpose to use it unlawfully. Defendant parked his car behind his former girlfriend's, beckoned her to his passenger window, and then fired three shots, two of which hit and subsequently killed the victim. At trial, defense counsel argued that defendant was so intoxicated at the time of the offense that he was incapable of acting purposely or knowingly. On appeal, defendant argued that in a jury instruction explaining the application of intoxication to crimes requiring a knowing or purposeful state of mind, such as murder, the court failed to explain that intoxication was not a defense to the lesser included offenses of aggravated manslaughter, passion-provocation manslaughter, and simple manslaughter.

Held, reversed. The New Jersey Supreme Court held that defendant was denied a fair trial by absence of a jury instruction charging that intoxication

was not a defense to the lesser included offenses. The court defined recklessness, which is predicated on defendant's conscious disregard of "a substantial and unjustifiable risk" (e.g., manslaughter), but the court did not explain that defendant's intoxication was immaterial to determining whether he so acted. The jury should have been instructed, upon a finding that defendant was intoxicated, that it could also find that defendant acted recklessly in pointing and firing the gun at the victim, despite his mental state at the time of the crime. Under the state statute, unawareness of a risk because of self-induced intoxication is immaterial, when, as is the case with manslaughter, recklessness is an element of the offense. The state had the burden of proving not that defendant was aware of the risk, but that if he had been sober at the time of the offense, he would have been so aware. However, by failing to instruct the jury that it could accept defendant's intoxication as a defense to murder and still convict him of manslaughter, the court effectively prevented defendant's conviction on the lesser included offense of aggravated manslaughter or manslaughter and forced the jury to choose between murder and acquittal. State v. Warren, 518 A.2d (1986), 23 CLB 492.

§ 4.07 Diminished capacity (New)

Washington Defendant was charged with aggravated first-degree murder. He challenged the trial court's order for him to submit to psychiatric evaluation. Defendant indicated that he would rely on diminished capacity as a defense during his trial, so the court ordered that he undergo psychiatric examination by a state-appointed psychiatrist. He claimed this examination would be in violation of his Fifth Amendment rights prohibiting self-incrimination.

Held, affirmed. The Supreme Court of Washington affirmed as modified and remanded. The court held that diminished capacity, like the insanity defense, required a psychiatric evaluation. The court noted that the only way to counter a plea of diminished capacity is to have expert testimony from a psychiatrist. When the defendant uses the diminished capacity defense he waives the doctor-patient privilege. However, the trial court can protect the defendant's Fifth Amendment interests by refusing to permit cross-examination on statements that might be considered confessional. The court explained that allowable statements would be those that expressed the psychiatrist's opinion concerning defendant's diminished capacity and his nonincriminatory observations concerning the basis of his opinions. State v. Hutchinson, 766 P.2d 447 (1989).

§ 4.10 Insanity—substantive tests

Court of Appeals, 2d Cir. In defendant's trial for theft and interstate transportation of stolen goods, the judge granted the prosecution's request to exclude a compulsive gambling defense. The expert testimony would be technical and contradictory; moreover, the relationship between a putative compulsion to gamble and an urge to steal was too tenuous to warrant the introduction of expert witnesses. Convicted on eight transportation counts, defendant appealed, contending that the trial judge erred in refusing to permit the compulsive gambling defense to be presented to the jury.

Held, affirmed. The Second Circuit uses the American Law Institute (ALI) test that states that "a person is

not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Even if defendant's gambling defense had been shown to be a mental disease or defect under the ALI test, there was still ample basis for the trial court's conclusion that defendant's compulsive gambling disorder was not relevant to the insanity defense. The trial judge had noted correctly that the relevance standard requires that the pathology alleged have "a direct bearing on [the] commission of the acts with which [defendant] is charged." The court concluded that there was ample basis in the record to warrant the conclusion that the trial judge did not abuse his discretion in finding that the volitional connection between gambling and stealing had not been established satisfactorily. United States v. Torniero, 735 F.2d 725 (1984), cert. denied, 105 S. Ct. 788 (1985).

Court of Appeals, 5th Cir. Defendant had been convicted of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception, and subterfuge. He had offered evidence at trial that he had lacked substantial capacity to conform his conduct to the requirements of the law because of drug addiction and offered to present expert witnesses who would testify to that lack of capacity. The court excluded this evidence. On conviction, defendant appealed, and the conviction was reversed. The Fifth Circuit agreed to a hearing en banc to reexamine the definition of insanity that it had adopted in Blake v. United States, 407 F.2d 908 (1969), that a person is not responsible for criminal conduct if, at the time of such conduct and as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Held, conviction vacated and case remanded for a new trial in accordance with the new insanity standard. The *Blake* definition did not comport with current medical and scientific knowledge. A stricter standard was adopted, that is that a person is not responsible for criminal conduct on the grounds of insanity only if at the time of that conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct. Since it is not possible for psychiatrists, much less jurors, to ascertain when a human act is volitional, the court saw no other prudent course for the law to follow but to treat all criminal impulses—including those not resisted—as resistible. The court made its holding prospective and remanded defendant's case for a new trial in accordance with its new insanity standard. United States v. Lyons, 731 F.2d 243, cert. denied, 105 S. Ct. 323 (1984).

Colorado Defendant pleaded guilty to the crime of escape, having fled from a state mental hospital where he had been committed pursuant to an insanity adjudication in an earlier criminal proceeding. Thereafter, he moved for post-conviction relief, asserting that application of the escape statute violated constitutional due process guarantees because "a commitment following an insanity adjudication carries with it a continuing presumption of legal incapacity during the period of commitment." Defendant

appealed following denial of his motion.

Held, judgment affirmed. The Supreme Court of Colorado ruled that while an insanity adjudication represents a judicial determination that an accused is not legally responsible for past criminal acts because of then-existing mental disease or defect, such an adjudication would not render a committed person legally incapable of committing future crimes during the period of commitment. An adjudication of insanity, it continued, creates a presumption of insanity but does not operate as res judicata as to defendant's culpability for future criminal acts. Here, said the court, defendant could have placed in issue his mental capacity to commit the crime of escape but, instead, elected to admit all elements of the crime. Accordingly, the court rejected defendant's contention, noting that to hold otherwise would lead to "a virtual grant of immunity for all criminal acts committed by persons adjudicated insane during the term of their insanity commitment." People v. Giles, 662 P.2d 1073 (1983), 20 CLB 175.

Minnesota Defendant was convicted of first-degree murder in the brutal slaying of his wife, to which he pled not guilty and not guilty by reason of insanity. He appealed the conviction on the ground that his right to assert mental illness as a defense was impinged upon by the jury instructions. The instructions regarding the evaluation of evidence relative to mental capacity provided that only testimony addressing the issue of whether defendant knew the nature of his act and knew that it was wrong was to be considered. Evidence of intent and premeditation was not to be considered with regard to the issue of capacity, which was characterized as an issue separate from intent.

Held, affirmed. The instructions correctly separated the issues of intent and capacity, and properly applied the M'Naghten rule. The Supreme Court of Minnesota held that at the initial stage of a proceeding in which the defendant has pled not guilty by reason of mental illness, only evidence of the act and its requisite intent can be admitted. Only after both sides have rested on these issues can the defendant introduce evidence of mental incapacity including expert testimony. The jury instructions should make it clear that evidence relating to mental illness should not be considered until the jury determines that the prosecution has proved all elements of the offense charged beyond a reasonable doubt. State v. Hoffman, 328 N.W.2d 709 (1982).

Minnesota Defendant was indicted on two counts of first-degree murder, to which he pled not guilty and not guilty by reason of mental illness. The state moved to restrict the testimony of defendant's expert psychiatric witnesses to the issue of whether defendant intended to commit first-degree murder. The state also moved for the exclusion of psychiatric testimony on the issue of defendant's mental capacity to form the intent. The trial court certified a question respecting the admission of psychiatric testimony on capacity.

Held, the certified question was answered in the negative. The inquiry at a trial into defendant's criminal responsibility for his acts proceeds in two stages, the first to determine intent and the second to determine capacity. The two inquiries differ significantly and so should be kept

separate. The inquiry as to intent is based on the presumption that people act within the boundaries of normal behavior and intend what they do. During the inquiry as to intent, defendant has the right to present evidence that disputes the physical facts upon which the prosecution is trying to establish intent. Psychiatric testimony on mental capacity does not come into play until the insanity defense is asserted. The question is no longer whether defendant manifested the intent to commit the crime, but whether he was laboring under a defect of reason when he did so. Because of the important distinction society recognizes between a verdict of "not guilty" and one of "not guilty by reason of insanity," the inquiries as to intent and capacity must proceed in separate stages. The court then rejected the doctrine of diminished responsibility. State v. Bouwman, 328 N.W.2d 703 (1982).

Washington Defendant was convicted of the murder of his wife. He had stabbed her twenty-four times and decapitated her. Defendant testified that he believed his wife had been unfaithful and that, under the teachings of the Moscovite religious faith which he followed, it would be improper not to kill an adulterous wife. On appeal, he complained of a jury instruction providing in part that a verdict of not guilty by reason of insanity must be based on a finding that the defendant is unable to tell right from wrong, and that "right and wrong" refers to knowledge of the person at the time of the act that he was acting contrary to the law. Defendant claimed that the court erred in defining "right and wrong" in the legal rather than the moral sense.

Held, conviction affirmed. The court noted that the instruction was taken from a statute which essentially codified the M'Naghten test and held that, under the test, one who acts under a partial insane delusion that he was redressing some supposed grievance is nevertheless punishable if he knows that his act is contrary to law. Defendant had attempted to conceal his actions, which demonstrated that he knew his act was against the law. Alternatively, the court held, "moral" wrong is measured by the morals of the society rather than the individual and, although courts have drawn a narrow exception to the societal standard of moral wrong in cases where an accused believes his act is ordained by God, defendant's conduct did not fit this exception because he claimed to be acting under general religious belief rather than a specific command from God. The court also noted that neither defendant's religious beliefs nor his apparently unsupported belief that his wife was unfaithful qualified as insane delusions as required by the M'Naghten test. State v. Crenshaw, 649 P.2d 488 (1983).

§ 4.20 —Burden of proof

Arizona Defendant was convicted of first- and second-degree murder for shooting his estranged wife and her male friend following an argument. At trial, he raised the defense of insanity, based on prolonged drug and alcohol abuse. The trial judge, with defense counsel approval, instructed the jury that "The defendant is presumed to have been sane at the time the offense was committed. Once sufficient evidence has been presented to raise the question of the defendant's sanity at the time of the offense, the state must prove beyond a reasonable doubt that the defendant was sane." Defendant

appealed, on the grounds that any instruction mentioning the presumption of sanity is improper.

Held, conviction affirmed. Because the presumption of sanity vanishes when there is proof sufficient to raise a reasonable doubt about defendant's sanity, and because trial judges are quite able to determine when that point is reached, it is not necessary to mention the presumption to the jury; nor should the presumption be mentioned, since it may confuse the jury. However, it is clear in this case that the jury understood the instruction and that its actions were consistent with it. Since the defense approved the instruction at the time it was given, the guilty verdict was affirmed in the absence of a showing of fundamental error. State v. Grilz, 666 P.2d 1059 (1983).

Montana Defendant was convicted of attempted deliberate homicide and aggravated assault. Defendant's defense at trial was that he lacked the requisite criminal mental state by reason of his insanity. On appeal, his primary contention was that the Montana statutory scheme deprived him of a constitutional right to raise insanity as an independent defense. Montana did away with the affirmative defense of insanity in 1979, and enacted alternative procedures that allow for consideration of a defendant's mental condition. The 1979 law provides that evidence of a defendant's mental disease or defect be considered at three stages of the proceedings. A defendant's condition is to be (1) weighed prior to trial to determine the defendant's competence to be tried; (2) considered by the jury at trial to ascertain whether the state-of-mind element of the crime is met; and (3) scrutinized by the judge at sentencing in deciding whether, at the time of the crime, the defendant was able to appreciate the criminality of his acts or to conform his conduct to the law. If the answer to either of these questions is no, the judge is then required to institutionalize the defendant for a period not to exceed the maximum prison sentence that could be imposed for the crime. Under the statute, the prosecution still retains its traditional burden of proving all the elements of the crime beyond a reasonable doubt.

Held, remanded for re-sentencing. The Montana Supreme Court found that the statute leaves enough room for consideration of mental condition to satisfy the demands of due process under the Fourteenth Amendment, and rejects defendant's argument for a fundamental right to plead insanity. The statute does not unconstitutionally shift the state's burden of proof on the necessary elements of the offense. The state retains its traditional burden of proving all elements beyond a reasonable doubt. Turning to the Eighth Amendment, the court stressed the sentencing judge's duty under the statute to consider the convicted defendant's conduct at the time of the crime, and to order institutionalization on a finding that defendant suffered from a mental disease or defect. The court concluded that these requirements serve to prevent the imposition of cruel or unusual punishment upon the insane. State v. Korell, 690 P.2d 992 (1984).

§ 4.40 —Committal and recommittal proceedings (New)

New Hampshire In 1973, defendant entered a plea of not guilty by reason of insanity to a charge of murder, in connection with the killing of his mother. The court accepted the plea,

and defendant was subsequently committed to the state hospital for life until or unless earlier release by due course of law. Under the law then in effect, defendant was not guaranteed the right to periodic review of his commitment. Later changes in statutory and case law, however, gave him that right, and he was recommitted in 1977, 1979, and 1981. In 1982, the legislature amended the recommittal statute providing for a judicial hearing for recommittal. At the hearing, when the court is satisfied by proof beyond a reasonable doubt that the hospital patient suffers from a mental disorder and that it would be dangerous for him to go at large, the court is obliged to renew the order of committal. The court is required to find the hospital patient dangerous if his crime caused death or serious bodily injury and his mental condition is substantially unchanged. At the hearing, only by applying the 1982 statutory amendment did the court find it would be dangerous for defendant to go at large. Accordingly, defendant was ordered recommitted subject to the continuation of his parole.

Held, reversed and remanded. The New Hampshire Supreme Court held that the irrebuttable presumption of dangerousness, based on defendant's past dangerous act and on the fact that the mental condition that led to his acquittal by reason of insanity had not substantially changed, offended the state constitution's due process clause. The court stated that due process requires that the patient be given a chance to defeat the statutory presumption with additional evidence. By denying the patient that chance, the 1982 amendment subverts the patient's right to confront the state on the issue of dangerousness and invites serious questions about punitive intent on the part of the legislature. State v. Robb, 484 A.2d 1130 (1984), 21 CLB 472.

5. PARTIES

§ 5.00 Principals

South Carolina Defendant, convicted of the armed robbery of a grocery store, argued on appeal that there should be a reversal because he was not present at the store when the robbery was committed. At trial, it was established that defendant and several others planned the crime and that defendant provided the others with guns, masks, and gloves. He then drove them to the store, leaving the scene himself prior to the robbery; defendant and the others later met at a predesignated location and divided the proceeds.

Held, affirmed. The Supreme Court of South Carolina held that a defendant's physical presence during a crime is not required to sustain his conviction as a principal, stating that

> [W]hen several people pursue a common design to commit an unlawful act and each takes the part agreed upon or assigned to him in an effort to insure the success of the common undertaking, ". . . the act of one is the act of all and all are presumed to be present and guilty . . ." [citation omitted].

Here, found the court, defendant's liability as a principal was established by evidence showing that he participated in planning the robbery, supplied the instrumentalities, and shared in the proceeds. State v. Chavis, 290 S.E.2d 412 (1982), 19 CLB 86.

6. DEFENSES

§ 6.00 Alibi

Arkansas Defendant was convicted of murder for shooting the deceased to death during the robbery of a motel. He asserted an alibi defense. To refute the alibi, the prosecution produced a witness who was allowed to testify that defendant has robbed him at gunpoint less than an hour earlier, at his place of employment, another motel several blocks from the murder scene. On appeal, defendant argued that the witness should have been permitted to testify only as to the time and place at which he observed defendant, and not as to the facts of the robbery itself.

Held, affirmed. The Supreme Court of Arkansas ruled that the witness's testimony was clearly relevant to disprove defendant's alibi; it held that "[t]he admissibility of testimony about another crime, to rebut a defense of alibi, is uniformly recognized" because it is not admitted merely to show an accused's bad character. The court noted that it would have been "unrealistic" to restrict the witness's testimony as defendant suggested; had the testimony been so diluted it went on to point out:

> [T]he jury would have received a false impression about the incident and might well have doubted whether [the witness] could identify a stranger whom he saw casually as he was closing up for the night. It was the very fact that [defendant] used a weapon in an attempt at robbery that would fix the incident in [the witness'] memory and strongly support his identification of [defendant]. The probative value of that important fact heavily outweighed any prejudice to [defendant] from the proof that he had drawn a gun on [the witness].

Williams v. State, 635 S.W.2d 265 (1982), 19 CLB 181.

§ 6.05 —Notice requirement

New Mexico Defendant appealed his conviction for burglary, claiming the trial court erred when it refused to allow him to present two witnesses. The prosecution contended that the two were alibi witnesses and said they (the prosecution) were not informed, as required by law, that defendant was using an alibi defense. Defendant claimed that he was not using an alibi defense, because the witnesses could not testify to his whereabouts during the crime, only before the crime. The trial court agreed with the prosecution, stating the testimony of the two witnesses contradicted another witness who claimed to be with the defendant before and during the crime, thereby establishing an alibi.

Held, conviction reversed and remanded. The court ruled that preclusion of testimony of defense witnesses was not warranted for noncompliance with alibi notice request. A sharply divided court stated the reason for the alibi defense rule was to

give the prosecution time to prepare an argument against such a defense and to prevent the defense from surprising the prosecution with information previously hidden. The court determined defendant did not willfully hide information, nor was the prosecution totally unaware of the witnesses' information concerning defendant's whereabouts. The prosecution had ample time to interview the witnesses and knew that they were with the defendant before the crime. McCarty v. State, 763 P.2d 360 (1988).

§ 6.15 Collateral estoppel

Colorado Defendant was charged with third-degree assault and resisting arrest. Defendant's son had been acquitted of identical charges at an earlier trial. Trial court reasoned that the judgment of acquittal in his son's trial collaterally estopped the People from asserting that defendant's action, in attempting to prevent police from using excessive force in arresting his son, were not legally justifiable. The People appealed.

Held, reversed and remanded. The court stated that in order for a defendant in a criminal case to invoke collateral estoppel against the state, whether double jeopardy is involved or not, the issue that the state desires to litigate must be identical to an issue that was actually and necessarily decided in the prior litigation. In addition, there must have been a final judgment on the merits of prior litigation, the state must have been a party to, or in privity with, a party to prior litigation, and the defendant seeking to assert collateral estoppel must have been a party to prior litigation. The error-correction procedures available to a party in a civil case are not available to nearly as great an extent to the People in a criminal case, and in the absence of such remedial procedures, juries may assume the power to acquit out of compassion, compromise, or prejudice. Thus, the premise of collateral estoppel, which is the confidence that the result achieved in the first trial was substantially correct, is lacking to a significant extent with respect to criminal trials. The traditional reasons for applying nonmutual collateral estoppel in civil cases have less force in the context of criminal litigation; therefore, the acquittal of defendant's son in a separate proceeding did not collaterally estop the People from prosecuting defendant in a separate trial. People v. Allee, 740 P.2d 1 (1987), 24 CLB 275.

Florida Defendant was charged in a three-count indictment with (1) aggravated battery by use of a firearm; (2) possession of a firearm by a convicted felon; (3) aggravated assault by use of a firearm. Before trial, his motion to sever the possession charge was granted and the case proceeded on the remaining two counts. At trial, complainant testified that defendant beat him with his fists and with a pistol. Defendant, testifying in his own behalf, admitted hitting the complainant with his fists but denied having or using the pistol; no other eyewitness saw a pistol. After deliberations, the jury found defendant guilty of the lesser included offenses of simple assault and simple battery. Thereafter, the trial court granted a defense motion for dismissal of the firearms possession charge on the ground of collateral estoppel. An intermediate appellate court reversed: It ruled that since the State had sought to try the three charges together, defendant, having moved for severance, could not then raise collateral estoppel as a defense.

Held, reversed and trial judge's order of dismissal reinstated. The test to determine the applicability of collateral estoppel as a bar to further criminal prosecution is whether the factual issue in question was actually decided by the jury in reaching its verdict. Here, reasoned the court, the jury, by finding him guilty of simple assault and battery rather than the aggravated crimes, must have decided that defendant did not hit the complainant with a pistol; it followed that the jury must have actually decided that defendant did not possess a pistol. The court rejected the State's argument that the verdict was the result of jury compromise or exercise of jury "pardon power," noting that it would not engage in such speculation. Finally, it concluded that defendant had not waived the right to assert collateral estoppel by moving for severance, stating that a finding of waiver would have the effect of requiring an accused to waive one constitutional right in order to assert another. The court explained:

> [Defendant] moved to have the possession count severed so that evidence of his prior conviction could not be introduced so as to deprive him of his constitutional right to a fair trial. It would be unfair to encumber or restrict the exercise of this right by requiring him to waive his right against double jeopardy. Therefore, we hold that a defendant who successfully severs one charge from other charges is not estopped from asserting collateral estoppel as a bar to further prosecution under the severed charge.

Gragg v. State, 429 So. 2d 1204, cert. denied, 464 U.S. 820, 104 S. Ct. 83 (1983).

§ 6.17 Duress (New)

Kansas Defendant and another were charged with burglary, kidnapping, and felony murder. Defendant informed the court that he intended to offer evidence to the jury that the crimes were committed under compulsion or duress, in that the other person—who was dead at the time the trial took place—had held a gun on him and said defendant's family were being held hostage. The kidnapping victims testified, however, that defendant did the talking, and although he was alone with victims for long periods, never indicated that he was under compulsion or duress. Defendant also made no attempt to contact his family to verify that they were held hostage. Trial court determined that (1) compulsion was not available as a defense to murder and (2) proffered evidence was not sufficient to prove compulsion. Defendant was convicted and appealed on the ground that he should have been allowed to use the compulsion defense.

Held, conviction affirmed. The court stated that compulsion or duress is only available as a defense where it is imminent, impending, and continuous. Defendant failed to account for the fact that he had several opportunities to escape and did not use them. State v. Myers, 664 P.2d 834 (1983).

§ 6.20 Entrapment

"[The] Entrapment Defense and the Procedural Issues: Burden of Proof, Questions of Law and Fact, Inconsistent Defenses," by Paul Marcus, 22 CLB 197 (1986).

Florida Police undertook a decoy operation in a high-crime area. An officer posed as an inebriated indigent, smelling of alcohol and pretending to drink wine from a bottle. The officer

leaned against a building near an alleyway, his face to the wall. Plainly displayed from a rear pants pocket was $150 in currency, paper-clipped together. Defendant Cruz and a woman passed by the officer after 10 P.M. Defendant approached the decoy officer, may have said something to him, then continued on his way. Ten minutes or so later defendant and his companion returned and defendant took the money from the decoy's pocket without harming him in any way. Officers then arrested defendant as he walked from the scene. The decoy situation did not involve the same modus operandi as any of the unsolved crimes that had occurred in the area. Police were not seeking a particular individual, nor were they aware of any prior criminal acts by defendant. In prosecution of defendant for grand theft, the trial court granted defendant's motion to dismiss based on entrapment. On appeal, the district court reversed on the ground that the appropriate test for entrapment is subjective.

Held, district court of appeals decision quashed. The Supreme Court of Florida reversed and the majority adopted the following threshold objective test of an entrapment defense: entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity, and (2) uses means reasonably tailored to apprehend those involved in the ongoing criminal activity. The "subjective" view of entrapment, apparently favored by a majority of the U.S. Supreme Court, focuses only on the predisposition of an accused; it permits convictions even where law enforcement agents have employed impermissible methods if it can be shown that, for example, the defendant has previous convictions for similar offenses. Rejecting this approach, the majority stated that the state must make an initial showing that the police conduct did not fall below commonly accepted standards. After the validity of the police activity has been established, the issue of the defendant's subjective predisposition may properly be submitted to the jury. "In other words," the court reasoned, "the court must first decide whether the police have cast their nets in permissible waters, and, if so, the jury must decide whether the particular defendant was one of the guilty the police may permissibly ensnare." Cruz v. State, 465 So. 2d 516 (1985).

Maine Defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor. After leaving a nightclub, defendant passed out in his car in the parking lot. He was awakened by a police officer, who ordered him to move his car. Defendant told the police officer that he was too drunk to drive, but the police officer insisted. Defendant proceeded to start his vehicle, and drove off. Some minutes later, the same police officer stopped defendant, administered sobriety tests, and arrested him for driving while under the influence of alcohol. At trial, defendant claimed that he was induced to drive while under the influence of alcohol by the police officer, and requested that the issue of entrapment be presented, but the trial court refused to instruct the jury on the defense of entrapment.

Held, guilty verdict vacated and case remanded. The Supreme Judicial Court of Maine stated that the trial court had refused to instruct the jury

on entrapment because it claimed to see no evidence of a "scheme, device, subterfuge or lure" on the part of the police officer. The appellate court, however, stated that these are not the only elements of entrapment that a defendant can show. "Entrapment may also be found where government agents, acting under color of apparent authority, order or sanction the activity that comprises the offense for which the defendant is subsequently arrested." Moreover,

> [a]ll that is necessary for the issue of entrapment to be generated is for the record to disclose evidence of entrapment of such nature and quality as to warrant a reasonable hypothesis that entrapment did occur. Once this is accomplished, the burden shifts to the State to prove the absence of entrapment beyond a reasonable doubt.

Further, "[i]nasmuch as the evidence in the case . . . was sufficient to generate the issue of entrapment, it was reversible error to fail to instruct the jury on entrapment." State v. Bisson, 491 A.2d 544 (1985).

Mississippi Defendant appealed his conviction of possession of marijuana with intent to sell. Defendant contended he was entrapped when police officers sold him marijuana and then arrested him.

Held, conviction affirmed. The court held that defendant had to establish he was not predisposed to the crime to prove entrapment. If defendant was not predisposed to the crime and the police established the situation for which he was arrested, then he was entrapped. The court noted in many entrapment cases the police not only supply the contraband but also offer to buy it. The court explained that this is misconduct on the part of the police. In this case, the court determined that there was no police misconduct because defendant was predisposed to the crime. Moore v. State, 534 So.2d 557 (1988).

Nevada Defendant was convicted of larceny and appealed the decision, arguing that he had been entrapped. A decoy officer carrying a shoulder bag with money, including a simulated $100 bill protruding from a tightly zippered pocket, was spotted by co-defendant. Defendant did not see the decoy, but was asked and agreed to aid co-defendant in the crime.

Held, affirmed. Although the money was exposed, the victim was far from helpless. Unlike Sheriff v. Hawkins, 752 P.2d 769 (Nev. 1988), the decoy was not vulnerable with easily obtained money. The court also said that the fact that defendant had no contact with the decoy and that he succumbed to the temptation of co-defendant to stalk their target systematically, evidenced his predisposition to the crime. DePasquale v. State, 757 P.2d 367 (1988).

Nevada After being arrested for theft, defendant filed a petition for a writ of habeas corpus, which was granted. The state appealed. Defendant, a black male, and a friend, a white male, left work on a break and saw a drunken man (a police decoy) with money protruding from a pocket. They passed him and went to a bar. Upon their return to work, they saw the man again. The friend tried to awaken him. When he would not awaken, defendant slipped the bills from the man's pocket, and was arrested, but his friend was released.

According to the police, this was a test of the court's decisions in Oliver v. State, 703 P.2d 869 (Nev. 1985) and Moreland v. State, 705 P.2d 160 (Nev. 1985).

Held, affirmed. In the court's view, the decoy operation used to ensnare defendant was indistinguishable from those employed in *Oliver* and *Moreland.* The police did not uncover crime; they created it. The money was exposed for the express purpose of entrapping someone. The backup officer decided to ensnare persons who fit a "criminal profile" developed by the police that consisted of males between eighteen and thirty, or other persons who, for any reason, impressed the backup officer as being "criminal types." The court found it interesting that defendant's friend was not arrested, although he fit the description and could have been held as an accomplice. The court said that the decoy operation was nothing more than an artificial temptation of the kind that the court had already condemned in *Oliver* and *Moreland.* There was nothing to suggest the two men would have stopped at all if the money had not been openly exposed. Defendant neither engaged in acts of violence nor attempted to find other valuables on the decoy's person; he simply succumbed to the artificially created temptation. Sheriff, Washoe County v. Hawkins, 752 P.2d 769 (1988).

Nevada Defendant was convicted of larceny from the person. He was arrested as a result of a police decoy operation designed to lure "dishonest" people to commit criminal acts in a downtown area of Las Vegas frequented mostly by homeless people. The incident in question began when defendant, such a "street person," walked down the street and happened to see the police decoy. The decoy officer, disguised as a vagrant, was slumped against a tree, pretending to be drunk and asleep. Protruding prominently from a breast pocket of his jacket was a ten-dollar bill, displayed in such a way, the decoy later testified, as "to provide an opportunity for a dishonest person to prove himself." Defendant saw the decoy, and evidently went over to help him. Defendant tried to "awaken" the "vagrant," in order to warn him that the police would arrest him if he did not get up and move on. The police decoy did not respond, and defendant began to step away. At this point, it was established at trial, defendant saw the ten-dollar bill sticking out of the decoy's pocket, reached down, and took it. He was thereupon arrested by the decoy and two other police officers who had been hiding nearby. On appeal, defendant argued that the police officer's activities were improper, and that he was the victim of entrapment.

The Nevada Supreme Court reversed defendant's conviction. The police decoy portrayed himself as susceptible and vulnerable, he did not respond when defendant attempted to wake him, and, moreover, the decoy displayed the ten-dollar bill in a manner calculated to tempt any needy person to commit a crime, whether predisposed to the crime or not. There was no evidence that defendant had any intention of committing larceny when he first approached the decoy. In fact, he initially went to the man's aid. The court further stated that "even after being lured into petty theft by the decoy's open display of currency and apparent helplessness . . . [defendant] did not go on to search

the decoy's pockets or to remove his wallet," further evidence of a lack of disposition to commit the crime. The activities of the police created an "extraordinary temptation" which, thus, constituted impermissible entrapment. Oliver v. State, 703 P.2d 869 (1985).

Ohio Defendant was convicted of trafficking in marijuana. Testimony at a pretrial hearing and at trial established that an informant had participated in the sale negotiations. Defendant testified that this informant had called him numerous times asking for drugs, which he had refused, until this particular instance. The sale was made to a narcotics agent, by direction of the informant. During discovery, defendant had attempted to locate the informant for purposes of his defense. As these efforts proved unsuccessful, defendant requested that the prosecutor divulge the informant's true identity. The prosecutor refused. Defendant contended that the informant's testimony was necessary to establish an entrapment. The trial judge refused to order disclosure of informant's identity, and found defendant guilty. On appeal, the issue presented was whether the identity of the police informant who negotiated the transaction resulting in defendant's arrest and conviction must be revealed.

Held, trial court affirmed and Court of Appeals reversed. The Supreme Court of Ohio stated that the identity of the informant did not have to be revealed where, although the defense of entrapment had been raised numerous times by defendant, there was no record of what occurred between him and informant that might have constituted entrapment. Moreover, defendant twice had the opportunity to present such evidence in response to the trial judge's inquiry and, having failed to do so, was denied discovery of police informant's identity. State v. Butler, 459 N.E.2d 536 (1984).

§ 6.25 Immunity from prosecution

Colorado Defendant was charged with second-degree murder, first-degree assault, and commission of the crime of violence. During an incident with his neighbors, the Volosins, defendant shot and killed Josslyn Volosin and wounded Michael Volosin and another man. The witnesses' versions of the events were in substantial conflict with one another. According to Michael Volosin, he ran to defendant's house after hearing a loud noise at his front door, whereupon defendant's wife opened the door, grabbed him, threw him to the grass, and had him on the ground when defendant came out of the house shooting. In contrast, defendant and his wife claimed that when defendant's wife answered the door, Volosin assaulted her. They claimed that Josslyn Volosin was trying to break up the fight when defendant appeared with a gun and fired four shots.

Section 18-1-704.5(2) of the Colorado Revised Statutes (1986) states that an occupant of a dwelling is justified in using physical force "against another person when that other person has made an unlawful entry into the dwelling" and when other statutory requirements are met. Section 18-1-704.5(3) provides immunity from criminal prosecution for an occupant who uses physical force in accordance with the provisions of Section 18-1-704.5(2). Trial court found that Michael Volosin had made an unlawful entry into defendant's residence and that the defendant had a reasonable belief that Volosin was committing a crime against his wife. The

court therefore held that Section 18-1-704.5(3) granted defendant immunity from prosecution for the charges based on force directed against him. The court also interpreted Section 18-1-704.5 as granting defendant immunity for charges based on force directed against the other two victims who did not enter his home. The court stated that it was the prosecution's burden to disprove beyond a reasonable doubt the facts constituting the basis for application of statutory immunity and that in this case, the prosecution had failed to meet that burden. The state appealed.

Held, reversed and remanded. The court stated that there is nothing in Section 18-1-704.5 suggesting that the General Assembly intended to broaden a home occupant's right to use force against an intruder on the basis of an appearance, rather than an actuality, of an unlawful entry by that other person; therefore, Section 18-1-704(5) provides home occupants with immunity from prosecution only for force used against one who has made an unlawful entry into the dwelling, and that immunity does not extend to force used against nonentrants. Because Section 18-1-704.5 permits a defendant to claim entitlement to immunity at the pretrial stage of a criminal prosecution, the court held that it was reasonable to require the defendant to prove by a preponderance of evidence each statutory prerequisite to this benefit. People v. Guenther, 740 P.2d 971 (1987), 24 CLB 272.

Georgia Defendant, charged with possession and sale of methaqualone, moved to quash the indictment on the ground that the district attorney had granted him transactional immunity. Defendant had been arrested on the charges in 1979. In exchange for furnishing information relating to drug and gambling investigations, the prosecutor gave defendant a letter that purportedly conferred immunity from prosecution on defendant for all violations of the law that occurred in the prosecutor's jurisdiction prior to September 8, 1980, the date of the letter. The letter was initialled by the judge before whom defendant's drug case was pending, and the charges were dismissed. Thereafter, the district attorney was defeated for reelection and his successor presented the dismissed drug case to the grand jury, which returned an indictment against defendant. The trial court refused to grant defendant's motion; the intermediate appellate court reversed, holding that "the promises of the public prosecutor and the public faith pledged by him must be kept."

Held, dismissal of indictment affirmed. The Supreme Court of Georgia, while holding that there was no statutory or common-law basis for the prosecutor's promise of transactional immunity, held that a "prosecutor has, with court approval, the power to promise to forego prosecution, [but] this promise must be limited to prosecution as to specific crimes or transactions." The agreement between defendant and the district attorney, it found, was overbroad because, in substance, it covered all crimes known and unknown; nevertheless, said the court, the agreement was valid and enforceable as to the known crimes that were the subject of the indictment. Further, it decided that to maintain the integrity of the district attorney's office, it was essential that the agreement be binding upon the district attorney's successor. Accordingly, it concluded, the indict-

ment should be quashed. State v. Hanson, 295 S.E.2d 297 (1982), 19 CLB 267.

§ 6.27 Insanity (New)

Arizona Defendant appealed his conviction for first-degree murder and attempted first-degree murder. During his trial, defendant pleaded insanity, and the court instructed the jury that the defense had to prove with "clear and convincing" evidence that defendant was insane at the time of the crime. The court then, in a lengthy explanation, defined the term as "certain" and "unambiguous." The court briefly clarified these latter terms stating that this burden of proof was not as strict as the reasonable doubt standard. On appeal, defendant claimed that the trial court committed a fundamental error in its instruction to the jury.

Held, conviction reversed and remanded. Although the "clear and convincing" instruction was correct, the court erred in its definition, which was too strict and put too great a burden of proof on the defense. The court also believed that the trial court's clarification was too brief to be useful because the court did not define "reasonable doubt" so that the jury could compare that definition to that of "clear and convincing" evidence. State v. King, 763 P.2d 239 (1988).

Montana Defendant was convicted of attempted deliberate homicide and aggravated assault. Defendant's defense at trial was that he lacked the requisite criminal mental state by reason of his insanity. On appeal, his primary contention was that the Montana statutory scheme deprived him of a constitutional right to raise insanity as an independent defense. Montana did away with the affirmative defense of insanity in 1979, and enacted alternative procedures that allow for consideration of a defendant's mental condition. The 1979 law provides that evidence of a defendant's mental disease or defect be considered at three stages of the proceedings. A defendant's condition is to be (1) weighed prior to trial to determine the defendant's competence to be tried; (2) considered by the jury at trial to ascertain whether the state-of-mind element of the crime is met; and (3) scrutinized by the judge at sentencing in deciding whether, at the time of the crime, the defendant was able to appreciate the criminality of his acts or to conform his conduct to the law. If the answer to either of these questions is no, the judge is then required to institutionalize the defendant for a period not to exceed the maximum prison sentence that could be imposed for the crime. Under the statute, the prosecution still retains its traditional burden of proving all the elements of the crime beyond a reasonable doubt.

Held, remanded for re-sentencing. A majority of the Montana Supreme Court found that the statute leaves enough room for consideration of mental condition to satisfy the demands of due process under the Fourteenth Amendment, and rejected defendant's argument for a fundamental right to plead insanity. The statute does not unconstitutionally shift the state's burden of proof on the necessary elements of the offense. The state retains its traditional burden of proving all elements beyond a reasonable doubt. Turning to the Eighth Amendment, the court stressed the sentencing judge's duty under the statute to con-

sider the convicted defendant's conduct at the time of the crime, and to order institutionalization on a finding that defendant suffered from a mental disease or defect. The court concluded that these requirements serve to prevent the imposition of cruel or unusual punishment upon the insane. State v. Korell, 690 P.2d 992 (1984).

Pennsylvania Defendant appealed her conviction for third-degree murder claiming that the Pennsylvania statute concerning the insanity defense was in violation of due process guaranteed by the Fifth and Fourteenth Amendments. Defendant claimed that the prosecution should have been required under due process to prove the sanity of the defendant. If the prosecution cannot prove sanity, then it cannot prove defendant was capable of using reason to commit the crime, defendant contended.

Held, conviction affirmed. The Supreme Court of Pennsylvania concluded that there was no violation of due process. The court determined that sanity is the normal human state. Proving a normal human state beyond a reasonable doubt would put too great a burden on the prosecution. The court stated proof of facts that exonerate the accused from his guilt remain solely the province of the criminal defendant. There should be satisfactory evidence to prove defendant insane, not just a reasonable doubt of defendant's sanity. The court noted that if it accepted defendant's argument, it would establish a rule that would facilitate the insanity defense for heinous crimes; thus the more atrocious the crime, the easier it would be to acquit on the grounds of insanity. Commonwealth v. Reilly, 549 A.2d 503 (1988).

§ 6.30 Necessity

"In Defense of the Defenders: The Vietnam Vet Syndrome," by John R. Ford, 19 CLB 434 (1983).

New Jersey Defendant, a quadriplegic, was charged with possession of marijuana. Defendant claimed "medical necessity" and asserted that he used the marijuana to relieve spasticity associated with his quadriplegia. Defendant claimed that the defense, which provided standards for determining whether conduct that would otherwise constitute criminal conduct was justifiable by reason of necessity, was available under a New Jersey statute. The relevant section of the statute cited by defendant reads as follows:

> Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

The state appealed the use of this defense allowed by the trial court.

Held, reversed and remanded. The New Jersey Supreme Court ruled that defendant could not assert a statutory defense of medical necessity because (1) his conduct was prohibited by law —that is, marijuana is classified as a controlled dangerous substance; (2) other state code provisions dealt with the specific situation involved in this case—that is, exceptions to the law; and (3) the state legislature had expressed an intent to exclude the justi-

fication alleged, as clearly appeared from statutory language permitting the possession of marijuana pursuant to a valid prescription, which defendant did not have and never attempted to get. State v. Tate, 505 A.2d 941 (1986).

§ 6.40 Impossibility of performance

Montana State appealed dismissal of their motion to file an information charging defendant with conspiracy to commit deliberate homicide. Defendant claimed that he could not be charged because the person he was supposed to kill was fictitious. Defendant made an agreement with an undercover agent to kill a person, but defendant did not know this person was fictitious. Defendant claimed the defense of factual impossibility as a defense to conspiracy, because the facts did not support the charge.

Held, reversed and remanded. The court determined that state law supported legal impossibility as a defense, but not factual impossibility. Conspiracy requires that someone contemplate committing an offense. Legal impossibility would mean that defendant had conspired to commit an act that was not illegal. If no offense is intended, no charge can be brought. A charge can be brought when defendant intends to commit a crime even though committing that crime would be impossible. In this case, defendant agreed to kill a person. Although the crime could not be committed, because the intended victim was not real, defendant intended to commit a crime. The fact that the crime could not be committed was immaterial. Therefore, the court determined that factual impossibility is not a defense to conspiracy. State v. Houchin, 765 P.2d 178 (1988).

§ 6.55 Self-defense

Arkansas Defendant was convicted of a double murder. He admitted having shot the victims but claimed self-defense and argued, on appeal, that the trial court erroneously excluded evidence of certain specific acts of violence committed by the victims. The trial court had admitted evidence of the reputation for violence of the decedents and prior specific violent acts known to defendant, but refused to allow evidence of specific violent acts by the deceaseds of which defendant was unaware at the time of the shootings. Defendant asserted on appeal that even if he did not know of the specific violent acts, the excluded evidence was probative on the issue of who was the aggressor.

Held, affirmed. The Supreme Court of Arkansas noted that evidence relating to the victims' aggressive character, including evidence of prior specific acts, was admissible in support of defendant's self-defense claim to the extent that it bore on defendant's state of mind at the time of the shooting. Evidence of prior specific violent acts unknown to defendant at the time of the incident, continued the court, could not be probative on that issue; accordingly, it held, the trial court's ruling was correct. Halfacre v. State, 639 S.W.2d 734 (1982).

Rhode Island Defendant was convicted of manslaughter. He killed a woman cohabitant in the kitchen of the apartment in which he and the woman lived. According to defendant, he acted in self-defense, after the woman attacked him with a 9-inch knife. Defendant claimed that he could not escape his assailant and merely tried to defend himself. Defendant alleged that the woman's fatal wounds were

self-inflicted, the accidental results of defendant's attempts to ward off her attack. According to Rhode Island law, a person who believes that he or she is in imminent danger of bodily harm may use such nondeadly force in self-defense as they believe is reasonably necessary under the circumstances to protect themselves. Before resorting to deadly force, however, the attacked person must attempt to retreat if he is consciously aware of an open, safe, and available means of escape. At trial, defendant requested that the judge instruct the jury that defendant was not obligated to attempt a retreat prior to resorting to the use of deadly force in self-defense, but the judge refused. On appeal, defendant attempted to create a new exception to the retreat requirement by adopting the common-law castle doctrine, which exempts an assailed person from the obligation to attempt a retreat when the attack occurs in the defendant's dwelling, even when the assailant is a cohabitant.

Held, conviction affirmed. The Rhode Island Supreme Court stated that the obligation to attempt retreat before using deadly force in self-defense exists even where one is assaulted by a co-occupant in his or her own living quarters. The court stated that

> A person assailed in his or her own residence by a co-occupant is not entitled under the guise of self-defense to employ deadly force and kill his or her assailant. The person attacked is obligated to attempt retreat if he or she is aware of a safe and available avenue of retreat.

In this case, the court opined, defendant had the option of retreating, but did not do so before using deadly force. State v. Quarles, 504 A.2d 473 (1986).

West Virginia Defendant, convicted of battery, argued on appeal that there should be a reversal because the jury was incorrectly instructed on self-defense. Defendant, a union leader, and complainant, a county prosecutor, had an argument at the latter's office following a meeting with regard to a labor dispute at a county hospital. Defendant refused to comply with several requests to leave and a fight ensued after he allegedly cursed the complainant and urged his followers to take over the office. Over defendant's objection, the trial judge instructed the jury that self-defense was not available to a defendant who engaged in misconduct, either by physical act or violent indecent language, calculated to provoke a breach of the peace. The "peace," explained the judge, "meant the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members."

Held, conviction reversed, verdict set aside, and new trial awarded. The West Virginia Supreme Court stated that the general common-law principle is that self-defense cannot be claimed by a defendant who intentionally provokes a fight; the provocation, it suggested, could consist either of words or physical acts. Here, however, the trial judge's instruction, in substance, implied that indecent language that disturbed the "tranquility" of the community would be insufficient to deprive defendant of his self-defense claim. State v. Smith, 295 S.E.2d 820 (1982), 19 CLB 269.

§ 6.70 Statute of limitations

Nevada After police found a roll of undeveloped film that was over ten years old in defendant's truck footlocker, and after it was developed, defendant was arrested and convicted of lewdness with a minor. On appeal, defendant claimed that the statute of limitations had expired because the crime was not discovered in three years. The state claimed that the statute was tolled because the crime was done in a secret manner.

Held, affirmed. The court concluded that the substantial evidence supported the lower court's decision that defendant had committed a felony in a secret manner under the provision of the state statute: he had used a remote control photographic device to be alone with the victim, hidden the film in his footlocker, denied ever participating in the production of child pornography, and was almost certainly intending to keep this crime secret because of its inherently repugnant nature. The court stated that when a crime is committed in a deliberately surreptitious manner that is intended to and does keep all but those committing the crime unaware that an offense has been committed, the crime is done in a secret manner. The court determined that although there was a victim who was aware of the crime, she could not be expected to act as an adult and report the crime because she was only between the age of five to ten, and a traumatized child will often retreat into silence. The court also determined that the state needed to prove the secret manner exception to the statute of limitations merely by a preponderance of the evidence and not beyond a reasonable doubt, because proving exception to the statute is not the same as proving guilt. Allowing that the state was merely proving jurisdiction, the court tolled the statute of limitations because the crime was performed in a secret manner. Walstrom v. State, 752 P.2d 225 (1988).

§ 6.85 Justification (New)

New York Defendant was convicted of criminal mischief. The charge, along with several assault charges, arose out of a barroom incident during which defendant broke the glass in an emergency fire exit door. The issue before the Court of Appeals was whether defendant was entitled to a charge that the jury could find that his conduct was justified and therefore not criminal.

Held, conviction reversed and new trial ordered. The court found that the trial court erred in ruling that the defense of justification was generally unavailable to one accused of criminal mischief. Defendant's testimony that he broke the glass in an emergency fire exit door when he pushed on the door frame while attempting to retreat from an unprovoked assault by the owner of the bar was sufficient to require the trial judge to give the requested charge on the defense of justification, notwithstanding the fact that he never admitted that he intended to cause property damage. People v. Padgett, 456 N.E.2d 795 (1983).

§ 6.90 Compulsion (New)

Kansas Defendant was convicted of felony murder, aggravated kidnapping, aggravated robbery, aggravated battery on a law enforcement officer, and aggravated battery. Defendant had hitchhiked a ride with Walters, Dunn, and Remeta. The car was pulled over by a county sheriff, who was shot by one

of the passengers. Shortly thereafter, the vehicle reached a grain elevator where one man was shot by Remeta. Two men were taken hostage and eventually killed. Walters was killed in an exchange of gunfire with the police and defendant, Dunn, and Remeta were arrested. Trial court refused to instruct the jury on the defense of compulsion because Kansas statute only provides for the defense of compulsion to crimes other than murder or manslaughter. Defendant appealed.

Held, reversed and remanded. The court determined that compulsion is a defense to charges of felony murder where compulsion is defense to the underlying felony so that the felony is justifiable. It was held that a defendant is not precluded from asserting a compulsion defense by denying commission of the crime where the compulsion issue is raised by evidence. In a compulsion defense, coercion or duress must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done; compulsion must be continuous and there must be no reasonable opportunity to escape the compulsion without committing the crime. Supporting evidence was sufficient to require compulsion instruction in this case. Defendant established that Remeta was a man to be feared. Prior to the events at the grain elevator, Remeta fired a gun out of the car window several times, refused to let defendant out of the car, talked about a hitchhiker he wished he had killed, and described other crimes he had committed, including several murders. Viewed in the light most favorable to defendant, and in light of the fact that it was undisputed that Remeta had possession of a weapon at all times, it was impossible for defendant to escape. Evidence for a compulsion defense came not only from defendant but also from Remeta and the state's witnesses. Because the trial court effectively prevented the jury from considering the evidence presented in defendant's defense when it refused the request of compulsion instruction, the case was reversed and remanded. State v. Hunter, 740 P.2d 559 (1987).

Part II – STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

7. JURISDICTION AND VENUE

§ 7.00 Jurisdiction

Pennsylvania Defendant, an attorney, was arrested and charged with bribery, obstructing the administration of law, conspiracy, and solicitation by agents within the office of the attorney general. The charges arose from an alleged attempt by defendant to bribe two police officers relating to a matter pending before a district justice. Defendant, after preliminary hearing, was held under bond for trial. Thereafter, an information was prepared and filed by the attorney general. In turn, defendant filed a petition asserting, among other things, that the information should be quashed because the attorney general lacked authority to bring the prosecution. The petition was granted, and the superior court, sitting en banc, concluded that the power of the attorney general to prosecute criminal matters was prescribed by Section 205 of the Commonwealth Attorneys Act and thus dismissed the information. The commonwealth appealed.

Held, affirmed. The Pennsylvania Supreme Court held that none of the criminal charges against defendant relating to his attempt to bribe two policemen to change their testimony, on a pending matter before a district justice, fell within any of the categories of cases subject to concurrent jurisdiction of the attorney general with the district attorney under provision of the Commonwealth Attorneys Act. The two police officers were not state officials or employees and the charges neither involved a corrupt organization nor were ones investigated by and referred to the attorney general by a commonwealth agency pursuant to a statute enforced by that agency. Indeed, none of the charges came within any class of case covered by Section 205(a) of the Act. Commonwealth v. Carsia, 517 A.2d 956 (1986), 23 CLB 403.

§ 7.05 Venue

U.S. Supreme Court After a Pennsylvania jury trial leading to defendant's conviction of first-degree murder and rape, he was sentenced to life imprisonment. However, the Pennsylvania Supreme Court reversed after finding that defendant's confession had been obtained improperly. During voir dire for a second trial, defendant's motion for a change of venue based upon the dissemination of prejudicial information was denied, and he was convicted. The trial court found that there was practically no publicity be-

tween the two trials and that the jury was unbiased. After the Pennsylvania Supreme Court affirmed and the district court denied habeas corpus relief, the court of appeals reversed.

Held, reversed. The voire dire testimony and the record of publicity did not reveal the kind of "wave of public passion" that would have made a fair trial unlikely. The Court also ruled that a trial court's findings of impartiality may be overturned only for manifest error. The fact that the majority of the panel "remembered the case" but nothing more was essentially irrelevant in the Court's view. Patton v. Yount, 104 S. Ct. 2885 (1984), 21 CLB 75.

California Defendant and his brother were charged with murder, rape, burglary, and kidnapping in connection with the death of a young white woman in a small, white community. The brother was found guilty in a separate trial and sentenced to death. The defendant sought a peremptory writ to compel a change of venue.

Held, writ issued. The Supreme Court of California granted the change of venue. It cited the influence of four factors which when taken together strongly indicated the need for a change of venue: (1) extensive publicity, including newspaper coverage of the crime and the brother's trial on a weekly or biweekly basis over a two-year period and coverage of the defendant's two arrests while on bail; (2) the small population (117,000) of the county where defendant would normally be tried; (3) the sensational nature and gravity of the offenses charged, even though the gravity may have been somewhat mitigated by the fact that the death penalty was no longer being sought; and (4) the status of the victim and the accused in the community, considering that the accused was a black with an arrest record in a more-than-99-percent white community where he had no friends, whereas the victim came from a family prominent in the community. Williams v. Superior Court of Placer County, 668 P.2d 799 (1983).

Georgia In 1975, defendant was convicted in superior court of murder and was given two consecutive life sentences. However, defendant's convictions were reversed in federal habeus corpus proceedings because of a burden-shifting jury instruction. Defendant was retried in same court, but the jury was unable to reach a verdict and a mistrial was declared. Subsequently, the superior court judge presiding over defendant's retrial entered an order, on his own motion, decreeing a change in venue on the ground that "after two trials and the accompanying publicity . . . an impartial jury cannot be obtained." Defendant filed a petition for writ of prohibition against the change of venue, which was denied, and he filed the petition again.

Held, reversed. The Supreme Court of Georgia reversed the order denying the petition for writ of prohibition, ruling that the superior court judge lacked the authority to grant a change of venue on his own motion and over the defense's objection. State statutory law gives defendant in a criminal case express authority to move for a change of venue where an impartial jury cannot be obtained in the county where the crime was alleged to have been committed; and it provides authority for a superior court judge to grant a change of venue on his own motion only when "in his judgment, there is danger of violence being com-

mitted on the defendant, if carried back to, or allowed to remain in the county where the crime is alleged to have been committed." In accordance with state constitutional and statutory law, the superior court judge lacked the authority to grant a change of venue on his own motion and over defense objections that a fair and impartial jury could not be obtained in the county where the crime was alleged to have been committed and was tried. Patterson v. Faircloth, 350 S.E.2d 243 (1986) 23 CLB 394.

Mississippi Defendant was extradited to Mississippi in connection with the killing of his stepfather. He filed a motion for change of venue, and after a hearing, the motion was denied. After conviction for capital murder, defendant appealed on several claims of error. One claim was that the court erred in denying his attorneys' request for a reasonable amount for expenses in order to conduct an investigation into the mood and attitude of the community toward defendant in furtherance of his motion for change of venue.

Held, affirmed. The Supreme Court of Mississippi affirmed the denial of such expenses. The Mississippi statute allows for reimbursement to an indigent's appointed counsel for "reasonable expenses," but does not define those expenses. Whether to allow expenses for obtaining an expert is not a question of due process entitlement; it must be decided on a case-to-case basis, and generally has been denied. In the instant case, the purpose of the request for expenses to hire an investigator was to show the disposition of the community, which ultimately was shown by other means. However, defendant's attorneys failed to outline any specific cost for the investigation. Applying the case-by-case approach it first had applied in a 1979 decision, the court held the denial of reasonable expenses to conduct the investigation was not error. Billiot v. State, 454 So. 2d 445 (1984), 21 CLB 186, reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858 (1985).

California Defendant was convicted of burglary, rape, kidnapping, and murder. Before trial, defense counsel moved for a change of venue over the objections of defendant, who contended that he was being deprived of his right, under both the federal and state constitutions, to be tried by a jury drawn from the area (vicinage) where the crime was allegedly committed. He appealed his conviction, arguing that his vicinage right was violated.

Held, affirmed. The court said that the mere fact that vicinage is an essential feature of the federal right to jury trial, as well as an aspect of the state constitutional right, does not mean it cannot be waived by counsel. Although there are certain fundamental protections guaranteed an accused, which counsel may not waive without his client's concurrence, vicinage is not one. The court rejected defendant's argument, however, because the historic nature and purpose of the vicinage right indicates it is not a personal one. The rule that crimes are tried in the community where they occurred, by jurors drawn from that community, protects the interests and rights of the community; therefore, the vicinage right belongs to the community as well as to the accused. Accordingly, the court concluded the vicinage right is not a personal one. A change of venue to ensure a fair trial, even over an accused's objec-

tions, did not threaten the respect for the individual. People v. Guzman, 755 P.2d 917 (1988).

Pennsylvania Defendant was held in civil contempt and committed to prison after she testified to a grand jury that she could not recall the events about which she was being questioned. Defendant was charged with two counts of burglary and two counts of conspiracy. While being questioned before a grand jury, she claimed she had no recollection of having participated in the burglaries. The supervising judge held her in civil contempt and sentenced her to six months' imprisonment unless she answered the questions before her.

Held, reversed. The court said that it was clear from the record that defendant did not refuse to answer questions before the grand jury, but had replied that she "could not recall" to all questions. Therefore, a witness who answers questions cannot be in contempt of court for not answering the questions. Assuming defendant was lying under oath (as the supervising judge obviously felt she was), the only sanction would be an indictment for perjury. In re Investigating Grand Jury, 544 A.2d 924 (1988).

8. PRELIMINARY PROCEEDINGS

§ 8.00 Grand jury proceedings

"Challenging Grand Juries Called by Public Petition," by Phillip S. Althoff and William H. Greig, 20 CLB 217 (1984).

New Jersey Defendant and others were indicted for participating in a conspiracy to defraud various insurance companies through the submission of false documents, as well as other charges. Prior to trial, defendant moved to dismiss the indictment, alleging that prosecutorial abuse had influenced the state grand jury that had indicted him. Two members of the grand jury investigating insurance fraud had revealed that they were employed by defrauded insurance companies. Even though the assignment judge supervising the grand jury was available, one of the deputy attorneys general did not consult the judge. Instead, the deputy attorney general excused one of the grand jurors, and, in accordance with a vote by the rest of the grand jurors, retained the other one.

Held, affirmed. The New Jersey Supreme Court found that the supervising court had the power and the responsibility to determine the impartiality of grand jurors, even though neither state rules nor the New Jersey grand jury manual impose specific responsibility for inquiring into the potential bias of prospective grand jurors, because of the statutory responsibility assigned to the highest court to promulgate rules governing the procedures of state grand juries, and because of the explicit power of courts to excuse grand jurors for cause. This necessarily gives rise to a duty on the part of a prosecutor to bring to the judge's attention the existence of any possible juror bias, which the judge should then determine. The court stated that any future departure from these procedures would

lead to dismissal of any resulting indictment, even though the court declined to reverse this conviction. State v. Murphy, 538 A.2d 1235 (1988).

North Dakota A county court judge ordered the preliminary examination hearing of defendant, charged with murder and attempted murder, closed. In North Dakota, a preliminary examination is in lieu of grand jury proceedings and indictment. The purpose of the preliminary examination is to determine if a crime has been committed and if probable cause exists requiring the accused to stand trial. Defendant, with the concurrence of the state's attorney, requested the closing order. The county court requested and received briefs from all interested parties before issuing the order. The petitioners, various newspapers and broadcasters, petitioned the North Dakota Supreme Court for an ex parte order staying the preliminary hearing of defendant until the high court ruled on the petition challenging the order of the county judge closing the preliminary hearing.

Held, affirmed. The appellate court concluded that the county judge did not abuse his discretion in ordering the preliminary hearing closed to the news media. It stated that the purpose of a preliminary examination is to determine if a trial should be held to determine the guilt or innocence of the accused. It is also a safety device to prevent the accused's detention without probable cause. Generally, only the prosecution presents evidence of its version of the matter. This may include hearsay and other prejudicial testimony not admissible at the trial, including evidence obtained by illegal means, and thus, in certain circumstances, may violate the accused's constitutional right to a fair trial if such prejudicial testimony is made public before the trial. The court emphasized that it could not ignore the fact that pretrial publicity of inadmissible evidence can defeat the defendant's constitutional right to a fair and public trial, and added that pretrial prejudicial publicity has caused the reversal of a conviction. Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72 (1983).

§ 8.05 —Subpoena

Wisconsin Respondent, a ten-year-old girl, was subpoenaed to testify against her mother in the latter's trial for murder and child abuse; her mother was charged with killing respondent's younger sister and with acts of abuse against respondent herself. Respondent's guardian ad litem moved to quash the subpoena, on the grounds that she was "of such tender years and in such a psychological and emotional state that requiring her to testify creates a probability of psychological damage to her far outweighing the probative value of any testimony she may give." The trial court directed a hearing and after taking testimony from a psychiatrist, a social worker, and respondent's foster-mother, concluded that "it would probably do great [emotional] harm to [respondent] if she were required to testify"; accordingly, the court ordered the subpoena quashed. The state then appealed.

Held, order quashing the subpoena vacated and case remanded. The Supreme Court of Wisconsin noted that the case presented a conflict between the best interests of the child witness and well-accepted legal principles:

> The well-accepted legal principle, a fundamental tenet of our modern legal system, is that the public has a right to every person's evidence except for those persons protected by a

constitutional, common-law, or statutory privilege.

* * *

The principle and its corollary—that each person has a duty to testify—are basic to the adversary system. The integrity of the legal system depends on the court's ability to compel full disclosure of all the relevant facts under the rules of evidence. The theory of the adversary system is that examination of all persons who have relevant information will develop all relevant facts and will lead to justice. [Citations omitted.]

Other than in child custody cases, in which the policy considerations were different from those underlying criminal prosecutions, it found no authority or precedent for excusing a witness completely from his obligation to testify because of potential emotional harm. Here, the court found that concern for the child's well-being should yield to concern to protect the child and society from further injury by bringing to trial the child's abuser: "excusing [respondent] from testifying might spare her stress now but might harm her in the long run by failing to allow the state to bring to trial and possible conviction the alleged abuser." Nevertheless, the court directed that the child witness be given the maximum protection consistent with the public interest in bringing the accused to trial and held the trial judge, prosecutor, and defense counsel responsible "to use their collective intellectual resources to devise a way so that [respondent] testifies with minimal trauma." State v. Gilbert, 326 N.W.2d 744 (1982), 19 CLB 387.

§ 8.10 —Immunity

New York Three felony complaints against defendant charged him with promoting gambling in the first degree and possession of gambling records in the first degree. The offenses allegedly occurred on April 17, May 3, and July 23, 1980. On August 28, 1980, defendant pleaded guilty to three misdemeanor offenses of attempting to promote gambling, in full satisfaction of the outstanding charges. The court accepted the plea and scheduled defendant to appear for sentencing on October 23, 1980. Prior to being sentenced, defendant testified before the Grand Jury concerning the May 3 transaction. Defendant did not assert his right against self-incrimination nor did he sign a waiver of immunity prior to or during his Grand Jury appearance. The Grand Jury defendant moved to dismiss the charges to which he had previously pleaded guilty, but had not been sentenced, claiming that he had acquired immunity relying on provisions of the Criminal Procedure Law dealing with transactional immunity. Defendant claimed that he had not executed a waiver and therefore he automatically acquired immunity pursuant to the statute.

Held, order reversed and case remitted. The New York Court of Appeals ruled that a defendant who pleads guilty and then happens to give Grand Jury testimony concerning the offense before sentence is imposed cannot claim to have acquired statutory immunity from prosecution or punishment for the offense to which he has pleaded guilty. People v. Sobotker, 459 N.E.2d 187 (1984).

§ 8.15 Arrest

"Arrest for Minor Traffic Offenses," by Arthur Mendelson, 19 CLB 501 (1983).

"Enforcement Workshop: Arrests on Reasonable Suspicion," by James F. Fyfe, 19 CLB 470 (1983).

Arkansas Defendant was convicted of murder and arson. The murder victim, defendant's uncle, did not perish as a result of a fire, but was killed by a shotgun blast. Defendant was observed at the scene of the fire that engulfed his uncle's dwelling, and which was set after decedent had been shot. Defendant, a suspect in the murder, was picked up the morning after the fire and brought to a sheriff's office. At the sheriff's office, defendant, who appeared to be intoxicated, was searched by a deputy sheriff, who found an empty whiskey bottle in defendant's boot. Defendant was thereupon arrested for public intoxication. An inventory search of defendant's person was then conducted, which yielded a shotgun shell similar to that used in the murder. The deputy sheriff had defendant change clothes, and he gave the clothes defendant had been wearing to a state police investigator in charge of the murder and arson investigation. A laboratory examination of the clothes revealed blood that matched the type of the murder victim. Defendant was subsequently charged with the murder and arson. Before trial, defendant moved to suppress the evidence uncovered in the search, on the grounds that there was no probable cause to arrest him for public intoxication, and that the search was conducted incidental to an illegal arrest for the murder and arson. The trial court denied defendant's motion to suppress. On appeal, defendant argued that the evidence obtained from him was the result of an unlawful arrest, and, as such, should have been excluded.

Held, reversed. The Arkansas Supreme Court found that the evidence seized from defendant in the search following his arrest for public intoxication was inadmissible, as the arrest was illegally based on a pretext. The facts established that the search had no relation to the arrest for public intoxication. The police did not inform defendant that he was being held as a suspect in the murder and arson investigation, and testimony by the police revealed that they would not have let defendant go if he so desired. The arrest for public intoxication was a pretext for conducting a search of defendant, who was a suspect in the murder and arson investigation. The circumstances of the arrest and search determined that the real intent of the officers was to investigate the murder and arson, and that the public intoxication arrest and search were a pretext. Such pretext can be found from the fact that the search had no relation to the nature and purpose of the public intoxication arrest. Since evidence obtained in an inventory search conducted pursuant to an illegal arrest is inadmissible, the evidence obained pursuant to the arrest for public intoxication should have been suppressed. Richardson v. State, 706 S.W.2d 363 (1986).

Montana Defendant was convicted of obstructing a peace officer, aggravated assault, and escape. The convictions and charges arose out of an incident in which defendant attempted to elude a law officer who stopped the motor vehicle in which defendant was a passenger. The incident began when an enforcement officer with the Montana Department of Highways observed a tractor-trailer pulling a skid-

der and caterpillar that seemed to be overweight and overwidth. The officer pursued the tractor-trailer, activating the lights on his patrol car, but the truck did not immediately pull off the road. After about three miles of pursuit, during which time the officer drew alongside the truck and motioned for the driver to stop, the truck pulled off the highway. The officer thereupon asked the driver to produce various documents, during which time defendant got out of the truck's cab and began to unhitch the skidder from the trailer. The officer thereupon requested that defendant cease his actions, since the officer intended to weigh the trailer. Defendant ignored the officer's instructions, and the officer repeated them. Defendant continued to ignore the officer's request and to unchain the skidder. The police officer then told defendant that he was under arrest for refusing to allow the weighing of the trailer. Defendant thereupon lifted a chain binder and threatened the officer with it. The officer at that point returned to his patrol car and radioed for police assistance, repeating to defendant that he was under arrest and should not remove the skidder. Defendant continued to do so, and then prepared to leave in a pickup truck. The officer again told defendant that he was under arrest and should not leave the scene. Defendant nonetheless left the scene. He was subsequently apprehended. After his convictions, defendant appealed, on the ground that he had not really "escaped" from official detention because he had never submitted to the custody of the law enforcement officer and had not been physically restrained by him.

Held, convictions affirmed. The Montana Supreme Court stated that defendant was properly charged and convicted of escape, although he was never physically restrained by the arresting officer. Physical restraint is not necessary for an arrest to occur. The standard for an arrest when there is no physical restraint is whether a reasonable person, innocent of any crime, would feel free to walk away under the circumstances. In this case, the facts and circumstances clearly showed that any reasonable person in defendant's position would have realized that he was under arrest and not free to leave the scene. No physical restraint was required by the officer to arrest defendant validly. Defendant was properly charged and convicted of escape because he secured his release by a threat of physical force or violence. State v. Thornton, 708 P.2d 273 (1985).

§ 8.35 Pretrial proceedings

Idaho Defendant was convicted of aggravated battery. During the trial, defendant's sister, although subpoenaed, did not testify. The state tried to secure her testimony but failed. Relying on State v. Mee, 102 Idaho 474, 632 P.2d 663 (1981), the trial court allowed the sister's testimony from the preliminary hearing to be introduced.

Held, reversed and remanded. On review, the court decided to overrule *Mee,* saying that a preliminary hearing is in no sense a trial, and, therefore, it does not require the same formality and precision observed at a trial. If an accused must anticipate that upon his ultimate trial he may be faced with the testimony taken at the preliminary hearing, he must be thoroughly pre-

pared at the preliminary hearing. The resulting preliminary hearing procedure would then duplicate the effort of the subsequent trial. The court emphasized that its decision was based not on an asserted violation of the confrontation clause of the U.S. Constitution, but rather on the independent right of a state to exercise its own authority in this area and the view that public policy considerations require such decision. Finally, the court concluded that its decision would apply only to this and similar pending and future cases. State v. Elisondo, 757 P.2d 675 (1988).

Kansas Defendant was charged with two counts of aggravated battery. A preliminary hearing was conducted at which the state and defendant called witnesses and introduced evidence. At the close of the hearing, the trial court dismissed the complaint and discharged defendant. The state appealed. Two issues were raised in the appeal. First, the state contended that the trial judge erred at the preliminary hearing by requiring the state not only to meet its statutory burden of proof, but also to disprove defendant's possible defenses. Second, defendant contended that an appeal by prosecution was not the proper procedure after a dismissal of a complaint at a preliminary examination.

Held, dismissal reversed and case remanded. The purpose of a preliminary examination is not to determine whether defendant is guilty beyond a reasonable doubt, but to determine whether it appears that a crime has been committed and whether there is probable cause to believe that defendant committed it. It is an inquiry as to whether defendant should be held for trial, not as to his guilt or innocence. Whenever there is a reasonable doubt as to defendant's innocence or a conflict of testimony raising a factual issue, defendant must be bound over for trial. Defendant's contention that an appeal by prosecution was improper was without merit, as Kansas law expressly provides otherwise. State v. Jones, 660 P.2d 965 (1983).

Oregon In a criminal prosecution for rape and sexual abuse, defense counsel moved for a pretrial order to produce the complaining witness, a minor child, for an interview. The trial judge ordered the mother, a nonparty, to produce the child, and the state brought a mandamus order charging that the judge lacked the authority to enter the order.

Held, preemptory writ issued. The Supreme Court of Oregon held that the trial judge did not have the power to order the district attorney to produce a witness for a pretrial interview. The court noted that the judge could not have directly ordered the witness to appear for an interview, and therefore could not order the mother in this case to produce the child for an interview. The child was not involved in a custodial relationship with a state agency that arguably could provide the district attorney with authority to compel the mother to produce the child. No statutory authority existed that empowered the district attorney to order a witness to appear for a pretrial interview with defense counsel. The court noted that the state-constitutional-compulsory-process provision was meant only to guarantee the right to obtain witness testimony at trial and does not require or empower the state to actively assist the defense by ordering its witness to appear for a pretrial interview. Upham v. Bonebrake, 736 P.2d 1020 (1987).

West Virginia Defendant was convicted of burglary and petit larceny. Defendant appealed his convictions, contending the trial court erred in denying a motion to suppress his confessions based upon an alleged prompt presentment violation. Before his release by Ohio officials, defendant signed a written waiver of his *Miranda* warnings at 9:55 A.M. for the West Virginia officials. After his arrival in West Virginia, defendant again waived his rights in writing at 2:50 P.M. The chief of police wrote down defendant's confession in question and answer form, and defendant signed it at 3:10 P.M. After the statement was typed and signed again, defendant was taken before a magistrate. Defendant focused on the delay after he waived extradition in Ohio and was transported from Ohio to West Virigina.

Held, affirmed. The court said that ordinarily courts do not count the time consumed in transporting the defendant from where he was apprehended to the magistrate's office. In the present case, *Miranda* warnings were given when the West Viriginia officers obtained custody of defendant in Ohio, but no intensive interrogation occurred until they arrived at the police station in West Virginia, where a signed waiver of his *Miranda* rights was obtained, and his confession followed within one-half hour. He was taken to a magistrate shortly thereafter. Under these circumstances, the court found no violation of the prompt presentment rule. State v. Bennett, 370 S.E.2d 120 (1988).

West Virginia Defendant allegedly assaulted a ten-year old girl. At that time defendant was thirty-one years old and had been living with the mother of the girl. Defendant was arrested and retained an attorney. Defendant's preliminary hearing was held in his attorney's absence and he was later indicted and convicted of sexual assault in the third degree. Defendant contended that the holding of the preliminary hearing in the absence of his attorney constituted error.

Held, conviction reversed and case remanded. The Supreme Court of Appeals stated that the absence of defense counsel at the preliminary hearing was not harmless beyond a reasonable doubt because defendant lost an important opportunity to effectively interrogate witnesses under oath prior to trial, at least with respect to impeachment. Furthermore, the record contained evidence that the victim's mother testified at the preliminary hearing; thus defendant, absent counsel, lost an opportunity at that hearing to discern her knowledge of the case. The mother did not testify at trial. State v. Stout, 310 S.E.2d 695 (1983).

§ 8.50 Prosecutor's discretion to prosecute

Texas Defendant was arrested for unlawful possession of a firearm. Because the arresting officer knew defendant had been convicted of a felony previously, the weapons charge was filed as a felony initially but then reduced to a misdemeanor when the prior conviction was erroneously overlooked during booking. When defendant was sentenced to imprisonment on an outstanding but unrelated intoxicated driving charge, the weapons case was dismissed by the prosecutor; the dismissal was not part of a plea bargain. Subsequently, defendant applied for and received an early release from prison. The officer who had arrested defendant on the weapons violation, learning of his early release, rearrested him for the same incident, again filing

it as a felony. Defendant was indicted and convicted of the felony weapons action, alleging that the second prose- offense; he brought a habeas corpus cution on the charge was motivated by prosecutory vindictiveness. Defendant claimed that he was prosecuted a second time because of his early release from the intoxicated driving sentence. Defendant's application was denied and he appealed.

Held, writ of habeas corpus denied. The Texas Court of Criminal Appeals, en banc, relying on United States v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), stated that where charges pending against an accused are increased pretrial, the accused has the burden of establishing prosecutory vindictiveness. It found distinguishable a line of cases, cited by defendant, holding that a presumption of vindictiveness exists when an increased sentence is imposed upon a defendant after retrial following a successful appeal. Here, it appeared from the record that the original felony charge was valid and had been reduced because of a clerical error. The fact of the subsequent reinstatement of the felony charge, without more, was not sufficient to discharge defendant's burden of proof. Ex parte Bates, 640 S.W.2d 894 (Crim. App. 1982). 19 CLB 382.

§ 8.60 Right to counsel (New)

Arizona Defendant was arrested and charged with driving while under the influence of intoxicating liquor or drugs while his license was suspended, revoked, or refused, and with driving with a blood-alcohol level of .10 or more while his license was suspended, revoked, or refused. After his arrest, defendant was taken to a police station, where he asked to call his attorney, which request was granted. Defendant left a message with his attorney's answering service. About fifteen minutes later, the attorney called defendant at the police station and asked to have a confidential phone conversation with defendant. Defendant was allowed to talk to his attorney on the telephone, but a police officer remained in the room and refused to leave. The police officer stood close enough to defendant to hear some of the phone conversation. The attorney was unable to ask defendant certain questions about defendant's condition and conduct prior to his arrest because of the proximity of the police officer. Without this information, the attorney was unable to advise defendant how to proceed. Defendant thereupon submitted to a breathalyzer test. Defendant later moved to dismiss the charges against him on the ground that he was deprived of his right to counsel because he was not allowed to consult with his attorney in private. The state claimed that defendant had no right to consult with an attorney before deciding whether to submit to a breathalyzer test.

Held, both charges dismissed. The Arizona Supreme Court declared that defendant was denied his right to counsel when he was not allowed to confer with his attorney in private, even though he was not entitled to consult with counsel prior to deciding whether to submit to a breathalyzer test. The state may not prevent an accused from consulting with counsel when such access would not delay unduly the DWI investigation and arrest, including a breathalyzer test. Once defendant began talking to his attorney, in this case by telephone, he had a right to privacy and confidentiality as long as such right did not

impair the investigation or the accuracy of a breathalyzer test. In this case, the short period between the time when defendant wished to speak to his attorney and the eventual administration of the breathalyzer test would not have severely impaired the results of the test or the rest of the investigation. Defendant was, therefore, denied his right to counsel by the police officer's refusal to leave the room during the attorney-client phone conversation. State v. Holland, 711 P.2d 592 (1985).

§ 8.65 Right to interpreter (New)

California Defendant Juan Rodriguez was charged with kidnapping and discharging a firearm at an inhabited dwelling; his cousin, defendant Barbaro Rodriguez, was also charged with kidnapping. At the start of the trial, two interpreters, Mona Rich and Enma Helou, were sworn to assist defendants. Thereafter, Helou was used to interpret for a Mrs. Michael and her nephew Huerta, witnesses in the case, while Rich remained to interpret for both defendants. Defendants shared Helou's services during her assistance to other witnesses as well. The record does not indicate which interpreter was assigned to act for which defendant. Defendants were found guilty as charged and appealed on the grounds, among other things, that they were improperly and unconstitutionally denied full-time assistance of an interpreter by being required to share one intepreter.

Held, conviction affirmed. The Supreme Court of California held that any error in defendants' sharing of an interpreter was harmless beyond a reasonable doubt. It cited Chapman v. California, 386 U.S. 18 (1967), under which a federal constitutional error may be deemed harmless if the appellate court is "able to declare a belief that it was harmless beyond a reasonable doubt." Nothing in the record in the instant case established that either defendant's ability to communicate or comprehend was impeded. Although at various times during the appeal defendants made generalized assertions that their defenses were at odds because the underlying conduct of which each was accused was different, they suggested neither an actual nor potential specific conflict in their defenses. In addition, there was no evidence of an interference in consultations between counsel and defendants; therefore, reversal was not mandated. People v. Rodriguez, 728 P.2d 202 (1986), 23 CLB 294.

9. INDICTMENT AND INFORMATION

§ 9.00 Indictment and information

Delaware Defendant, convicted of delivering methamphetamine, argued on appeal that the indictment should have been dismissed because it failed to identify him by his proper name. The indictment was issued in the name of James O. Mayo, after an undercover officer identified defendant's photo from police records listed under that name. At trial, defendant denied that he was known as James O. Mayo and produced various documents identifying himself as James O. Carter. Police witnesses testified that defendant was the person who sold the contraband to the undercover officer and that defendant's fingerprints matched those in the Mayo files.

Held, affirmed. The Delaware Supreme Court sustained the indictment invoking an exception to the general rule that "a substantial misnomer or mistake in either the Christian name or surname of a defendant will, as a general rule, vitiate an indictment and entitle the defendant to dismissal." Where a defendant is known by an alias or other name, it held, an indictment charging him by either name is sufficient. In any event, stated the court, defendant had waived any objection to the misnomer by failing to raise it before trial. Mayo v. State, 458 A.2d 26 (1983), 20 CLB 67.

Oklahoma Defendant argued for reversal of her conviction because the information charging her with soliciting for lewd and immoral acts lacked specificity and should have been dismissed. The factual portion of the information recited that defendant "did solicit one Bobby Carter to commit an act of lewdness with her, the said defendant, by then and there asking the said Bobby Carter to engage in lewd acts with her for hire in violation of a state statute."

Held, reversed. The Criminal Appeals Court stated that "to be adequate, an information must apprise the defendant of what acts he or she must be prepared to meet in the prosecution of the case and to defend against any subsequent prosecution for the same offense." Here, it found, the language of the accusatory instrument was conclusory and failed to appraise defendant of the particular acts that gave rise to the charge. Accordingly, it held, the information was fatally defective. Wirt v. State, 659 P.2d 341 (Crim. App. 1983), 20 CLB 66.

10. PRETRIAL MOTIONS

§ 10.15 —Severance

New Jersey Defendants were charged with murder and possession of a weapon with intent to use it unlawfully. Defendants, who were brothers, had made statements implicating each other, but only one of them had confessed to the crime. The other brother claimed to have been much less involved in the killing, although he was at least an accessory after the fact, according to a statement made to police. The state attempted to have defendants tried together, but they sought separate trials.

Held, decision of Appellate Division affirmed. The New Jersey Supreme Court ruled that when the confession of any co-defendant involving any other co-defendant cannot be excised effectively co-defendants should receive separate trials. The statement of a co-defendant against another co-defendant is inadmissible hearsay and violative of defendant's Sixth Amendment right to confront witnesses. Implicatory statements of a defendant are not admissible just because the statements are to some extent corroborated by inculpatory statements made by the other defendant. The court stated that its concern in this case was "preventive" and not "remedial" action, since the decision was made in the context of pretrial proceedings, and not after a jury verdict. In the interests of justice, therefore, defendants should have their trials severed from each other. State v. Haskell, 495 A.2d 1341 (1985).

Rhode Island Defendant, convicted of murder, argued on appeal that he was entitled to a new trial because the court below refused to grant his motion to sever his case from that of two co-defendants. Defendants Tavares and Matera were tried jointly for the murder. The prosecutor established that the three had engaged in an argument with the deceased immediately before the killing and that Tavares was seen holding the murder weapon, an icepick, immediately after; however, no witness saw the actual stabbing. Tavares took the stand in his own defense and testified that defendant stabbed deceased. Defendant, who did not testify, was subsequently convicted.

Held, reversed and remanded. The Supreme Court of Rhode Island stated that "[a] defendant's rights to a fair trial is sufficiently threatened so as to warrant severance when he and his co-defendant present antagonistic defenses." A real, substantial, and irreconcilable conflict, it suggested, made it likely that the jury would determine guilt based upon the conflict alone. Here, by denying the motion for severance, the trial court forced defendant to face the accusations of his co-defendant as well as of the state; defendant was thus unable to rely on the absence of eyewitness testimony to the slaying as his defense. The resulting prejudice to defendant, ruled the court, was severe enough to warrant a new trial. State v. Clarke, 448 A.2d 1208 (1982), 19 CLB 175.

§ 10.30 Motion to suppress

Colorado Defendant filed a motion to suppress an information charging her with possession of a Schedule I controlled substance. The motion was based on the assertion that state police officers who arrested her had willfully and illegally gone outside their jurisdiction to make the arrest. The state countered that the officers had acted in response to a tip from a confidential informant calling for immediate action, whose existence defendant questioned. The district court dismissed the information after prosecution failed to produce the informant at an in camera hearing, as ordered by the court.

Held, dismissal affirmed. The Colorado Supreme Court, en banc, ruled that although the government had a qualified privilege to keep sources of law enforcement information confidential, the privilege must give way when the informant's identity is relevant and helpful to the defense or essential to a fair determination of cause. Dismissal of an action is appropriate if the government fails to disclose in contravention of a court's order. The court must balance the public's interest in protecting the flow of information to law enforcement authorities about criminal activity with defendant's need for evidence to prepare for a defense. (Ronaro v. United States, 353 U.S. 53, 62; 77 S. Ct. 623, 628 (1957).) The trial court could properly suppress evidence gained by a police officer in contravention of a state statute governing extraterritorial arrest if the evidence also infringed defendant's right to be free of unreasonable searches and seizures guaranteed by the state constitution. Here, the trial court properly ordered disclosure of the informant, since there was a reasonable basis in the evidence to question the police officers' credibility and motive in the extraterritorial arrest that was central to determination of defendant's motion to suppress. People v. Vigil, 729 P.2d 360 (1986), 23 CLB 396.

Pennsylvania. Defendant was convicted of murder of the third degree for beating to death his nineteen-month-old son. On appeal, he contended that the trial court improperly denied his motion to suppress a statement of confession he made at the time of his initial arrest because he had not received a prompt arraignment. The initial arrest was made after the arresting officers received information from defendant's wife implicating him in the beating. After receiving *Miranda* warnings, defendant confessed to the assault. He was released three hours after the arrest without being arraigned. At 8:00 P.M. that day, defendant was arrested for aggravated and simple assault of his other children and was arraigned on those charges less than six hours later. Approximately nine and one-half hours later, when he was advised that the nineteen-month-old son had died, he was arrested for murder of the third degree.

Held, conviction affirmed. Defendant's argument that the trial court erred in suppressing his statement was wholly without merit. The complete release of an accused within six hours of arrest accomplishes the purposes sought to be achieved by the requirement of a prompt arraignment, and no purpose would be served by applying an evidentiary bar to such cases. Commonwealth v. Bernard, 456 A.2d 1364 (1983).

§ 10.35 Motion to dismiss for lack of speedy trial

Nevada The state appealed the granting of habeas corpus in three cases, consolidated for appeal, which involved delays of 73, 85, and 125 days between the dates of arrest and arraignment of the respective defendants.

Held, judgments reversed and habeas corpus petitions denied. The court first construed a state law which afforded an arrested person a statutory right to be brought before a magistrate "without unnecessary delay." It held that the specific purpose of this statute is to prevent law enforcement personnel from conducting a "secret interrogation of persons accused of crime," and that speedy arraignment is primarily intended to ensure that the accused is promptly informed of his privilege against self-incrimination. Although the prearraignment delay in each of the instant cases was lengthy, and none of the delays resulted from conduct by any defendants, the court noted that all defendants were released from custody immediately after their arrest and that none were interrogated or made any incriminating statements during the delay. Since the passage of time will not alone establish a deprivation of an accused's rights, and since there was no prejudice here, there was no statutory ground for habeas relief. The court noted that the statute did not directly involve federal constitutional speedy-trial rights, and did not require the same interpretation that federal courts have given the similarly worded Federal Rule of Criminal Procedure 5(a). As to defendant's constitutional claims, the court held that they failed to show prejudice sufficient to establish violation of their Sixth Amendment speedy-trial right. Sheriff, Clark County v. Berman, 659 P.2d 298 (1983).

11. DISCOVERY

§ 11.00 In general

Kansas Defendants were convicted of one count of attempted felony theft and six counts of felony theft. The charges arose from activities at a Cargill Incorporated soybean receiving and processing plant where defendants allegedly failed to make deliveries of soybeans for which they were paid. Defendants charged that there was insufficient evidence to support the convictions. They also argued that Cargill, and the attorney hired by Cargill to assist the prosecution, should have participated in discovery. Defense counsel had filed a number of motions for discovery and for sanctions for destruction of evidence.

Defendants were primarily concerned with Cargill's inventory for the year in which the alleged crime took place, results of tests allegedly conducted by Cargill concerning the synchronization of clocks on scales and continuous roll tape, tests conducted by Cargill with one of defendants' trucks, and a videotape (which was later destroyed by Cargill employees) of a bona fide delivery by defendants to the Cargill plant. The court of appeals found that because the complaining witness was not required to employ private counsel to assist the prosecution, the private counsel should have been bound by discovery requirements of criminal procedure. The court reversed defendant's conviction and the state appealed.

Held, conviction reversed. On the issue of discovery, the court stated that an attorney hired by the prosecuting witness to assist the prosecutor must participate in discovery by disclosing requested evidence that is in the attorney's possession, custody, or control. The attorney must also disclose any evidence known to him or her that would tend to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. The attorney is not required, however, to search for documents and other material evidence of the prosecuting witness to which he has access, which might conceivably be helpful to the defense. Since a prosecuting witness is not a party to the action and its records are not in the possession of the state, the court determined that a trial court has no authority to compel discovery from it. In addressing the specific items requested by defendants, the court found the following: (1) The defense made no sincere effort to either secure the 1983 Cargill inventory or show that it would have been exculpatory; (2) the State provided defense counsel with a document that reported results of tests showing how fast a truck could be unloaded, and there was no showing in the record that there were more complete written reports of these tests; (3) all information regarding tests conducted concerning the synchronization of clocks on scales and continuous roll tape was apparently furnished to defense; and (4) defendants were not prejudiced by Cargill's recording over the only videotape that demonstrated a bona fide delivery of soybeans by them because the trial court had offered to let them recreate this bona fide unload and defendants had refused. State v. Dressl, 738 P.2d 830 (1987), 24 CLB 273.

§ 11.10 —Statements of co-defendants

Ohio Defendant was convicted of aggravated burglary and related crimes. On appeal, he contended that introduction of post-arrest statements made by a codefendant, Neeley, violated state discovery requirements and prej-

udiced his defense, requiring reversal. In accordance with Ohio Rules of Criminal Procedure, defendant filed a demand for discovery seeking, inter alia, statements made by Neeley to law enforcement officers; the prosecutor responded that no such statements existed. At trial, however, the prosecutor attempted to establish, as part of his direct case, that Neeley told his arresting officer that he had spent the day of the crime helping a friend move; the officer's testimony was stricken on the ground that Neeley's statements had not been disclosed in response to defendant's demand for discovery. In presenting his defense, defendant called alibi witnesses who testified that he had been ill in bed on the date of the crime and had been visited by Neeley several times during the day. In rebuttal, Neeley's arresting officer was again called by the prosecutor and, over objection, permitted to testify to Neeley's statements. Defendant argued that admission of Neeley's statements was improper because of the State's failure to comply with rules of discovery and prejudiced his defense by casting doubt upon his alibi evidence.

Held, conviction for aggravated burglary affirmed. The Supreme Court of Ohio, while agreeing that Neeley's statement was discoverable and should have been disclosed, found that nevertheless reversal was not warranted because

> the trial court is vested with a certain amount of discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material. The court is not bound to exclude such material at trial although it may do so at its option. Alternatively, the court may order the noncomplying party to disclose the material, grant a continuance in the case or make such other order as it deems just under the circumstances.

Here, no abuse of discretion had occurred, because (1) there was no suggestion that the State's failure to disclose was anything other than a negligent omission; (2) defendant did not request a continuance after admission of the disputed testimony; (3) defendant failed to allege how disclosure of Neeley's statements would have assisted the preparation of his defense; (4) in fact, defendant was aware of Neeley's statement prior to admission, as a result of the prosecutor's unsuccessful attempt to introduce it as part of his case-in-chief; and (5) Neeley's statement did not directly contradict defendant's alibi in any event. State v. Parson, 453 N.E.2d 689 (1983), 20 CLB 170.

§ 11.15 —Statements of witnesses

Connecticut Defendant was convicted of kidnapping, attempted murder, sexual assault, robbery, and assault. At trial, the victim testified that she walked to the bus stop in front of Central High School, where she was confronted by defendant, who told her he had a gun, took her money, and dragged her through a fence and down a hill behind the school. Defendant testified that at the time of the alleged crime, he was aboard city bus 12. At trial, the driver of bus 12 verified defendant's alibi. However, in a taped conversation between the bus driver and the defense investigator shortly after the incident, the witness was unable to identify a photograph of defendant, and, over defense's objection, prosecution was granted access to the tape. On appeal defendant argued that the court's order

that defense produce statements of certain alibi witnesses violated a provision of the practice book of the state constitution, which clearly prohibited disclosure of statements made by defense witnesses.

Held, reversed. The Connecticut Supreme Court set aside the judgment, holding that the trial court erroneously ordered the disclosure of statements made by certain alibi witnesses to the defense investigator, which were used to impeach a witness's credibility, and therefore required reversal for a new trial. Citing Middleton v. United States, 401 A.2d 109, 115 (D.C. App. 1979), which held that "the accused be secure from condemnations resting upon his coerced testimony or the improper annexation of his counsel's labors," the court ruled that important constitutional and societal interests were at risk by allowing for mutual disclosure of witness statements and revising the provision of the practice book, which legislated that disclosure was only applicable to witness statements made to the prosecution and not to the defense. Moreover, because the state could use the taped statement to impeach the credibility of a crucial alibi witness, the bus driver, who unlike other witnesses, had no ties to defendant and had no apparent interest to lie on his behalf, the trial court's order allowing access was therefore constitutionally harmful. State v. Whitaker, 520 A.2d 1018 (1987), 23 CLB 497.

Rhode Island Defendant was charged with five counts of first- and second-degree sexual assault and convicted of two counts of second-degree sexual assault. He appealed, claiming that the state's failure to provide defendant with discovery relating to an alleged incident of fellatio hampered his counsel's ability to conduct an adequate defense. In response to defendant's pretrial discovery request, the state failed to provide a summary of the testimony it expected the victim to give at the trial. It did, however, furnish a copy of a statement made by the victim indicating that vaginal intercourse and cunnilingus had occurred, and that defendant had asked her to kiss his penis. At the trial, the victim, a nine-year-old girl, testified that defendant had forced her to perform fellatio. Defendant's motion to pass the case was denied by the trial judge, who held that the victim's discovery statement on vaginal intercourse and cunnilingus should have alerted defendant to a possible allegation of fellatio.

Held, affirmed. Although the state should have provided defendant with a summary of the testimony concerning fellatio, its failure to do so did not warrant a mistrial. First, that defendant was acquitted of first-degree sexual assault, which requires intercourse, cunnilingus, fellatio or some other form of penetration, and convicted only of second-degree sexual assault, which does not require penetration, shows that he was not prejudiced by the testimony in question. Second, defendant could have filed a bill of particulars but chose instead to rely entirely upon discovery. Finally, defendant was really attempting to challenge the sufficiency of the indictment, which he waived his right to do by not raising the issue before or during the trial. State v. Concannon, 457 A.2d 1350 (1983).

Utah Defendant was convicted of aggravated robbery. He contended that during discovery, the prosecution voluntarily assumed the obligation to provide defense counsel with certain

requested information, including the correct addresses and telephone numbers of two potential witnesses and statements taken from those witnesses by a state investigator. Because the prosecutor did not fulfill this obligation, defendant claimed his ability to defend was impaired when the two witnesses appeared at the trial and gave unanticipated testimony. When the trial court denied his motions for a continuance or a mistrial, the defendant appealed.

Held, reversed. The Supreme Court of Utah, citing Section 77-35-16 of the Utah Code, stated that there are two requirements the prosecution must meet when it voluntarily responds to a request for discovery: (1) The prosecution must either produce all of the material requested or identify explicitly those portions of the request with respect to which no responsive material will be provided, and (2) when agreeing to produce any of the material requested, the prosecution must continue to disclose such material on an ongoing basis to the defense. Therefore, if the prosecution agrees to produce certain specified material and it later comes into possession of additional material that falls within the same specification, it has to produce the later-acquired material. The court found the prosecutor to have violated both of the requirements. During the discovery period, the prosecutor assumed that all information pertaining to the case was located in his files and did not check the files of other members of the prosecution's team. Therefore, the defense did not learn of statements taken from the two witnesses months before the trial until the first days of the trial. The court stated that given the explicit language of the defense's request for "statements in possession of any member, or group involved in the prosecution or the investigation of the above-entitled case," there could be no doubt that the prosecutor's unconditional agreement to produce obliged him to search more than merely his own files. The prosecutor also failed to provide the defense with the after-acquired information responsive to the request for the current addresses and phone numbers of the two witnesses. The court determined that the prosecutor's good faith was irrelevant in a determination of whether he had violated his discovery duties. The court concluded that the prosecutor's failure to produce the requested information resulted in a prejudicial error sufficient to warrant reversal of the conviction. State v. Knight, 734 P.2d 913 (1987).

§ 11.25 —Records

U.S. Supreme Court After defendant was convicted in Pennsylvania state court of rape, incest, and corruption of a minor, the Supreme Court of Pennsylvania remanded for further proceedings. Prior to defendant's trial, the state Children and Youth Services (CYS) had refused to comply with a defense subpoena for records relating to the charges, including a statement by the defendant's daughter, who was the main prosecution witness.

Held, affirmed in part and reversed in part. While defendant was entitled to have the state agency file reviewed by a trial judge to determine whether it contained information that probably would have changed the outcome of the trial, the failure to disclose the file directly to the defense attorney did not violate the confrontation clause. Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987), 23 CLB 387.

12. GUILTY PLEAS

§ 12.00 Plea bargaining

Hawaii Defendant pleaded guilty to theft and firearms possession charges as part of a plea bargain. In accordance with an understanding that such guilty pleas would dispose of all criminal charges pending against defendant, the prosecutor dismissed his pending indictment for armed robbery. Unknown to the staff prosecutor who negotiated the plea and defense counsel, a police investigative report of defendant's participation in drug sales some six months earlier had been received by the Office of the Prosecuting Attorney; defendant was indicted for promoting dangerous drugs approximately one month after the plea bargain. Since the intent of the negotiated plea had been to resolve all open criminal matters against defendant, the Prosecuting Attorney agreed to dismiss the drug indictment. However, he left office before acting and his successor refused to dismiss, contending that the offenses charged were beyond the scope of the plea agreement.

Held, dismissal of the indictment affirmed. The Supreme Court of Hawaii found that the record supported defendant's contention that his guilty pleas were induced by the prosecutor's agreement to resolve all charges pending against him. While the drug charges had not been filed, said the Court, the prosecutor's office was on notice of their existence when the plea understanding was reached; due process, it concluded, mandated that they be included in the bargain. State v. Yoon, 662 P.2d 1112 (1983), 20 CLB 176.

Washington Defendant was convicted of statutory rape and indecent liberties. Plea negotiation ensued, defendant agreed to waive his right to appeal these convictions and to plead guilty to two other as yet untried charges. In return, the state agreed to make a sentencing recommendation totaling 116 months to be served concurrently. At the sentencing proceeding, however, the trial court declined to follow the prosecuting attorney's recommendation concerning the length of sentence. The trial court denied defendant's subsequent motion to appeal on the rape and indecent liberties convictions.

Held, affirmed. The Supreme Court of Washington stated that the right to appeal is no more fundamental than the right to a jury trial or the privilege against self-incrimination. Because defendants can waive these rights by pleading guilty, the court held that defendants can also waive the right to appeal a conviction, as long as the waiver is done intelligently, voluntarily,

and with an understanding of the consequences. State v. Perkins, 737 P.2d 250 (1987).

§ 12.05 —Defendant's right to specific performance

U.S. Supreme Court After defendant was convicted of murder and other charges, the Arkansas Supreme Court set aside the murder conviction. The prosecutor made one plea proposal, but when defense counsel called the prosecutor three days later to accept the offer, the prosecutor told counsel that a mistake had been made and withdrew the offer. Instead, he proposed a second offer, which ultimately was accepted, and a twenty-one-year sentence was imposed to be served consecutively with previous sentences. After exhausting state remedies, defendant's previous habeas corpus petition in the district court was dismissed, but the court of appeals reversed.

Held, reversed. The defendant's acceptance of the prosecutor's first plea offer did not create a constitutional right to have the bargain successfully enforced, and he could not successfully attack his subsequent guilty plea. The Court observed that the guilty plea was made voluntarily and intelligently because defendant's plea was not induced by the prosecutor's withdrawn offer, and it rested on no unfulfilled promise. Mabry v. Johnson, 104 S. Ct. 2543 (1984), 21 CLB 77.

Michigan Defendant appealed the decision to try him after he had made an agreement with the police saying that he would not be prosecuted. The case involved a drug transaction in which undercover agents paid him $33,000 for a pound of cocaine. When defendant was arrested, he no longer had the money. After consulting with a superior officer at the scene, an officer agreed that the state would not prosecute if defendant returned the money. The prosecutor, however, did not feel bound by this decision, and defendant appealed the decision of the court of appeals to try the case.

Held, affirmed. The court decided to try defendant because the police lacked the authority to make a binding promise of immunity or not to prosecute. The court reasoned that it would undermine the accountability built into the prosecutorial function and would question the logical limits of the power of the police to control the criminal justice system if it were to accept the police agreement. In this case, dismissal of criminal charges was not desirable because it advanced no legitimate interests. Rather, it appeared that the decision to promise defendant immunity had stemmed from the embarrassment resulting from the loss of the buy money. The court's decision to deny defendant's request for specific performance was not an adjudication of guilt, which would have violated his constitutional right to a presumption of innocence, but rather it was a denial of unauthorized, nonplea agreements made by the police. Accordingly, the court allowed defendant to be tried, but suppressed the police agreement and the buy money as evidence. People v. Gallego, 424 N.W.2d 470 (1988).

New York Defendant pleaded guilty to burglary in the first degree in full satisfaction of the indictment against him for burglary and robbery. He made an agreement with the prosecutor that, in return for his guilty plea, he would receive a recommendation for youthful offender treatment and a

sentence of probation. The People's recommendation that the court accept the plea was conditioned expressly upon his promise to testify for the People should the case against one of his accomplices proceed to trial. The court, noting that a similar arrangement apparently had been approved by another judge for two other accomplices, agreed to the terms of the plea agreement, reserving the right to change the sentence should the presentence report contain information indicating that the promised sentence was improper, unrealistic, or inadequate. At trial, defendant testified in accordance with the terms of the agreement. However, the court imposed a ninety-day term of imprisonment instead of the probation it had agreed to. The court listed several factors in its decision not to follow its agreement. Defendant appealed from the sentence.

Held, reversed. The court of appeals examined the reasons given by the trial court for disregarding its agreement and found them insufficient. The court's off-the-record warning that it would not abide by its agreement was not entitled to any recognition. As a matter of fairness, defendant was entitled to the precise terms of the agreement, since the state could have held him to those terms. Reasoning that defendant's accomplices had not received similar treatment was an inappropriate basis for refusal to honor the agreement; there is no requirement that all participants in a crime be treated equally. Not only was defendant entitled to specific performance of his bargain, he irrevocably had changed his position by testifying for the people, thus waiving his privilege against self-incrimination and exposing himself to the risk of retaliation; therefore, he was entitled to specific performance of his plea agreement. As a matter of fairness, once a defendant has been placed in such a "no-return" position, relegating him to the remedy of vacatur of his plea cannot restore him to the status quo ante. Therefore, he should receive the benefit of his bargain, absent compelling reasons requiring a different result. People v. Danny G., 61 N.Y.2d 169, 461 N.E.2d 268, 473 N.Y.S.2d 131 (1984).

§ 12.10 —Who may rely on prosecutor's promises

Arkansas Defendant was convicted of first-degree murder and sentenced to life imprisonment. Defendant sought postconviction relief on the ground that her counsel was ineffective. Defendant alleged that after trial she learned that the deputy prosecuting attorney had spoken with her attorney outside her presence and offered to recommend a sentence of fifteen years' imprisonment if she would plead guilty. She contended that this offer of a negotiated plea was never communicated to her. Defendant attached to her petition an affidavit of the deputy prosecutor in which he stated that he made the offer to her attorney. The prosecutor stated that her attorney rejected the offer immediately but said he would communicate it to his client. Her attorney later told the prosecutor that defendant had refused the offer.

Held, conviction affirmed. The Supreme Court of Arkansas denied the petition without prejudice with respect to this allegation. It stated that a plea agreement is an agreement between the accused and the prosecutor, not between counsel and the prosecutor. As such, counsel has the duty to advise his client of an offer of a negotiated plea. Here, however, defendant does not allege that she would have accepted

the plea or that she would now accept it. The court found this to be a significant point because, even if it found merit to defendant's bare allegation that her plea was not communicated, there would be no grounds on which to set aside the finding of guilt or to order a new trial. The most that would be appropriate, said the court, would be a simple reduction in sentence to fifteen years. Rasmussen v. State, 658 S.W.2d 869 (1983).

§ 12.15 Nolo contendere or *non vult*

"Nolo Contendere: Efficient or Effective Administration of Justice?," by Dr. Cathleen Burnett, 23 CLB 117 (1987).

§ 12.20 Plea to charge not included in indictment

Court of Appeals, 8th Cir. Petitioner was charged by indictment with violating a state statute which prohibited "assault with intent to maim or kill with malice aforethought." Although the charge in the indictment referred to the relevant statutory section, the caption on the back of the indictment read "assault with intent to kill with malice." Subsequently, in order to clarify the nature of the charge, the state filed a substitute information which described the charge in the exact language of the statute. Defense counsel moved to dismiss on the ground that the substitute information charged him with a different offense, but that motion was never ruled on; defendant subsequently pled guilty to the offense charged by the substitute information. At the plea hearing, the trial court asked petitioner if he understood the charge and explained the range of punishment. On appeal, he claimed that his plea was not knowing and voluntary because he was not informed of both his counsel's dismissal motion and the filing of the substitute information.

Held, conviction affirmed. The court held that it was immaterial that the substitute information charged petitioner with a more severe offense than did the indictment, since he was fully informed by the information and the court concerning the precise nature of the charge and the applicable range of punishment. Furthermore, the court held, counsel's failure to discuss the substitute information and motion to dismiss resulted in no prejudice, particularly because applicable state law gave petitioner no right to be charged by indictment rather than by information. Watson v. Wyrick, 698 F.2d 925 (1982).

§ 12.30 Duty to inquire as to voluntariness of plea

California On the advice of his attorney, petitioner pled guilty to armed robbery and to assault with a deadly weapon, receiving a five-year sentence. The plea arrangement was a "package deal" under which the prosecutor offered reduced charges only if all three co-defendants pled guilty. Petitioner sought habeas corpus on the grounds that a "package deal" plea bargain arrangement is inherently coercive.

Held, petition for writ of habeas corpus denied. While a "package deal" plea bargain is not inherently coercive, the trial court is required to inquire into the totality of circumstances in accepting such pleas. The following factors are among those requiring consideration: (1) The prosecutor should not have misrepresented the facts to the defendant, nor should the plea have been induced by prosecutorial threats that, if carried out, would warrant ethical censure. (2) The evidence should support the confession of guilt,

and the sentence should not be disproportionate to that guilt. (3) Any promise of leniency for someone close to the defendant should be closely scrutinized, since it might constitute a coercive inducement. (4) Specific threats by a co-defendant should also be scrutinized for coercive effect. In this case, the fact that the petitioner believed his co-defendants might have attacked him if he refused to plead was not sufficient to show coercion. In re Ibarra, 666 P.2d 980 (1983).

Nevada Defendant was convicted of one count of sexual assault pursuant to a guilty plea. He appealed the trial court's denial of his motion for habeas corpus relief, contending that the record did not show that his plea was made knowingly and voluntarily.

Held, decision reversed and guilty plea set aside. The record revealed that the trial judge did not personally address defendant at the time the guilty plea was entered to determine if defendant understood the elements of the offense to which he was pleading. Furthermore, defendant made no factual statements constituting an admission of guilt. Therefore, the record did not show that the plea was entered knowingly and voluntarily. Barlow v. Director, Nevada Dep't of Prisons, 660 P.2d 1005 (1983).

Nevada Defendant was convicted on a guilty plea of assault with a deadly weapon. He appealed the trial court's denial of his motion to withdraw his plea, claiming that his lack of understanding of the consequences of his plea rendered it involuntary.

Held, reversed and remanded. The trial court did not canvass defendant to determine whether he understood the range of possible punishments that could flow from his plea; the record was devoid of any indication that defendant understood the consequences of pleading guilty. Thus, the plea had to be set aside because the record did not affirmatively show that the plea was knowing and voluntary. Ramey v. State, 661 P.2d 1292 (1983).

§ 12.35 Duty to inquire as to factual basis for plea

Connecticut Defendant assisted in the escape of an inmate from a federal penitentiary. The inmate, in his flight, shot and wounded a state trooper with a gun that defendant provided. Defendant was charged with attempted murder, larceny, and assault. Initially pleading not guilty, defendant then withdrew his plea and entered a plea of guilty on the assault charge. The state entered a nolle prosequi on all remaining charges. After sentencing, defendant moved to withdraw his guilty plea, and the motion was denied. Defendant subsequently filed a petition for a writ of habeas corpus alleging that record of a factual basis for a guilty plea is a requisite under the federal constitution. The court assigned to the habeas action granted the petition. The commissioner of correction and warden of the correctional institute appealed.

Held, reversed. The Supreme Court of Connecticut held that a guilty plea obtained without an adequate factual basis in the record does not violate the due process clause and is not void. The court overruled the cases of State v. Eason, 410 A.2d 688 (1984); State v. Cutler, 433 A.2d 988 (1980); State v. Marra, 387 A.2d 550 (1978) and State v. Battle, 365 A.2d 1100 (1976) to the extent that they hold that a record of a guilty plea must affirmatively disclose that a factual basis for the plea exists and that it was en-

tered voluntarily and intelligently to be constitutionally valid. Instead, the court followed recent federal case law, which holds that a state court is not under a constitutionally imposed duty to establish a factual basis for a guilty plea. Accordingly, the case was remanded on the issue of the voluntariness of the plea. Paulsen v. Manson, 525 A.2d 1315 (1987).

§ 12.40 Equivocal guilty plea

Court of Appeals, 4th Cir. Petitioner was convicted of burglary and larceny. He had requested a bench trial but, after the prosecutor declined to waive a jury, he pled "guilty under protest" to the charges. Upon inquiry by the trial court, he refused to admit his guilt. After informing petitioner of the maximum sentence possible and the limited grounds available for appeal, the court dismissed the jury, proceeded to hear evidence, and found at the conclusion of the evidence that defendant was guilty without regard to his plea. Petitioner successfully obtained a writ of habeas corpus from the district court on the ground that his plea had not been voluntary because the case was tried as if on a not-guilty plea without petitioner being advised, thereby denying petitioner crucial knowledge of the consequences of his plea.

Held, judgment reversed and petition denied. The court pointed out that, under the applicable statute, although a trial court is not required to hear evidence after a guilty plea it may do so within its discretion. In determining whether the waiver embodied in a defendant's guilty plea is voluntary, three federal constitutional rights are involved: the privilege against self-incrimination, the right to a trial by jury, and the right to confront one's accusers. Here, defendant's self-incrimination rights were not violated because the trial court expressly held that the evidence was sufficient to establish guilt regardless of the plea. Furthermore, since petitioner did not want a jury, his right to a trial by jury was not infringed, and, since cross-examination of prosecution witnesses was permitted, petitioner was not denied the right to confront his accusers. Knight v. Johnson, 699 F.2d 162, cert. denied, 464 U.S. 832, 104 S. Ct. 112 (1983).

§ 12.45 —Duty to advise defendant of possible sentence

Court of Appeals, 1st Cir. Defendant, relying on the state's promise to recommend a sentence of five to ten years' imprisonment, pled guilt to armed robbery. He was subsequently sentenced to ten to twenty years. On appeal, he claimed that his guilty plea was involuntary, arguing, among other things, that his attorney told him that he would be eligible for parole in eighteen months. In fact, the requirement was two-thirds of the minimum sentence imposed; thus, defendant would have been eligible for parole forty months into the proposed five-year sentence and would in fact be eligible eighty months after commencement of the ten-year sentence the trial court imposed.

Held, conviction affirmed. Details of parole eligibility are normally considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty. Even where, as here, actual misinformation is established, defendants seeking to set aside a guilty plea must show that correct information would have made a difference in his plea decision. Defendant could not carry this burden; among other things, the lower courts had found that he was

expressly advised of the maximum possible sentences, that the sentencing judge was not bound to follow the prosecutor's recommendation, and that defendant, as a previous parole violator, could reasonably be expected to be familiar with the rules of parole eligibility. Cepulonis v. Ponte, 699 F.2d 573 (1983).

§ 12.50 —Court's failure to advise defendant of consequences of plea

Court of Appeals, 11th Cir. Petitioner, a twenty-two-year-old male, allegedly had sexual intercourse with a five-year-old girl. He was arrested the same day, signed a statement admitting commission of the crime, and later pled guilty on the advice of counsel. He subsequently sought a writ of habeas corpus, claiming that his guilty plea was not entered voluntarily and knowingly because he did not know that a conviction carried a mandatory life sentence with a minimum of twenty-five years before parole eligibility. The district court denied his petition.

Held, judgment affirmed. The court refused to overrule the magistrate's determination that petitioner's attorney correctly told him of the precise consequences of a guilty plea. Since these findings of fact established petitioner's awareness, the fact that the trial court itself did not advise him of the minimum twenty-five years in prison did not mandate a different result. Although federal law requires the judge to personally tell defendant of the mandatory minimum sentence, Florida law does not, and the 11th Circuit has held that a state trial judge need not inform a defendant of the requisite time of confinement prior to eligibility for parole. Owens v. Wainwright, 698 F.2d 1111, cert. denied, 464 U.S. 834, 104 S. Ct. 117 (1983).

Louisiana Defendant was convicted of burglary on his plea of guilty. He argued on appeal that there should be a reversal and a reinstatement of his plea of not guilty because the trial court had not advised him fully of the rights he was waiving by entering a guilty plea. The record disclosed that the court had not advised defendant of his "right to a jury trial, his right to confront his accusers, and of his privilege against self-incrimination or make any inquiry as to his understanding of these rights and that by pleading guilty he was waiving them."

Held, conviction reversed and remanded for defendant to enter a new plea. The Supreme Court of Louisiana found that the plea colloquy did not comport with the requirements of Boykin v. Alabama, 395 U.S. 328, 89 S. Ct. 1709 (1969), as the trial court failed to determine that defendant understood the full scope of his constitutional rights and the consequence of his guilty plea. Accordingly, the court continued, it could not be said that defendant had expressly and knowingly waived those rights. State v. Godejohn, 425 So. 2d 750 (1983), 19 CLB 484.

New Jersey Defendant pled guilty to possession of marijuana with intent to distribute. On appeal, he contended that because a state statute required the forfeiture of public employment for any persons convicted of a crime of the third degree or above, the court should have forewarned him that one of the consequences of his plea would be the potential loss of his job with the Department of Environmental Protection.

Held, conviction affirmed. The court determined that a defendant need only be informed of the penal consequences of a guilty plea and not col-

lateral consequences, such as the potential loss of employment. Although a trial court may advise defendant of any collateral consequences it is aware of, the failure to do so is not reversible error. State v. Heitzman, 527 A.2d 439 (1987), 24 CLB 277.

§ 12.55 Effect of involuntariness of plea

Georgia Defendant appealed his death sentence for rape and murder. He had pleaded guilty to the crimes and had requested the death sentence. On appeal he contended he had come under the influence of his attorney and that his plea was involuntary.

Held, sentence affirmed. The court stated that the attorney was only an assistant of the defendant. Defendant had the ability to make the ultimate decisions concerning his defense. Therefore, the court concluded that the defendant's attorney made no error by complying with his client's desire for the death sentence because defendant was competent and properly informed. Morrison v. State, 373 S.E.2d 506 (1988).

§ 12.65 —Promises

Mississippi Defendant was indicted for armed robbery committed February 4, 1979. Subsequently, he entered into a plea bargaining agreement with the state on the advice of his attorney in which he would be eligible while in custody to earn "good time" toward early release, as would any other prisoner. The state statutory provisions regarding good time remained unchanged since 1977, well prior to defendant's offense; however the interpretation of those statutes by the Mississippi Department of Corrections (MDC) had changed. As a consequence, prisoners convicted of armed robbery after 1977 who were sentenced to serve less than ten years were administratively barred from earning good time after January 5, 1981, although good time earned prior to that date was not taken away. On June 20, 1981, defendant was advised in an official MDC memorandum that he was eligible for no more good time, and therefore must serve some two years, eight months more than was formerly required. Defendant filed a petition in the circuit court asking either that the court permit withdrawal of the guilty plea or grant specific performance of the plea agreement, whichever was appropriate. The circuit court summarily dismissed defendant's petition.

Held, reversed and remanded. The Mississippi Supreme Court decided that defendant was entitled to withdraw his guilty plea made in reliance on erroneous advice from his attorney because such a plea constitutes a waiver of some of the most basic rights of free citizens, i.e., those secured by the Fifth, Sixth, and Fourteenth Amendments to the Constitution, as well as comparable rights under the state constitution. Therefore, the court reversed and remanded for an evidentiary hearing, stating that should defendant prove that which he has alleged, all of the substantive relief he could possibly receive would be a vacation of his guilty plea and reinstatement of his not guilty plea. The State would then be free to put defendant on trial under the indictment. Tiller v. State, 440 So. 2d 1001 (1983).

§ 12.70 Motion to withdraw guilty plea

"Guilty Pleas and the Right of the People to Withdraw Their Consent," by Arthur Mendelson, 22 CLB 29 (1986).

Minnesota In 1974, defendant, indicted for first-degree murder, entered a negotiated guilty plea to a reduced charge of second-degree murder. He was sentenced to the statutory maximum prison term of forty years. In 1981, he sought post-conviction relief in the form of a withdrawal of his guilty plea, arguing that it was motivated not by the knowledge of his own guilt, but by the knowledge that a co-defendant had recanted those parts of his story indicating that the killing by defendant was intentional and unjustified.

Held, affirmed. The court did not err in refusing to permit defendant to withdraw his guilty plea notwithstanding the claim of recantation by the co-defendant. There was insufficient evidence to establish the authenticity of the recantation. Furthermore, defendant sought to overturn not a jury verdict, but his own guilty plea and a statement that he was pleading guilty because he was guilty. State v. Risken, 331 N.W.2d 489 (1983).

North Dakota Defendant, charged with issuing a bad check, appeared without counsel and entered a guilty plea after the court advised her of the nature of the charges and her right to counsel. Imposition of sentence was stayed. Subsequently, defendant consulted with an attorney and moved to withdraw her guilty plea on the grounds that meritorious defenses to the charge existed. The trial court denied her motion.

Held, affirmed. The Supreme Court of North Dakota stated that "in the absence of an abuse of discretion on the part of the trial court, its decision to deny defendant's motion to withdraw her guilty plea will stand." Here, said the high court, the record showed that defendant was advised by the trial judge and understood the charge against her. The trial judge, it continued, was under no "obligation to explore with the defendant any or all conceivable defenses that may be raised"; further, it noted, defendant had pleaded guilty to a similar charge a year earlier, having been represented by counsel on that occasion, and so had the benefit of at least one attorney's advice. Accordingly, it held, the trial judge's denial of defendant's motion to withdraw her guilty plea was not an abuse of discretion. State v. Stai, 335 N.W.2d 798 (1983), 20 CLB 174.

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

WEIGHT AND SUFFICIENCY

§ 13.02 —View of crime scene (New)

Virginia Defendant was convicted, without a jury trial, of possessing heroin with intent to distribute. Defendant was arrested as a result of a surveillance conducted by police officers in a certain block in the City of Richmond. At trial, defendant denied he was present where the officers testified they had seen him, and he denied possessing or selling heroin. Defense counsel's motion for a view was granted. The judge, accompanied by the prosecutor and defense counsel, viewed the scene of the crime. On his return to the court, the trial judge stated that defendant was asked to be there but waived his right to be present. Neither defendant nor his coun-

sel made any comment following this statement. On appeal, defendant argued that a view of the scene of a crime is part of a felony trial and that he had a right, pursuant to the Virginia Code, to be present when the trial judge viewed the scene. Defendant contended that this is a right that cannot be waived, and therefore his absence from the view rendered his conviction invalid.

Held, conviction affirmed. The Virginia Supreme Court affirmed the conviction and held that the right of an accused to be present at a view may be waived and the presence of the accused is not a jurisdictional prerequisite. The court added that even though an accused may waive his right to attend a view, the event must be conducted in a manner free from any prejudice to his right to a fair trial; therefore, no evidence should be taken and no tests conducted in his absence. Neither should there be permitted any irregularity or misconduct that may tend to influence the trier of fact. Jones v. Commonwealth, 317 S.E.2d 482 (1984), 21 CLB 188.

§ 13.05 Presumptions and inferences

Georgia Defendant was indicted for conversion of leased personal property (specifically, leased videotapes) that according to the lessor, she did not return. On her motion, the trial court dismissed the indictment on grounds that the criminal statute proscribing conversion was unconstitutional. The state appealed, contending that the trial court erred in holding that the statute created a mandatory presumption of intent.

Held, reversed. The Georgia Supreme Court held that although subsection (b) of the statute created an impermissible presumption of intent, its invalidity did not mean that the rest of the statute describing the offense of conversion of leased property is likewise invalid. Subsection (a) straightforwardly states: "A person commits the offense of conversion when he converts to his own use any personal property which had been delivered under the terms of a lease or rental agreement in violation of the agreement and to the damage of the owner or lessor." Trial courts need to frame appropriate charges, to assist the jury in understanding the term "convert" as used in the statute, in terms of permissible inference rather than that of mandatory presumption. State v. Russell, 350 S.E.2d 430 (1986), 23 CLB 403.

New Jersey Defendant was convicted by a jury of possessing a handgun without a permit, possessing a handgun for unlawful purposes, and two counts of aggravated assault. On appeal, defendant argued that the State failed to meet its burden of proof as to the possession of a handgun without a permit. The State offered no direct evidence on the permit issue, choosing to rely on the statutory presumption that an accused weapons offender shall be presumed not to possess the requisite license or permit "until he establishes the contrary."

Held, conviction affirmed. The Supreme Court of New Jersey declared that once possession of a weapon is shown and an accused fails to come forward with evidence of a permit, the State may employ the statutory presumption to establish the absence of the required permit, and the jury should be instructed that although such a statute authorizes the inference that there is no such permit, the ultimate burden of persuasion rests on the

State, with the jury being at liberty to find the ultimate fact one way or the other. Permitting the jury to make such a determination did not offend the court's notion of due process. Defendant relied upon the premise that there is no rational connection between the basic facts and the ultimate facts presumed, but the court disagreed with that premise and, therefore, defendant's argument. State v. Ingram, 488 A.2d 545 (1985).

§ 13.15 Burden of proof

Kansas Defendant was convicted of second-degree murder and aggravated burglary. He killed a seventy-six-year-old woman by strangling her in the course of burglarizing her home. At trial, the court instructed the jury that "there is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true." During the course of the trial, defendant did not strongly contest the issue of intent. On appeal, though, defendant argued that the trial court's instructions to the jury as to intent improperly shifted the burden of proof from the state to himself.

Held, conviction affirmed. The Kansas Supreme Court declared that the jury instruction on presumption of intent did not shift the burden of proof to defendant. The court stated that "it is reasonable to conclude that a rational person, under ordinary circumstances, does intend the natural and probable consequences of his or her voluntary acts." Defendant confessed to strangling his victim with an army sock by knotting it around her neck, the likely result of which action was her death. The question of intent, therefore, was by definition answered. As to whether the trial court's instructions to the jury shifted the burden of proof from the state to defendant, the court's instructions did the exact opposite. The trial court instructed the jury that

> [T]he law places the burden upon the state to prove the defendant is guilty. The law does not require the defendant to prove his innocence. Accordingly, you must assume that the defendant is innocent unless you are convinced from all of the evidence in the case that he is guilty.

The Kansas Supreme Court stated that

> This [instruction] does not suggest to the jury that the defendant must come forth with evidence in rebuttal, but directs the jury to carefully weigh the evidence before applying the presumption. This means *all* of the evidence—the state's evidence and the defendant's evidence, if any. The jury must weigh the evidence and make that determination.

The trial court's instruction to the jury did not state a mandatory presumption and did not impermissibly shift the burden of proof to defendant. State v. Mason, 708 P.2d 963 (1985).

§ 13.18 Statutory alteration to rules of evidence (New)

Arizona Defendant was convicted of sexual conduct with a minor and child molestation. Because the victim, a five-year-old girl, was found legally "unavailable" to testify at defendant's trial, four of her out-of-court statements were introduced pursuant to Ariz. Rev. Stat. Ann. § 13-1416, a statutory hearsay exception rule. On appeal,

defendant argued that the statute unconstitutionally infringed upon the court's authority to make procedural rules, specifically the Arizona Rules of Evidence.

Held, affirmed. Rules 803 and 804 contain twenty-seven specific hearsay exceptions and two "catchall" exceptions. The Supreme Court of Arizona stated that the purpose of these exceptions is to admit trustworthy hearsay statements supported by "particularized guarantees of trustworthiness." Statutory hearsay exceptions are unconstitutional unless they require similar or equivalent guarantees of trustworthiness. Section 13-1416 admits hearsay "which is not otherwise admissible by statute or court rule." Because it could be used as a replacement for the analytical framework provided by the rules of evidence, Section 13-1416 impermissibly infringed upon the court's rule-making authority. Victim's statements, while inadmissible under the statute, were admissible under the rules of evidence. Statements she made to her treating psychologist were admissible under rule 803(4). Statements victim made to her physicians and babysitters were supported by circumstantial guarantees of trustworthiness equivalent to those offered by the various hearsay exceptions enumerated in rules 803 and 804; therefore, the statements were admissible under the catchall exceptions, rules 803(24) and 804(b)(5). State v. Robinson, 735 P.2d 801 (1987).

Arkansas Defendant was convicted of raping the nine-year-old son of the woman with whom he was living. At trial, testimony of witnesses as to what the victim had said about defendant was admitted pursuant to an Arkansas statute that provides that statements made by a child under 9 years of age concerning any act or offense against that child involving sexual offenses, child abuse, or incest are admissible in criminal proceedings even though the declarant is available as a witness. On appeal, defendant argued that in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980), the Supreme Court stated that the confrontation clause of the Sixth Amendment requires, as a prerequisite to making an exception to the hearsay rule, that a witness whose out-of-court statement is to be discussed (i.e., the declarant) be unavailable and that there be adequate indicia of reliability of the statement. In this case, the victim was not unavailable.

Held, conviction affirmed. Although the victim in this case recanted his claims against defendant during trial, earlier testimony given by witnesses accused defendant of sexual abuse, and it was these hearsay statements to which defendant objected. The court followed the ruling in United States v. Inadi, 106 S. Ct. 1121 (1986), in which the Supreme Court held that where the testimony in court can be expected to be substantially different from that given out of court, the reason for the unavailability requirement disappears and the question then becomes solely whether there are sufficient indicia of reliability to make an exception to the hearsay rule. Because a psychologist had testified that it was not unusual for children who have been sexually abused to recant their statements and defendant did not argue that the victim's statements lacked sufficient indicia of reliability, the court stated that the unavailability requirement did not apply in this case in view of the great difference between trial testimony and out-of-court statements of the alleged victim. Johnson v. State, 732 S.W.2d 817 (1987), 24 CLB 268.

Arkansas Defendant was convicted of carnal abuse in the first degree. On appeal, he challenged the constitutionality of Rule 803(25) of the Arkansas Rules of Evidence and the admissibility of two videotaped statements by victim, his seven-year-old daughter under Section 43-2036 of the Arkansas Statutes Annotated (Supp. 1985). Trial court, relying on Rule 803(25), had permitted the state to play the videotaped interviews during trial. The videotapes showed the victim describing and demonstrating with two dolls the incidents of sexual contact between defendant and herself. Defendant was not notified that two interviews were to take place, and his attorneys were not present for either session.

Held, conviction reversed. Rule 803(25) permits statements made by a child under age 10 to be admitted in criminal proceedings when those statements concern sexual offenses, child abuse, and incest committed against that child. The admission of such hearsay statements are conditioned on a hearing conducted by the court, outside the presence of a jury, in which the court determines the likelihood of trustworthiness of the statement using criteria enumerated in the rule. Since victim had testified at trial and had been subject to unbridled cross-examination by the defense, the court rejected defendant's contention that hearsay evidence admitted concerning victim's statements under Rule 803(25) violated the confrontation clause. Specific provisions for videotaped statements are provided in Section 43-2036. Section 43-2036 requires the videotaped deposition of the child to be taken before a judge in chambers in the presence of the prosecuting attorney, defendant, and his attorneys. It also requires examination and cross-examination of the alleged victim to proceed at the taking of the videotaped deposition. Since Section 43-2036 was not complied with, the court held that trial court erred in receiving the videotape into evidence, and the conviction was reversed. Cogburn v. State, 732 S.W.2d 807 (1987), 24 CLB 274.

Kentucky Defendant was convicted of sodomy and sexual abuse. Although there was no physical or medical evidence of the acts, there was a videotaped interview with the four-year-old victim, defendant's daughter, in which she told and demonstrated with anatomically correct dolls what had happened with her father. The videotaped interview was admitted into evidence before the jury pursuant to Ky. Rev. Stat. Ann. § 421.350(2). The trial court refused defendant's request to suppress the videotaped testimony of the child. Defendant appealed, stating that the videotape was an impermissible, unsworn, out-of-court statement.

Held, reversed. The Supreme Court of Kentucky stated that in the case of young children, the trial court must determine a child competent to testify before that child can become a witness. The court found KRS 421.350(2) to be an unconstitutional infringement of the inherent power of the judiciary as declared in Sections 27 and 28 of the state constitution, because it permitted the testimony of young children who had not been determined competent to testify by the court to be admitted as evidence. Also, the statute constituted a legislative interference with the authority of the judiciary to conduct an orderly system of justice, because it permitted a child to be a witness without first having taken an oath to tell the truth. Because the trial court did not first determine the child competent to testify in this case, the videotaped testimony was accordingly held to be

inadmissible as evidence. Gaines v. Commonwealth, 728 S.W.2d 525 (1987).

Missouri Defendant was convicted of first-degree sexual abuse and third-degree assault. The victim, defendant's eight-year-old stepdaughter, was allowed to testify about the incidents of abuse without a prior determination of competency pursuant to Mo. Ann. Stat. § 491.060(2). Section 491.060(2) creates rebuttable presumptions that a child less than ten years of age is not competent to testify except when that child is alleged to be a victim of offense against the person, sexual offense, or offense against the family. On appeal, defendant argued that the statute was unconstitutional because it denied him equal protection under the law as guaranteed by the Fourth and Fifth Amendments to the United States Constitution and Mo. Const. art I, § 2.

Held, affirmed. The Supreme Court of Missouri stated that in equal protection claims, if a statutory classification neither burdens a suspect class nor impinges upon a fundamental right, then it need only be rationally related to a legitimate governmental interest to be valid. The well-established rule is that the legislature has the plenary power to prescribe or alter rules of evidence absent an express constitutional guarantee to the contrary. The classification made by Section 491.060(2) did not operate to the disadvantage of a suspect class nor did it impinge upon a fundamental right. Since he had the opportunity to cross-examine the child, defendant was not deprived of a fair trial or any meaningful opportunity to defend against the abuse charges when the child was allowed to testify. Section 491.060(2) does not arbitrarily classify various criminal offenders as argued by defendant. Because the presumption of competency made by Section 491.060(2) is made applicable only when the child's testimony is critical to the prosecution and such a presumption is not necessary when the child's testimony is not the only direct link between the accused and the crime, the court determined that the distinction was a rational one, made to further the legitimate state interests of protecting the welfare of children and enacting procedural and evidentiary rules to effectively enforce state criminal statutes. Thus, Section 491.060(2) did not deny defendant equal protection. State v. Williams, 729 S.W.2d 197 (1987) (en banc).

ADMISSIBILITY AND WITNESSES

§ 13.20 Relevancy and prejudice

Arizona Defendant was convicted of first-degree murder, unlawful transportation of marijuana, and conspiracy to unlawfully transport marijuana. He appealed, contending that the trial court erred by admitting photographs of the victim's charred body and skull into evidence. The photographs, he argued, were highly prejudicial and did not prove that defendant was the perpetrator.

Held, reversed and remanded for a new trial. Although the photographs were relevant to identify the deceased and to show how the crime was committed, relevance alone does not determine whether photographs are admissible evidence. They are admissible only if their probative value outweighs their inflammatory effect on the jury. In this case, the inflammatory effect substantially dwarfed any probative value. The fact that the victim was killed and the manner of his death were never in controversy. The only issue being tried was the identity of the

killer, and the photographs could not contribute to a reasoned determination of that issue. State v. Chapple, 660 P.2d 1208 (1983) (en banc).

Maine Defendant, convicted of armed robbery, argued on appeal that there should be a reversal because a shotgun found in his presence at the time of arrest was improperly admitted into evidence at trial. Defendant was identified two days after the robbery from photographs. Police proceeded to his girl friend's apartment, where they found defendant asleep on a bed. On the floor, partially protruding from beneath the bed, was a shotgun; police seized the weapon and arrested defendant. At trial, witnesses stated that defendant was armed with a rifle or shotgun when he committed the robbery and generally described the weapon. The shotgun seized at the time of defendant's arrest matched the witness' description, but the prosecution offered it into evidence without making a direct effort to authenticate it as the weapon used during the crime; the shotgun was admitted over defendant's objection that its probative value was outweighed by its prejudicial impact on the jury.

Held, affirmed. The Supreme Judicial Court of Maine found that the trial judge had properly ruled that the shotgun was relevant to the issue of defendant's identity. It was rational, stated the court, to infer that defendant "committed the crime because he was later found to be in possession of a weapon meeting the general description of that used in the commission of the theft." To lay a proper foundation for admission of the weapon, the court continued, it was not required that it be directly and unequivocally identified as the gun used by defendant during the crime; a sufficient foundation was established by the witness' description. The danger of prejudice was not great, suggested the court, because the jury's reason would not likely have been overcome by the sight of the shotgun; neither would the jury have likely drawn an improper inference concerning defendant's character or criminal propensities from his possession of such a weapon. Accordingly, it ruled, the trial judge had acted within his discretion in admitting the shotgun into evidence. State v. Forbes, 445 A.2d 8 (1982), 19 CLB 87.

Maryland Defendant, convicted of armed robbery, burglary, and related crimes, argued on appeal that the trial court erroneously refused to permit evidence that he lacked the requisite intent. It was alleged that defendant and Byrd had forcibly entered the Owsik residence, threatened Mrs. Owsik with guns, and removed various items of property. Defendant contended at trial that he and Byrd had been recruited by Walker, who told them that the purported crime had been planned by Mr. Owsik, who intended to submit fake insurance claims. The trial court refused to allow defendant and his witnesses, Byrd and Walker, to refer to the alleged insurance fraud during their testimony, ruling that it was irrelevant.

Held, reversed and remanded. The Maryland Court of Appeals held that defendant was entitled to a new trial, stating that evidence tending to show defendant's intent, as well as the property owner's consent or lack of consent, was relevant and admissible. Here, defendant had offered testimony tending to establish that he lacked intent to commit robbery and burglary because he intended to enter and take property from the Owsik residence with the owner's consent; thus, although

he may have intended to participate in an insurance fraud, he lacked intent required to commit the crimes for which he was tried. Accordingly, it held that evidence concerning the insurance scheme should have been admitted. Leeson v. State, 445 A.2d 21 (1982).

Mississippi Defendant was convicted of possession of marijuana with intent to transfer or distribute it. During the trial, a state expert testified on the reasons why marijuana was classified as a controlled substance. Defendant appealed concerning the admission of this testimony and on other grounds.

Held, conviction affirmed. The court stated that although the testimony was not relevant and should not have been permitted, the strength of the evidence against defendant prevented a finding of prejudice. The fact that the case was not a "close" one also led to a finding of harmless error on another appeal by defendant based on the fact that the prosecutor asked questions suggesting the existence of evidence that was not in fact brought before the jury. The case was remanded for resentencing on other grounds. Burns v. State, 438 So. 2d 1347 (1983).

Missouri Defendant was convicted of two counts of first-degree murder for which he was sentenced to death. Under the terms of a plea agreement, in exchange for two concurrent thirty-year terms of imprisonment, a co-defendant was to plead guilty to two counts of felony murder and to "testify truthfully" if called as a witness. Co-defendant was endorsed as a witness by both the state and defendant; however, prior to defendant's trial, the state announced that it did not intend to have co-defendant testify. The state's motion *in limine* to prohibit any reference to co-defendant's plea agreement was sustained on the condition that the state not call co-defendant as a witness. On appeal, defendant argued that the court erred during the penalty phase of trial in prohibiting him from introducing evidence pertaining to the plea agreement between co-defendant and the state.

Held, conviction affirmed. The court determined that defendant made only a vague and conclusory argument that co-defendant's plea agreement was relevant as a mitigating factor since the agreement did not pertain to defendant's character or prior record. Whereas co-defendant's activities in the crime were relevant to the circumstances of the offense, the bargain he struck with the prosecutor was not. Because defendant's contention was in essence a flawed assertion that the jury may properly engage in a proportionality review that takes into consideration sentences awarded other defendants, the court determined that trial court did not abuse its discretion in excluding evidence of the plea agreement. State v. Schneider, 736 S.W.2d 392 (1987).

Pennsylvania Defendant was convicted of vehicular homicide. While driving at one o'clock in the morning, defendant struck and killed a man who was jaywalking, wearing sunglasses, and drunk. Defendant appealed because the trial court excluded the evidence of intoxication of the deceased pedestrian, which was relevant to defendant's theory of the cause of the accident.

Held, reversed and remanded. The trial court had based its decision to exclude the evidence on Kriner v. McDonald, 223 Pa. Super. 531, 302 A.2d 392 (1973), which stated that

intoxication of the pedestrian is inadmissible in a civil case unless such evidence proves unfitness to be crossing the street. However, this case was criminal and not civil. Unlike the civil contest, the issue before the court was not negligence or contributory negligence, but rather causation: was defendant's conduct a direct and substantial cause of the injury? The court believed that the trial court should have admitted evidence of a pedestrian's intoxication only if that evidence was relevant and supported by expert testimony that explains the manner by which alcohol affects one's motor reflexes and sense of judgment, since such testimony would help the jury to understand a material element of the crime, namely, causation. Defendant sought to demonstrate that decedent had caused the accident, challenging the causal connection between his conduct and the accident, the direct connection that the commonwealth must prove beyond a reasonable doubt. Commonwealth v. Uhrinek, 544 A.2d 947 (1988).

§ 13.25 Defendant's silence while in custody

Connecticut Defendant was convicted of felony murder. At trial, he was cross-examined by a prosecutor as to his failure to make either a pre-arrest or post-arrest statement to police in regard to his role in the crime. Defendant had submitted himself to the custody of the police, but, on the advice of counsel, had exercised his right to remain silent, not answering a question regarding a car he owned that was found at the murder scene. In addition, defendant had failed to respond to the prosecutor's questions as to his actions when he found out that he was wanted. At trial, the prosecutor pointed to this silence as evidence of defendant's culpability. Defense counsel objected that the question constituted an impermissible comment on defendant's right to remain silent by pointing to the fact that defendant had never given a statement to police. Defendant cited Doyle v. Ohio, 426 U.S. 610, 617–618, 96 S. Ct. 2240, 2243–2244 (1976), which held that a post-arrest silence has ambiguous meaning because it may be nothing more than the exercise by an arrestee of his right to remain silent in the wake of the customary *Miranda* warnings given a suspect at the time of his arrest, and might have little or nothing to do with guilt or innocence. Defendant attempted to extend *Doyle* to include the pre-arrest period.

Held, affirmed. The Connecticut Supreme Court found that the questions addressed to defendant by the prosecutor on cross-examination with respect to his pre-arrest and post-arrest silences were not violative of defendant's state and federal constitutional rights to remain silent, in the absence of a demonstration on the record that government personnel induced defendant's post-arrest silence by giving him a *Miranda* warning. At the time of his initial questioning, defendant was not under arrest, having turned himself in to the police, and he had not been given *Miranda* warnings when he invoked his Fifth Amendment rights. The court stated that it adhered to the general principle that a "pre-arrest silence under circumstances where one would naturally be expected to speak may be used either as an admission or for impeachment purposes. . . . The circumstances, of course, must be such that a reply would naturally be called for even in the pre-arrest setting." Since defen-

dant had never been issued *Miranda* warnings, *Doyle* was inapplicable, and there was no constitutional violation in the cross-examination as to defendant's pre- and post-arrest silence. State v. Leecan, 504 A.2d 480 (1986), cert. denied, 106 S. Ct. 2922 (1986).

§ 13.35 Chain of possession

Iowa Defendant was convicted for burglary and the determination that he was an habitual offender. On appeal, he contended that the trial court erred in admitting into evidence a pair of gloves because a proper chain of custody was lacking. At trial, an accomplice identified and claimed ownership of a pair of gloves received into evidence over defendant's objection. In particular, the accomplice testified that he had loaned the gloves to defendant on the night of the burglary. While he did not specifically describe any distinguishing characteristics of the gloves, he stated they were clean when he loaned them and later they were dirty and smelled of beef (the case involved burglary and theft of beef). After defendant and two other individuals were arrested, the vehicle they occupied was seized by the police, impounded and searched. No gloves were found during this procedure. Later, the owner picked up the U-Haul truck and, while cleaning it, one of the owner's employees discovered the gloves lying on the floor and turned them over to the police. At trial, he identified the gloves as the ones found in the truck.

Held, conviction affirmed. The Supreme Court of Iowa found that the trial court did not abuse its discretion in admitting the gloves into evidence for two reasons. First, the gloves were a solid object, and they were properly identified by both the owner-accomplice and the employee. Secondly, there was no material change or alteration in the condition of the gloves. Therefore, the chain of custodial evidence provided an adequate foundation for the admission of the gloves. State v. Hutchison, 341 N.W.2d 33 (1983).

§ 13.40 Best evidence rule

Arkansas Defendant, a county tax collector, was convicted of theft for embezzling public funds and malfeasance in office. In calculating the amount of the theft, a team of auditors spent 3,700 hours over a nine-month period examining books and records maintained by defendant's office. At trial, a member of the audit team was permitted to summarize the audit findings from work sheets. Defendant argued it was error to allow such testimony without first introducing the original documents.

Held, conviction affirmed. The Supreme Court of Arkansas ruled that the contents of the voluminous documents, which cannot be presented in court conveniently, may be received in summary form. Here, it noted, hundreds of original documents had been examined by the auditors, who recorded their findings on worksheets; both the original documents and worksheets were made available to defendant for discovery and inspection. Accordingly, it concluded, the summary nature of the auditor's testimony was proper. Mhoon v. State, 642 S.W.2d 292 (1982), 19 CLB 490.

§ 13.45 Character and reputation evidence

Georgia Defendant was convicted of murdering his twenty-month-old daughter. On appeal, he argued that he was entitled to a reversal because of the trial court's erroneous ruling that he had placed his character in issue; that ruling enabled the State to introduce evidence of his bad character,

i.e., prior convictions for sodomy and theft. The court's disputed decision came after the following cross-examination of a prosecution witness:

Q. [Y]ou don't have such a good feeling about Wayne Franklin, do you?
A. He's all right.
Q. And you said Wayne's all right. I say you say that Wayne's all right?
A. Uh-huh.

Held, conviction affirmed. The Georgia Supreme Court found that the quoted exchange amounted to an inquiry into character and that, as a matter of law, defendant had placed his character in issue.

Consequently, the court held, the State had the right to rebut the evidence of defendant's good character by introducing evidence of prior convictions for crimes of moral turpitude. Even if error was committed, concluded the court, it was harmless in view of the remaining overwhelming evidence of guilt. Franklin v. State, 303 S.E.2d 22 (1983), 20 CLB 69.

Missouri Defendant, convicted of rape and kidnapping, argued on appeal that there should be a reversal because the trial court erroneously excluded evidence relating to the victim's prior sexual conduct. Defendant had testified at trial in his own behalf, asserting that the sexual activities were consensual. The complaining witness, he stated, had told him at that time that she was having sexual problems with her boyfriend. Defendant then sought to introduce evidence that the complainant had told medical personnel who examined her after the alleged rape that she had engaged in sex with her boyfriend earlier that same evening; he also called the boyfriend and attempted to question him on the same subject. The trial court refused to permit those lines of inquiry, holding that it was inadmissible under the state's rape-shield law. On appeal, defendant asserted that the evidence was probative of "motive to have sex, motive to lie, and motive to go to a hospital [fear of pregnancy]."

Held, conviction reversed and case remanded. The Supreme Court of Missouri found that the rape-shield law creates only a presumption that evidence of a victim's prior sexual conduct is irrelevant. The statute, the court continued, provides for exceptions and permits a trial judge to admit such proof if it is relevant to a material fact or issue or is evidence of the "immediate surrounding circumstances of the alleged crime." Here, the evidence proffered by defendant went to the "immediate surrounding circumstances" of the alleged rape and was "highly probative of the issues of consent and [defendant's] mental state." It stated:

> The evidence was not offered to show a general inclination to have a sexual experience, but, rather to prove a specific motive. That it may have been inflammatory is outweighed by the fact that this evidence was extrinsic to defendant's own testimony, tending to corroborate that testimony and concerned statements and sexual acts that occurred in very close temporal proximity to the alleged rape.

Finding that the excluded evidence was probative of consent, an element common to both the rape and kidnapping charges, the court reversed both convictions and remanded for a new trial. State v. Gibson, 636 S.W.2d 956 (1982), 19 CLB 269.

Nebraska Defendant was convicted of forcible sexual assault. The victim was a woman whom he knew and with whom he had had sexual relations on five separate occasions in the presence of and with the participation of the woman's husband. On the night of the sexual assault, though, the woman's husband was not at home. On that night, defendant went to the woman's home, and after gaining entrance to the home, refused to leave when requested to do so by the woman. Defendant thereupon sexually assaulted the woman after punching her in the mouth. At bench trial, defendant moved to admit evidence of the victim's previous sexual relations with defendant, in order to show that the sexual "relations" with the woman on the night of the alleged assault were consensual. The court ruled that defendant's proof was insufficient to establish the relevancy of the victim's past sexual behavior to the act in question. On appeal, defendant argued that the trial court erred in not admitting evidence of the woman's past sexual activity with defendant.

Held, conviction affirmed. The Nebraska Supreme Court ruled that evidence of the victim's previous sexual relations with defendant was inadmissible in the absence of evidence of consent to the sexual act of which defendant was convicted. By Nebraska law, in order for evidence of a sexual assault victim's past consensual sexual relations with a defendant to be admissible, a defendant must prove that the act for which he was prosecuted was also consensual. In the present case, there was ample evidence, including defendant's own statements, that the sexual act committed by defendant was forcibly performed. When the victim reported the incident, she was bloody and bruised. A neighbor, to whom the victim ran for help, testified that the victim was crying hysterically and bleeding when she sought the neighbor's assistance. An emergency room physician, who treated the victim's wounds, also testified to her physical condition, including the injuries sustained. Finally, after his arrest, defendant admitted that he "might" have struck the victim and that it "could be" possible that he had sexual relations with the victim against her will on the night of the incident. Thus, in the absence of either express or inferential consent on the part of the assault victim, the evidence of past sexual relations with defendant was properly excluded from evidence. State v. Hopkins, 377 N.W.2d 110 (1985), 22 CLB 297.

Virginia Defendant was convicted of murder for fatally shooting his father; he claimed self-defense. On appeal, he argued that the trial court erroneously excluded evidence of his good character, as follows:

> [Defense Attorney]: Are you aware of the defendant's general reputation for violent behavior in the community?
>
> [Witness]: Yes, sir.
>
> [Defense Attorney]: And what is that reputation?
>
> [Witness]: He has no reputation for violent behavior in the community.
>
> [Prosecutor]: Well, I would object to that.
>
> [Court]: The reputation for violence in the community of the victim is admissible to explain the reaction of the defendant at the time. But the defendant's reputation for violence

> is not admissible. So I'll sustain that objection.

The state argued that (1) defendant did not make a proper offer of proof since "proof that defendant did not have any reputation for violence is not the equivalent of having a reputation for being a peaceable, law-abiding citizen"; (2) the character evidence was irrelevant because defendant admitted the physical act of shooting his father; and (3) the error, if any, was harmless.

Held, reversed and new trial ordered. The Supreme Court of Virginia stated that an accused may offer evidence of his good character for a trait involved in the particular prosecution; evidence of defendant's general reputation for violence or nonviolence is relevant in a murder prosecution, it stated, and the semantic distinction relied on by the prosecution was not of any import. Responding to the prosecution's second contention, the court stated:

> It is true that the admissibility of character evidence is grounded upon the premise of improbability of guilt by such a person, but a concession of the physical act which occurred is not synonymous with a concession of guilt. A specific intent is an indispensable element of the murder, and character evidence may tend to negate the existence of the mens rea.

While there was evidence in the record of defendant's reputation for honesty and his lack of prior criminal involvement, the court declined to find the error harmless since there was no other evidence of his reputation for peacefulness. Barlow v. Commonwealth, 297 S.E.2d 645 (1982), 19 CLB 384.

Wisconsin Defendant was convicted of rape. The trial court admitted direct testimony by the complainant that she was a virgin at the time of the incident, and also admitted medical testimony to the effect that complainant had sustained a small tear in her hymen, broken blood vessels and swelling in the area. The court also refused to admit evidence proffered by the defense to establish that the complainant, but not the defendant, had gonorrhea at the time of the incident. The court of appeals reversed conviction.

Held, judgment reversed and conviction reinstated. The court examined Wisconsin's rape-shield law, which provides that, subject to certain exceptions, "any evidence concerning the complaining witness' prior sexual conduct . . . shall not be admitted into evidence . . . ." It held that this statute does not necessarily preclude the admission of such evidence for another proper purpose, so long as (1) the evidence serves to prove a relevant fact independent of the complainant's prior sexual conduct; (2) the probative value of the evidence outweighs any prejudice; and (3) a proper limiting instruction is given. Since the plain meaning of the words "prior sexual conduct" includes the lack of sexual activity, and since complainant's testimony did not establish any fact independent of her prior sexual conduct, that testimony was inadmissible. The court found that the doctor's testimony, along with other testimony by complainant that she made several remarks to defendant to the effect that she "didn't do that," could have been admissible because each was highly probative on the issue of consent. However, since a proper limiting instruction was not given in either case, admission of this testimony was also

erroneous. The court, however, deemed the errors to be harmless based on the weight of the evidence. The court held that the evidence about gonorrhea was also inadmissible on its face under the rape-shield law, and that since the improper admission of the virginity evidence was harmless, there was no basis to hold that admission of the proffered evidence would have changed the result. State v. Gavigan, 330 N.W.2d 571 (1983).

§ 13.50 Proof of other crimes

Georgia Defendant was convicted of murder and possession of a firearm. He appealed, contending that the trial court erred in allowing testimony of prior unprovoked assaults defendant committed by shootings.

Held, affirmed. The evidence was properly admitted. Defendant's prior crimes were sufficiently similar to the crime for which he was convicted to prove defendant's tendency to respond to a dispute with a gun. Since defendant claimed self defense, evidence of previous unprovoked attacks was relevant to show malice, intent, motive, and bent of mind. Gentry v. State, 301 S.E.2d 273 (1983).

Nevada Defendants, convicted of armed robbery, argued on appeal that evidence of criminal activity unrelated to the crime charged was erroneously admitted through the testimony of a police detective and required reversal. At trial, the detective testified that witnesses identified defendants from photographs that he had obtained from the homicide division. The defense counsel objected to the reference to the homicide division, but rejected the trial court's offer to give a limiting instruction because they felt that such an admonishment would highlight the detective's statement.

Held, affirmed. The Supreme Court of Nevada noted the general rule that evidence of prior criminal activity is admissible only for limited purposes and only if its probative value outweighs its prejudicial effect, affirmed the convictions. The rule against introduction of previous offense testimony is not violated, said the court, unless the testimony is prejudicial to the defendant. Here it found, the reference to the homicide division was too tenuous to have damaged the defendants. Coats v. State, 643 P.2d 1225 (1982), 19 CLB 88.

North Carolina Defendant was convicted of assault with a deadly weapon with intent to kill, inflicting serious injury, kidnapping, and first-degree murder. On appeal, he argued that testimony of the victim of a prior rape should not have been admitted since he had stipulated to the prior conviction. However, defendant never stipulated that the Georgia rape conviction involved the use or threat of violence to the victim even though an element of rape under Georgia law is the "use or threat of violence to the person." When the state sought to introduce testimony of the rape victim, defendant objected on the ground that his stipulation foreclosed the state from establishing that the prior conviction involved the use or threat of violence. The victim took the stand and stated that defendant had raped her at knife point, threatening to kill her and her young daughter.

Held, affirmed. There was no error in the trial court's admission of the rape victim's testimony. The use or threat of violence in the commission of a prior felony may be proven or rebutted by the testimony of witnesses, and the state may introduce evidence thereof notwithstanding defendant's

stipulation of the record of conviction. The state should be allowed to perform its duty to prove each aggravating circumstance of a crime beyond a reasonable doubt. If defendant had committed a particularly heinous crime in the past, the jury should be so informed. Conversely, defendant should be allowed to offer evidence in support of possible mitigating circumstances instead of being bound by the state's stipulation. State v. McDougall, 301 S.E.2d 308, cert. denied, 104 S. Ct. 197 (1983).

North Dakota Defendant was convicted of driving while under the influence of alcohol. On appeal, he argued that the state's complaint improperly alleged defendant's prior conviction for a similar offense, and that admission of evidence of the prior conviction was prejudicial. Under North Dakota law, a class B misdemeanor for drunken driving can be enhanced to a class A misdemeanor by evidence of a prior conviction for a similar offense.

Held, affirmed. The court noted that its own jurisdiction and the weight of authority supports the view that, with no statutes to the contrary, a prior conviction resulting in an enhanced penalty for subsequent convictions for drunken driving must be alleged in the complaint or information. Defendant should be notified of the exact nature of the charge against him, and should have an opportunity to meet the allegation of prior convictions. The evidence was not too prejudicial for admission because its probative value outweighed any danger of unfair prejudice. The danger of prejudice was minimized by the judge who limited live witness testimony to the recitation of defendant's name, the type of offense, and the date of conviction. Furthermore, it was clear that the prior conviction was not the sole reason for the subsequent conviction. The record showed defendant's blood alcohol test to be well beyond the 0.10 percent presumption of intoxication. State v. Edinger, 331 N.W.2d 553 (1983).

§ 13.55 Proof of other bad acts

Arizona Defendant was convicted of first-degree murder. On appeal, he challenged the trial court's admission of evidence of a prior murder attempt upon the victim, in the form of the victim's hearsay statements. Two witnesses testified that eleven months before her death, they had contact with the victim, who was bleeding and in a stupor. Victim told both witnesses that defendant had drugged her and tried to kill her. Defendant challenged the admission of the victim's statements on three grounds: (1) the incident constituted an inadmissible prior bad act; (2) the statements were inadmissible hearsay; and (3) the admission of the testimony denied defendant his Sixth Amendment right to confrontation.

Held, affirmed. The incident did not constitute an inadmissible bad act presented to prove defendant's character and that he acted in conformity therewith. Instead, it was presented as evidence of defendant's ill will toward the victim and his ability to premeditate her murder. It was admissible to rebut defendant's claimed inability to harm the victim because of his love for her. Admission was also proper under the "excited utterance" exception to the hearsay rule because the victim's statements related to a startling event and were spontaneous. Defendant's contention that the statements were inadmissible because the victim was drugged when she

uttered them was incorrect. It is unquestionable that drugs can impair one's ability to perceive and communicate. However, the question of the reliability of drug-influenced statements should be for submission to the jury. Finally, admission of the victim's statements did not deny defendant his right to confrontation. Absent cross-examination of the declarant, the confrontation clause is satisfied if the hearsay statement has a high degree of reliability. Generally, any evidence falling within the "excited utterance" exception would for that reason alone satisfy the reliability requirement. In addition, much of what the declarant said was corroborated by independent evidence. State v. Jeffers, 661 P.2d 1105 (1983).

§ 13.60 Proving intent

New Hampshire Defendant was convicted of disposing of stolen property, a stereo system. The stereo and a handgun had both been stolen from the complainant's home at the same time. The stereo was recovered from a party who bought it from defendant; the handgun was not recovered.

At trial, testimony established that defendant had attempted to sell both the stereo and a handgun identical to the one stolen from the complainant to a third party on the day of the theft. It was also shown that defendant, an acquaintance of the complainant, was very familiar with the handgun. On appeal, defendant argued that testimony relating to the handgun was unduly prejudicial because it suggested that he had stolen the weapon, an uncharged crime.

Held, conviction affirmed. The Supreme Court of New Hampshire found that the disputed evidence was admitted properly. Evidence concerning defendant's familiarity with the handgun, it stated, was relevant on the issue of defendant's knowledge that the stereo was stolen because it showed that, if the revolver had been presented to him along with the stereo, he would have recognized the gun as having been stolen from (the complainant) and would therefore have known or believed that the stereo was also stolen. The trial judge, continued the Court, had specifically instructed the jury to consider the testimony only on the issue of defendant's intent; moreover, it found, there was no reason to believe that the implication that defendant had stolen the handgun and the stereo at the same time caused the jury "to view him in a substantially more negative light" than if the evidence was limited to theft of the stolen stereo only. Accordingly, it concluded that the probative value of the disputed evidence was not outweighed by any prejudicial effect it may have had. State v. Donovan, 462 A.2d 125 (1983), 20 CLB 178.

Pennsylvania Defendant was accused of bludgeoning his victim to death and of robbery. Convicted of second-degree murder and robbery and sentenced respectively to life-imprisonment and ten to twenty years concurrently, he filed a direct appeal. At the trial, his counsel had maintained that defendant, who was seventeen years old at the time of the incident in question, and suffered from organic brain damage and mild retardation, was, due to his diminished capacity, incapable of forming an intent to kill or commit robbery. The defense at trial was that he was guilty only of third-degree murder and theft. Among defendant's contentions on appeal was that the trial court erred in excluding testimony of a clinical psychologist offered

by the defense to establish that defendant lacked the specific intent to commit robbery at, or about, the time of the murder. Defendant asserted that he should have been given the opportunity to establish diminished capacity sufficient to negate the requisite intent to commit robbery as a defense against the robbery charge and against application of the felony murder doctrine.

The query, posed on direct examination, that the trial court deemed inadmissible was:

> Now, Dr. Cooke, were you able to form an opinion with a reasonable degree of scientific certainty as to whether or not Marvin Garcia [*defendant*] had an intent to steal anything from Mrs. Schmidt prior to or before committing this homicide?

Held, affirmed. The Supreme Court of Pennsylvania upheld the trial court's objection to this question. The court held proper psychiatric testimony admissible only to negate the specific intent required to establish first-degree murder. Therefore, the determination of whether defendant ever formed an intent to rob, and if so, when he formed such intent, had to be made on the basis of the factual circumstances surrounding the criminal episode as developed by demonstrative evidence and testimony other than psychiatric expert testimony. The chief justice, concurring in the ruling on inadmissibility of the question, disagreed with the conclusion in the main decision that psychiatric testimony is admissible only to negate the specific intent required to establish first-degree murder. If proper evidence had been offered by the defense, either psychiatric or otherwise, to negate the specific intent required by the underlying felony, that evidence should have been submitted to the jury for its assessment in the determination of the applicability of the felony murder principle to the case. Commonwealth v. Garcia, 479 A.2d 473 (1984), 21 CLB 186.

Pennsylvania Defendant was convicted of first-degree murder and criminal conspiracy. On appeal, he claimed that the evidence was insufficient to establish a shared intent to kill the victim. Defendant and his coconspirators had been selling drugs in a housing project. He had expressed an intent to kill the deceased, whom he believed was interfering with his drug business. In defendant's presence, a coconspirator shot and killed deceased at the residence where the illicit business was being conducted. Defendant assisted in disposing of the body and concealing the murder weapon. He then told a friend that he had killed deceased, and admonished him not to disclose that confidence.

Held, conviction affirmed. The commonwealth's evidence of shared intent to kill went beyond and the defendant's presence at the scene of the crime. The evidence of defendant's stated intent to kill deceased, his help in concealing the crime, and his subsequent admission of his participation provided an adequate basis for the jury's verdict and the inference of his shared intent to kill deceased. Furthermore, the nature of the killing, a shotgun blast to the head at short range, established a specific intent to take life. Commonwealth v. Rodgers, 456 A.2d 1352 (1983).

§ 13.70 Circumstantial evidence

Florida Defendant was convicted of a double murder based upon evidence

that his fingerprints were found on various objects in the victims' home; the fingerprint evidence, he argued, was insufficient to sustain the conviction. At trial, he had testified that he handled the items on the day before the killings when he and the victims' nephew, a friend, had performed some household chores.

Held, reversed and remanded. The Supreme Court of Florida noted that the case against defendant was entirely circumstantial and thus subject to a "special standard of review." It stated: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." Here, said the court, the fingerprint evidence was the only proof of defendant's involvement in the murders and the state "failed to establish that [defendant's] fingerprints could only have been placed on the items at the time the murder was committed." Moreover, it found, defendant's explanation was reasonable and not inconsistent with the state's proof. Jaramillo v. State, 417 So. 2d 257 (1982), 19 CLB 178.

§ 13.80 —Flight

Indiana Defendant, convicted of robbery and theft, argued on appeal that a reversal was required because the trial court erred in charging the jury that evidence of defendant's flight from police could be considered by them as evidence of consciousness of guilt. At trial, it was established that defendant robbed the complainant in her apartment at gunpoint, taking cash, jewelry and car keys. She then discovered that her car was missing. Three days later, a state trooper observed defendant make an illegal U-turn and attempted to pull defendant over for the traffic violation. Defendant refused to pull over and increased his speed; he was finally stopped at a road block and a check on the car revealed that it had been stolen. On appeal, he argued that his attempted flight from police related only to the traffic violation and not the robbery-theft charges, and that the jury was misled by the trial judge's instruction on flight.

Held, conviction affirmed. The Supreme Court of Indiana rejected defendant's claim stating that "[i]t is well established that flight may be considered as circumstantial evidence of guilt." To ascertain whether a jury instruction on flight is applicable, continued the court, "all reasonable inferences that may be drawn from the evidence must be considered." Here, it found, defendant was fleeing from police in a car three days after it was stolen, supporting the reasonable inference that defendant would not have fled if the car were not stolen. Accordingly, concluded the court, the instruction on flight was relevant to the charges and was not given erroneously. Potter v. State, 451 N.E.2d 1080 (1983), 20 CLB 173.

§ 13.90 Exhibits

New Mexico Defendant was convicted of vehicular homicide. He appealed, arguing that the trial court abused its discretion in refusing his request to have the jury view the accident scene. The reasons for his request were to prove that the victim was blinded by the sun when she attempted to cross the intersection and that it would have been impossible for an eyewitness to see defendant's car from where she claimed to have seen it. The state presented evidence that at the

time of the accident, defendant's blood had a high alcohol content and he was driving between ten and twenty-five miles per hour above the speed limit.

Held, affirmed. The trial court did not abuse its discretion in denying defendant's request because the view would not have substantially aided the jury in reaching a correct verdict. The jury was entitled to find defendant guilty upon proof that he was intoxicated at the time of the accident. The proof of negligence on the victim's part that defendant wanted to establish via the view would have been of value only if it established that the victim's negligence was the sole cause of the accident. In light of the substantial evidence of defendant's intoxication, this would have been impossible to establish. Furthermore, the jury could have inferred from the testimony it heard that the victim's vision was impaired by the sun. Finally, the conditions of the accident scene would not have been the same in July, when the trial took place, as they were the previous November when the accident occurred. State v. Maddox, 660 P.2d 132 (App. 1983).

§ 13.95 Opinion evidence

Indiana Defendant, convicted of burglary, argued on appeal that there should be a reversal because the trial court erroneously refused to allow prosecution witness to give opinion evidence on cross-examination. It was established at trial that police arrived at the subject premises, a house owned by Reid, approximately two minutes after receiving a report that someone was kicking down the front door. Upon arrival, they found the door broken open, with the premises in disarray and defendant hiding under the bed. Defendant claimed that he had gone to the premises to visit Reid; arriving to find the door broken open, he entered to check on Reid's safety and hid from police because he was wanted on an unrelated charge. To give validity to defendant's account, defense counsel attempted to question prosecution witness as to whether the crime could have been committed within two minutes and whether defendant could have entered after the crime occurred, but before police arrived. However, prosecution objections were sustained, which rulings defendant claimed constituted reversible error.

Held, conviction affirmed. The Indiana Supreme Court noting the general rule that witnesses may testify only to specific statements of fact, not opinions. While opinion testimony may be given in certain exceptional circumstances, it is not permissible "when the jurors are as well qualified to form an opinion on the facts as the witness."

The court stated:

> Here the defendant's questions called for opinions from the witnesses which are within the jurors' knowledge. The jurors were presented with the circumstances of the crime, and the defendant's version, and the time element. The jury was well qualified to form an opinion as to the possibility of the defendant's actions under the circumstances. In fact, it was the jury's role to do so as the trier of fact.

It concluded that the trial court had not erred in sustaining the State's objections. Hensley v. State, 448 N.E.2d 665 (1983), 20 CLB 73.

New Jersey State appealed for certification of the reversal of defendant's conviction for death by automobile. A

state trooper, while patrolling, discovered an accident. While at the scene of the accident, he made notes, drew diagrams, and ordered pictures be taken. The officer believed that defendant was off the road when he hit the victim, because of where the car was situated. Defendant claimed he did not see the victim. Because the officer was not an accident reconstruction expert, defendant contended the trial court erred when it allowed the officer to express his opinions about the point of impact.

Held, reversed and conviction reinstated. The court stated a lay witness may give his opinion in matters of common knowledge and observation. The court proceeded to give numerous examples of cases where a lay witness, who had knowledge of a field, gave opinions about facts he witnessed. In this case, the officer had training and substantial experience in accident investigation. He based his opinion on his experienced observations, not on any unknown assumptions. The court believed these observations provided sufficient evidence on which to base an opinion about the point of impact. State v. Labrutto, 553 A.2d 335 (1989).

North Carolina Defendant was convicted of sexual abuse. He argued on appeal that he was entitled to a new trial because an expert psychiatric witness, testifying for the prosecution as to the results of his examination of the complainant, was erroneously permitted to express his opinion of defendant's guilt.

The challenged testimony was adduced as follows:

> Q. Doctor Danoff, do you have an opinion based upon your medical training and experience as to whether or not James was fantasizing in any manner in his account of this situation?
> Objection.
> Court: Overruled; you may answer.
> A. Yes, I do.
> Court: The answer to that question is yes or no; do you have an opinion?
> A. Yes, I do.
> Q. What is that opinion?
> A. That an attack occurred on him; that this was reality.
> Motion to strike.
> Court: Motion denied.

Held, reversed and new trial ordered. The North Carolina Supreme Court agreed with defendant that the expert's testimony that "an attack occurred on (complainant), that this was reality" exceeded the proper function of expert testimony as an aid to the jury in determining factual issues and amounted to an improper opinion that defendant was guilty. Expert testimony is admissible, said the court, if:

> (1) the witness because of his expertise is in a better position to have an opinion on the subject than the trier of fact.
> (2) the witness testifies only that an event could or might have caused an injury but does not testify to the conclusion that the event did in fact cause the injury, unless his expertise leads him to an unmistakable conclusion and (3) the witness does not express an opinion as to the defendant's guilt or innocence.

Here, it found, the expert was properly qualified under the first criteria but his testimony violated the second and third criteria. The expert, continued the court, did not testify that the complainant's mental state was consistent with one who had been

sexually attacked or that such an attack "could" have caused his mental state; rather, the testimony was that such an attack had occurred. Accordingly, said the court, the expert's testimony was unresponsive and should have been stricken. Refusing to find the error harmless because the case involved close questions of credibility, it reversed. State v. Keen, 305 S.E.2d 535 (1983), 20 CLB 171.

§ 13.110 Stipulations as evidence

Missouri Defendant, convicted of murder for setting a fire which took five lives, argued on appeal that the trial court erred in allowing photographs of the burned victims into evidence. Admission of the photos was unnecessary to resolve any disputed issue in the case and served only to inflame the jury, defendant contended, because he had offered to stipulate to the cause of death.

Held, conviction affirmed. The Supreme Court of Missouri noted that the state was not obligated to accept defendant's offer to stipulate. As the state must bear the burden of proving a defendant's guilt beyond a reasonable doubt, continued the court, "it should not be unduly limited as to the manner of satisfying this quantum of proof." State v. Clemons, 643 S.W.2d 803 (1983), 19 CLB 488.

§ 13.115 Identification evidence

"Evidence and Trial Advocacy Workshop: Relevancy and Exclusion of Relevant Evidence: Admissibility of Evidence of a Scientific Principle or Technique—Application of the *Frye* Test," by Michael H. Graham, 19 CLB 51 (1983).

Georgia Defendant was convicted of murder and aggravated assault. On appeal, defendant argued that the assault victim's "show-up identification" of him as her assailant violated due process, and that the trial court erred in refusing to allow him to impeach the victim's testimony with a record of her conviction for aggravated assault. At the trial, the victim testified that while driving she heard a shot from a taxicab. After she backed her car toward the taxicab, she observed a man disembark from the cab and approach her. She testified that the man shouted "I don't need no damn witnesses," shot into her car, and assaulted her. At her request, a patrolman drove to the scene and discovered that the cab driver was dead. Afterwards, the victim identified defendant, who was driving by in a car, as her assailant. Defendant was then arrested. The victim testified that she had not known defendant but had seen him once or twice before. The record showed that at the time defendant was arrested, the arresting patrolman had been informed by several of the defendant's friends that defendant had been with them for the past two hours and that the patrolman dispersed the group without taking any statements. The record also showed that the victim had been sentenced to three years on probation for aggravated assault under the Georgia First Offender Act.

Held, conviction reversed. The victim's identification of defendant as her assailant did not violate due process. Under the circumstances, there was little potential for improper and prejudicial influence by the state because the identification was made spontaneously at a time when defendant was not under police suspicion for the commission of any crime. The identification procedures were not impermissibly suggestive. However, the trial court erred in refusing defendant an

opportunity to impeach the witness with evidence of her prior conviction. In balancing the right of a first offender to be protected against having the stigma of a criminal record as opposed to the right of a criminal defendant to impeach a prosecution witness, the latter must prevail. Such error was harmful because the case against defendant rested entirely on the identification testimony. Gilstrap v. State, 301 S.E.2d 277 (1983).

Indiana Defendants were convicted of the robbery of a Wendy's restaurant. About one hour after the robbery, defendants were detained by the police. Six witnesses to the robbery were brought by the police to the site where defendants were detained. When the witnesses and the police arrived at the location where defendants were detained, the witnesses were lined up and defendants were placed in front of them. The witnesses identified defendants as the robbers, and defendants were arrested. At trial, two of the witnesses, both of whom were restaurant employees, testified against defendants. However, there was conflicting testimony as to what the police officer who escorted the witnesses to the site where defendants were detained told the witnesses on the way. Some testimony was offered that the officer implied that the police had suspects they believed to be the robbers. Other testimony related that the police officer only told them that the police had persons they wanted the witnesses to view for possible identification. The witnesses' identification testimony was, nonetheless, admitted and was used to convict defendants. On appeal, defendants argued that the manner in which the initial identification of defendants by the witnesses was handled was unduly suggestive and tainted the reliability and admissibility of the witnesses' in-court testimony.

Held, affirmed. The Indiana Supreme Court declared that the identification testimony of the witnesses was properly admitted at trial. The court stated that the criterion for admission of identification testimony is the reliability of the identification. It must be determined whether, if suggestion occurred, the suggestion was so great as to result in a very substantial likelihood of misidentification. The court noted that unnecessary suggestion alone does not make the identification testimony inadmissible. The question to be answered is whether, under the totality of the circumstances, the identification was reliable despite the suggestiveness of the confrontation procedure. The court stated that the reliability of an identification depends on the opportunity of a witness to see the criminal at the time of the crime, a witness' degree of attention, the accuracy of his prior description of a criminal, the level of certainty displayed by a witness at the time of identification, and the amount of time that passed between the crime and the confrontation. In this case, the two witnesses who testified were close to defendants at the crime scene, their descriptions of defendants were accurate, and they confronted defendants about one hour after the crime. Considering the facts and circumstances of the case, the witnesses' identifications were reliable, and the trial court properly admitted their testimony. Hamlet v. State, 490 N.E.2d 715 (1986).

Minnesota Defendant was convicted of criminal sexual conduct and aggravated robbery. A year after the incident, the complainant spotted defendant. She contacted police, who

showed her a photographic display which contained defendant's picture and other pictures. She positively identified defendant based on the pictures, and repeated her identification at a subsequent confirmatory lineup and at trial. On appeal, defendant complained of the identification procedure, arguing that the lineup was unfair in that he was the only person in the lineup whose picture had been shown to the witness. He also argued that he was prejudiced by the trial court's admission of police identification photographs of him.

Held, conviction affirmed. The court held that, since the complainant had identified defendant's picture, the lineup was merely a confirmatory lineup, and the identification procedure thus did not create a very substantial likelihood of irreparable misidentification. It further pointed out that if the complainant had failed to identify him from the photographs, the lineup would have been open to question on that ground. As to defendant's second claim, the court held that the general reason for generally excluding police identification photographs is the risk that the jury might improperly infer from them that the defendant has a serious prior criminal record. The probative value of such photographs must be balanced against their potential prejudice, and the court found no prejudicial error after applying this test. State v. Russell, 330 N.W.2d 459 (1983).

§13.120 —Courtroom identification

Washington Defendant was convicted on four counts of aggravated first-degree murder. He appealed, contending that the trial court improperly admitted four "in life" photographs of the victims. During the trial, the defense had objected to the photographs, arguing that they were irrelevant and unfairly prejudicial and offered to stipulate to the victims' identities in order to remove that issue from the case. The pictures were admitted, nonetheless.

Held, affirmed. State law mandates that when named victims have been killed, the prosecution must prove the victims' identification. Defendant contended that this point of law became irrelevant when he offered to stipulate to the identity of the victims. The court said that if the state does not agree to the stipulation, the issue remains open and the state can proceed to prove its case in the manner that it sees fit, subject to restrictions. The photographs' value must in no way be outweighed by unfair prejudice to defendant. A trial court's decision in this area could be reviewed only when no reasonable person would take the position adopted by the trial court. The court concluded that the trial court did not abuse its discretion in admitting the photographs, and, therefore, did not violate defendant's due process rights. State v. Rice, 757 P.2d 889 (1988).

West Viriginia Defendant appealed his conviction for second-degree sexual assault. Before defendant was arrested, an officer took him to the victim's home, but she could not identify him as the man who raped her. Defendant claimed that this impermissible "show up" identification tainted the pretrial process.

Held, conviction affirmed. The court explained that although the "show up" was impermissible, the victim's failure to identify defendant probably did him more good than harm. The court postulated the in-

court process was not marred because the victim identified defendant through testimony rather than by sight. The victim testified that she spoke to a man in a car like defendant's, and that man raped her. The defendant later testified that, while driving his car, he spoke to the victim. The court determined an in-court identification can be made if the witness has a reliable basis for doing so, and that basis is independent of pretrial information. In this case, the victim did not rely on the pretrial information to make her in-court identification; therefore, the court found no error. State v. Stewart, 375 S.E.2d 805 (1988).

§ 13.130 —Clothing

Delaware Defendant was convicted of first-degree rape, first-degree kidnapping, and possession of a deadly weapon during the commission of a felony. He appealed, contending that reversible error occurred when the state did not produce or account for potentially exculpatory evidence in the form of the clothing defendant wore during his alleged offenses. Before the trial, defense counsel inquired of the state about production of the clothes. He wanted to examine them for the presence of blood stains from the victim. The state was unable to produce them, claiming that it lacked possession of them and that no blood stains were found on them. At trial, a police detective testified that a detective assigned to the evidence unit took the clothes. The evidence unit detective, however, testified that he never took the clothes and did not know what happened to them. The state argued that a duty, under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), to produce the clothing did not attach because possession of the evidence was unclear. Further, it argued that it did not breach any duty it had under *Brady* because it had acted in good faith.

Held, conviction reversed and case remanded. The state's duty under *Brady* did attach because it was clear that the state actually had possession of defendant's clothing at one time and then lost or destroyed it. Its claim that no blood was found on the clothes had to be based on possession, albeit short-lived. Finding that the degree of prejudice to defendant from the loss of potentially exculpatory evidence outweighed the state's claim of good conduct, the court concluded that the state breached its *Brady* duty. The state, which offered no consistent explanation of its handling of the clothes, did not meet its heavy burden of overcoming defendant's claim of prejudice. Deberry v. State, 457 A.2d 744 (1983).

§ 13.140 —Lie detector test

Florida Defendant was convicted of grand theft. He had orally stipulated to the admissibility of a polygraph examination. During the trial, the polygraph operator acted as an expert witness over the objections of defense, who claimed that defendant only stipulated to the admissibility of the test results and not the expert testimony. At the close of the evidence, defense requested a three-paragraph jury instruction detailing the unreliability of polygraph test results. The trial court refused, instead giving the standard jury instruction on expert witnesses. There were two issues involved. First, did the defendant's oral stipulation involve only the admission of the "pass or fail" results of the polygraph test, or both the results and the expert testimony of the operator? Second, was

the standard instruction to the jury sufficient as to the weight and reliability of the test?

Held, affirmed. The Supreme Court of Florida approved with exception. The court held that the oral stipulation allowed the admissibility of the polygraph. Furthermore, when polygraph tests are used pursuant to the stipulation of both parties, it is generally assumed that the testimony of the examiner is to be included with the admission of the polygram because he is most able to attest to those factors that contribute to its valid interpretation. Since the test results include the examiner's opinions, instruction to the jury must be given. The court found sufficient the standard jury instruction that states that the jury "may believe or disbelieve all or any part of an expert's testimony." Finally, the court announced that, henceforth, all stipulations be set out in writing and signed by the parties. Davis v. State, 520 So. 2d 572 (1988).

Maine Defendant had been released on parole in 1976, following his 1966 murder conviction. He was arrested on rape charges in 1980 and a parole revocation hearing ensued. At the hearing, the complainant herself testified and the results of a polygraph test given to her were received in evidence. Defendant's parole was revoked following the hearing, upon a finding by the parole board that defendant had committed the rape and thereby violated the conditions of his release. Defendant petitioned for post-conviction review, contending that his state and federal due process rights had been violated by use of the polygraph evidence at the hearing.

Held, reversed and remanded. The Supreme Judicial Court of Maine vacated the parole revocation. Under Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972), it observed, a state may not revoke an individual's probation or parole without affording the individual due process of law. State law, it continued, barred the use of polygraph evidence from criminal proceedings; while recognizing that a parole revocation hearing is not a criminal trial, it concluded: "[T]his highly unreliable [polygraph] evidence tended to strongly buttress the credibility of the witness. Accordingly, we conclude that the use of this evidence rendered the parole revocation hearing fundamentally unfair and denied the defendant due process of the law." Ingerson v. State, 448 A.2d 879 (1982), 19 CLB 177, vacated and remanded on other grounds, 491 A.2d 1176 (1985).

§ 13.156 Evidence obtained under hypnosis (New)

"Hypnotically Induced Testimony: Should It Be Admitted?" by Peggy S. Ruffra, 19 CLB 293 (1983).

Idaho Two girls disappeared from their California home after their mother was murdered. The girls and the murdered mother's first husband (defendant) were sighted in Boise and identified from a newspaper picture. Further investigation produced witnesses who saw both girls in the care of defendant. This ultimately led to defendant's arrest in Boise. At defendant's trial for kidnapping, the testimony of a witness, who had been hypnotized twice prior to trial in order to refresh her memory, was presented. The first hypnosis session was conducted by a detective in the presence of the witness' attorney, another detective, two investigators, and operator and recorder. Defense counsel was

aware of the session, part of which was tape recorded. The existence of the second session was not revealed during discovery. The key portion of the witness' testimony consisted of having seen the two missing girls in defendant's house and also of having seen defendant in the house. Defendant was convicted of kidnapping, and appealed, contending that the trial court erred in admitting the testimony of a witness who had been hypnotized to refresh her recollection.

Held, reversed and remanded. The Supreme Court of Idaho adopted a rule whereby trial courts are directed, in cases where hypnosis has been used, to conduct pretrial hearings on the procedures used during the hypnotic session in question. Trial judges then were directed to apply a "totality of the circumstances" test and determine whether, in view of all the circumstances, the proposed testimony is sufficiently reliable to merit admission. A dissenting judge favored a per se rule of inadmissibility. State v. Iwakiri, 682 P.2d 571 (1984), 21 CLB 85.

Illinois Defendant was convicted of murder and armed robbery. During a scuffle, two police officers were shot and killed and their service revolvers taken. On appeal, defendant sought review of the trial court's denial of a motion to suppress the testimony of one of the state's witnesses who testified that he had observed the shooting from inside his home. Defendant contended that the witness' recollection of the shooting and identification of the defendant had been induced or influenced by a session of hypnosis. The witness had undergone hypnosis to assist him in recalling the license plate number of the car that the police officers had stopped.

Held, affirmed. The Supreme Court of Illinois declined to determine the admissibility of hypnotically induced testimony, but stated that a previously hypnotized witness may testify as to his prehypnotic recollection. The Sixth Amendment confrontation clause does not necessarily prohibit the use of testimony based on a witness' prehypnotic recollection, even though the witness' confidence in his memory may have been bolstered to some degree by hypnosis. In such cases, the proponent of the testimony should establish the nature and extent of the witness' prehypnotic recall, and the parties should be permitted to present expert testimony on the potential effects of the hypnosis to the trier of fact. Thus, the trial judge correctly ruled that witness could testify to his prehypnotic recollection. It was determined that on retrial the state would be required to demonstrate that the posthypnotic identification of defendant was anchored in witness' prehypnotic recollection and the defendant would be permitted to present expert testimony to aid the jurors in understanding the potential effects of hypnosis on witness' testimony. People v. Wilson, 506 N.E.2d 571 (1987).

Nebraska Defendant, charged with robbery, was granted his motion to suppress the posthypnotic testimony of the victim, and the state appealed. The victim reported the robbery to the police immediately after it occurred, and was able to recall and relate the details of the robbery and to give a description of the three armed males who committed the crime. During a subsequent hypnotic interview, the victim was able to identify two of the men who robbed him, one of whom was defendant. He again discussed the robbery in great detail.

Held, the state's exceptions were sustained. The court, citing its decision of the same day in State v. Patterson, 331 N.W.2d 500 (1983), held that any evidence the victim was able to recall and relate prior to the hypnosis and as to which there was sufficient reliable recorded evidence was admissible. State v. Levering, 331 N.W.2d 505 (1983).

Nebraska Defendant was convicted of sexual assault. He appealed, arguing that the trial court erred in permitting the victim to testify as to any matters involving the crime which were discussed during a hypnotic session. While under hypnosis, the victim related all of the matters she had previously related to police officers. No material facts were related for the first time during the session.

Held, affirmed. A witness is not rendered incompetent merely because he or she was hypnotized during the investigatory phase of a case. Instead, the witness is permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis. In this case, it was clear that hypnosis did not create the victim's memory of the events. The commission of the assault, lack of consent, and description of the assailant were all well known to her prior to hypnosis. State v. Patterson, 331 N.W.2d 500 (1983).

North Carolina Defendant appealed his conviction for armed robbery on the ground that hypnotically refreshed testimony of his accomplice should not have been admitted at trial.

Held, reversed. Overruling its decision in State v. McQueen, 244 S.E.2d 414 (1978), the Supreme Court of North Carolina held the hypnotically refreshed testimony inadmissible and reversed the conviction. It cited the influence of recent scientific findings:

> The overwhelming scientific evidence is that a subject under hypnosis is extremely susceptible to suggestion, has an often overwhelming desire to please the hypnotist, and is left, after hypnosis, with an inability to distinguish between prehypnotic memory and post-hypnotic recall, which may be the product of either suggestion, confabulation or both.

Further, the tendency of hypnosis to give a subject a false confidence in the accuracy of his posthypnotic recall "may actually nullify the safeguard of cross-examination." The court also cited the growing tendency of other courts to exclude hypnotically refreshed testimony, particularly the overruling in 1983 of the 1968 Maryland decision followed in *McQueen.* While the court did not hold the rule of inadmissibility applicable to all testimony of a previously hypnotized witness, it held that the party attempting to introduce testimony of a previously hypnotized witness must prove that the proffered testimony was related prior to hypnosis. State v. Peoples, 319 S.E.2d 177 (1984), 21 CLB 182.

Virginia Defendant was convicted of murder and abduction of a woman who had been fishing with a male friend when defendant encountered them. Defendant was arrested and charged. About two weeks later, and before the body of the murder victim had been found, the male friend of the murder victim underwent hypnosis in order to remember more details of the events on the day of the abduction. The effort to hypnotize the wit-

ness (the male friend) was made by an anesthesiologist who often used hypnosis in his medical practice. The attempt occurred in the presence of a detective investigating the incident, who did not actively participate in the session. Although the witness could see the detective, the detective did not speak to him during the session. The doctor asked the witness to recount the events leading up to the abduction and prompted the witness to give a more detailed account by questioning him during the narrative. The witness recounted the events through the time when he called the police. Both the witness and the doctor later asserted that the attempt to hypnotize the witness was unsuccessful, that the witness' account of the incident was not altered or enhanced, and that it was not influenced by suggestions from the doctor. Later the remains of a woman's body were found near the scene of the abduction, which remains were identified as those of the victim. Before his trial, defendant filed a motion to exclude the witness' testimony in its entirety, because hypnosis was used to refresh his memory. After reviewing the witness' statements to police prior to his attemped hypnosis, the court found that the witness did not recount anything during the session that he had not already told the police, and therefore admitted the witness' testimony. After the witness' trial testimony, defendant again moved to strike the testimony on the ground that it was hypnotically tainted, but the trial court denied the motion. Defendant was subsequently convicted. On appeal, defendant argued that the trial court erred in admitting the witness' testimony.

Held, conviction affirmed. The Virginia Supreme Court found that the witness' testimony was properly admitted at trial. The question of the admissibility of a witness' testimony depends in part on the witness' competency, the determination of which generally lies within the discretion of the trial court. The admissibility of hypnotically induced testimony likewise depends on the competency of the witness, specifically his ability to observe, remember, and communicate facts. In determining the competency of previously hypnotized witnesses, a trial court should review the circumstances surrounding the hypnosis session, including any evidence of suggestion, and should compare the witness' prior statements with those made after a real or alleged hypnotic session. In this case, the record supported the trial court's finding that the witness' testimony after the real or attempted hypnosis was unchanged from that offered before the session. The hypnotist was a doctor who frequently used hypnosis and who asserted that no suggestion was offered to the witness, whose recollection was, therefore, not altered or enhanced. The witness' testimony was found to be the product of independent recollection, untainted by hypnosis, and was properly admitted. Hopkins v. Commonwealth, 337 S.E.2d 264 (1985), cert. denied, 106 S. Ct. 1498 (1986).

§ 13.157 Posthypnotic testimony (New)

Colorado Defendant was convicted of felony murder and conspiracy to commit sexual assault, charges arising out of the murder of two sisters. He told the police that his brother and another man had taken the sisters to a canyon with the intent of knocking them un-

conscious and raping them. In order to better remember the events in question, defendant underwent hypnosis after signing an agreement with the police that they would not prosecute him for "passive involvement" in the homicides. Defendant made no incriminating statements at these interview sessions but in the months that followed made various inculpatory statements that led to his arrest and subsequent conviction. The conviction was reversed by trial court on the grounds that defendant was entitled to transactional immunity; however, the posthypnotic testimony of defendant and two other witnesses was determined to be admissible. Both the State and defendant petitioned for a writ of certiorari.

Held, affirmed on the hypnosis issue. Defendant's contention that evidence admitted through hypnosis is unreliable and inadmissible per se was rejected; rather, the admissibility of posthypnotic testimony was held ultimately to depend on whether the testimony was reliable, and that the trial court must make an individual inquiry in each case to determine whether the testimony of a hypnotized witness is sufficiently reliable. Additionally, the court held that the following procedures should be followed in cases involving posthypnotic testimony: (1) the party who intends to use testimony from a previously hypnotized witness must timely advise the opposing party of the fact of hypnosis, and make available for inspection all records dealing with the hypnotic sessions; (2) the proponent of evidence from a hypnotized witness bears the burden of establishing its reliability under a preponderance of evidence standard; and (3) the trial court should consider the totality of the circumstances before ruling on the reliability of the testimony. Thus, in light of the fact that there was substantial corroboration of their testimony and some evidence indicating that neither's testimony was the result of the hypnosis session, the posthypnotic testimony of the two witnesses was held to be reliable and, accordingly, admissible as evidence. Defendant's contention that hypnosis had tainted the reliability of his own recall was rejected, the court determining that the record supported the finding that he had not been hypnotized during the hypnosis interview sessions. People v. Romero, 745 P.2d 1003 (1987).

§ 13.158 Recantation of previous testimony by witness (New)

Arkansas Defendant, convicted of rape, argued on appeal that it was an error to permit a prosecution witness to testify in rebuttal that he had given perjured testimony for defendant at an earlier trial of the same case. The defendant had asserted an alibi defense. His parents testified that on the night in question he had arrived home at 2:00 A.M., two hours before the rape was committed, and remained at home until noon on the following day; they understood that he had been out with a friend, Dean. Dean had testified at the earlier trial, which ended in a mistrial, that he and the defendant had been out all evening and that he had driven the defendant home at some time after midnight. However, at the second trial, Dean was called by the prosecutor in rebuttal. He acknowledged that his earlier testimony was false and stated that the defendant had asked him to give the fabricated testimony.

Held, affirmed. The Supreme Court of Arkansas stated that fabricated evidence of innocence has traditionally been considered cogent evidence of

guilt. A party's attempt to fabricate evidence, said the court, is proof that the party himself believes his case to be weak; from that, it reasoned, the inference can be drawn that the case lacks truth and merit. Citing *Wigmore,* the court stated that the inferences to be drawn from fabricated evidence did not apply to any specific fact in the case, but against the entirety of the offering party's evidence. Thus, it suggested, Dean's testimony was admissible not only in rebuttal but also as part of the state's case in chief. Kellensworth v. State, 633 S.W.2d 21 (1982), 19 CLB 82.

§ 13.170 Privileged communications

"Evidence and Trial Advocacy Workshop: Privileges—Husband and Wife; Identity of Informer," by Michael H. Graham, 20 CLB 34 (1984).

Georgia Defendant was convicted of murder and the unlawful concealment of the victim's death. On appeal, he contended that the trial court erred in allowing his ex-wife to testify to communications made to her by him during the time they were married. Her statements contradicted defendant's testimony as to the schedule of his whereabouts on the day of the murder.

Held, affirmed. The communications between defendant and his ex-wife were not privileged because they were not confidential. Communications between spouses are not confidential if impersonal and not made in reliance on the marital relationship. Such was the case with defendant's communications because they only concerned his daily activities. Wilcox v. State, 301 S.E.2d 251 (1983).

Georgia Defendant was convicted of possession of a firearm and murder. On appeal, he argued that the trial court erred in admitting evidence of a confidential communication between him and his wife.

Held, affirmed. There was no violation of the Georgia statute protecting certain confidential communications. Although the letter was identified by defendant, it was never offered in evidence. The only testimony regarding the letter was its identification and subsequent questions regarding statements made by defendant. There was no objection to the questions regarding those statements. Furthermore, the record did not clearly establish that defendant and his wife were married at the time the letter was written or at the time of the trial. Gentry v. State, 301 S.E.2d 273 (1983).

Indiana Defendant was convicted of felony murder by arson. Defendant, a juvenile, lived in a house with her mother, her infant child and her two brothers. She was at odds with her mother over her performance at school and her relationship with her current boyfriend. She planned to run away with her boyfriend and infant child, and made preparations to that end. Before leaving home at 10:00 P.M. defendant spilled gasoline on the carpet and ignited the gasoline causing a fire which destroyed most of the house and caused the death of both brothers. Defendant's attorney employed a person who gave defendant a polygraph examination for the purpose of assisting him in rendering legal advice to defendant. On appeal, defendant claimed that the trial court erred in permitting the state's witness, the polygraph examiner, to testify in the state's case-in-chief.

Held, affirmed. The Supreme Court of Indiana stated that the trial court did not err in keeping from the jury the fact that the defendant's statements

made to polygraph examiner were made during the course of a polygraph examination. The attorney-client privilege attached to the communications between defendant and the examiner at the time the communications were made. However, defendant waived the attorney-client privilege attached to these communications when she called the examiner to testify at her waiver hearing in juvenile court. Brown v. State, 448 N.E.2d 10 (1983).

Minnesota Defendant was convicted of burglary, kidnapping, and first-degree murder. His insanity defense was rejected by the jury. During the second phase of his bifurcated trial, the state subpoenaed two psychiatrists who had originally interviewed defendant at the request of the defense and had advised counsel on his presentation of the insanity defense. The two psychiatrists had not been asked by the defense to testify at trial. On appeal, defendant argued that it had been an error to allow the state to subpoena testimony from defense-retained psychiatrists, because the psychiatrists had, in part, based their opinions on confidential information supplied by the defense. Defendant argued that the information he had provided to the psychiatrists was protected by the attorney-client privilege, and use of this confidential medical information at trial was a violation of that privilege.

Held, affirmed. The Minnesota Supreme Court found that the information the defendant provided the two psychiatrists was not protected by the attorney-client privilege. The court stated that although defendant had not knowingly waived the attorney-client privilege, he had impliedly waived it when he spoke to the two psychiatrists. Although the psychiatrists assured defendant that their conversations would be confidential, the court reasoned that the two psychiatrists would have revealed some of the issues discussed with defendant and defense counsel had they testified in defendant's favor at trial. Because "only communications that are meant to stay in confidence are protected by the privilege" and some of the issues discussed between the psychiatrists and defendant could not be kept confidential, the court determined that the information provided by the psychiatrists was not protected by the attorney-client privilege. In addition, the court stated that because it has been held that an attorney, within the limits of professional propriety, has the implied authority to divulge confidential information to third persons when necessary, the attorney-client privilege permitted the defense counsel to divulge confidential information to the psychiatrists from whom he was seeking advice. State v. Schneider, 402 N.W.2d 779 (1987).

Nebraska Defendant appealed his conviction of first-degree sexual assault. The victim was being treated for psychosis with a prescription drug. Claiming that treatment information was important to his case, defendant wanted the victim's physician to testify even though state law guaranteed patient/physician privilege. The trial court granted the state's motion to prevent the physician's testimony. Defendant claimed the trial court denied him due process of law and curtailed his right of confrontation.

Held, conviction reversed and remanded. The court ruled the victim's testimony is inadmissible when the defense is unable to present impeachment witnesses. The court noted that the Sixth Amendment guarantee to con-

frontation is primarily secured by cross-examination. Because the victim in this case refused to relinquish the patient/physician privilege, she could not effectively be cross-examined about her medication's effect on her mental state. The court explained that when privileged information is needed for impeachment, the court should conduct an in camera investigation to learn whether or not there is any relevant information. If there is, the victim then must decide whether to allow that information or have his or her testimony stricken. State v. Trammell, 435 N.W.2d 197 (1989).

Pennsylvania The attorney general, investigating suspected illegal activity relating to the purchase of exposed X-ray film from hospitals by which silver may be reclaimed via a refining process, obtained a warrant to search the home office of defendant, who had admitted to the illicit purchases, in order to seize his business records. On executing the warrant, defendant told investigators he had given the business records they sought to his attorney, who confirmed this, and another search warrant was obtained for his attorney's office. The law firm sought injunctive relief, and the second warrant was quashed on grounds that it was overly broad and violated the attorney-client privilege. On appeal, the superior court vacated and remanded the decision. Defendant again appealed, arguing that the warrant was so intrusive into areas in which he and his attorney had legitimate expectation of privacy as to render it unreasonable and in violation of his Sixth Amendment right to the effective assistance of counsel.

Held, affirmed. The Supreme Court of Pennsylvania held that evidence sought in the search warrant was not protected under the attorney-client privilege, which is intended to ensure confidential communication between a lawyer and his client to foster a free and open exchange of relevant information between them. Defendant, however, sought to protect what he gave his attorney to hold, not what he said, and thus confidentiality of communication was not at issue. Moreover, the warrant did not compel defendant or his attorney to divulge any matters concerning the facts surrounding the conveyance of the business records or client-attorney communications incidental to their transmittal, but merely required submission to a search. Therefore, there was no basis to the assertion that the tangible evidence sought in the warrant was intended to be included under the attorney-client privilege. In re Search Warrant B-21778, 521 A.2d 442 (1987).

§ 13.173 Defense-retained psychiatrist (New)

Colorado A psychiatrist petitioned for order compelling the district court to quash a subpoena of him and to vacate a contempt citation. The psychiatrist had been retained by the public defender's office to perform a mental status evaluation of defendant, who was charged with murder, in order to determine the feasibility of a mental status defense. When called as a witness by the prosecution at the time of defendant's pretrial sanity hearing, the psychiatrist refused to testify, and the court issued an order of contempt.

Held, order reversed. A psychiatrist, retained by defense to assist counsel in the preparation for trial, is an agent of the defense counsel for purposes of attorney-client privilege. Because the

psychiatrist in this case was hired to assist counsel in preparing a defense, he was an agent of defense and defendant's comments to him were privileged information. The court rejected the argument that defendant's assertion of a mental status defense indicated an implied waiver of the attorney-client privilege. Therefore, absent a waiver, the psychiatrist could not be held in contempt for refusing to reveal the content of his communications with defendant. Miller v. District Court, 737 P.2d 834 (1987), 24 CLB 267.

Nevada Defendant was convicted of first-degree murder. On appeal, defendant asserted that attorney-client privilege was violated when the state called a psychiatrist, originally hired by the defense, as a rebuttal witness to determine defendant's sanity at the time of the killing.

Held, conviction affirmed. Attorney-client privilege is not absolute; rather, it rests on the theory that encouraging clients to make full disclosures to their attorneys enables attorneys to act more effectively, justly, and expeditiously, a benefit that outweighs the risks posed in truth finding. Although most jurisdictions hold attorney-client privilege to be violated when a defense-retained psychiatrist not called on by defense is called as a rebuttal witness to give an opinion on a defendant's legal sanity, this court did not. The opinion testimony on sanity and testimony of nonincriminatory observations in arriving at that opinion, including nonincriminatory statements made by defendant, violated neither defendant's Fifth Amendment privilege against self-incrimination nor his Sixth Amendment right to effective counsel. Haynes v. State, 739 P.2d 497 (1987), 24 CLB 267.

§ 13.175 Duty of court to advise witness of right to counsel and privileges against self-incrimination

Maine Defendant was charged with failure to stop for a police officer, having failed to pull his vehicle over in response to an officer's signals and almost running the officer over in the process. At trial, defendant testified that his companion in the car, Babbitt, not he, had been the driver and that in any event neither he nor Babbitt had noticed the officer. Defendant then called Babbitt as a witness. The trial judge, sua sponte, advised Babbitt that evidence had been adduced that an attempt had been made to run down a police officer, that he, Babbitt, was the driver, and that he could be implicated in the crimes of failure to stop for a police officer, reckless conduct with a dangerous weapon, and obstructing a police investigation. The judge went on to advise Babbitt of the penalties carried by each crime, that he had a Fifth Amendment right to decline to testify and afforded Babbitt an opportunity to consult with an attorney. After speaking with counsel, Babbitt elected not to testify. Defendant was convicted and, on appeal, argued that the judge's cautionary warning to Babbitt violated his right to obtain witnesses in his favor.

Held, conviction reversed. The Supreme Judicial Court of Maine recognized that there is an important interest in protecting a witness' right against self-incrimination and that a trial judge should advise a witness of his rights when the witness may unknowingly incriminate himself. The court held that "[w]arnings concerning the exercise of the right against self-incrimination, however, cannot be emphasized to the point where they

serve to threaten and intimidate the witness into refusing to testify." Here, it found, the trial judge's warnings went beyond simply informing Babbitt that he had a right to refuse to testify and a right to consult with counsel; by emphasizing the seriousness of the crimes and emphatically and repeatedly advising Babbitt that he could elect not to testify, said the court, the trial judge effectively "drove the witness off the stand." As Babbitt's testimony was critical in corroborating defendant's version of the facts, the trial judge's actions deprived defendant of a fair trial, requiring reversal, it concluded. State v. Fagone, 462 A.2d 493 (1983).

§ 13.185 Witness' refusal to answer questions—effect

New York Defendants, convicted of assault and possession of a weapon, argued on appeal that a new trial was required because the prosecution called the victim as a trial witness, knowing that he would refuse to testify. The victim, Iovino, appeared at trial but expressed a reluctance to testify. Counsel was assigned and, after conferring with Iovino, advised the court that Iovino would not testify if called; no reason was given for the refusal. Nevertheless, the court permitted the prosecution to call Iovino; when he refused to answer any questions concerning the assault despite the court's admonitions, the jury was excused and Iovino was held in contempt. Upon the jury's return, the court gave an instruction that the witness' refusal to testify was not to be considered during deliberations. An intermediate appellate court reversed the convictions, concluded that the trial judge erred in allowing the People to call Iovino, once it was clear that he would not testify, because his refusal gave rise to a natural inference that he feared reprisals.

Held, reversed and convictions reinstated. A decision to permit the prosecution to call a witness who has indicated a refusal to testify is a matter of the trial judge's discretion.

> Once a witness has communicated that intent, the trial court must determine whether any interest of the State in calling the witness outweighs the possible prejudice to defendant resulting from the unwarranted inferences that may be drawn by the jury from the witness' refusal to testify. The trial court's exercise of discretion is subject to review by this court only on the basis of whether that discretion was abused.

Permitting a prosecutor to call a recalcitrant witness would be reversible error if the prosecutor's motivation was to create unwarranted inference against the defendant in the minds of jurors or otherwise bolster his case in a manner not subject to cross-examination. Here, however, there was no indication that the prosecutor was guilty of misconduct, as he never commented on or attempted to exploit Iovino's refusal to testify and his case was fully established through other evidence. Moreover, Iovino had not expressed his unwillingness to cooperate until just before he was called; the court stated that under these circumstances "it was not unreasonable for the prosecutor to attempt to induce the witness to again change his mind about testifying by putting him before the jury and having him admonished regarding the court's contempt power." As the prosecutor had a legitimate interest in calling the witness and did not exploit his refusal to testify, the case against defendants was strong and an

appropriate curative instruction was given, the New York high court concluded that there had been no abuse of discretion. People v. Berg, 451 N.E.2d 450 (1983), 20 CLB 177.

§ 13.190 Immunity of witness from prosecution

Georgia Defendant and two others, one Batton and one Dickey, were charged with murder and robbery; the charges against Batton were dismissed, but both defendant and Dickey were convicted at separate trials. Defendant was sentenced to death; he then moved for a new trial and a grant of immunity for Batton, claiming that if immunized, Batton would testify that Dickey, not defendant, had actually fired the fatal shots. Defendant's motions were denied and he appealed, claiming a violation of his Sixth Amendment right to obtain witnesses in his favor.

Held, affirmed. The Supreme Court of Georgia observed that while the Sixth Amendment gave a criminal defendant the right to obtain the testimony of favorable witnesses, it did not confer a right to displace a witness' properly claimed privilege against self-incrimination. However, the court suggested, due process considerations could justify a judicial grant of use immunity to a defense witness, even absent a statutory basis for judicially conferred immunity, where the witness can offer exculpatory testimony essential to the defense and there is no countervailing state interest in withholding use immunity. Assuming, without deciding, that the Georgia courts have the inherent power to grant use immunity under such conditions, the court here found that defendant's request for immunity for Batton was not warranted. The prosecution, it stated, had expressed an interest in prosecuting Batton if sufficient evidence of her involvement in the crime was discovered; a grant of use immunity could jeopardize that prosecution by imposing on the state the burden of proving that the evidence against Batton was derived independently of her testimony on defendant's behalf. The state's interest in a future prosecution of Batton, decided the court, outweighed defendant's need for her testimony. Accordingly, the Georgia high court held that defendant's motions for a grant of immunity to Batton and a new trial had been properly denied. Dampier v. State, 290 S.E.2d 431 (1982), 19 CLB 86.

New Jersey Defendant was indicted for murder and contended that the evidence on which the indictment was based had been derived from testimony that he was compelled to give in exchange for a grant of limited immunity. Defendant had testified against two others; during this testimony, he had implicated himself in the crime. A year later, defendant was indicted. Defendant appealed the order denying dismissal of the indictment.

Held, reversed and remanded. The court said that under defendant's immunity, the state was barred from using compelled testimony or any evidence that was developed as a result of such testimony to prosecute a defendant who had given the compelled testimony, but it could use any evidence that is found or derived through means totally independent of the compelled testimony. The court said that the duty to prove that the evidence the prosecution proposes to use is derived from a legitimate source wholly independent of the compelled testimony

rests with the prosecution. The witness must be left in substantially the same position as if he had claimed the Fifth Amendment privilege. Therefore, the court concluded that the Fifth Amendment mandates the strictest scrutiny of, and the strongest protestations against, possible prosecutorial misuse of testimony with respect to a witness who had earlier been compelled to testify under the grant of immunity. The state must prove that such evidence was developed or obtained from sources or by means entirely independent of and unrelated to the earlier compelled testimony. State v. Strong, 542 A.2d 866 (1988).

§ 13.195 Expert witnesses

"Scholarship in the Courtroom: The Criminologist as Expert Witness," by Patrick R. Anderson, 20 CLB 405 (1984).

"Battered Women, Straw Men, and Expert Testimony: A Comment on *State v. Kelly*," by James R. Acker and Hans Toch, 21 CLB 125 (1985).

California Defendant was convicted of murder and was sentenced to death. At trial it was established without dispute that victim, a restaurant worker, took a break from his job at 4 P.M. to cash his paycheck. Shortly after 5 P.M. he was shot and killed by a man at a street intersection in Long Beach. The principal issue was the identity of the perpetrator. The prosecution presented seven witnesses who identified defendant as that person with varying degrees of certainty and one eyewitness who categorically testified that defendant was not the gunman. The defense presented six witnesses who testified that defendant was in another state on the day of the crime. On appeal, defendant contended that the trial court abused its discretion in excluding the testimony of an expert witness on the psychological factors that may affect the accuracy of eyewitness identification.

Held, conviction reversed. The Supreme Court of California en banc held that expert testimony informing the jury of certain psychological factors that may impair accuracy of a typical eyewitness identification, with supporting references to experimental studies of such factors, falls within the broad statutory description that provides that the court or jury may consider in determining the credibility of a witness "any matter that has any tendency in reason" to bear on the credibility of a witness. However, in an ordinary case, the court stated, such evidence will not be needed; expert testimony will only be admitted when an identification is a key element of the prosecution's case but is not substantially corroborated by other evidence. People v. McDonald, 690 P.2d 709 (1984), 21 CLB 263.

Georgia Defendant was convicted of child molestation. At trial, the state introduced testimony by three expert witnesses: a professor of behavioral sciences, a child therapist, and a clinical psychologist, all of whom concluded that the victim was suffering from child sexual abuse syndrome. The court of appeals affirmed defendant's conviction, and he appealed.

Held, reversed. The Supreme Court of Georgia found the testimony of the expert witnesses as to whether the child had in fact been sexually abused to be inadmissible. In Smith v. State, 277 S.E.2d 678 (1981), it was established that an expert may not testify as to his opinion as to the existence vel non of a fact unless the inference to be drawn

from facts in evidence is beyond the comprehension of the jurors who, for want of specialized knowledge, skill, or experience, are incapable of drawing from the facts such an inference for themselves. In the present case, the jury had the benefit of extensive testimony that the victim exhibited several symptoms that were consistent with child sexual abuse syndrome and, therefore, was fully capable of deciding whether the child was in fact abused, and, if so, whether defendant abused the child. Accordingly, the admission of this aspect of the experts' testimony was held to be incorrect. Allison v. State, 353 S.E.2d 805 (1987) (per curiam).

Iowa Defendant was convicted of indecent contact with a child, an eight-year-old female, while the victim and her five-year-old sister were asleep in bed. At trial, the prosecution called two expert witnesses: the first, the principal of the elementary school the victim attended; the second, a child abuse investigator employed by the Iowa Department of Human Services. The essence of their testimony was that children usually tell the truth when they report that they have been sexually abused. Defense counsel did not challenge the witnesses' qualifications, but timely objected that their testimony was not a proper subject for expert opinion. Specifically, defense counsel objected that no person could be an expert in that area, and that their testimony should be disallowed. The court nonetheless allowed the witnesses' testimony. On appeal, defendant argued that the trial court erred in overruling his objections to the admission of the experts' testimony that children almost never lie about sexual abuse.

Held, conviction reversed and case remanded for new trial. The Iowa Supreme Court declared that the trial court abused its discretion in admitting the challenged expert testimony that children rarely lie about sexual molestation, thereby prejudicing defendant and depriving him of a fair trial. The prosecution did not meet its burden to show that the subject matter of the testimony was admissible pursuant to Iowa Rule of Evidence 702, which states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The court stated that when viewed in light of the factual issues in this case, the state's contention that the witnesses' testimony was offered merely to help the jury understand the issue of the general truthfulness of children who claim to have been sexually abused was unrealistic. The prosecutor's real purpose was to bolster the victim's credibility. The effect of the experts' testimony was comparable to telling the jury that the victim would not lie about the matter, so that defendant must be guilty. The expert opinion testimony went beyond merely aiding the jury to understand the evidence and, in effect, passed judgment on the guilt or innocence of defendant. Opinions concerning the truthfulness of a witness, whether or not delivered by an expert, should generally be excluded, because the task of weighing the truth of any witness' testimony is reserved for the jury. State v. Myers, 382 N.W.2d 91 (1986).

Iowa Defendant was convicted of first-degree murder. To support the

first-degree charge, prosecutor introduced evidence that the murder was committed in the course of a rape. A psychiatrist who had examined defendant and his history testified for the state as to the psychology of rapists and characterized defendant as one of the class of aggressive, antisocial, or sociopathic hatred rapists. Defendant appealed on the ground, inter alia, that this evidence should not have been admitted.

Held, conviction affirmed. The court concluded that testimony was reasonably admitted to rebut defendant's contention that sexual intercourse with victim was consensual. State v. Hickman, 337 N.W.2d 512 (1983).

Kansas Defendant was convicted of voluntary manslaughter in the shooting death of her husband. Upon remand, defendant was tried for a third time. An integral part of her defense was that she had shot her husband in self-defense while suffering from the battered-woman syndrome. The trial court refused to permit the testimony of the state's expert witness, who questioned the validity of the syndrome. A mistrial was ordered when the jury was unable to reach a verdict. Subsequently, defendant's motion for acquittal was granted, and the state appealed.

Held, appeal sustained in part. The Supreme Court of Kansas distinguished between requiring that a methodology of an opinion be generally accepted and requiring that the opinion itself be generally accepted. In State v. Hodges, 716 P.2d 563 (1986), it was held that expert testimony on the battered-woman syndrome could not be excluded from evidence to prove the reasonableness of a defendant's actions in self-defense, because the theory and the methodology underlying the syndrome were generally accepted in the scientific community. The court in *Hodges* did not, however, express an opinion upon whether the syndrome itself had become generally accepted, a view that would have permitted only expert testimony favorable to the theory of the battered-woman syndrome to be admitted. Thus, it was held that the trial court misinterpreted the prior ruling in *Hodges* and that the state should have been permitted to present expert witness testimony questioning the validity of the battered-woman syndrome. State v. Hodges, 734 P.2d 1161 (1987).

Kansas Defendant was convicted of voluntary manslaughter. Defendant killed her husband in the bedroom of their home with two shotgun blasts after she was beaten by him and threatened with further violence. At trial, defendant attempted to admit the testimony of a Kansas State University assistant professor of psychology, who was an expert on the battered woman syndrome, to bolster defendant's claim of self-defense, but the court refused to allow the expert's testimony. The trial court ruled that the testimony was irrelevant to defendant's claim of self-defense, and that its prejudicial effect outweighed its probative value. On appeal, defendant argued that the trial court erred in refusing to permit the expert testimony on the battered woman syndrome.

Held, reversed and remanded. The Kansas Supreme Court declared that the trial court improperly excluded the expert's testimony on the battered woman syndrome. The basis for the admissibility of expert testimony is necessity arising out of the case's circumstances; that is, the testimony must

offer something that the jurors in that particular case could not otherwise understand. As well as being helpful to the jury, the expert's opinion must be shown to be generally accepted within the expert's particular scientific field. In the present case, the court ruled that the battered woman syndrome was beyond the knowledge and comprehension of the average lay juror without explanation by an expert. In addition, according to the record, the theory of the battered woman syndrome had gained wide enough acceptance among experts in the field to make such expert opinion scientifically, and thus, legally, admissible. State v. Hodges, 716 P.2d 563 (1986).

Minnesota Defendant was convicted of criminal sexual assault conduct in the first degree. For one month after the assault, victim, a fourteen-year-old, delayed reporting to police and continued to babysit defendant's children. At trial, the trial court allowed the testimony of an expert witness who discussed behavioral characteristics commonly exhibited by adolescent victims of assault. The cour of appeals remanded the case finding that trial court had committed a reversible error when it admitted this testimony, and the state appealed.

Held, court of appeals reversed. The expert witness, a clinical psychologist specializing in the area of sexual abuse, had not examined victim and did not attempt to describe characteristics she observed in victim. Rather, the expert focused her testimony on the general fact that neither a delay in reporting nor continued contact with an assailant is unusual when the victim of an assault is an adolescent. The court concluded that trial court had not abused its discretion by admitting the expert's testimony; the expert's testimony was helpful to the jury and limited in scope so that it was neither misleading nor confusing. State v. Hall, 406 N.W.2d 503 (1987), 24 CLB 278.

Montana Defendant was convicted of deviate sexual conduct and appealed, arguing that expert testimony in support of the victim's credibility was improper, invaded the province of the jury, and should not have been admissible. In the incident at trial, defendant had accompanied his girl friend with her three sons, including the victim, nine-year-old Shane, on a trip from Missoula to Kalispell, Montana. Defendant had been living with victim's mother for about a month. Defendant's girl friend and two of her sons remained in Kalispell while defendant and Shane returned to Missoula late in the evening. Shane testified that on the trip home defendant stopped the car three or four times to perform oral sex on him over his objections. After arriving at their apartment in Missoula, defendant entered Shane's bedroom to perform anal sex on the boy, which continued the rest of the night and early morning. Shane testified that defendant slapped him numerous times and told him not to tell anyone. Shane left the apartment at around 8:00 A.M. and went to the apartment of his mother's friend. Over three weeks later, Shane told his mother about defendant's attacks, whereupon she contacted the local police. After an interview with the authorities, Shane was examined by a pediatrician, a child's psychiatrist, and two clinical psychologists, who each testified at trial. The latter two, Doctors Jenni and Walters, both testified

that they believed Shane was sexually assaulted.

Held, conviction affirmed. The Montana Supreme Court held that the expert testimony was admissible for the purpose of helping the jury to assess the credibility of a child sexual assault victim. The court applied State v. Meyers (359 N.W.2d 604 (Minn. 1948)), which established that it was within trial court's discretion to admit testimony describing the psychological and emotional characteristics typically observed in sexually abused children and those observed in the complainant. In the instant case, it ruled that expert testimony in no way impinged upon the jury's capacity ultimately to judge the victim's credibility, and merely enlightened them on a subject they may have had no common, previous experience with. Moreover, the fact that the victim waited over three weeks to report the assault is not uncommon in cases of children subjected to sexual abuse, since they can be unaware or uncertain of the criminality of the act, and feelings of confusion, shame, guilt, and fear often delay disclosure of it. State v. Geyman, 729 P.2d 475 (1986), 23 CLB 397.

North Carolina. Defendant was convicted of second-degree sexual offense and second-degree rape. At trial, a clinical psychologist who had treated the victim, a thirteen-year-old girl, testified as a state witness. On redirect examination, the prosecutor asked the witness if she had "an opinion satisfactory to [her]self as to whether Vickie [the victim] was suffering from any type of mental condition in early June of 1983 [when the incidents were reported by the victim], or a mental condition which could or might have caused her to make up a story about the sexual assault?" The defense immediately objected to the question, but the trial judge overruled the objection. The prosecutor thereupon asked the witness, "What is your opinion?" The witness then responded that "There is nothing in the record or current behavior that indicates that she [the victim] has a record of lying." On appeal, defendant argued that the trial court erred in admitting this testimony, because it was elicited to bolster the victim's credibility, in violation of North Carolina Rules of Evidence 405 and 608.

Held, reversed. The North Carolina Supreme Court found that the trial court committed reversible error by allowing the prosecutor to pose the question to the clinical psychologist acting as state's witness regarding whether the victim had a mental condition that would cause her to fabricate a story about the sexual assault. The question was improper in that it was intended to elicit a response that would bolster the victim's credibility and to obtain the expert witness' expression of opinion as to defendant's guilt or innocence. North Carolina Rule of Evidence 405(a) prohibits the use of expert testimony on the character, or a character trait, of a person as circumstantial evidence of behavior, and Rule 608 prohibits the use of expert testimony to show the propensity of a witness for truth and veracity. These Rules of Evidence, taken together, in effect prohibit an expert's opinion as to a witness' credibility. The clinical psychologist's testimony on the victim's character was inadmissible because it related to the likelihood that the victim was telling the truth about the alleged sexual assaults and to the likelihood that defendant committed the crimes of which he was accused.

State v. Heath, 341 S.E.2d 565 (1986).

Pennsylvania Following conviction of statutory rape and corruption of an eight-year-old girl, defendant appealed on the grounds that the trial court erred in admitting testimony of the Commonwealth's expert witness, a board certified pediatrician. The pediatrician specifically testified that she had treated approximately 90 to 100 cases per year of alleged sexual abuse over the past four years, and, although the court sustained an objection in a question referring to medical literature as the basis for her testimony, she was allowed to testify that in her experience she knew of no children in the victim's age range who had fabricated stories about sexual abuse.

Held, conviction reversed and remanded. The Supreme Court of Pennsylvania reversed the Superior Court by holding that the expert testimony concerning the credibility of eight-year-old children who claim to have been objects of sexual abuse was improperly admitted. Citing Commonwealth v. O'Searo, 352 A.2d 32 (Pa. 1976), which held that permitting expert testimony for the purpose of determining the credibility of a witness "would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such a judgment," the state supreme court ruled that the pediatrician's testimony encroached on the exclusive province of the jury. In addition, the expert testimony was prejudicial to defendant, since the prosecution relied heavily on the perceived veracity of the victim to establish its case; therefore, the court granted a new trial. Commonwealth v. Seese, 517 A.2d 920 (1986), 23 CLB 298.

Washington Defendant was convicted of rape. The state appealed when trial court reversed the conviction, holding that an inadequate foundation had been laid for the introduction of expert testimony on "rape trauma syndrome."

Held, conviction affirmed. The court determined that the expert's testimony that victim was suffering from rape trauma constituted an opinion as to the guilt of the defendant and, thus, was unfairly prejudicial. Furthermore, because the scientific evaluation of rape trauma syndrome has not reached a level of reliability that surpasses the common sense evaluation present in jury deliberations, the court determined that to allow testimony on the subject would only lead to a battle of experts who would invade the jury's province of fact-finding and add confusion rather than clarity. State v. Black, 745 P.2d 12 (1987).

Wyoming Defendant was convicted of voluntary manslaughter of his father as the lesser-included offense of first-degree murder. Defendant was sixteen years old, had been involved in a violent altercation with his father that day, and allegedly had been brutalized by his father for many years. Defendant waited with a number of weapons, including two shotguns, three rifles, a pistol, and a knife, in the garage of the family home for one and one-half hours until his parents returned from dinner, and then fired repeatedly, slaying his father. His first comment after the slaying was that he did it for revenge. At trial, defendant unsuccessfully sought to elicit testimony from a forensic psychiatrist concerning specific incidents of abuse that defendant had related to him, as

well as general testimony regarding the "battered child syndrome," in order to aid jurors in comprehending the psychological ramifications of such abuse upon defendant. At the trial, defendant's counsel advised the court that the psychiatrist would express an opinion as to defendant's mental or emotional condition, and the assertion was made that defendant had a right to establish the facts that formed the basis of that opinion.

Held, conviction affirmed. The expert psychiatric testimony was properly excluded. The court's explanation that the psychiatrist's proferred testimony regarding specific incidents of abuse related to him by defendant did not fall within the hearsay exception made for statements used for purposes of medical diagnosis or treatment. Here, the psychiatrist had been consulted in preparation for trial, not for diagnosis or treatment. The court added that there was no showing of how this testimony would relate to a claim of self-defense, since there was no evidence that defendant believed himself to be in imminent danger of death or great bodily harm. Moreover, the lack of a sufficient foundation for the testimony concerning the "battered child syndrome" rendered it inadmissible. The court concluded that the defense failed to demonstrate that the state of scientific knowledge in the area permitted the expert to express a reasonable opinion. Jahnke v. State, 682 P.2d 991 (1984).

§ 13.200 Hostile witnesses

"Evidence and Trial Advocacy Workshop: Direct Examination," by Michael H. Graham, 20 CLB 340 (1984).

North Carolina Defendant, convicted of trafficking in methaqualone and related charges, argued on appeal that she was entitled to a reversal because the court improperly refused to declare a defense witness hostile. The witness, Watson, had informed defense counsel that he would testify that another person, not defendant, delivered the drugs that were ultimately sold to an undercover investigator. When called to the witness stand, however, Watson failed to testify as expected. Defense counsel, claiming surprise, requested a voir dire examination out of the jury's presence to establish that Watson should be declared a hostile witness. The trial judge refused to grant the motion and, accordingly, counsel was not permitted to cross-examine or ask leading questions of his own witness.

Held, denial of the motion was prejudicial error; new trial ordered. The Supreme Court of North Carolina said that counsel should be able to lead his own witness where the witness is hostile or unwilling to testify. Had the trial judge allowed the requested voir dire examination, "defense counsel might have been able to demonstrate that to his surprise the witness was unwilling to answer certain questions before the jury which were very relevant to defendant's defense." Since the testimony defendant sought to elicit from Watson went to the heart of the defense, the North Carolina high court found that the trial judge's ruling constituted reversible error. State v. Tate, 297 S.E.2d 581 (1982), 19 CLB 381.

§ 13.207 Informants—disclosure of identity (New)

Colorado Defendant's conviction for felony murder, aggravated robbery, and conspiracy to commit aggravated robbery was reversed by the appellate court on the ground that the trial court

improperly denied defendant's motion to disclose the identity of an informant. The state appealed, arguing that disclosure would be harmful in future investigative efforts utilizing the informant's services. Defendant was convicted by the trial court of holding up and then killing an attendant of a gas station. Two days after the killing, the police received a tip from the informant which led them to the recovery of a .22-caliber revolver from an abandoned automobile. Ballistics tests established that the revolver was the murder weapon.

Held, reversed and remanded. The right to withhold an informant's identity is not absolute but, instead, must be balanced against defendant's constitutionally protected right to prepare his defense adequately. However, a defendant seeking a disclosure of a informant's identity must make a minimal showing that such disclosure may be needed to present an adequate defense. Defendant's theory that disclosure was required because the informant was intimately involved in the crime was not supported by the record. The trial court's ruling on the disclosure motion should have been based upon the findings of a thorough evidentiary hearing. The case was remanded so that such a hearing could take place. People v. McLean, 661 P.2d 1157 (1983).

Mississippi Defendant, convicted of selling a controlled substance to an undercover investigator, argued on appeal that he was entitled to a reversal because, *inter alia,* the trial court did not require the state to identify a confidential informant. At trial, the state's evidence showed that the informant introduced defendant and the investigator and was present when the drug sale occurred; defendant testified that the informant actually sold the drugs to the investigator and then, in the investigator's presence, gave defendant the monetary proceeds in repayment of a loan.

Held, reversed and defendant discharged. The Supreme Court of Mississippi distinguished an informant who simply tells the authorities about criminal activity from the informant in this case, who took part in the police activities, becoming a witness to the crime. The identity of an informant need not be disclosed if he was used only as an informant, said the court. Here, however, where the informant played an active role in the purchase of the contraband and could have been called as a witness, defendant was entitled to know his identity. Daniels v. State, 422 So. 2d 289 (1982), 19 CLB 385.

Ohio Defendant was convicted of drug trafficking. The Ohio Court of Appeals reversed and ordered a new trial, holding that the trial court should have compelled disclosure of the identity of an informant who did not testify in order to protect defendant's right to confront his accusers. A narcotics officer received information from the informant that defendant was selling cocaine. The officer and informant arranged two controlled purchases from defendant. In both instances, the informant purchased cocaine from defendant while the officer and several other narcotics officers witnessed the exchanges. The trial court denied defendant's repeated requests for disclosure of the informant's identity upon the state's representation that the informant had been assured that his identity would be protected.

Held, reversed and conviction reinstated. The determination of whether an informant's identity should be disclosed involves a balancing test of the

benefit to the accused in preparing a defense to criminal charges against the state's interest in preserving the anonymity of informants. The informant's testimony, and defendant's opportunity to cross-examine him, was not critical. The arranged purchases were witnessed by several police officers, in close proximity, and the informant's hands were in plain sight so as to eliminate the possibility that the informant switched packets. Therefore, it could not be said that the informant, without testifying, was actually a witness for the prosecution who was not subject to cross-examination. State v. Williams, 446 N.E.2d 779 (1983).

§ 13.220 Refreshing witness' recollection

"Evidence and Trial Advocacy Workshop: Direct Examination—Refreshing Recollection; Exclusion and Separation of Witnesses," by Michael H. Graham, 20 CLB 430 (1984).

§ 13.225 Requirement of corroboration —accomplice testimony

Maryland Defendant, convicted of murder, argued an appeal that he was entitled to a reversal because of the prosecution's failure to corroborate accomplice testimony connecting him to the crime. At trial, Morris, an admitted accomplice, testified that while he, defendant, and another were committing a robbery, defendant fatally shot the victim; Morris then went to the home of friends and told them what had occurred. Morris's friends also testified, over defendant's objection, as to Morris's statements to them concerning the crime. There was no other evidence linking defendant to the incident.

Held, reversed and remanded. The court of appeals ruled that an accomplice cannot be corroborated by "the extrajudicial comments of the accomplice himself." Morris's statements were closely connected in the time and causally related to the crime, stated the court, and thus could be admitted as res gestae exceptions to the hearsay rule; however, irrespective of their admissibility as "excited utterances," using the statements to corroborate Morris's testimony eviscerated the requirement of accomplice corroboration. The court explained: "We believe the conclusion is logical that commensurate with the requirement that an accomplice's testimony must be corroborated is the requirement that the evidence offered as corroboration must be independent of the accomplice's testimony. Clearly, repeating what an accomplice stated out of court cannot mount this hurdle." Therefore, concluded the court, the evidence against defendant was insufficient as a matter of law. Turner v. State, 452 A.2d 416 (App. 1982), 19 CLB 392.

§ 13.245 —Impeachment by prior conviction

California Defendant was convicted by a jury of receiving stolen property. Before trial, the court denied a motion to bar impeachment with then unspecified prior convictions should defendant choose to testify. The court based its ruling on article 1, section 28, subdivision (f) of the California constitution, concluding that it was more specific than subdivision (d) and, therefore, controlled. Subdivision (f) was adopted by the voters to amend the state constitution to require that information about prior felony convictions be used without limitation to discredit the testimony of a witness, including that of a defendant. The

issues on appeal were (1) whether the court erred in ruling that defendant could be impeached with what proved to be prior convictions for possession of heroin and possession of heroin for sale, and (2) whether the error, if any, was prejudicial.

Held, conviction affirmed. The Supreme Court of California en banc stated that while simple possession of heroin does not necessarily involve moral turpitude, possession for sale does, although the trait involved is not dishonesty, but, rather, the intent to corrupt others. Defendant should, therefore, not have been impeached with the conviction for simple possession at all, and the trial court erred in stating it had no discretion with respect to either conviction. Were the errors prejudicial? The defense had valuable evidence that served to exculpate defendant although, unfortunately for defendant, it consisted of testimony that others had given at her parole revocation hearing. Thus, well before the prosecution disclosed the prior convictions for impeachment purposes, the jury knew that defendant had a criminal past. After a review of the entire record, the majority concluded that it was not reasonably probable that a result more favorable to defendant would have occurred in the absence of error and, therefore, affirmed. Thus, the intention of the drafters of the constitutional amendment was to restore trial court discretion as visualized by the Evidence Code and to reject rigid, black letter rules of exclusion of evidence engrafted onto the Evidence Code by a line of decisions; that is, a trial court's discretionary power to exclude certain evidence was not intended to be abolished. People v. Castro, 696 P.2d 111 (1985).

Iowa Defendant, convicted of murder, argued on appeal that it was an error for the prosecutor to cross-examine him at trial about his previous conviction for escape. Escape, he contended, is not a crime of dishonesty or falsity and hence had no bearing on his credibility as a witness.

Held, conviction reversed and remanded for a new trial. The Supreme Court of Iowa stated that "[E]vidence of a prior conviction must meet a two-pronged test: (1) the prior crime must involve dishonesty or false statement, and (2) the trial court must determine that the danger of unfair prejudice does not substantially outweigh the probative value of the conviction." As the crime of escape does not contain an element of dishonesty or falsity, the court stated, it was improper to allow defendant's conviction for that crime to be used as the basis for impeachment. State v. Gavin, 328 N.W.2d 501 (1982), 19 CLB 484.

Nebraska Defendant was found guilty of attempted sexual assault in the first degree. The fourteen-year-old prosecutrix testified that, while she was being held in jail as a material witness, the defendant, a jailer, invited her to watch television in the jailer's station and then sexually assaulted her. Defendant contended that it was she who began kissing him, and that sexual intercourse had not taken place. Defendant's motion to introduce evidence of prosecutrix's previous juvenile convictions in order to impeach her testimony was denied, and he appealed.

Held, conviction affirmed. The court concluded that Nebraska law does not provide for the admission of evidence of prior juvenile convictions of a witness for impeachment purposes.

The court distinguished the case from the Supreme Court decision in Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974), that defendant should have been allowed to introduce evidence of a witness' prior juvenile convictions. In the *Davis* case, defendant sought to establish that the witness was on juvenile probation and thus subject to coercion by the state in that if he failed to testify against the defendant his probation might be revoked; in the *Beach* case, however, no bias or motive would be shown by prosecutrix's prior juvenile convictions. State v. Beach, 337 N.W.2d 772 (1983).

New Jersey Defendant was convicted as an accomplice of assault with intent to rob and aiding and assisting in the escape of the perpetrators. The appellate division reversed and remanded, holding that the trial court erred in excluding the use of narcotics convictions to attack the credibility of two of the three state witnesses who testified against defendant. The state appealed the reversal, contending that the five- and eight-year-old convictions were too remote and thus inadmissible.

Held, affirmed. The evidence of prior convictions was admissible because its probative value outweighed any danger of prejudice suffered by the state. The trial judge incorrectly applied this balancing test to the witnesses as he would to a defendant without recognizing that much greater prejudice could result to a defendant than to a witness from proof of the same crime equally remote from the trial. State v. Balthrop, 457 A.2d 1152 (1983).

§ 13.255 —Impeachment by prior inconsistent statement

Kentucky Defendant, convicted of rape, argued on appeal that the trial court committed reversible error when it permitted the prosecutor to introduce defendant's tape-recorded confession as rebuttal evidence. The recording was proffered, after the defense had rested, to show that defendant had made statements to an interrogating police officer contradicting his trial testimony. Defendant objected, asserting that the recording properly should have been introduced during the prosecution's case in chief; his objection was overruled and the recording was played for the jury.

Held, reversed. The Supreme Court of Kentucky acknowledged that the recording indeed impeached defendant's credibility since it contained prior contradictory statements. The court found that "these statements go beyond simply negating his credibility; they go to the very substance of the matter by directly showing [defendant's] culpability." Any statements or act (e.g., flight) in the nature of an admission of guilt should be introduced as evidence in chief and *"should not be introduced in rebuttal* under the guise of contradicting or impeaching defendant as a witness." Even though the trial judge instructed the jury in this case that the only purpose of the rebuttal evidence was to contradict defendant, the Kentucky high court found that the recording was so prejudicial that the admonition could not cure its effect and ordered a new trial. Gilbert v. Commonwealth, 633 S.W.2d 69 (1982), 19 CLB 84.

Tennessee Defendant, convicted of armed robbery, argued on appeal that

there should be a reversal because the trial court failed to instruct the jury that the state's impeachment of two of its own witnesses could be considered only on the issue of their credibility. Defendant had asserted an alibi defense, introducing testimony that he was with his wife and friends when the robbery occurred. At the close of the defendant's proof, the state called two of his children to rebut the alibi, but their trial testimony was consistent with the alibi. The prosecutor proceeded to question the children as to contradictory statements they had given to a police officer previously and then called the officer to prove the prior inconsistent statements. Defense counsel did not object to the officer's testimony and did not request an instruction advising the jury that the witnesses' prior inconsistent statements were received only for impeachment purposes and not as substantive evidence of the facts stated.

Held, reversed and remanded. The Supreme Court of Tennessee stated that the facts presented an exceptional situation. The principle is well established, said the court, that prior inconsistent statements offered to impeach a witness are admissible only on the issue of credibility. In general, though, a trial judge's failure to give such a limiting instruction is not reversible error in the absence of a request from defense counsel. Here, however, the court characterized the state's case as weak and the impeachment testimony extremely damaging in the context of the facts. It was unable to say "beyond a reasonable doubt that the failure to instruct the jury on the limited purpose for which the children's prior inconsistent statements could be considered did not result in substantial prejudice to appellant which affected the results of the trial." Accordingly, the court found that failure to give the limiting instruction resulted in substantial prejudice to defendant's rights and reversed. State v. Reece, 637 S.W.2d 858 (1982), 19 CLB 270.

§ 13.265 —Impeachment for bias or motive

Delaware Defendant was convicted of second-degree murder and possession of a deadly weapon during the commission of a felony. He appealed, contending error in the trial court's refusal to permit the jury to hear that the state's eyewitnesses to the alleged crime had received cash payments from the victim's family before testifying. He argued that such evidence was essential to the jury's assessment of the witnesses' character and credibility. This was especially true, defendant argued, in light of the facts that the money was given to the witnesses for haircuts and new suits and that the prosecution tried to persuade the jury that the witnesses were clean-cut teenagers instead of hoodlums by referring to their courtroom appearance.

Held, reversed. Evidence of the payments to the eyewitnesses was admissible because it addressed the issue of bias and the credibility of the witnesses' testimony. Its admission was especially important because the testimony contrasted sharply with that of defendant, and there was no other significant evidence of bias on the part of the eyewitnesses. Thus, the jury was not exposed to facts sufficient for it to draw inferences as to the reliability of the eyewitnesses, and so the suppression of the testimony concerning payments violated defendant's right

of confrontation. Weber v. State, 457 A.2d 674 (1983).

§ 13.275 —Impeachment for prior illegal or immoral acts

Montana Defendant was convicted of aggravated assault arising out of an altercation at a bar. In his case in chief, defendant called as a witness one of his companions at the event in question. The witness testified, as did defendant, that the victim swung first. On cross-examination, the prosecution asked the witness if it was not true that he had been banned from the bar because he constantly caused trouble there.

Held, conviction reversed. The court found that the trial court erred in permitting the interrogation of a witness, not a party to the prosecution, as to past instances of misconduct for impeachment purposes. It cited a statute providing that specific instances of a witness' conduct cannot be proved by extrinsic evidence for the purpose of attacking or supporting his credibility unless they bear on his or another witness' character for truthfulness or untruthfulness. The court pointed out that the issue of the witness' previous misconduct was wholly unrelated to his ability to observe or recall the incident, and that the question served only to create unfair prejudice against defendant. State v. White, 658 P.2d 1111 (1983).

Oregon Defendant appealed his conviction for second-degree theft. He claimed that the "Crime Victim's Bill of Rights," which allowed his previous conviction for shoplifting to be used to question his credibility, was an ex post facto law and therefore unconstitutional. Defendant had been arrested and convicted for shoplifting. Before his second arrest, the state passed the bill, which allows a prosecutor to impeach defendant with evidence that he had previously been convicted of a crime involving dishonesty. Defendant claimed that because this was not a law when the first crime was committed, he should not be subject to its provisions.

Held, conviction affirmed. The court explained that an ex post facto law punishes acts that are legal at the time they occurred, changes the punishment for those acts, or deprives the defendant of a defense for those acts. In this case, no new crime was created, no new punishment was involved, and no substantive right of defendant was abridged. Therefore, the "Crime Victim's Bill of Rights" was not found in violation of the federal or state constitutions. State v. Gallant, 764 P.2d 920 (1988).

Vermont Defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor. On appeal, defendant argued that he had been prejudiced by evidence presented at the trial that he had been convicted twice previously of driving while intoxicated.

Held, reversed and remanded. The evidence of the prior convictions was inadmissible under Vt. Stat. Ann. tit. 12 § 1608, providing that, "[t]he conviction of a crime involving moral turpitude within fifteen years shall be the only crime admissible in evidence given to affect the credibility of a witness." Since drunken driving convictions are not convictions of crimes involving moral turpitude, their admissibility for impeachment purposes is clearly prohibited. Admission of such evidence would practically deprive a defendant of the legal presump-

tion of innocence and would prejudice a jury against him. The court rejected the state's contention that any error in presenting the evidence was harmless in view of the overwhelming evidence of guilt, finding instead that the case could have been decided either way and that the judgment was affected substantially by the error. State v. Bushey, 457 A.2d 279 (1983).

§ 13.280 —Impeachment on collateral issue

Michigan Defendant was charged with murder and conspiracy to murder in connection with the killing of his wife. At trial, he testified in his own behalf and was cross-examined about an argument that he and his wife had engaged in approximately one week before her body was discovered. Defendant denied the argument. In rebuttal, the prosecutor called a witness who testified that she had overheard the argument in question. Defendant was acquitted of murder but convicted of the conspiracy charge. On appeal, he asserted that the rebuttal testimony was improper impeachment on a collateral matter. The state argued that the rebuttal testimony was admissible both on the issue of motive and for impeachment purposes.

Held, reversed and remanded for a new trial. The Supreme Court of Michigan noted that the testimony of the rebuttal witness may, indeed, have tended to establish motive but, if so, should have been introduced during the prosecution's case in chief; it is improper, said the court, for the state to divide its direct proof and reserve some for rebuttal. Furthermore, it ruled, while the rebuttal evidence did contradict defendant's testimony on cross-examination, cross-examination may not be used "to revive the right to introduce evidence." Even if the witness' testimony was not admissible as part of the state's direct case, its use in rebuttal to contradict defendant violated the principle that extrinsic evidence may not be used to impeach a witness on collateral matters. Refusing to find the error harmless, the court reversed and ordered a new trial. People v. Losey, 320 N.W.2d 49 (1982), 19 CLB 173.

§ 13.305 Sequestration of witnesses

Louisiana Defendant was found guilty of first-degree murder. Motion by defense to sequester witnesses present in the courtroom during voir dire was denied by the trial judge. Defendant appealed on this and other grounds.

Held, conviction affirmed. The court declared that under the Louisiana statute governing sequestration of witnesses, a trial judge must grant a motion to sequester, whether made by defense or prosecution. His discretion is limited to modifying the order once it is granted. However, nothing was brought out during the voir dire that could have influenced the testimony of a witness; therefore the error resulted in no prejudice to defendant. State v. Johnson, 438 So. 2d 1091 (1983).

§ 13.310 Res gestae witness

Alabama Defendant was convicted of robbery and murder; the victim's husband was also killed in the same incident and defendant contended on appeal that he was prejudiced by the admission of evidence relating to the husband's death. The evidence consisted of defendant's post-arrest statement incriminating himself in both killings, photographs of the husband's body, and testimony concerning his wounds.

Held, affirmed. The state Court of

Criminal Appeals found the two deaths were "the result of one continuous transaction, consisting of several inextricably intertwined acts." Evidence of the husband's death it held, was admissible at defendant's trial for killing the wife as "part of the res gestae and as shedding light on the acts, motive and intent of [defendant]." Godbolt v. State, 429 So. 2d 1131 (Crim. App. 1983), 20 CLB 67.

§ 13.315 Hearsay evidence

"[The] Constitutional Right to Present Evidence: Progeny of *Chambers v. Mississippi*," by Steven G. Churchwell, 19 CLB 131 (1983).

Indiana Defendant was convicted of robbery. At the initial trial, Officer Terry Allen testified that he was dispatched to investigate possible criminal activity at 2306 Longley Avenue in South Bend, the home of Renoy Vrient. Allen testified that, on arriving, he observed a seriously injured man lying on his back on the floor, and he found a wallet with a man's name on it. When Allen was asked to give the name, the defense objected that such a question called for hearsay testimony and that the best evidence would be the actual wallet. The trial court overruled the objection and allowed Allen to state that the wallet contained the name Renoy Vrient. On appeal, defendant argued, among other things, that Allen's testimony about what he observed on the victim's wallet was inadmissible hearsay and was precluded by the best evidence rule.

Held, conviction affirmed. The Supreme Court of Indiana held that the testimony of the officer concerning the name on the robbery victim's wallet helped explain the officer's actions and as such did not constitute hearsay evidence. The information in the wallet was not put into evidence to prove the truth of what it stated but to explain the officer's observations and subsequent actions, such as dusting for fingerprints. The testimony of the officer provided continuity to Dr. Koscielski's testimony in which he stated that he knew the victim and identified him as Vrient. In addition, the name on the wallet was undisputed and was not central to the prosecution; therefore, the best evidence rule did not preclude testimony of the officer concerning the name of the robbery victim on the wallet he found at the scene of the crime. Moore v. State, 498 N.E.2d 1 (1986), 23 CLB 296.

Montana State appealed decision to exclude the testimony of a social worker and a counselor. Defendant was charged with incest after his daughter told the social worker and the counsel that she was abused. The trial court determined that the child was incompetent to testify, but the prosecution wanted to use the child's statements to the social worker and the counselor. The trial court determined that these statements were hearsay and therefore inadmissible.

Held, affirmed and remanded. Although the state contended that the testimony of the social worker and the counselor would be expert testimony, the court disagreed. The court explained that experts offer opinions on subjects not understood by the jury and allow the jury to render the final decision; they do not make judgments about the identity of the perpetrator. The court determined that the social worker and the counselor could not give expert testimony, because they would simply be identifying the al-

leged perpetrator. The court, however, did establish rules by which hearsay may be used in cases in which a child is unavailable as a witness: (1) the victim must be unavailable as a witness, whether through incompetency, illness, or some other like reason; (2) the proffered hearsay must be evidence of a material fact, and must be more probative than any other evidence available through reasonable means; and (3) the party wanting to offer the hearsay testimony must give advance notice of that intention. State v. J.C.E., 767 P.2d 309 (1988).

North Carolina Defendant was convicted of the robbery of a jewelry store; an alleged accomplice, Hart, was not apprehended. At trial, a prosecution witness testified that she had met with defendant and Hart following the robbery; during the ensuing conversation, both made incriminating statements concerning the crime. Over defendant's objection, the witness was permitted to testify to the substance of Hart's statement, which inculpated defendant. On appeal, defendant argued that Hart's statement was inadmissible hearsay and should have been excluded.

Held, conviction affirmed. The Supreme Court of North Carolina ruled that Hart's "hearsay statement [was] admissible because of the implication derived from the defendant's silence or failure to deny the statements." A statement is admissible as an "implied admission," explained the court, if made in the defendant's presence, "under such circumstances that a denial of an untrue statement would be naturally expected and . . . that [the defendant] was in a position to hear and understand the statement and that he had the opportunity to speak." Here, found the court, Hart's statement clearly met the criteria of an implied admission and was properly received in evidence. State v. Cabey, 299 S.E.2d 194 (1983), 19 CLB 488.

Wisconsin Defendant was convicted of first-degree sexual assault. The complainant was defendant's seven-year-old daughter. On appeal, the dispositive issue was whether sufficient evidence was presented at the preliminary hearing to bind defendant over for trial. That issue turned on whether the trial court properly admitted hearsay evidence at the preliminary hearing.

Held, conviction reversed. The court admitted testimony concerning the victim's out-of-court statements made to a social worker about the sexual assault under the residual exception to Wisconsin's hearsay rule. The girl refused to testify and was therefore declared to be unavailable. The court noted, however, that the residual hearsay exception can apply whether the out-of-court declarant is available or not. The question, instead, is whether the evidence is shown to have the trustworthiness characteristic of other hearsay rule exceptions. The court decided that "there is a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court when the child and the perpetrator are sole witnesses to the crime." The court then set out a non-exclusive list of factors to be assessed in determining whether, in the particular case, the required level of trustworthiness has been reached. State v. Sorenson, 421 N.W.2d 77 (1988).

§ 13.320 —Recorded statements

Nebraska Defendant was convicted of felony offense of delivering cocaine. On appeal, he assigned as error the admission of certain tapes of telephone conversations. Critical to the conviction of defendant were two tape recordings of telephone conversations between defendant and a supervisor of the State Patrol drug division named Wagner. Wagner testified that he was acquainted with defendant; that during the three or four months preceding the calls in question he had approximately twenty phone conversations and six personal meetings with defendant; that he was familiar with his voice; that during such phone calls Wagner either asked for defendant or made sure that it was defendant to whom he was talking by asking, "Is this Bobby?"; and that he was able to identify the voice recorded on the two cassettes as that of defendant.

Held, conviction affirmed. The Supreme Court of Nebraska found that for a tape recording of a telephone conversation between a witness and a defendant to be admissible in evidence, it need only be shown that the conversation is relevant; that it accurately reflected the conversation; that the tapes had not been altered, changed, or erased in any way; and that the voices heard on the tapes were those of the witness and defendant. State v. Pearson, 338 N.W.2d 445 (1983).

§ 13.325 —Use of prior testimony

Nebraska Defendant, convicted of robbery, argued on appeal that the trial court erred in admitting the preliminary hearing testimony of an absent prosecution witness. A week before trial, the prosecution learned that the witness had moved out of state. Attempts to contact her by telephone and through local law-enforcement agencies were unsuccessful. The witness had testified at the preliminary hearing, at which time defense counsel cross-examined her without restriction. Her hearing testimony, which essentially corroborated the testimony of other witnesses who did testify at trial, was admitted over defendant's objection. On appeal, defendant contended that the state failed to make sufficient efforts to locate the missing witness.

Held, affirmed. The Supreme Court of Nebraska stated that when a witness cannot be located, despite the prosecution's diligent efforts, testimony given by the witness at a previous trial or hearing for the same offense may be introduced at trial. Here, the court found sufficient evidence that the witness was not available and that reasonable efforts were made to locate her. As defendant was present at the hearing and the witness was subject to full cross-examination, admission of her prior testimony was proper. State v. Williams, 320 N.W.2d 105 (1982), 19 CLB 180.

§ 13.330 —Dying declaration

New Mexico Defendant, convicted of voluntary manslaughter, argued on appeal that the deceased's deathbed statement was erroneously admitted into evidence as a dying declaration. The deceased had not been informed that he would die of his gunshot wounds. However, he acknowledged to the family attorney, who was visiting for the purpose of obtaining a dying declaration, that his injuries were very serious and that there was a strong possibility that he would not recover. He then answered the attorney's question concerning the shoot-

ing incident. The attorney testified that the deceased was in obvious pain during the interview, had difficulty breathing, and was being monitored by machines; several hours after the interview, he died.

Held, trial court's verdict and conviction affirmed. The state supreme court held that for a statement to be admissible as a dying declaration, it must be established that the statement was made under a sense of impending death. It is not required that the declarant express a belief that he is dying; rather, "if it can reasonably be inferred from the state of the wound or the state of the illness that the dying person was aware of his danger, then the requirement of impending death is met." Here, said the court, declarant's recognition of the seriousness of his injuries and the strong possibility of death, combined with his actual condition, was sufficient to show that he believed his death to be imminent. Accordingly, it concluded, his statement qualified as a dying declaration. State v. Quintana, 644 P.2d 531 (1982), 19 CLB 81.

§ 13.335 —Guilty pleas of co-defendant

Delaware Defendant was convicted of multiple drug offenses based upon evidence seized when police executed a search warrant at residential premises while defendant and others were present. All of the five persons present had been arrested and indicted for the same charges, but two pleaded guilty to the lesser offense of simple possession of drugs prior to trial, pursuant to plea bargains with the State. At trial, defendant attempted to introduce evidence of his co-defendants' guilty pleas in an effort to corroborate his defense that the seized drugs were not his; the trial court refused to admit the guilty pleas into evidence.

Held, convictions affirmed. The Supreme Court of Delaware found that the co-defendants' guilty pleas did not amount to "confessions" to the crimes charged against defendant. The co-defendants, it noted, pleaded guilty only to the charges against themselves and did not admit to exclusive possession of the drugs. Moreover, stated the court, the guilty pleas were hearsay and were not admissible as statements against interest, because (1) defendant failed to establish that the co-defendants were unavailable as trial witnesses; (2) the guilty pleas could be taken as evidence of the co-defendants' guilt but, as exclusive possession was not admitted, did not exonerate defendant; and (3) defendant failed to produce corroborating circumstances establishing the trustworthiness of the guilty pleas which, as part of a plea bargain, were potentially self-serving. Therefore, evidence of the guilty pleas was excluded properly. Potts v. State, 458 A.2d 1165 (1983), 20 CLB 179.

Kentucky Defendant and Hodge, an alleged accomplice, were charged with armed robbery. On the first day of their joint trial, Hodge pled guilty to a reduced charge; subsequently, he was called as a prosecution witness to testify against defendant. During direct examination, the prosecution questioned Hodge extensively about his plea of guilty and his knowledge of the potential sentence; defendant contended, on appeal following his conviction, that the case against him was impermissibly bolstered by Hodge's repeated admissions of guilt.

Held, reversed. The Supreme Court of Kentucky noted that it is improper

for the prosecution to show at trial that a co-defendant has already been convicted of the same charges. It continued:

> To make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper regardless of whether the guilt has been established by plea or verdict, whether the indictee does or does not testify, and whether or not his testimony implicates the defendant on trial.

While evidence of Hodge's guilty plea would have been admissible to impeach his testimony on cross-examination by defendant, said the court, the prosecutor's use of the guilty plea was prejudicial and warranted a new trial. Tipton v. Commonwealth, 640 S.W.2d 818 (1982), 19 CLB 381.

§ 13.340 —Prior inconsistent statements as substantive evidence

Pennsylvania Defendant was convicted of second-degree murder, burglary, and criminal mischief. After defendant's arrest, his girlfriend, a witness to the crimes, made a tape-recorded statement to the police that inculpated defendant. Before trial, however, the girlfriend recanted her testimony. At trial, the witness likewise denied that defendant committed the crimes. Over objection from defendant, the state was allowed to introduce the witness' tape-recorded statement at trial as substantive evidence, which was used to convict defendant. On defendant's appeal, the Superior Court reversed the trial court and held that the lower court erred in admitting the witness' tape-recorded statement as substantive evidence. On further appeal, the state argued that the witness' original statement to the police, which was later recanted, was properly admitted at trial.

Held, reversed and remanded. The Pennsylvania Supreme Court ruled that the witness' prior, inconsistent statements were properly admitted as substantive evidence, since the witness was available for cross-examination at trial. The court stated that until this case, they had limited the use of such prior, inconsistent statements by a nonparty witness as those made in this case to the impeachment of a witness, because such statements were hearsay. The court ruled in this case though, that from then on such statements could be admitted as substantive evidence, and not just to impugn a witness' credibility. In this case, the hearsay concern was nonexistent, since the out-of-court statements were made by a witness who also testified under oath at trial, and who was subject to cross-examination. The court stated that the witness' initial, out-of-court statements were made under highly reliable circumstances which assured the witness' voluntariness, knowledge, and understanding. The witness was extensively questioned at trial by both the prosecutor and by defense counsel as to the respective validity of each of her earlier statements, and as to the discrepancies between them. Under these circumstances, the jury had an ample opportunity to assess their relative credibility. Commonwealth v. Brady, 507 A.2d 66 (1986).

§ 13.341 —Prior consistent statements as substantive evidence (New)

Connecticut Defendant, convicted of sexual assault, argued on appeal that the trial court erred in permitting the

victim to testify about her statements to police concerning the crime. Over defendant's objection, the victim testified

> (1) that she told a police officer on May 26, 1979, that she had been raped and gave him a description of the man who had raped her; (2) that at the time she also gave the police a description of the van in which the rape occurred; (3) that on June 2, 1979, when she was walking with her aunt on Congress Avenue she saw what she identified as the same van in which she was raped; (4) that she remained in the area and alerted a police officer, who was ticketing cars in the area, that she believed the parked van to be the van in which she had been raped; and (5) that when the defendant thereafter walked out onto the street she identified him to the police officer as the man who raped her.

Defendant asserted that the above portion of the victim's testimony was inadmissible hearsay.

Held, conviction affirmed. The Supreme Court of Connecticut ruled that in sex-related cases, prior consistent statements of the victim are admissible as exceptions to the hearsay rule as corroborating evidence showing "constancy of accusation." It is permissible, said the court, for the victim to recount the details of prior statements, provided, as here, the witness first testifies about the incident itself and also identifies the person to whom the prior statements were made. Accordingly, the court found defendant's contentions to be without merit. State v. Hamer, 452 A.2d 313 (1982), 19 CLB 391.

§ 13.345 —Business records exception

"Evidence and Trial Advocacy: Hearsay Exceptions—Business Records," by Michael H. Graham, 24 CLB 239 (1988).

Kansas Defendant was convicted of first-degree murder. On appeal, he claimed the trial court erred in admitting a tape recording and transcript thereof into evidence. On the night of the charged offense, the victim, a highway partolman, observed defendant's speeding car and chased it. By radio, the victim described the car, its location, its tag number, the speed at which it was going, and defendant. Travellers who discovered that the victim had been shot broadcast that information on the victim's radio. Defendant argued that the hearsay rule prohibited admission of the tape recording and transcript.

Held, affirmed. The tapes were admissible under the business records exception to the hearsay rule. They were "writings," even though sound recording so made as part of the patrol's ordinary business, and were made at virtually the same time that the events discussed were occurring while the speakers were observing them. The sources of information from which the tape recording was made, and the method and circumstances of the making of the tape were such as to indicate its trustworthiness. Furthermore, the speakers were under stress caused by their perception of the events, and so lacked incentive to falsify or distort. The transcript of the tape, whose accuracy was not challenged, was also admissible. Secondary evidence as to the contents of official records is admissible, especially if it is helpful to jurors and witnesses. Jurors, witnesses, court, and counsel

may refer back to portions of a written statement more easily than to conversations contained in a tape recording. State v. Rainey, 660 P.2d 544 (1983).

§ 13.365 —Documentary evidence

"Evidence and Trial Advocacy: Hearsay Exceptions—Public Records and Reports," by Michael H. Graham, 24 CLB 350 (1988).

"Evidence and Trial Advocacy: Hearsay Exceptions—Records of Vital Statistics," by Michael H. Graham, 24 CLB 444 (1988).

§ 13.370 —Photographs

Mississippi Defendant was convicted of the murder of his wife. Defendant, his wife, and his wife's two nephews had been drinking beer all day at defendant's home. Around 8:00 P.M. that evening, defendant carried his badly beaten wife to the hospital. She had been dead for two or three hours. Her death was the result of massive blood loss resulting from multiple bruises and abrasions to her body and deep lacerations of her scalp and labia. On appeal, defendant contended that the trial court erred in admitting into evidence a second group of photographs depicting the interior of defendant's home because the state failed to establish that the authorities entered the defendant's home pursuant to a lawful search warrant or with the defendant's consent. Therefore, it was argued, the photographs were inadmissible as the product of an illegal search. The defense counsel objected to these photographs of the home on the basis of "all of the same objections that I have stated previously as to the other photographs." One of the previous objections was that a proper predicate had not been laid for the introduction of the photographs. The state argued that this objection was not broad enough to encompass the Fourth Amendment claim now raised by defendant.

Held, conviction affirmed. The Supreme Court of Mississippi applied the general rule that a failure to object with specificity in the trial court results in a waiver of review on appeal. The court held that the objection to the admissibility of the photographs of the interior of defendant's house was waived by the failure to state the additional basis for the objection in the trial court. Stevens v. State, 458 So. 2d 726 (1984), 21 CLB 269.

North Carolina Defendant was convicted of first-degree murder. He appealed, contending that the trial court erred by admitting into evidence during the guilt-innocence determination phase five photographic slides, portraying the body of the deceased shortly after she was killed. He argued that they should not have been admitted until the sentencing phase, at which time they could serve as evidence of an aggravating factor. Their admission during the guilt-innocence determination phase, he argued, was improper because their inflammatory effect outweighed any probative value they may have had.

Held, affirmed. The photographs were admissible to illustrate the testimony of a forensic pathologist because they were accompanied by a limiting instruction of their purpose. The fact that they depicted a gruesome and gory scene did not render them incompetent in evidence because they were properly authenticated by witnesses as accurate portrayals of what they saw. Any gruesome or vicious portrayal in the slides resulted solely

from the nature of the crime committed and not from any improper use of the slides. State v. Williams, 301 S.E.2d 335, reh'g denied, 464 U.S. 1004, 104 S. Ct. 518 (1983).

§ 13.371 —Drawings and sketches (New)

Illinois Defendant was convicted of murder and burglary. After a separate sentencing hearing, the trial court sentenced defendant to death and also imposed a sentence of fourteen years imprisonment for the burglary. On direct appeal to the Illinois Supreme Court, defendant attacked his convictions on numerous grounds, among which was his claim that it was reversible error for the trial court to refuse to admit as inadmissible hearsay the police artist's sketch, which was offered for the purpose of impeaching the identification testimony of two prosecution witnesses. The state contended that the sketch was properly excluded because defendant did not establish a proper foundation for its admission into evidence.

Held, exclusion of the composite sketch to impeach identification testimony of witnesses was harmless beyond a reasonable doubt. The high court held that where the sketch is used for impeachment purposes as a prior inconsistent description of the assailant and where authenticity has been established, unequivocal testimony from the person who prepared the sketch, which also establishes that the identification witness previously adopted and confirmed it as an accurate drawing, is sufficient foundation for its admission despite a denial by the identifying witness that he had agreed to its accuracy. That denial is, of course, admissible and relevant in the jury's assessment of the extent to which the drawing is, in fact, impeaching. People v. Yates, 456 N.E.2d 1369 (1983), reh'g denied, 467 U.S. 1268, 104 S. Ct. 3563 (1984).

§ 13.375 —Res gestae and spontaneous declarations

Georgia Defendant was tried on counts relating to faulty operation of a motor vehicle. At trial, the state patrolman at the scene of the arrest testified, on recall and over the defendant's objection, that the passenger had stated that the only persons in the vehicle were defendant and the passenger. After conviction, defendant appealed, contending that the testimony did not explain the conduct of the officer and was not original evidence but hearsay.

Held, affirmed. The testimony was admissible because such a witness may testify to what he saw and heard while in defendant's presence. Clearly, this testimony was what the officer's investigation disclosed at the scene when he made the arrest, even though it was made in rebuttal to defendant's contrary exculpatory testimony. Henderson v. State, 317 S.E.2d 343 (1984).

Indiana Defendant, Daniel Scott Corder, was convicted of murder and attempted murder and sentenced to consecutive terms of fifty-five and forty-five years, respectively. Among defendant's contentions in his direct appeal was a claim that the trial court had erred in admitting testimony about statements made by one of the victims.

Held, affirmed. The Supreme Court of Indiana upheld the finding of the trial court. The witness was among the neighbors who had discovered defendant's father, after he was shot, in the driveway. The father had stated, "Scott went crazy, beat us with a base-

ball bat," and later, "I'm shot." When a neighbor asked the father where he was shot, he responded, "stomach." This neighbor testified that approximately ten minutes passed between the time he heard a gunshot and the time the father spoke to him in the driveway. Over defendant's objections, the neighbor testified about the father's statements. Defendant contended that this evidence was hearsay and should have been excluded. However, the evidence concerning the father's statements fell squarely within the excited utterances exception to the hearsay rule. The two basic requirements that must be established before the exception applies were present. First, there was a startling or exciting event that rendered reflective thought inoperative. Second, the statement was the spontaneous result of the event and not the result of reflective thought. Here, the father's statements were the result of an extremely traumatic event, not the result of reflective thought. Although the statement, "Scott went crazy," could be considered an opinion, this did not mean that the statements, as a whole, could not be admitted. Corder v. State, 467 N.E.2d 409 (1984).

Indiana Defendant, convicted of rape, argued on appeal that there should be a reversal because evidence that he had killed his mother previously was introduced at his trial. Complainant testified that defendant told her, during the rape, that he had been in prison for killing his mother. The state then established that defendant had, in fact, committed that crime. It established the fact through the testimony of the arresting officer and defendant's ex-wife, and on cross-examination of defendant himself.

Held, affirmed. The Supreme Court of Indiana rejected defendant's claim that admission of testimony regarding the previous killing was unduly prejudicial, holding that "[s]tatements uttered by the accused during the commission of the offense charged, including prejudicial comments about his prior prison record, are admissible as part of the *res gestae* of the offense." Moreover, it continued, the evidence was admissible on the issue of identity. As complainant's attacker told her that he had killed his mother, the fact that defendant had, indeed, committed such a crime was circumstantial evidence that defendant committed the rape. Therefore, admission of the disputed testimony was proper. Taylor v. State, 438 N.E.2d 294 (1982), 19 CLB 176.

Rhode Island Defendant was convicted of second-degree sexual assault. The victim, defendant's three-year-old daughter, did not testify at trial because the trial justice had ruled her incompetent. The trial justice did, however, allow into evidence statements made by the child through the testimony of a counselor, a doctor, and a social worker. Defendant petitioned for certiorari review arguing that those statements were hearsay not without any exception and that they were inadmissible because the child had been ruled incompetent as a witness.

Held, vacated and remanded. The Supreme Court of Rhode Island found that victim was incompetent to testify at the time of trial when she was four years old; therefore, assertions she had made at age three could not be considered inherently more reliable. Because a time lapse of nine days occurred between the time the victim reported the incident to her mother and the time she made the statements to the counselor, the statements the child made to the

counselor were not admissible under the spontaneous-utterance exception to the hearsay rule, the assertions made were not spontaneous in nature, nor in direct temporal proximity to an exciting event, and the victim could have been coached by her mother. In Ketcham v. State, 162 N.E.2d 247 (Ind. 1959), the court stated that if a child is too young to be a witness, the credibility of the child's testimony is not enhanced by having it presented to the jury through another person. Thus, the court determined that all assertions made by the defendant's daughter were inadmissible once the trial justice had determined she was incompetent. Because this evidence could have influenced the jury in reaching its verdict, the court reversed. State v. Paster, 524 A.2d 587 (1987).

WEIGHT AND SUFFICIENCY

§ 13.385 —Drug violations

Mississippi Defendant, convicted of possession of marijuana with intent to deliver, argued on appeal that there should be reversal because the evidence was insufficient, as a matter of law, to sustain the conviction. At trial, it was established that defendant and a friend, Pace, left Virginia for Mississippi in Pace's auto. Pace's ostensible purpose was to visit his family, while defendant was to be dropped off at another friend's house along the return route. After getting under way, Pace disclosed that he had approximately fifty pounds of marijuana in the trunk of the car. Subsequently, the two stopped at a motel and Pace brought the marijuana, in large garbage bags, into their room. The following day, police, armed with a search warrant, entered the room and seized the marijuana and various items of drug paraphernalia which were in plain view. Pace, who pled guilty prior to trial, was called as a witness by defendant and testified that the marijuana was his and defendant had "nothing to do with it."

Held, affirmed. The Mississippi Supreme Court found that the issue of his guilt had properly been submitted for the jury's determination. The concept of possession, it stated, is not susceptible to a specific rule but the facts must be sufficient to warrant a finding that a defendant was "aware of the presence and character of the particular substance and was intentionally and consciously in possession of it." Constructive possession, continued the court, "may be shown by establishing that the drug involved was subject to [defendant's] dominion or control." Here, the jury's verdict was not against the overwhelming weight of the evidence; consequently, the court affirmed the conviction. Martin v. State, 413 So. 2d 730 (1982), 19 CLB 80.

§ 13.400 —Murder

Pennsylvania Defendant was convicted of murder in the second degree and robbery. On appeal, he contended that the evidence was insufficient to support his convictions and that the trial court erred in allowing testimony concerning a sexual assault upon the decedent, since he was not charged with any sexual offense.

Held, affirmed. Viewed in the light most favorable to the commonwealth, the evidence was such that the trier of fact could reasonably have found that all of the elements of the crimes had been established beyond a reasonable doubt. The evidence established that (1) decedent lived in an apartment above the bar owned by defendant's family; (2) defendant was in

the bar when decedent came there to pick up her food stamps and social security check; (3) decedent was found murdered in her apartment that afternoon; (4) defendant's blood was found in the apartment; and (5) defendant stated to police that he had committed the crime. The commonwealth proved beyond a reasonable doubt the elements of serious bodily injury and an attempt to rob the victim of her property. Defendant's argument that testimony concerning sexual assault should not have been admitted because he was not charged with rape was without merit. In this case, defendant was charged with murder of the second degree based upon the underlying felonies of rape and robbery. Thus, the testimony, though inflammatory, was relevant to an element of the crime with which defendant was charged. Commonwealth v. Giles, 456 A.2d 1356 (1983).

§ 13.410 —Receiving stolen goods

Ohio Defendants, husband and wife, were convicted of possessing stolen stereo equipment seized from their son's bedroom in the family residence pursuant to a search warrant. They contended on appeal that the evidence was insufficient to establish that they had actual knowledge that stolen property was located in their home. Their son had a lengthy juvenile record for theft-related offenses, a situation well-known to defendants. Both defendants testified at trial that they were unaware that the equipment, which was connected and operable, was in the house prior to the seizure. It was not disputed that defendants owned the residence and had dominion and control over the entire premises as well as having parental custody, control, and responsibility over their son.

Held, affirmed. The Supreme Court of Ohio found that the mere fact that the stolen property was located within the family residence and subject to defendants' control did not amount to proof of constructive possession. However, it found, the speakers were bulky, operable, and in plain view; these circumstances, together with defendants' awareness of their son's criminal history, were sufficient to sustain a finding that defendants had actual knowledge that the stolen equipment was on the premises. Thus, concluded the court, defendants had constructive possession of the stolen property. State v. Hankerson, 434 N.E.2d 1362, 19 CLB 83, cert. denied, 459 U.S. 870 (1982).

§ 13.425 —Sex crimes

Minnesota Defendant was charged with criminal sexual conduct in the third degree for sexually penetrating a fourteen-year-old girl. The state appealed a pretrial order granting defendant's motion to limit certain expert testimony. The testimony was that complainant gave birth to a child after the alleged penetration and that blood-test results indicated that defendant was the father. After the charge was filed, defendant voluntarily gave a sample of his blood for comparative analysis with the blood of complainant and her baby. A blood specialist compared the blood types of the three, with respect to fifteen different gene systems, and concluded that (1) his analysis can detect 94 to 97 percent of all cases of nonpaternity, and that, in this case, the results did not provide evidence of nonpaternity; (2) approximately 1,121 unrelated men would have to be randomly

selected from the general male population before another man would be found with all the appropriate genes to have fathered the child in question; and (3) there was a 99.911 percent likelihood that defendant was in fact the father. Before the trial was to begin, defense counsel moved for an order limiting the expert testimony on two grounds: first, that it was inadmissible evidence of statistical probability, and second, that it was based on the assumption that defendant had sexually penetrated complainant, which was the ultimate issue in the case. The state appealed the court's grant of the motion.

Held, remanded for trial. The trial court should not have suppressed the evidence in its entirety. References to statistical probabilities were properly suppressed because they can have an exaggerated impact on the trier of fact by making uncertainties appear all but proven. On the other hand, the blood expert should be permitted to testify as to the basic theory underlying blood testing and should be permitted to testify that not one of the fifteen tests excluded defendant as the father of the child. State v. Boyd, 331 N.W.2d 480 (1983).

South Dakota Defendant was convicted of the class 4 felony of sexual contact with a child under fifteen years of age. The statute under which he was convicted prohibits anyone fifteen years of age or older to have sexual contact with a person other than his spouse when such other person is under the age of fifteen. Violation of the statute is a class 4 felony. If, however, the actor is less than three years older than the victim, he is guilty of a class 1 misdemeanor. On appeal, defendant raised the following issues: (1) His complaint record was not sufficient evidence of his age. (2) The victim's testimony did not prove the existence of sexual contact. (3) The court improperly deleted his requested instruction suggesting the application of a stricter test of credibility to the victim and other witnesses.

Held, affirmed. There was sufficient evidence to convict defendant, and the trial judge's instruction to the jury was proper. The complaint record was admissible as evidence of defendant's date of birth because it constituted a record of a public agency's routine functions. Federal Rules of Evidence 803(8) permitted its admission into evidence even though the declarant was available as a witness. The victim's testimony provided sufficient evidence of sexual conduct despite defendant's claim that the victim was hesitant about testifying to such an attack. The victim's hesitance and reluctance to discuss the details of defendant's contact was understandable in light of her age. Finally, the court's deletion of defendant's requested instruction was proper. Overruling its decision in State v. Fulks, 83 S.D. 433, 160 N.W.2d 418 (1968), it held that the testimony of a rape victim should not be treated differently from the testimony of any other victim merely because of the nature of the charge. It also held that an instruction of the kind requested by defendant reflected the antiquated view of rape as a crime defined by victim's conduct. State v. Ree, 331 N.W.2d 557 (1983).

§ 13.435 Fingerprints

Nebraska Defendant was convicted of burglary after a jury trial. As part of the prosecution's preparation for trial, an affidavit prepared by a Nebraska state patrolman was submitted to the district court, seeking an order

pursuant to the state Identifying Physical Characteristics Act, to compel defendant to submit to finger printing and palm printing. The affidavit stated, among other things, that defendant was asked to voluntarily give a sample of his finger prints and palm prints and that defendant refused. An order requiring defendant to so submit was entered. Pursuant to the order, a palm print was taken from defendant that matched the one on the glove wrapper found on the floor of the store during the burglary investigation. Defendant contended on appeal that his motion to suppress the palm print exemplar was erroneously denied. Defendant argued that the statute was constitutionally infirm in that it authorized him to be unreasonably seized by police authorities in violation of the Fourth Amendment as well as the Nebraska Constitution.

Held, affirmed. The Supreme Court of Nebraska found that the Act providing for an order compelling a suspect to produce nontestimonial evidence for identification was constitutional. However, the court construed the Act to require a showing of probable cause to believe the person to be seized has engaged in an articulable criminal offense prior to the judicial officer issuing an order pursuant to the Act. The court added that it would be anomalous to require such probable cause prior to the seizure of papers, books, and other objects, but not for the seizure of persons. State v. Evans, 338 N.W.2d 788 (1983).

14. TRIAL

§ 14.15 —Disqualification of trial judge

Michigan Defendant was convicted, after a bench trial, of breaking and entering. Initially, he had appeared before the trial court to enter a guilty plea to the crime; he admitted a factual basis for the crime but, midway through the allocution, changed his mind and was permitted to withdraw the guilty plea. Defendant then waived a jury and proceeded to trial before the same judge who presided over the abortive plea proceeding. On appeal, de-

fendant argued that his right to be tried by an impartial fact finder had been violated; the trial judge, he contended, should have disqualified himself or advised defendant that he had a right to a trial by another judge. The intermediate appellate court agreed and reversed the conviction.

Held, reversed and remanded. The Supreme Court of Michigan acknowledged that a judge's knowledge of the facts (e.g., by reading transcripts of prior proceedings) could serve as a basis for disqualification; here, however, defendant was completely aware of the trial judge's involvement in the plea proceeding but nevertheless waived a jury trial. Moreover, the court noted that there was no evidence of actual bias against defendant. Under the circumstances, said the court, the trial judge was under no obligation to, sua sponte, afford defendant the opportunity to be tried by another judge and, having not complained below, defendant could not raise the issue for the first time on appeal. People v. Cocuzza, 318 N.W.2d 465 (1982), 19 CLB 83.

Nebraska Defendant was convicted of manslaughter and was given the maximum penalty of imprisonment for the crime. As his sole assignment of error, defendant contended that the sentencing judge should have recused himself as requested by defendant on account of the judge's ex parte contact with members of the victim's family. Shortly after the verdict was announced in court, the prosecutor approached the trial judge and informed the court that the victim's parents and sister wished to visit with the judge because the victim's family were nonresidents of the state. Apparently, the judge met in chambers with the victim's parents and sister in the absence of either counsel and without recording what transpired at that meeting. In light of this and its prejudice to defendant regarding any prospective sentence, defendant's lawyer requested that the judge recuse himself. The trial judge said that the court was in no way prejudiced by the meeting with the family, and as far as the court's reassessing its own ability to be fair and to consider all the facts and circumstances in this case, its opinion and judgment would not be colored by the family's visit. There was no verbatim record, however, of the family's visit; all that existed was the judge's description of what transpired at that meeting. To counter defendant's claim that the trial judge should have recused himself, the state argued that since defendant had not shown that the sentencing judge was in any way influenced by his contact with the victim's family, there was no error in the refusal of the judge to recuse himself from sentencing.

Held, sentence vacated and cause remanded with direction. Although the court believed a party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality, the court determined that the sentencing judge should have recused himself from the sentencing hearing when requested by defendant. The court said that a judge should not initiate, invite, or consider ex parte communication concerning a pending or impending proceeding that is before him, and concluded that such a rule is a requisite to the orderly administration of justice in any judicial system. A judge who initiates, or invites and receives, an ex parte communication concerning a pending or

impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal. The court ordered that, in similar cases, the judge should recuse himself because he is forced into the mutually exclusive roles of witness, testifying as to what happened at a private meeting, and judge, keeping order over that testimony. State v. Barker, 420 N.W.2d 695 (1988).

§ 14.20 Qualifications of prosecutor

New York Seeking to avoid charges of political bias, a district attorney appointed a "special assistant district attorney" to handle criminal investigation and prosecution of the incumbent of the district attorney's former congressional seat. The memorandum of understanding gave the special prosecutor "full authority and responsibility to investigate, to determine whether to prosecute, and to prosecute any person" for offenses related to the congressman's campaign for office, and went on to grant him broad authority and great independence in pursuing the investigation. The congressman petitioned, challenging the appointment and seeking to disqualify the district attorney from proceeding against him herself. Lower courts held the appointment to be void, and an appeal was brought.

Held, affirmed. The court found the appointment to be void stating that the district attorney's powers are conferred by statute. "She may delegate duties to her assistants but she may not transfer the fundamental responsibilities of the office to them." The memorandum concerning the appointment of the special prosecutor was clearly an attempt by the district attorney to divest herself of her discretionary judgment to initiate, pursue, and conclude investigations and prosecutions, and was therefore void. Regarding the issue of the district attorney's disqualification to conduct an investigation herself, on which lower courts issued conflicting opinions, the issue was raised prematurely. The mere fact that the district attorney had expressed misgivings about conducting the investigation herself was not sufficient to provide a basis for the court to assume jurisdiction to pass on her qualifications. Schumer v. Holtzman, 454 N.E.2d 522 (1983).

§ 14.30 Defendant's right to continuance

Arkansas Defendant was convicted of attempted rape and kidnapping. He appealed, arguing that the trial court abused its discretion in refusing to grant him a continuance, the basis of his displeasure with his appointed attorney. Defendant claimed that his appointed attorney had a personality conflict with him and was related to a deputy sheriff. The trial court, finding those allegations to be false, advised defendant that he could either be represented by the appointed attorney or represent himself.

Held, affirmed. Not every denial of a continuance is an abuse of discretion or constitutional violation. Defendant failed to meet his burden of proving his need for a new attorney and the court's abuse of discretion in denying that need. In view of the fact that competent counsel had been appointed, the trial scheduled, and the jury empaneled, the public's interest in orderly court administration and prompt trials outweighed defendant's alleged need for competent counsel. The appointed counsel was competent and skilled in criminal law practice, and defendant's

allegations against him were false. Thus, the trial court's denial of a continuance was proper. Berry v. State, 647 S.W.2d 453 (1983).

Georgia Defendant was convicted of murder. He argued on appeal that the trial court abused its discretion by refusing to grant a continuance on the day set for trial. He claimed that the court's appointment of counsel just eight days prior to the trial prejudiced him because his counsel did not have an apportunity to interview all witnesses adequately in preparation for the trial.

Held, affirmed. The trial court did not abuse its discretion in denying the motion for continuance. No showing had been made that any prospective witness not interviewed by defense counsel would have been beneficial to defendant. Furthermore, defendant had been represented by retained counsel as early as six months prior to trial. Newberry v. State, 301 S.E.2d 282 (1983).

Georgia Defendant, after being denied a continuance, was tried and convicted of murder. On appeal, he argued that the trial court abused its discretion by denying his motion for continuance on the day upon which the trial was to have commenced. Three months after defense counsel was appointed, the state accepted pleas from the co-defendants to the lesser offense of robbery in exchange for their promises to testify against defendant. Three days later, on the day the trial was to begin, defendant filed the continuance motion and contended that the plea agreements were "unexpected developments" which "drastically [altered] the needs of the defense" requiring "a substantial continuance" in order "to properly prepare an adequate defense."

Held, affirmed. The continuance was properly denied. The record demonstrated that counsel prepared an adequate defense for defendant, and was aware of the co-defendants' intention to plea bargain months before they did so. Furthermore, no indication was given to the trial court of the specific actions that remained to be taken to prepare the defense. Hampton v. State, 301 S.E.2d 274 (1983).

Indiana Defendant, convicted of robbery, argued on appeal that there should be a reversal because the trial court denied his motion for a continuance predicated upon failure of a defense witness to appear. Defense counsel requested the postponement orally on the morning the trial was scheduled to commence, stating that the witness was essential to defendant's case and that she had agreed to appear. Noting that trial had been continued on a previous occasion because the same witness had failed to appear, the court ordered that the matter proceed.

Held, conviction affirmed. The Supreme Court of Indiana rejected defendant's argument that denial of his motion amounted to a violation of his constitutional "right to have compulsory process for obtaining witnesses." Defendant, it found had notice of the trial date and an opportunity to obtain the issuance of subpoenas and, if necessary, court enforcement of same; however, he failed to avail himself of that opportunity and thus had no recognizable ground on which to base a complaint.

Refusal to grant the motion was not an abuse of discretion, continued the court, "given the trial court's granting of a previous motion for continuance because of the absence of this same witness, the lack of an explanation at the time the motion was made support-

ing the essential nature of the witness's testimony to the defendant's contentions . . . and the failure to employ the subpoena power." Rowe v. State, 444 N.E.2d 303 (1983), 19 CLB 482.

§ 14.35 Right to public trial

New York Defendant appealed his sentence as a second-felony offender. He claimed that his first conviction was in violation of his Sixth Amendment right to a public trial. During defendant's trial for his first conviction, the courtroom was cleared so that an undercover officer could testify. The Supreme Court of New York later determined closing the court for an undercover officer must be preceded by a careful inquiry into the reasons why the courtroom should be closed. This decision, however, was not applied retroactively to defendant's first conviction. Defendant claimed, after his second conviction, that he should not be considered as having two felony convictions because the first was obtained illegally.

Held, sentence affirmed. The court stated that defendant's first conviction did not violate the constitution as it was interpreted at that time. The court noted that interpretations constantly change, and it refused to apply changes in interpretations retroactively. The court noted that his first conviction was not overturned; therefore, there was no prohibition against using it. People v. Catalanotte, 532 N.E.2d 1244 (1988).

New York Defendant was charged with criminal sale of a controlled substance and released on bail pending trial. On July 5, defense counsel was notified that the case was scheduled for trial on July 8. He immediately advised defendant, who claimed illness and expressed uncertainty about her ability to appear. In fact, defendant failed to appear on July 8 and the case was put over until the following Monday, July 11. When defendant did not appear on the adjourned date and defense counsel revealed that he had been unable to locate her over the weekend, the court ordered a hearing to determine her whereabouts. At the hearing, a friend who had posted bail for defendant testified that, shortly before the trial was scheduled, defendant mentioned that she intended to leave town. The friend also had heard that defendant was then "out in the street." The court found that defendant's absence was voluntary and that she had waived her right to be present at trial. Over defense counsel's objection, defendant was tried in absentia and convicted by the jury; while defense counsel called no witnesses, he did state that he would have called defendant had she been present and that she would have given an exculpatory explanation for the alleged drug sales. On appeal, defendant contended that her right to be present at trial under the federal and state constitutions had been violated by her trial in absentia.

Held, conviction reversed. The New York Court of Appeals stated that while a defendant's right to be present at trial may be waived, the trial judge's "factual finding of voluntary absence from court on the day scheduled for her appearance is alone insufficient as a matter of law to establish an implicit waiver of defendant's right to be present at trial so as to permit the court to try defendant *in absentia*." The right to be present at trial, it continued, is of a fundamental constitutional na-

ture and accordingly, the issue is whether defendant knowingly, voluntarily, and intelligently waived a known right. The court refused to find such a waiver here because defendant had not been informed of the nature of her right to be present and the consequences of her failure to appear (i.e., that a trial in absentia could proceed). Thus, it concluded that a finding that a criminal defendant has received actual notice of a trial date and has nevertheless voluntarily failed to appear is insufficient, as a matter of law, to justify a trial in absentia. Even where a defendant is advised fully of his right to be present and fails to appear, cautioned the court, a trial in absentia should not be automatic. Rather, the trial judge should consider "all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear." In most cases, it stated, an adjournment pending execution of a bench warrant would be preferable to trial in absentia, unless it can be shown by the prosecution "that such a course of action would be totally futile." People v. Parker, 440 N.E.2d 1313 (1982), 19 CLB 271.

§ 14.41 Defendant's right to testify (New)

Colorado Defendant was convicted of first-degree assault by a jury. He did not testify at trial. During the trial, both after the prosecution rested and after the defense rested, defendant, his counsel, and the prosecutor appeared before the judge out of the presence of the jury. During these times, defendant did not speak to the judge about testifying or any other matter. Immediately before the lunch recess, following the presentation of defendant's case, defendant's trial lawyer told the judge that defendant would not testify, and the defense rested. When defendant returned from the lunch recess, he was intoxicated. The case then was submitted to the jury, which found him guilty. Defendant moved for a new trial, and an evidentiary hearing was held on that motion. The motion was denied by the trial court, which found that defendant's conduct in returning to the courtroom intoxicated after the noon recess demonstrated an intention not to testify. The court of appeals, however, ordered a new trial.

Held, affirmed. A criminal defendant's right to testify is a fundamental constitutional right. The majority of the court reasoned that because the court had ruled previously that the right to testify only may be waived by a defendant in a criminal case, the right to testify is a fundamental constitutional right. The court added that waiver of a fundamental right must be voluntary, knowing, and intentional. The court imposed a duty on trial courts to erect procedural safeguards surrounding relinquishment of the right to testify in accordance with those set out in Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938). Whether there is proper waiver of the right should be determined clearly by the trial court. It would be "fitting and appropriate," the court stated, for that determination to appear upon the record. People v. Curtis, 681 P.2d 504 (1984), 21 CLB 86.

§ 14.60 Decisions of defense counsel as binding upon defendant

Massachusetts Defendant was convicted of assault, arson, and first-degree murder. His defense was that the arson from which the charges arose was per-

formed by an acquaintance who pled guilty to manslaughter. On appeal he complained of the trial court's instruction that "malice in arson may be inferred from the wilful doing of the act of burning without legal justification."

Held, conviction affirmed. The court pointed out that, because defendant's trial case was based on the concept that it was his acquaintance rather than he who set the fire, the case was tried on the theory that the sole disputed issue was the identity of the perpetrator. Since that was the sole issue contested by defendant, and since error cannot be argued on the basis of a theory that was not presented at trial, the court concluded that the malice instruction did not create a substantial risk of prejudice to defendant. Comm'r v. Ely, 444 N.E.2d 1276 (1983).

§ 14.80 Conduct of trial judge

"[The] Criminal Court Judge: The Art of Judging," by Paul Wice, 20 CLB 189 (1984).

§ 14.90 —Prejudicial comments

"The Criminal Defense Counsel's Concise Guide to Prejudicial Judicial Communication During Criminal Jury Trials," by Brian R. Henry, 23 CLB 413 (1987).

§ 14.105 —Exclusion of evidence

North Carolina Defendant murdered a woman with whom he had once lived and was convicted and sentenced to death. During the penalty phase of the trial, the defense was not permitted to introduce testimony by a criminologist whose statistical studies showed a link between the life stresses defendant had experienced and a tendency to commit violent crimes against close friends and family members. The criminologist would have given his opinion that, in cases like defendant's, the violence was linked to a self-destructive impulse and was not likely to be directed against strangers.

Held, affirmed. On appeal, the Supreme Court of North Carolina held that the trial court was justified in excluding the testimony. It cited its decision in State v. Pinch, 292 S.E.2d 203 (1982), that the presiding judge may "exclude repetitive or unreliable evidence or that lacking an adequate foundation," and described the criminologist's report as "of questionable scientific import or value in mitigation." State v. Boyd, 319 S.E.2d 189 (1984), 21 CLB 182.

§ 14.120 —Granting severance

Arkansas Defendants were convicted of capital felony-murder. On appeal, they argued that the trial court erred in refusing to sever the charges and try them separately. Each defendant testified that he played a passive role in the murder and that the other owned the murder weapon and committed the murder. Shortly after the jury had retired, it returned to tell the trial judge it was unable to determine who had actually pulled the trigger. The jury then found both defendants guilty and fixed punishment at life without parole. However, forms filled out by the jury reflected their belief that neither defendant had committed the murder.

Held, reversed and remanded. Defendants' motions for separate trials should have been granted. Not only were defendants' defenses antagonistic mirror images of one another but the jury was unable to segregate the evidence with respect to the crucial

issue of which defendant committed the murder. As a result, the jury may well have given a lesser sentence to one defendant, and a greater sentence to the other, than it might otherwise have done had there been separate trials. McDaniel v. State, 648 S.W.2d 57 (1983).

Iowa Defendant was convicted of first-degree kidnapping, first-degree murder, and second-degree theft. He was tried with four other defendants and claimed on appeal that his trial should have been severed from the others, claiming that joinder was prejudicial because of attempts by the other defendants to shift the blame to him and because of their reference at trial to other crimes with which he was allegedly involved.

Held, conviction affirmed. After pointing out that Iowa Rule of Criminal Procedure 6(4) leaves severance to the discretion of a trial court, the court pointed out that the complained-of testimony was merely a recitation of conversations and was apparently calculated to lend credibility to the claim of one co-defendant that he had been coerced by the others. It further noted that the crimes discussed were never actually committed, and that because the conversations would have been admissible in any event as evidence of the planning which went into execution of the crime involved here, any prejudice which might have arisen from the joint trial was negated. The court further pointed out that mere attempts to blame others among co-defendants is generally insufficient to show prejudice, and that prejudice may be avoided by the exercise of cross-examination rights by co-defendants and the use of limiting instructions. State v. Streets, 330 N.W.2d 3 (1983).

§ 14.121 Dual jury trial procedure (New)

California Defendant appealed his conviction for first-degree murder. Defendant's trial was held jointly with co-defendant, Davison. Because some of the evidence consisted of statements with one defendant incriminating the other, two juries were empaneled, one for each defendant. When evidence was presented where Davison incriminated defendant, defendant's jury was excused and vice versa. Defendant claimed that the dual jury was prejudicial.

Held, conviction affirmed in part and reversed and remanded in part. The court noted that other jurisdictions, including the federal courts, have upheld the use of dual juries as an economical alternative to separate trials. When defendants are charged jointly, they should be tried jointly unless it can be proven that the defendants' rights will be violated. Although defendant claimed that various prejudices arose because there was a dual jury, he proved none of them. People v. Harris, 767 P.2d 619 (1989).

Idaho Defendant was convicted of premeditated first-degree murder and rape and was sentenced to death. He committed the acts in concert with another man, who was his co-defendant at trial. At co-defendants' arraignments, the possibility of severance of their trials was discussed due to the existence of a confession by defendant and inculpatory statements made by his co-defendant. The state made a motion to empanel two juries to hear the case simultaneously, which motion was ruled on favorably by the trial court. According to the procedure utilized, each jury panel heard testimony relating to only one

of the co-defendants and decided the guilt or innocence of that co-defendant only. Although both juries heard most of the testimony and were at most times present in the courtroom simultaneously, they were sequestered at a hotel in a segregated manner, and were required to avoid all contact with members of the other jury panel. In addition, a bailiff was assigned to each jury, and separate opening and closing arguments were presented to each jury. After his conviction, defendant appealed, asserting that the court's refusal to sever his case from that of his co-defendant and the use of dual juries in a simultaneous trial deprived him of his due process rights.

Held, conviction affirmed. The Supreme Court of Idaho declared that defendant received a fair trial and there was no reversible error. Defendant failed to establish that, just because a two-jury procedure was used, he was prejudiced. Therefore, the use of such procedure was not improper. The reason that a dual jury panel was utilized in this case was ostensibly to protect the constitutional rights of each defendant. These rights might have been abridged if two separate trials had been held where one defendant might have testified against the other, violating the prohibition against such testimony. In addition, at the second of such separate trials, the second defendant could presumably have suffered the burden of the extensive publicity attracted by the first trial, making a fair and impartial jury panel difficult to achieve. The dual jury procedure was employed in Bruton v. United States, 391 U.S. 123 (1968), to avoid the problem of the rule that a defendant's confession may not be used by a jury in deciding the guilt or innocence of a co-defendant. In this case, defendant argued that the dual jury procedure should not have been used because of the antagonistic defenses of the co-defendants. The court stated in this regard that it saw no problem because the co-defendant did not even testify, and the only testimony heard about the acts committed was given by defendant himself. Defendant also argued that he was prejudiced by the admission of his fiancee's testimony. His fiancee was a prosecution witness who recounted defendant's confession to her, although with slight variations in the two versions she gave to the separate juries. Defendant alleged that the juries saw both of the co-defendants' counsels attacking each other's client. Supposedly, this resulted in prejudice to defendant. The court saw no such prejudice or jury confusion, and stated that any contradictions in the state's witness' testimony benefited defendant. The court saw neither a problem with the use of a new trial procedure nor an abuse of the trial court's discretion in the use of the dual jury procedure, even though the trial involved a capital crime and a possible death sentence, and affirmed defendant's conviction and sentence. State v. Beam, 710 P.2d 526 (1985), cert. denied, 106 S. Ct. 2260 (1986).

§ 14.150 Conduct of prosecutor

"The Ethical Prosecutor's Misconduct," by Randolph N. Jonakait, 23 CLB 550 (1987).

"Why Prosecutors Misbehave," by Bennett L. Gershman, 22 CLB 131 (1986).

"[The] Burger Court and Prosecutorial Misconduct," by Bennett L. Gershman, 21 CLB 217 (1985).

Alabama Defendant, convicted of murder and robbery, argued on appeal that there should be a reversal because the district attorney trying the case was permitted to act as both prosecutor and witness. The district attorney testified as a witness to an oral confession and written statement made by defendant after his arrest, becoming the principal state's witness. Over defendant's objection that the district attorney should not occupy a dual role, the trial court permitted him to continue as prosecutor.

Held, conviction reversed and new trial ordered. The Alabama Court of Criminal Appeals stated that generally, where a lawyer is a witness for his client, the trial of the case should be left to other counsel. Unless made necessary by "sound and compelling" circumstances, continued the court, the prosecuting attorney should not testify at the trial. Here, it was evident that prior to trial, the prosecutor was aware that he would be a witness; since nothing in the record suggested that he was the only witness to defendant's confession or the only one who could prosecute the case, his action could not be justified. Waldrop v. State, 424 So. 1345 (1982), 19 CLB 484, cert. denied, 105 S. Ct. 3483 (1985).

§ 14.155 —Improper questioning of witnesses

Florida Defendant was convicted of manslaughter. He claimed that he struck the victim, a man his daughter had once lived and subsequently quarreled with, in defense of himself and his daughter. A bartender who witnessed the killing testified that defendant was a pleasant-seeming person whom he had never seen act violent. The prosecutor asked the witness if he had heard of defendant's striking his wife on a date subsequent to the killing. The defense objected to the questioning and moved for a mistrial.

Held, reversed. On appeal, the Supreme Court of Florida held that the reference to the defendant's alleged violence toward his wife was reversible error. The prosecutor's claim that the question was intended to test the credibility of the witness was unpersuasive, since it was logical to conclude that the witness' testimony was limited to events prior to the date of the offense. An inquiry to establish a defendant's reputation for peacefulness is relevant only as of the date of the offense being tried. State v. Michaels, 454 So. 2d 560 (1984), 21 CLB 183.

Montana Defendant, convicted of theft, argued on appeal that there should be a reversal because the prosecutor improperly cross-examined a defense witness about defendant's criminal history. The witness had testified that defendant had a good reputation for honesty and related character traits. On cross-examination, she was asked if she knew that defendant had prior arrests for traffic and intoxicated driving offenses; she denied knowledge of defendant's prior record.

Held, reversed; new trial ordered. The Supreme Court of Montana noted that it was improper for the prosecutor to cross-examine the character witness based upon an arrest record, which has no substance in and of itself to establish character and, in any event, involved offenses that did not relate

to the traits in issue at trial. Refusing to find the error harmless, the court stated that "imputing to him by indirection a criminal record, and one related to traits of character not involved in the specific offense for which the defendant was charged here, was certainly substantial." State v. Kramp, 651 P.2d 614 (1982), 19 CLB 381.

§ 14.160 —Comments made during opening statement

Arkansas Defendant was convicted of first-degree murder and sentenced to thirty-five years' imprisonment. The murder victim, Penelope Turnbull, was shot and killed while attending a party by someone firing a weapon from outside the party. There was no direct evidence that defendant killed Turnbull, but there was circumstantial evidence that he fired the shot. In the ensuing arrest, Sergeant Howard of the state police testified that after he warned defendant of his rights, defendant said he wanted a lawyer. Howard said he ceased the interrogation and was getting ready to leave when defendant asked him two questions about the murder, one of which was self-incriminating. The trial court ruled that the conversation was admissible, since it was initiated voluntarily by defendant, but that the written statement that resulted was excluded. During the trial, the prosecution mentioned the conversation in its opening statement. The defense, on appeal, immediately moved for mistrial, arguing, among other things, that the attention of the jury was inappropriately focused on defendant's invocation of his constitutional right to a lawyer, which possibly led the jury to believe that defendant was trying to hide something, and that this was a prejudicial error. The state argued that since the trial court had admitted the questions that defendant asked, the state was merely explaining to the jury what happened leading up to them; otherwise it might have appeared that Howard had not warned defendant of his rights.

Held, affirmed. The Arkansas Supreme Court held that prosecutor's comment, during opening argument, that defendant had requested an attorney was not so prejudicial as to require a mistrial. The state simply mentioned what was said immediately before defendant asked the two questions that were admitted. People v. Morgan (492 N.E.2d 1303 (1986)) held that the test to be applied to such comments is whether the reference is intended to direct the jury's attention to defendant's silence. In the instant case, the comment was not cross-examination emphasizing defendant's silence to the jury. Moreover, defendant cited no case holding that such a statement is of such a prejudicial nature that it will prevent a fair trial. Holden v. State, 721 S.W.2d 614 (1986), 23 CLB 395.

§ 14.165 —Comments made during summation

"[The] Prosecution's Rebuttal Argument: The Proper Limits of the Doctrine of 'Invited Response,' " by Bruce J. Berger, 19 CLB 5 (1983).

Florida Defendant was convicted of trafficking in methaqualone, possession of a firearm during commission of a felony, and three counts of sale or delivery of cannabis. At trial, the prosecutor commented during his closing argument that defendant "is supplying the drugs that eventually get to the school yards and eventually get to the school grounds and eventually

get into your homes." Defendant argued on appeal that these comments were prejudicial and served as ground for reversal.

Held, conviction reversed. The Florida Supreme Court found that the prosecutor's comment that jurors may end up the victims of defendant's criminal behavior if they failed to convict him was improper. The court stated "No evidence in the record supports a finding that the defendant ever sold any drugs which ended up on a school yard, or in the juror's homes, nor was there any evidence the defendant intended the drugs involved in the instant case to end up in juror's homes." Thus, the prosecutor's argument was highly prejudicial and constituted a basis for reversal. State v. Wheeler, 468 So. 2d 978 (1985).

Missouri In defendant's trial for rape, most of the evidence consisted of the contradicting statements of victim and defendant. As part of his closing argument, prosecuting counsel attempted to define the standard of proof as "beyond reason and common sense." After defendant made a timely objection, which was overruled, the prosecutor told jurors that the jury instructions meant that they should find defendant guilty if their common sense told them defendant committed the crime. Defendant was found guilty and appealed.

Held, conviction reversed. The Supreme Court of Missouri found the prosecutor's remarks to be reversible error. The Missouri Approved Jury Instructions specifically provided that neither court nor counsel is to define nor elaborate on the instructions regarding the burden of proof. Here an incorrect definition was offered in the face of sharply controverted evidence of guilt, and may conceivably have tipped the balance in favor of conviction. State v. Williams, 659 S.W.2d 778 (1983).

§ 14.170 —Comment on defendant's failure to testify

Mississippi Defendants were charged with possessing drugs when police officers executed a search warrant at their residence, finding marijuana and certain controlled substances in capsule and tablet form. At trial, they called no witnesses. When, on summation, the prosecutor made several references to the "undisputed facts," defendants moved for a mistrial, which was denied. On appeal following their convictions, defendants argued that the prosecutor had improperly commented on their failure to offer evidence or testify.

Held, convictions affirmed. The Supreme Court of Mississippi stated that since defendants could have produced a witness who was present when the search was made, the prosecutor's comments on their failure to dispute the State's evidence was not error.

Further, it continued, while reference to an accused's failure to testify is forbidden, any error committed by the prosecutor was harmless beyond a reasonable doubt, given the overwhelming evidence against defendants and their "total failure . . . to dispute the evidence in any manner."

Finally, said the court, any prejudice to defendant was cured by the trial judge's admonition to the jury that defendant's failure to testify was not to be considered. Lee v. State, 435 So. 2d 674 (1983), 20 CLB 173.

§ 14.180 —Comment on failure of defense to call certain witnesses

Connecticut Defendant, a deputy sheriff, was convicted of larceny for de-

positing tax monies he collected into a personal checking account. At trial, defendant testified in his own behalf and was cross-examined as to the checks written to various payees. In rebuttal of defendant's explanation of such payments, the prosecution subpoenaed one payee, Jamele; Jamele, who was facing federal prosecution for gambling activities and tax evasion, was examined outside of the presence of the jury, declining to answer questions concerning the payments on Fifth Amendment grounds. The trial court sustained Jamele's right to remain silent, forestalling any examination of the witness before the jury. During summation, the prosecutor remarked "Where is Nick Jamele? Where is the man (defendant) paid six thousand dollars to?" Defendant's request for a mistrial was denied.

Held, error; new trial ordered. The Supreme Court of Connecticut rejected the State's argument that any prejudice occasioned by the prosecutor's summation was harmless in view of the overwhelming evidence against defendant, holding that "[t]he prosecutor's argument to the jury was improper both because the inference sought was clearly impermissible and because it demonstrated a complete disregard for the tribunal's rulings." Once the trial judge had ruled that Jamele could refuse to testify, Jamele was not an available witness and neither party could argue that the jury should draw an unfavorable inference from his absence. The prosecutor here purposefully disregarded the trial judge's ruling by suggesting that defendant had an obligation to produce an unavailable witness. Such a deliberate attempt to undermine the trial judge's ruling to defendant's prejudice was "so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal." State v. Ubaldi, 462 A.2d 1001, 20 CLB 170, cert. denied, 104 S. Ct. 280 (1983).

§ 14.195 —Defense counsel's "opening the door"

Alabama Defendant, charged with committing murder during a robbery, argued on appeal that the prosecutor's remarks on summation concerning the defense's failure to call a certain witness were improper and required a reversal. At trial, it was established that the victim's wallet was found in a wooded area, not far from where the body was subsequently discovered, by the "missing" witness, Pou. Pou, a prison inmate serving in a work detail on the adjacent road, gave the wallet to authorities. The wallet contained no cash when the authorities received it. Neither side called Pou as a witness. Defendant admitted having an altercation with the victim and claimed self-defense; after realizing that he had killed the victim, he claimed to have panicked and thrown the victim's wallet, containing identification, away without having removed any money. On summation, defense counsel made much of the fact that the wallet was found by Pou, a convicted thief, and argued that Pou could have taken the victim's money. The prosecutor responded, in his closing argument, that Pou was in the county jail and could have been called by defendant.

Held, conviction affirmed. The Court of Criminal Appeals acknowledged the general rule that one party may not comment unfavorably on the other party's failure to produce a witness supposedly favorable to that party if the witness is equally available . . . or accessible to both sides.

Here, however, the court found that defense counsel's references to Pou "opened the door to any argument by the district attorney concerning Pou." Accordingly, it decided, the prosecutor's argument was not improper. Helton v. State, 433 So. 2d 1186 (Crim. App. 1983), 20 CLB 179.

New York Defendant, convicted of murder, argued on appeal that the trial court erred in permitting the prosecutor, on redirect examination of the investigating detective, to elicit hearsay testimony inculpating defendant. The most damaging testimony against defendant was given by one Marrero. The investigating detective was asked, during cross-examination by defense counsel, whether Marrero himself had been considered a suspect; the detective answered affirmatively. On redirect, the prosecutor asked the detective for the basis upon which he had considered Marrero a suspect. Defendant's hearsay objection was overruled, with the trial court holding that defense counsel had "opened the door" by raising the question on cross-examination. The detective proceeded to recount a statement given to him by "a concerned citizen informant" which described defendant and Marrero as the perpetrators; the detective went on to reveal other information regarding defendant and Marrero gathered during the investigation that enable him to rule out Marrero as a suspect.

Held, order reversed. The court of appeals recognized that the "opening the door" theory gives a party the right to explain and clarify on redirect examination issues that have been raised for the first time on cross-examination by the opposing party. However, it noted, the trial court should only allow the introduction of so much additional evidence on redirect as is necessary to meet what has been brought out on cross-examination; the theory does not provide an independent basis for introducing new evidence on redirect.

Here defense counsel's cross-examination gave the prosecutor an opportunity to explore the basis for the detective's suspicions, but did not

> clear the way for the prosecutor to explore the entire ambit of the officer's investigation, including all information connecting the defendant with the homicide. In short, although defense counsel may have partially "opened the door" by asking whether (Marrero) was a suspect, the passageway thus created was not so wide as to admit the hearsay testimony directly implicating the defendant in the crime charged. The door was opened only as to whether the witness considered Marrero a suspect.

It was error, ruled the court, to broaden the scope of redirect inquiry to include all information concerning defendant, including hearsay, developed during the detective's investigation. Since the other evidence of defendant's guilt was not overwhelming, the error was not harmless, said the court in ordering a new trial. People v. Melendez, 434 N.E.2d 1324 (1982), 19 CLB 78.

§ 14.205 —Suppression of evidence

Indiana Defendant was convicted of robbery while armed with a deadly weapon. Among the issues he presented on his appeal was the court's denial of his motion to suppress the testimony of one Stephen Lux, a fellow prisoner. Lux had testified at trial that, when he and defendant were incarcerated together in the Shelby

County jail, defendant had described the robbery for which he was on trial.

Held, affirmed. Defendant's only arguments for suppressing the statement of Lux were based on the holding in United States v. Henry 447 U.S. 264 (1980), 100 S. Ct. 2183: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel." Here, however, unlike in *Henry*, there was no showing that Lux was solicited by the state or any of its agents purposely to induce defendant to make an incriminating statement. In fact, Lux stated he had not been spoken to by anyone representing the state prior to the time that defendant voluntarily talked to him. Since there had been no testimony to contradict the voluntary nature of defendant's disclosures, the trial court correctly had denied the motion to suppress. Hare v. State, 467 N.E.2d 7 (1984).

Montana Defendant was convicted by jury of sexual intercourse without consent. The prosecution interviewed the detective who interrogated defendant three times prior to trial and defense counsel interviewed him once. None of the interviews produced any information beyond that contained in the written report. After the trial had started, the prosecution learned that defendant's interview by the detective had been more extensive than the report indicated. Defendant had specifically denied being in the locations where the victim claimed the attack. He also denied having had intercourse with anyone that night. Defendant had also talked to the detective about his mental problems in more detail than the report indicated. He told the detective that he was having problems with smoking and the devil. His religious convictions were also discussed in detail. The trial court granted a motion to restrict any testimony regarding the devil and smoking or religious convictions. On appeal, defendant contended his defense was prejudiced by the failure of the state to supply to defense counsel a complete summary of detective's interview with defendant until mid-trial.

Held, conviction reversed and case remanded. The Montana Supreme Court found that defendant's statement to the detective that he was having problems with "smoking and the devil" was both material and exculpatory as suggesting a possible insanity defense. Thus, the suppression of such evidence from defense counsel, whether negligent or intentional, prejudiced defendant and entitled him to a new trial. State v. Patterson, 662 P.2d 291 (1983).

North Carolina Defendant was convicted of first-degree murder and felonious assault and was sentenced to death and twenty years imprisonment. Defendant then filed a motion for appropriate relief, including a motion for stay of execution. After a hearing, the superior court ruled that defendant was entitled to a new trial solely because of the prosecution's failure to disclose certain evidence in its possession to defendant before trial.

Held, remanded. The Supreme Court of North Carolina granted certiorari, stating that pursuant to United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976), on a challenge regarding the prosecution's failure to disclose unrequested evidence, the central question involved the materiality of the withheld evidence. The court stated that an assessment must be made of

the impact that the evidence would have had on the determination of defendant's guilt, for such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. The court stated that materiality hinges on two factors:

> (1) The strength of the evidence itself vis-à-vis the issue of guilt and (2) The magnitude of the evidence of guilt which the convicting jury heard.
>
> * * *
>
> Accordingly, [the court reasoned] the reviewing court must view the additional evidence in light of the evidence used to convict defendant in determining whether it would likely have created a reasonable doubt as to defendant's guilt.

The court selected the jury, since it, not the trial judge, is the fact-finder as the reviewer of the effect of this undisclosed evidence. Since it is the jury that determines guilt or innocence based solely on its evaluation of the evidence, reviewing courts must assess the undisclosed evidence to the jury. The proper standard to be applied is this: Would the evidence, had it been disclosed to the jury that convicted defendant, and in the light of all other evidence that the jury heard, likely have created in the jury's mind a reasonable doubt that did not exist otherwise as to defendant's guilt? State v. McDowell, 310 S.E.2d 301 (1984), 21 CLB 81.

§ 14.210 —Failure to call witness (New)

Mississippi Defendant appealed his conviction for murder, claiming the prosecution erred when it did not call the only eyewitness to testify. Defendant contended that common law requires that all witnesses to a crime be called by the prosecution even if they can prove the defendant's innocence.

Held, conviction affirmed. The court explained that the prosecution would have erred if it had failed to produce a witness who could have exculpated defendant and who was unknown to defendant. In this case, defendant knew about the witness and had an opportunity to question him and call him to testify. Because the witness was hostile to defense, he would not have aided defendant. The court concluded that there was no need to call him. Harrison v. State, 534 So.2d 175 (1988).

15. JURY

SELECTION

INSTRUCTIONS

SELECTION

§ 15.00 Selection of veniremen

Maine Defendant was convicted of manslaughter. On appeal, she claimed that the trial court erred in denying her motions challenging the composition of the pool from which the jury was drawn and for public funds up to $29,000 with which to pursue her jury pool challenge. Specifically, she argued that persons aged 18 through 24, persons with less than a high school education, and blue-collar workers were significantly underrepresented in the jury pool. She complained that the sum of $500 the court allotted defendant to pursue her jury pool analysis and compensate a statistician was insufficient to protect her rights to a fair trial and effective assistance of counsel.

Held, affirmed. Defendant's constitutional rights to a trial by an impartial jury drawn from a source fairly representative of the community were not violated. The three groups defendant identified as being underrepresented were not "distinctive" for purposes of a jury pool challenge. Groups classified by age, lack of education, and occupational status are not distinctive because they lack limiting qualities, cohesion of experience, or a community of interest sufficient to set them apart from the general population. Their interests may be sufficiently represented by other segments of society. Nor did the court's denial of defendant's motion for up to $29,000 in public funding deprive her of a fair trial and effective assistance of counsel. While indigent defendants are entitled to the basic tools of an adequate defense, which in some situations consist of more than an attorney and a transcript, they have no constitutional right to all the services enjoyed by paying clients. Defendant was not entitled to the additional funding because she failed to prove that it was necessary for an adequate defense or that she would be substantially prejudiced without it. State v. Anaya, 456 A.2d 1255 (1983).

Mississippi Defendant appealed his conviction for armed robbery. Defendant claimed his motion to strike jury venire should have been granted. Instead of choosing the required 70 names to be used as possible jurors, the deputy circuit clerk chose 91 and struck out 29. The clerk explained that he eliminated those who were dead, those who had moved away, those who were over 65, and those

who had served on a jury in the last two years. Under these conditions, people are exempt from jury service.

Held, conviction reversed and remanded. The court explained that state law requires people to claim their exemption if they are over 65 or have served on a jury in the last two years. People cannot automatically be disqualified from serving on a jury. Serving on a jury is a privilege that cannot be unilaterally retracted. Thus, the clerk erred when he removed the names of prospective jurors. Adams v. State, 537 So.2d 891 (1989).

§ 15.05 —Qualifications

Missouri Defendant, a prelingually deaf person, was convicted of the capital murder of another prelingually deaf person. Defendant claimed that, by statute, the jury commissioner of the city of St. Louis was unconstitutionally required to exclude from the jury wheel all persons known to him to be substantially deaf. On appeal, defendant argued that the trial court erred when it excluded from the jury pool deaf, mute, deaf-mute, and blind persons. Defendant argued that the statutory exclusion of this recognizable, handicapped group of persons violated his constitutionally guaranteed right to a trial by a jury composed of a representative cross section of the community.

Held, case retransferred. The Missouri Supreme Court ruled that the alleged exclusion of handicapped people, specifically deaf persons, from the jury pool did not deny defendant his right to trial by a jury drawn from a cross section of the community. The cross-section requirement is not absolute; it is applied less strictly when manifest convenience or the public interest show reason for deviation from the requirement. Deaf jurors were excluded to ensure a fair trial for defendant because it was believed that a jury composed of deaf people might not be able to reach an informed, fair decision. A person who challenges the composition of a jury that is to try him has the burden of establishing the facts necessary to sustain his challenge. In this case, there was no reason to conclude that a deaf person could not expect a fair trial from a jury from which deaf people were excluded. The exclusion of deaf people from a jury, even if established, did not violate defendant's constitutional rights. State v. Spivey, 700 S.W.2d 812 (1985), 22 CLB 298.

§ 15.15 Systematic exclusion of blacks, etc.

Florida Defendant, a black man, was convicted of second degree murder and possession of a firearm in the commission of a felony. The charges stemmed from defendant's shooting of a black Haitian immigrant. The jury pool consisted of 35 prospective jurors, 31 whites and four blacks. The state used peremptory challenges to remove the first three blacks called. The defense objected to each of these challenges and moved to strike the entire pool. At this point, the trial court heard arguments as to whether the state's challenges were discriminatory and violated defendant's Sixth Amendment right to trial by an impartial jury. The trial judge held that the state did not have to explain its challenges and denied the defense motion. The court did, however, give each side five additional peremptory challenges. The defense then used all of its peremptory challenges in an effort to reach the remaining black prospective juror,

who eventually served as an alternate juror. On certification of a question of great public importance to the Florida Supreme Court, defendant claimed that the trial court erred in denying his motion, thereby improperly allowing the state to exercise its peremptory challenges so as to exclude all blacks from his jury.

Held, remanded for new trial. The Supreme Court of Florida abandoned the requirements of Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965). *Swain* requires that "purposeful discrimination may not be assumed or merely asserted" but must be proved. The majority of the high court adopted a test that once a threshold is passed, the burden of proof is placed on the party whose use of the challenges is questioned. The *Swain* text "impedes, rather than furthers" the State constitution's guarantee of an impartial jury, the court asserted. The first step under the new test is for the complaining party to show a "strong likelihood" that the other party is using its peremptory challenges in a discriminatory manner. At that juncture, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties, witnesses, or characteristics of the juror other than race, then the inquiry should terminate. If the challenges are demonstrated to have been solely based on race, however, then the entire jury pool must be dismissed and a new one impanelled. State v. Neil, 457 So. 2d 481 (1984), 21 CLB 265.

§ 15.20 Capital cases

Nebraska Defendant was convicted of first-degree murder in the shooting death of his wife. The trial court overruled his motion to prohibit asking the jury panel questions related to their feelings about the death penalty; during jury selection, the trial court reminded the jurors that the death penalty was a possibility and asked them whether or not they had any conscientious scruples against the death penalty. On appeal, defendant argued that this procedure resulted in a "prosecution-prone" jury, which would be more likely to convict.

Held, conviction affirmed. The court held that, in accordance with Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770 (1968), a conviction will not be overturned simply because of a "death-qualifying" voir dire, absent concrete evidence to support a claim that the jury is prosecution-prone. *Witherspoon,* held the court, does not preclude exclusion of a juror who has indicated an inability to fairly and impartially determine guilt, and such a juror must be excused for cause. Thus, the questioning in this case was proper because it was directed at the issue of whether the jurors would be able to render a verdict based upon an impartial consideration of the evidence and the law. The court pointed out that if the sentencing of the defendant rested with the jury, as was not the case here, the exclusion of all jurors opposed to the death penalty would have compromised the impartiality of the panel. Finally, since defendant was not sentenced to death, he could not demonstrate prejudice in regard either to his conviction or to his sentence. State v. Lamb, 330 N.W.2d 462 (1983).

New Mexico Defendant was convicted of first-degree murder, first-degree kidnapping, and armed robbery, for which he received consecutive sentences of life, eighteen years, and nine years. Defendant appealed, claiming that the trial court denied him a fair trial when it questioned prospective jurors during voir dire about their views on capital punishment prior to any determination of guilt. Those jurors who were opposed to the imposition of capital punishment under any circumstances were excused for cause.

Held, affirmed. While a prospective juror who simply voices general objections to the death penalty cannot be excused for cause, one whose beliefs about capital punishment would lead him to ignore the law or violate his oath can be excused for cause. The trial court did not err in questioning jurors about the death penalty before there was a determination of guilt. In fact, this was the only reasonable manner in which the voir dire could have been conducted. Otherwise, there would have been no way of knowing how many jurors should have been impanelled. State v. Hutchinson, 661 P.2d 1315 (1983).

Tennessee Defendant was convicted of first-degree murder and sentenced to death. At trial, several prospective jurors were excused when they expressed reservations with regard to imposition of a death sentence. In particular, one potential juror was dismissed after she expressed reservations about capital punishment and about her ability to decide impartially on defendant's guilt or innocence knowing that if found guilty he faced a possible death sentence. Specifically, the potential juror stated that she would absolutely refuse to consider imposition of the death penalty in this case, regardless of the law and the evidence presented against defendant. On appeal, defendant argued that excusal of the prospective juror because of reservations about the death penalty was improper.

Held, conviction affirmed. The Tennessee Supreme Court ruled that excusal of the juror on the basis of reservations with respect to the death penalty was proper. The test of whether a juror may be excused is whether a juror's views substantially would prevent him from fulfilling his duties as a juror in accordance with his instructions and oath. In this case, the court held that the potential juror's views with regard to possible imposition of a death sentence upon conviction would impair her performance in a finding of defendant's guilt or innocence. Thus, the excusal of the prospective juror was proper. State v. Williams, 690 S.W.2d 517 (1985).

Texas Defendant was convicted of murder committed during the course of a robbery and sentenced to death. The trial judge refused to allow the defense to question a prospective juror before granting the prosecuting attorney's challenge for cause. Questioned first by the prosecutor and then by the judge about whether he would be willing to find a person guilty of a crime calling for the death penalty, the juror vacillated in his answers before giving the answer that led to his being excused. Defendant appealed the trial judge's refusal to allow defense counsel to question the juror.

Held, conviction reversed and case remanded. The court said that the

juror should not have been excused before the defense could question him unless he had already stated unequivocally that regardless of the evidence he would vote for a verdict that would not result in the death penalty being imposed. Perillo v. State, 656 S.W.2d 78 (Crim. App. 1983).

§ 15.25 Conduct of voir dire

"'And Then There Were None . . .' Anonymous Juries: An Interview With Herald Price Fahringer," by Fred Cohen, 22 CLB 244 (1986).

Iowa Defendant was convicted of second-degree theft. Prior to trial, he unsuccessfully challenged the county attorney's proposed use of rap sheets of all prospective jurors during the jury selection process. Chapter 692 of the Iowa Code provided regulations on the compilation and dissemination of criminal history data, and Section 692.2 (3)(a) restricted the dissemination of the rap sheet to instances in which "[t]he data is for official purposes in connection with prescribed duties. . . ." On appeal, defendant argued that the investigation of jurors' criminal backgrounds was not a prescribed duty within the meaning of the statute and that the trial court's construction of the statute violated defendant's constitutional rights to due process and equal protection.

Held, reversed and remanded. Because defendant had an important personal stake in selecting a fair jury, the Supreme Court of Iowa determined that he had the standing to contest the county attorney's use of criminal-history data during jury selection. The statutory duties of the county attorney did not disclose an authoritative rule or direction to obtain rap sheets on prospective jurors. In addition, the court held that it would be unfair to allow the county attorney unfettered discretion to obtain rap sheets in light of the possibility of a breach of security with the broad dissemination of information to the attorney and his staff. However, Section 692.2(3)(a) would permit the county attorney to obtain a rap sheet on an individual in cases where there is a reasonable basis for believing that the rap sheet may contain information pertinent to the individual's selection as a juror that is unlikely to be disclosed through voir dire or through judicial questionnaires. In such circumstances, the court stated that the information on the rap sheet should also be made available to the defendant unless good cause is shown to the contrary. State v. Bessenecker, 404 N.W.2d 134 (1987).

New Hampshire Defendant, charged with murder, escaped from custody during jury selection. The trial proceeded in defendant's absence, with the court questioning the five jurors already selected, as well as the prospective jurors, about their ability to render a fair and impartial verdict despite defendant's escape. The members of the jury, as finally constituted, had all responded that defendant's escape and absence from the trial would not influence their judgment as to his guilt or innocence. Defendant was convicted and subsequently apprehended; on appeal, he argued that the trial court's voir dire of the jury was insufficient to ensure their impartiality.

Held, affirmed. The Supreme Court of New Hampshire ruled that the record did not establish an abuse of the trial court's discretion during voir dire and was sufficient to ensure the empaneling of a fair and impartial jury. While the prospective jurors may have

known about defendant's escape, said the court, each of those finally selected stated under oath that his or her verdict would be based only upon the evidence at trial. Moreover, several prospective jurors were excluded when they stated that they had formed opinions about defendant's guilt because of his escape, thus establishing that the trial court's questioning was sufficient to uncover bias or prejudice. State v. Lister, 448 A.2d 395 (1982), 19 CLB 179.

Rhode Island Defendant, convicted of conspiracy to commit robbery, argued on appeal that there should be a reversal because the trial court erroneously refused to disqualify two jurors for cause. Defendant had challenged both jurors, claiming that they equivocated when questioned about their ability to act impartially; the trial court refused to excuse either for cause and both were peremptorily challenged by defendant. Defendant contended that requiring him to exercise two of his six peremptory challenges to remove these prospective jurors from the panel impermissibly diluted and diminished his right to a fair trial.

Held, affirmed. The Supreme Court of Rhode Island assumed, without deciding, that the two jurors should have been excused for cause. The court concluded that this fact alone "[did] not so impair the right of peremptory challenge as to constitute reversible error." It held that the "minimal requirement to the assertion of prejudicial error in such a context would be that upon exhaustion of a defendant's peremptory challenges, he should bring to the attention of the trial justice that he is unsatisfied with the makeup of the jury assembled to try the case." As defendant had not expressed his dissatisfaction with the jury, as finally selected, to the trial court, his argument was rejected. State v. Barnville, 445 A.2d 298 (1982), 19 CLB 85.

Tennessee Defendant, convicted of robbery, argued on appeal that reversible error was committed when the prosecutor was allowed to state, during voir dire, that a city court judge and the grand jury both had already found probable cause to believe that defendant had committed the crime charged. The remarks were made in the context of an explanation, to prospective jurors, of the criminal justice process.

Held, reversed and remanded for a new trial. The Supreme Court of Tennessee characterized the prosecutor's statements as "highly improper." The jury was misled, said the court, because it was not informed that grand jury proceedings are ex parte and preliminary hearings often "cursory" in nature. The effect of the prosecutor's remarks, it found, was to create bias in the minds of the jurors and deprive defendant of the presumption of innocence. Refusing to find the error harmless, the Tennessee high court ordered a new trial. State v. Onidas, 635 S.W.2d 516 (1982), 19 CLB 181.

Virginia Defendant was convicted of robbery and attempted murder. He was initially indicted for first-degree murder as well, but the state amended that charge to murder committed during the commission of a robbery. Defense counsel thereupon moved to sever that trial, but the trial court refused the request, and defendant pled not guilty to all three charges. After a jury was picked, the trial judge changed his mind and agreed to sever the murder charge from the trial for attempted murder and robbery. The

trial judge subsequently informed the jury of the change in the charges against defendant to be tried by them. Out of the jury's presence, defense counsel moved to disqualify the jury, because the jurors had knowledge of the murder charge pending against defendant. The trial judge conducted a voir dire of the jurors, asking them what effect such knowledge would have on their ability to be fair and impartial on the other charges. During the course of the voir dire, the trial judge told the jurors of defendant's motion to disqualify them. The judge also told them that he "would not sustain his [defendant's] motion to strike the panel. . . ." Defense counsel, out of the jury's presence, again moved to disqualify the panel, this time because he felt that they would be adversely affected by the knowledge that he wanted them disqualified. The trial judge and defense counsel then conducted another voir dire of the jury. The judge again denied defendant's motion to strike the jury, and he began the process of taking evidence. Defendant was subsequently convicted of robbery and attempted murder in the second degree. On appeal, defendant argued that the trial judge committed reversible error by telling the jury that defense counsel had moved to disqualify the whole panel.

Held, reversed and remanded for new trial. The Virginia Court of Appeals stated that the trial judge committed prejudicial, and thus, reversible error when he informed the jurors that defendant's counsel had challenged them for cause and had moved to strike the entire jury panel. It was error for the trial court to tell the jury that the additional voir dire was being conducted because defendant's counsel had moved to disqualify the whole jury. The judge's statement to the jury that there had been a motion to disqualify them had the probable effect, ruled the court, of creating in the jurors' minds an unfavorable impression that defendant's counsel lacked confidence in their ability to be fair and impartial. In addition, the judge's statement to the jury that he would not sustain defendant's motion gave the jury the impression that the motion was improper, which it was not, even though the judge made a further statement to the jury that defendant's counsel did not do anything "improper from a legal sense." This explanation was equivocal and did not dispel the impression created earlier that defendant's counsel committed impropriety and that he lacked confidence in the jury's ability. Wilson v. Commonwealth, 342 S.E.2d 65 (1986).

§ 15.35 —Peremptory challenges

California Defendant appealed his conviction of capital murder. He claimed that the prosecution misused its peremptory challenges to exclude certain jurors. Defendant, using a *Wheeler* motion (People v. Wheeler, 583 P.2d 748 (1978)), questioned the prosecution's peremptory challenges, claiming it had group bias. In response to the motion, the prosecution gave reasons why each challenge was made.

Held, conviction affirmed. The court stated that the prosecution gave clear reasons for its challenges. The prosecution excluded possible jurors for individual reasons, not for any group biases. The defendant also claimed that the reasons were subjective and trivial. The court explained that trivial reasons are not invalid. What is required are reasonably specific and neutral explanations that are related to the particular case being

tried. Although defendant claimed that the prosecution excluded those with a predisposition against the death penalty, the court refused to consider "death penalty skeptics" a specific group of people as defined by *Wheeler*. People v. Johnson, 767 P.2d 1047 (1989).

Florida Defendant, a black man, was convicted for carrying a concealed firearm. During his trial, the state used four of its six peremptory challenges to exclude blacks from the jury. The defense objected, but the judge accepted the reasons for exclusion by the state. At issue was the appropriate procedure to follow when a claim of racial discrimination through the exercise of peremptory challenges has been raised.

Held, affirmed decision of district court to remand for new trial. The court, citing State v. Neil, 457 So. 2d 481 (Fla. 1984), recognized the protection against improper bias in the selection of juries. The court said that the nature and burden of proof was an issue in this case, and, therefore, established the following test based on *Neil:* A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. Once this likelihood is shown, the other party must then present a clear, reasonably specific, racially neutral explanation of legitimate reasons for the state's use of peremptory challenges. This explanation must be reasonable and not a pretext. In this case, the court determined that although the state's assertions concerning the peremptory challenges were reasonable, reasonableness alone was not enough. The state did not offer a convincing explanation, having failed to question two of the challenged jurors on the grounds alleged for bias. The court concluded that when the state engages in a pattern of excluding a minority without apparent reason, the state must be prepared to support its explanations for exclusion with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself. State v. Slappy, 522 So. 2d 18 (1988).

§ 15.36 —Challenges for cause (New)

Mississippi Defendant was convicted of capital murder. On appeal, defendant claimed that it was an error for the state to challenge a potential juror for cause. The trial judge sustained the state's challenge. Defendant contended that his right to trial by a jury drawn from a fair and representative cross-section of the community in which the trial was held was denied in violation of the federal and state constitutions. The question presented on appeal was whether a potential juror, who on voir dire examination stated unequivocally that she did not believe in capital punishment and that she would not vote for the death penalty, and also stated that this would not affect her vote on the question of guilt or innocence, may be excluded from the jury for cause in the context of the bifurcated trial required under state law.

Held, no error. The Mississippi Supreme Court found no error in the trial court's action sustaining the state's challenge for cause against a prospective juror, since the juror was

so opposed to capital punishment that her service on the jury would have frustrated the state's legitimate efforts to administer its constitutionally valid death penalty scheme. Defendant insisted that he was entitled to have this juror serve at the guilt phase of his trial, and if that required the trial court to impanel a second separate jury to hear the sentencing phase, so be it. The supreme court stated that the trial court was free to employ a second jury if it wished, but it was not constitutionally required to do so. The court held that it is proper under state law that the same jurors who hear the guilt phase remain and continue to serve as the jurors at the sentencing phase of a capital murder trial. Jones v. State, 461 So. 2d 686 (1984), 21 CLB 378.

§ 15.40 —Prejudice on part of individual jurors

Arkansas Defendant was convicted of capital murder and attempted capital murder. Among the points raised on his appeal was that the trial court abused its discretion by not excusing one of the jurors for cause. The juror had indicated on a questionnaire that his business had been robbed and that there had been acts of violence against his family. When asked if these events would influence him, he responded, "No, in a case like this, as serious as it is, I certainly wouldn't be predisposed." He said that he was not biased and would be fair and impartial.

Held, affirmed. Actual bias, not implied bias, was the issue here. When actual bias is in question, the qualification of a juror is within the sound discretion of the trial judge because the judge is in a better position to weigh the demeanor of the prospective juror's response to the questions on voir dire (Allen v. State, 281 Ark. 1, 660 S.W.2d 922 (1983)). Jurors are assumed to be unbiased, and the burden of demonstrating actual bias is on the appellant. Since the juror was questioned on the issue and his responses were satisfactory to the trial judge, and since appellant demonstrated no actual bias, the trial court did not abuse its discretion in holding the juror competent. Linell v. State, 671 S.W.2d 741 (1984), cert. denied, 105 S. Ct. 1778, 470 U.S. 1062 (1985).

§ 15.45 Exposure of jurors to prejudicial publicity

Georgia Defendant was convicted of murder and he appealed. During the voir dire for his trial, the court asked an entire panel of prospective jurors whether any one of them had formed an opinion regarding the guilt or innocence of the accused. One panel member responded that he had "first-hand knowledge of what he [Charlie Giles] did from his [Giles'] brother." In response to further questioning, he added, "I know what happened and I know the details and it wasn't good." Defendant contended that the court should have excused the entire panel for cause because it had heard these responses.

Held, judgment affirmed. Although the juror stated that he knew that something that had happened between defendant and the victim wasn't good, he did not state the substance of what he had heard. Although the better practice might have been to excuse the panel, retaining it under these circumstances was not an abuse of discretion. Giles v. State, 317 S.E.2d 527 (1984).

Minnesota Defendant was charged with several counts of criminal sexual

conduct and related crimes for allegedly engaging in sexual activities with children. He moved for dismissal of the charges on the grounds of misconduct by an investigating officer, who had tipped off television news reporters that defendant's residence was to be searched on a particular night. The searches were filmed by a news crew and the resulting publicity, defendant contended, prejudiced his right to a fair trial; as an alternative to dismissal, he also argued for suppression of the evidence seized during the search. His motions were denied but the trial judge granted a change of venue; defendant took an interlocutory appeal.

Held, remanded for trial. The Minnesota Supreme Court ruled that, notwithstanding the deliberate leak of information concerning the investigation by agents of the state, defendant was not entitled to dismissal or suppression. Neither was an appropriate remedy, but the court stated, because defendant's rights could be protected amply by the less dramatic measure ordered by the trial judge, i.e., a change of venue, together with an appropriate voir dire. While the court noted that an accused's failure to demonstrate prejudice would not be dispositive under all circumstances, it refused to grant defendant the relief sought in this case and remanded for trial. State v. Astleford, 323 N.W.2d 733 (1982), 19 CLB 274.

INSTRUCTIONS

§ 15.80 Burden of proof

U.S. Supreme Court After defendant was convicted in Ohio state court of aggravated murder, she appealed on the ground that the trial judge had violated due process by instructing the jurors that they could acquit defendant of aggravated murder if she proved by a preponderance of the evidence that she was acting in self-defense. The Ohio Supreme Court affirmed the conviction.

Held, affirmed. The Ohio state practice of placing on defendant the burden of proving that she was acting in self-defense when committing the alleged murder did not violate due process, where the trial judge also instructed that the state had the burden of establishing elements of aggravated murder beyond a reasonable doubt. Martin v. Ohio, 107 S. Ct. 1098 (1987), 23 CLB 388, reh'g denied, 107 S. Ct. 1913 (1987).

§ 15.110 Credibility of witnesses

Indiana Defendant was convicted of the theft of a car on the basis of testimony given by an accomplice who had pled guilty to a lesser offense. On appeal, he argued that the trial court erred in admitting the accomplice's plea-bargain agreement with the state because it contained a recommendation for a two-year sentence, thereby creating an inference in the jury's mind that defendant would receive the same sentence.

Held, conviction affirmed. It is settled that, in order for the jury to have all the facts and circumstances upon which to judge the credibility of a witness, the state must disclose any promises, grants of immunity, or rewards offered in return for his testimony. And, the court held, although there is no need to inform the jury of the penalties prescribed for a crime, the court here did not instruct the jury of the prescribed penalties for theft or for the habitual offender statute. Furthermore, since the jury was instructed that they should consider the fact that the accomplice had agreed to cooperate with the state in consideration of len-

iency, there was no indication that defendant would receive the same sentence. Garland v. State, 444 N.E.2d 1180 (1983).

§ 15.115 —Defendant's failure to testify

Connecticut Defendant was convicted of murder and assault in the first degree. He appealed the verdict. The Supreme Court of Connecticut set aside the judgment and ordered a new trial, partly on the ground of the trial court's failure to instruct the jury that it could not draw any inference from defendant's decision not to testify. Defendant had requested the trial court to instruct the jury about his right not to do so under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article First, § 8, of the Connecticut constitution. The court was asked to add that "[a]bsolutely no inference of guilt can be drawn from the exercise by the accused of his constitutional right not to testify." The court instead instructed the jury that:

> An accused person is under no obligation to become a witness in his own behalf. Under our law, an accused person may either testify or not as he sees fit. It is for the State to prove him guilty and no burden rests upon him to prove his innocence.

Held, judgment set aside, new trial ordered. The Fifth Amendment to the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." That provision acts as a restraint upon the individual states under the Fourteenth Amendment to the U.S. Constitution. The Connecticut counterpart, Article First, § 8, of the Connecticut constitution similarly provides that no person shall be compelled to give evidence against himself. The U.S. Supreme Court has used these protections to construct a right to a "no-adverse-inference" instruction by the trial court—that is, that the jury may not draw inferences of guilt from a criminal defendant's exercise of that right when the defendant properly requests such an instruction. The court held that such an instruction is essential to insure the full and free exercise of the Fifth Amendment right against self-incrimination and to the system of justice that it is designed to uphold. Carter v. Kentucky, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed 241 (1981). The court, after noting that the right to such instruction is part of the Fifth Amendment right against self-incrimination, extending to state trials by virtue of the Fourteenth Amendment, held that a criminal defendant has an independent right under Article First, § 8 of the Connecticut constitution to the same "no-adverse-inference" instruction upon proper and timely request. Although the instruction in this case occurred on May 26, 1977, before the *Carter v. Kennedy* decision, the Supreme Court of Connecticut held the *Carter v. Kennedy* rule applicable to all convictions for which avenues of direct appeal had not been exhausted and time for appeal expired. Thus, in this case, the *Carter v. Kennedy* rule was applicable because the case was not final when the rule was announced. State v. Cohane, 479 A.2d 763, 21 CLB 184, cert. denied, 469 U.S. 990, 105 S. Ct. 397 (1984).

§ 15.120 Duty to charge on defendant's theory of defense

Rhode Island Defendant was found guilty in the beating death of his female companion. He had found her naked and drunk on the bathroom floor after a co-worker of his had left their apartment, and reached the conclusion—unsubstantiated—that she had had sex with the co-worker. Evidence established that the fatal beating occurred at least several hours after he found and first beat her, and probably took place nearly a day later. He had beaten the victim on other occasions. The trial judge instructed the jury only on first- and second-degree murder and on manslaughter. Defendant appealed, arguing, inter alia, that the trial judge was required to instruct the jury on voluntary manslaughter, as a lesser included offense.

Held, conviction for second-degree murder affirmed. The court stated that voluntary manslaughter, under the common law definition, is "an unintentional homicide without malice aforethought in the heat of passion as a result of adequate provocation." The killing in this case occurred after defendant had time to cool off and there was no evidence of a legally adequate cause. Since the evidence did not support a verdict of voluntary manslaughter, defendant was not entitled to an instruction on it. State v. Conway, 463 A.2d 1319 (1983).

§ 15.130 Duty to charge on essential elements of crime

New York Defendant appealed his conviction for rape and other sex crimes. Defendant, using physical force, bound, handcuffed, and raped a woman. He was charged with committing sexual offenses by use of forcible compulsion consisting of physical force. During his trial, the court instructed the jury on both statutory definitions of "forcible compulsion": (1) "physical force" and (2) "express or implied threats." Defendant objected to the second definition because it varied from the charge for which he was indicted.

Held, conviction affirmed. The court stated that no evidence of express or implied threats was presented in the trial. If it had been presented, there would have been an error because defendant was not charged with compulsion consisting of threats. The court explained that the trial court should have tailored the definition of "forcible compulsion" to meet the trial's needs, but considering it did not, the error was excusable because it had no potential for prejudicing defendant. People v. Grega, 531 N.E.2d 279 (1988).

§ 15.145 Intent and willfulness

Missouri Defendant and several co-defendants were convicted of capital murder. On appeal, defendant argued that the state's verdict director for capital murder did not properly instruct on the requisite mental state. Specifically, defendant argued that the verdict director did not hypothesize the requisite intent, as it attributed the intent to commit capital murder alternatively to defendant or one of the co-defendants. Only the intent to commit burglary, defendant claimed, was attributed directly to defendant and not alternatively to the co-defendants.

Held, affirmed. The verdict director properly instructed on the requisite intent. It provided that if defendant knew that he or another would be prac-

tically certain to commit a capital murder in the course of conduct for which he was criminally responsible (burglary), then he had the requisite intent for capital murder. Defendant, who in the course of the burglary announced that he would kill anyone found on the premises, was fully aware of the possibility that capital murder would be committed. State v. Betts, 646 S.W.2d 94 (1973).

§ 15.155 Lesser included offenses

U.S. Supreme Court At petitioner's trial for first-degree murder, the Florida trial court informed him that it would instruct the jury on lesser-included offenses if he would waive the statute of limitations, which had expired as to those offenses. The jury was instructed solely on capital murder when petitioner refused to waive the statute. He was found guilty of first-degree murder, and although the jury recommended life imprisonment, the trial court imposed the death sentence. The Florida Supreme Court affirmed the conviction, but reversed the death sentence because respondent had not been provided access to a portion of the presentence report. On remand, the Florida Supreme Court affirmed.

Held, affirmed. It was not error for the trial judge to refuse to instruct the jury on lesser-included offenses. The Court reasoned that, since no lesser-included offense was available because of the running of the statute, a lesser-included offense instruction would have detracted from, rather than enhanced, the rationality of the jury deliberation process. Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154 (1984), 21 CLB 66.

Arizona Defendant was convicted of felony murder, second-degree burglary, kidnapping, and robbery. Originally, he was indicted for both felony murder and premeditated murder, but the trial court would only instruct the jury on felony murder. Defendant requested that the trial court instruct the jury on lesser included offenses within premeditated murder, specifically manslaughter, second-degree murder, and negligent homicide. The trial court refused to do so, because the premeditated murder charge had been dismissed. On appeal, defendant argued that this refusal on the part of the trial court to instruct the jury on lesser included offenses within the dismissed premeditated murder charge constituted reversible error.

Held, conviction affirmed. The Arizona Supreme Court ruled that "where a charge has been dismissed, a defendant is not entitled to have the jury instructed on the lesser included offenses of that charge." The premeditated murder charge had been dismissed. Without a greater charge there are no lesser included offenses. The court stated that "[r]equiring the trial court to instruct on lesser included offenses when the greater charge has been dismissed is at odds with the purpose behind the lesser included offense doctrine." The purpose of this doctrine is to offer an alternative other than acquittal or conviction when the jury does not feel that the crime is as charged, but the defendant is clearly guilty of a lesser included offense. In this case, defendant was also charged with felony murder, and was convicted of same. He was not entitled to be charged with a lesser offense included within a dismissed charge. State v. Wiley, 698 P.2d 1244 (1985).

Arizona Defendant-appellant had been convicted of a first-degree burglary count, three counts of aggravated assault, and one count of misconduct involving weapons. One of the issues on appeal was whether the trial court erred in failing to include instructions on lesser-included offenses. Defendant had a sawed-off .22 caliber semiautomatic rifle in the assault and break-in for which he was prosecuted. His argument was that the evidence supported the view that the object he carried was an inoperable firearm and thus, neither deadly nor dangerous within the meaning of Ariz. Rev. Stat. Ann. §§ 13-105(7), 13-105(9), or 13-105(12). According to him, the jury should have been instructed on lesser-included offenses, and failure to do so was reversible error.

Held, conviction affirmed. The basic rule on instructions for lesser-included offenses is that the instruction must be supported by some theory of the case and substantiated by the evidence. Here, defendant's theory at trial was alibi. He maintained that he was with his brother at a party during the time the crime was committed. The state, on the other hand, introduced the weapon that three witnesses said appellant carried, introduced evidence that the weapon was of a type prohibited by statute, and allowed the jury to examine it. There was no evidence presented to the jury that the firearm was in a permanently inoperable condition at the time of the crime. They would therefore have had no basis for convicting him of any of the lesser included offenses that did not require an operable firearm as an element. The court cited its previous decision on instructions where one element of the crime may not be proved. If the jury simply disbelieves the state's evidence on one element of a crime, conviction on a lessor offense is still possible. Theoretically, this reasoning then would require instructions on all offenses included in every criminal trial. It was the court's position in State v. Schroeder, 389 P.2d 255 (1964), and apparently in this case, that "[the] law does not require or even permit such a procedure." State v. Caldera, 686 P.2d 642 (1984).

Arizona Defendant was convicted of armed robbery and first-degree felony-murder. On appeal, defendant asserted that the trial court erred in rejecting his lesser included theft instruction. The issues on appeal were whether (1) theft is a lesser included offense of robbery under Arizona law; (2) the evidence supported the giving of a theft instruction; and (3) defendant was prejudiced by the failure to give a theft instruction.

Held, reversed and remanded. First the court held that theft is a lesser included offense of robbery under Arizona's revised criminal code. The court reasoned that robbery as defined under the revised code "necessarily includes an exercise of control over property as contemplated by the definition of theft . . ." because "one cannot take property without exercising control over it." Second, the court held that the evidence warranted an instruction on theft because the jury could have rationally found that the state failed to prove that the taking of property was accomplished by force. There was testimony sufficient for the jury to have rationally believed that defendant used no force in taking the victim's money. Finally, the court had no trouble finding that defendant had been prejudiced by the lack of a proper theft instruction. State v. Celaya, 660 P.2d 849 (1983) (en banc).

Arkansas Defendant was convicted of raping his fourteen-year-old daughter, who testified that her father began regularly having intercourse with her when she was in the eighth grade. Defendant initially pleaded not guilty and argued that nothing improper occurred between him and his daughter. Nevertheless, he requested jury instructions on the lesser included offenses of carnal abuse in the third degree and sexual misconduct. The difference between these offenses and rape is the element of forcible compulsion. The trial court found that there was no rational basis to give the instructions because defendant denied any crime occurred and thus was either guilty or innocent. However, the court of appeals decided that the trial court committed error when it refused to give a lesser included offense instruction.

Held, reversed and conviction reinstated. The Arkansas Supreme Court ruled that there was no rational basis for the lesser included offense instruction, since defendant had denied the rape completely and did not defend himself against the charge on the basis of his daughter's consent. Moreover, the instruction would lead a jury to conclude that defendant's daughter had consented to sexual intercourse with her father, but in this case consenting adults were not involved but, rather, a father accused of raping his adolescent daughter with evidence that it had been going on for years. Flurry v. State, 720 S.W.2d 699 (1986), 23 CLB 394.

Arkansas Defendant, convicted of aggravated robbery, argued on appeal that the trial judge erred by refusing to instruct the jury that it could find defendant guilty of the lesser included offense of simple robbery. At trial, it was established that defendant displayed a gun and demanded money from a store owner. As the owner handed over the money, he activated a hidden camera that photographed the scene; the photograph showed defendant holding a small revolver.

Held, conviction affirmed. The Supreme Court of Arkansas stated that while robbery is a lesser included offense of aggravated robbery, there is no need to instruct the jury as to the lesser offense "if there is no rational basis for acquitting [a defendant] of aggravated robbery and convicting [him] of the lesser offense." Here, there was no rational basis for acquitting defendant of aggravated robbery and convicting him of simple robbery, because there was no question that a deadly weapon was used; defendant, the court stated, "was guilty of aggravated robbery or nothing at all." Therefore, it was not error to refuse to instruct on the lesser included offense. Lovelace v. State, 637 S.W.2d 549 (1982), 19 CLB 276.

California People appealed the reversal of defendant's conviction of attempted murder and the lesser related offense of battery with serious bodily injury. On appeal, defendant claimed that the trial court erred when it allowed battery with serious bodily injury to be included as a lesser offense, because by its statutory definition attempted murder does not necessarily have to include battery with serious bodily injury.

Held, reversed. Although the court agreed with defendant's claim that battery is not a lesser offense to attempted murder, it said any objection should have been made at trial. When a defendant, who is represented by com-

petent counsel, makes no objection, he gives his implied consent to the ruling. In this case, the court could find no due process error in violation of the Fourteenth Amendment. People v. Toro, 766 P.2d 577 (1989).

California Defendant was convicted by a jury of second-degree burglary. On appeal from his conviction, his principal contention was that the trial court erred in refusing to instruct the jury, in accordance with defendant's theory of the case, that he could be convicted of vandalism, a related offense not necessarily included in burglary. Defendant's strategy at trial was to attempt to convince the jury that conflicting inferences could be drawn from the evidence, one of which was that he had no intent to steal when he broke the window to the restaurant, but did so in an outburst of anger and frustration because he had not been paid for his work at a discotheque earlier that night by the owner. If the jury had accepted his theory of the case, and had been permitted to do so, it should have convicted him of vandalism, for under the instructions given regarding circumstantial evidence, a conviction of burglary or attempted burglary would not have been proper. The trial court denied his request for an instruction on vandalism, however, on the ground that vandalism is not necessarily a lesser-included offense within the charged burglary offense.

Held, reversed. The Supreme Court of California held that in the described circumstances, a defendant is entitled to instructions on a related, but not necessarily included, offense. Therefore, defendant's request should have been granted. The court set forth the following guidelines for determining when additional instructions are required: (1) Some basis must exist for finding the uncharged offense was committed; (2) The uncharged offense must be "closely related" to the charged offense; and (3) Defendant must have relied at trial on a defense "consistent" with a conviction on the uncharged offense. The court based its ruling on state guarantees of due process and the right to jury trial. People v. Geiger, 674 P.2d 1303 (1984), 21 CLB 79.

California Defendant was convicted of first-degree murder in the shooting death of her husband. She presented some evidence that the shooting was not premeditated and was provoked by her fear that her husband, who was fighting with her at the time, would reach into his pocket for his gun. The fight began when the victim complained about a gun defendant kept in her house and had purchased several months earlier. According to defendant, she grabbed the gun before the victim could take it, and as he reached for it she accidently shot him with it. After the shot, the victim reached behind him. Thinking that the victim was reaching for a gun in his pocket, defendant left the room. The defense counsel did not articulate a deliberate objection to the jury instructions, which did not instruct on the lesser offenses of second-degree murder and voluntary manslaughter. Defendant appealed the conviction arguing that the trial court erred in not instructing sua sponte on the lesser charges.

Held, conviction reversed. Although the court was required to instruct on voluntary manslaughter, it should have instructed on second-degree murder. The duty to give instructions, sua sponte, on a particular offense arises

only if the defendant is relying on such a defense, or there is substantial evidence supportive of such a defense and the defense is not inconsistent with defendant's theory of the case. Sua sponte instructions should not have been given on either of the two theories of voluntary manslaughter presented by defendant—heat of passion and unreasonable self-defense. As for the heat-of-passion theory, there was no evidence of provocation, with the possible exception of the victim's grabbing of the gun. A jury could have found that a reasonable person in defendant's position, faced with such an attack and with knowledge of the victim's violent nature, would have acted to repel the attacker. A trial court should not instruct on heat-of-passion voluntary manslaughter where the same facts would give rise to a finding of justifiable homicide via self-defense. Because defendant claimed that the shooting was accidental, the trial court did not err in failing to instruct on voluntary manslaughter via unreasonable self-defense. Defendant did not rely on that defense, and it was inconsistent with defendant's theory of the case. Instructions on second-degree murder should have been given as there was evidence that defendant did not form the intent to kill her husband until he tried to grab the gun from her. People v. Wickersham, 650 P.2d 311 (1982).

Mississippi Defendant appealed his conviction of rape, claiming that the trial court erred when it refused to instruct the jury that he could be convicted of the lesser charge of assault. Defendant testified that the victim consented to have intercourse with him in a hotel room. They continued having sex in a car on the road side, where they were found by the police. Defendant admitted striking the victim after she became rough while performing oral sex, but said they did not have intercourse in the car. This differed from the victim's testimony, which claimed that the victim never consented and was forced to have sex.

Held, conviction reversed and remanded. The court explained that if there had been sexual penetration while the two were in the car, the lesser crime of assault could not be considered. Because defendant claimed there was no penetration but did admit striking the victim, the jury could reasonably consider an assault conviction, if it believed defendant's story rather than the victim's. Griffen v. State, 533 So.2d 444 (1988).

§ 15.160 Limiting and cautionary instructions

U.S. Supreme Court After defendant was convicted in Kentucky state court of second-degree burglary and related charges, he appealed on the ground that the court had not complied with his request for a *Carter* admonition (i.e., that no adverse inference be drawn from his failure to testify), rather than a *Carter* "instruction." The Kentucky Supreme Court affirmed the conviction.

Held, reversed. In this case, the failure to respect petitioner's constitutional rights was not supported by an independent and adequate state ground. The court observed that there was nothing in the record to reveal that the petitioner's reference to an "admonition" meant that he was insisting on an oral statement to the jury and nothing else. James v. Kentucky, 466 U.S. 341, 104 S. Ct. 1830, 21 CLB 72, reh'g denied, 467 U.S. 1268, 104 S. Ct. 3565 (1984), cert. denied, 105 S. Ct. 1849 (1985).

South Carolina Defendant was convicted of murder, and assault and battery with intent to kill. He appealed, arguing that his right to remain silent had been infringed. When defendant presented psychiatric testimony that he was legally insane at the time of the crime, the solicitor asked the psychiatrist whether he was aware that defendant refused to make a statement to police officers. The defense counsel objected, and the trial judge asked the jurors if any of them remembered the question. One juror answered affirmatively. The trial judge instructed that juror to forget the question. The State, therefore, contended that the prejudicial effect of the question was cured by the trial judge's instruction.

Held, reversed and remanded. The South Carolina Supreme Court held that the State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent. Here, the solicitor's question focused the jury's attention on post-arrest silence as substantive evidence of his sanity. A mere general remark excluding evidence does not cure the error. The jury must be specifically instructed to disregard the evidence, and not to consider it for any reason during deliberations. A casual remark to forget the question cannot substitute for a curative instruction. State v. Smith, 350 S.E.2d 923 (1986), 23 CLB 401.

§ 15.180 Presumptions and inferences

Delaware Defendant was convicted of robbery in the first degree, possession of a deadly weapon during the commission of a felony, and conspiracy in the second degree. On appeal, he contended that the jury charge on rebuttable presumption in connection with his possession of recently stolen goods violated his Fifth Amendment right to protection against self-incrimination and was not warranted by the facts. The jury charge was based on a Delaware law providing a rebuttal presumption that a person who is in possession of goods acquired as a result of a commission of a recent crime is presumed to have committed the crime. It was accompanied by instructions that defendant could destroy the presumption with a satisfactory explanation of his possession of stolen goods or with an alibi, and that the lapse of time between the commission of the crime and the discovery of possession had to be considered. The jury instruction, and the statute on which it was based, did not specify whether the presumption was mandatory, not mandatory but shifting the burden of persuasion to defendant, or permissive—that is, not manadatory and not burden-shifting. It did however, call the presumption a "rebuttable presumption," and stressed that the state had to prove guilt beyond a reasonable doubt. Defense counsel, who proffered an "inference" instruction in lieu of the "presumption" instruction, argued that the presumption was mandatory and thus in violation of the Fifth Amendment.

Held, affirmed. The instruction and jury charge were constitutional. The phrase "rebuttable presumption," as it is commonly understood, indicates only a permissible inference which does not shift the state's burden of proof to defendant. The jury instruction that the state still had to prove guilt beyond a reasonable doubt was sufficient. Defendant's claim that the jury charge was not warranted by the facts was equally erroneous. Despite defendant's rebuttal evidence, the state established a strong link between the possession

of stolen goods and the commission of the crime, and there was ample evidence against defendant beyond his possession of the stolen goods. Craig v. State, 457 A.2d 755 (1983).

Utah Defendants were convicted of burglary and theft. When they were arrested, property recently stolen was found in their possession and was used as evidence to convict them. At trial, the jury was instructed as to a statutory presumption that

> A person commits theft if he obtains or exercises unauthorized control over the property of another with the purpose to deprive him thereof. Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

On appeal, defendants argued, among other things, that the instructions given to the jury violated their constitutional rights. Specifically, they argued that the jury instructions violated their right to a presumption of innocence and improperly shifted the burden of proving innocence to defendants.

Held, reversed and remanded. The Utah Supreme Court found that the jury instructions in question were constitutionally defective. The instruction given the jury that possession of stolen property, in the absence of a satisfactory explanation, was prima facie evidence of theft by the person in possession of the property improperly shifted the burden of proof from the state to defendants, and were as such an unconstitutional violation of defendants' right to be presumed innocent. The court cited Francis v. Franklin, 105 S. Ct. 1965 (1985), which found that the use of any mandatory rebuttable presumption in a jury instruction is unconstitutional. In this case, the jury instructions set forth a mandatory presumption requiring the jury to find defendants guilty of theft unless defendants rebutted the presumption and persuaded the jury that such a finding was unjustified, in effect making defendants guilty until proved innocent and shifting the burden of proof from the state to defendants. State v. Chambers, 709 P.2d 321 (1985), 22 CLB 299.

§ 15.195 Punishment (or disposition following insanity acquittal) of no concern to jury

Indiana Defendant was convicted of voluntary manslaughter. After reading the information during voir dire, the trial judge remarked that some people do not wish to serve on murder cases because they do not wish to be involved in a death penalty and informed the jury that the death penalty was not a possibility in this case. On appeal, defendant argued that it was error for the judge to so inform the jury, especially when he was not allowed to inform the jury of the possible penalties he actually faced.

Held, conviction affirmed. The court recognized that the penalty for any crime is irrelevant to the jurors in the performance of their guilt assessing duty, and that they should be oblivious to the punishment scheme because judges rather than juries fix sentences. However, it pointed out, the death penalty is a special case and its possibility can be a secret concern which might reasonably be expected to improperly influence jurors. Since the judge's remarks were calculated to prevent prospective jurors from engaging in improper speculation, it

could not reasonably be said that the remarks rendered defendant's trial unfair. Burgess v. State, 444 N.E.2d 1193 (1983).

§ 15.215 Prejudicial comments by trial judge during charge

California Defendant was convicted of the first-degree murder of two individuals. He was paid $4,000 to commit the murders. Before the jury met to consider whether defendant should receive life imprisonment or a death sentence, the court instructed them: "As jurors, you must not be influenced by pity for a defendant or by prejudice against him. You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."

After defendant received the death penalty, the state public defender appealed the sentence on his behalf, arguing that the instruction to the jury not to be swayed by sympathy was improper.

Held, death penalty reversed; new penalty trial ordered. The California Supreme Court cited its opinion in People v. Robertson, 655 P.2d 279 (1982), that "in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it." Despite the aggravating factors in the crime, defendant did present jury with a number of sympathy factors that might possibly have influenced a properly instructed jury to clemency. People v. Easley, 671 P.2d 813 (1983).

Minnesota Defendant was convicted of attempted second-degree (intentional) murder and of assault in the first degree in the shooting of a friend and of another victim. In instructing the jury on the attempt charges, the judge explained the meaning of taking a "substantial step" by citing the contrasting examples of someone who thinks about shooting someone but stays at home and someone who, having thought about shooting someone, goes to that person's house to look for him. Defendant appealed, arguing that this example had the effect of directing a verdict on the issue of attempt.

Held, conviction affirmed. The court stated that there is a danger in using an example that fits too closely. However, even if an error was committed, it was not prejudicial, since the example did not deal with intent, which was the real issue, but only with whether defendant took a substantial step toward killing the victim, which was not an issue. State v. Williams, 337 N.W.2d 689 (1983).

§ 15.225 Charge on issues of law

California Defendant was convicted of first-degree murder and sentenced to death. During sentencing, defendant contended that the court committed reversible error when the jury was charged in the unadorned language of the so-called Briggs instruction, which states that the governor is empowered under the California constitution to reprieve, pardon, or commute a sentence. Defendant claimed that People v. Ramos, 689 P.2d 430 (Cal. 1984), held that the Briggs instruction is incompatible with the guarantee of fundamental fairness established in the due process clause of the California constitution. Defendant claimed that when Briggs is used, the jury must be told that they may not consider it when sentencing. The attorney general, however, maintained

that the Briggs instruction, which was not emphasized by either the prosecutor or the trial court, was a harmless error.

Held, affirmed as to guilt, reversed as to punishment. The court said when a court uses the Briggs instruction, it commits serious error and necessarily subjects a defendant to prejudice. The court stated that, in this case, the Briggs instruction was not harmless because it was emphasized by the prosecutor, who had said that "lifers" did not stay in prison with the governor's commutation power, apparently to influence the jurors to impose death. Although the trial court admonished the jury to disregard the prosecutor's statement, it did not tell the jury to disregard its own Briggs instruction. The jury had specifically been instructed to follow the rules of law delivered by the court. In the absence of an admonition that the jury should not consider the Briggs instruction, they would reasonably infer that it should be considered when sentencing and that the governor, not the jury, was the final arbiter. People v. Bunyard, 756 P.2d 795 (1988).

Georgia Defendant was convicted of murder and sentenced to death. At trial, the prosecutor "read the law" to the court. The prosecutor cited a prior Georgia Supreme Court decision that supposedly established that a presumption of malice may arise from a reckless disregard for human life, and that a wanton and reckless state of mind is sometimes equivalent to a specific intent to kill. The court then advised the jury that they should not take what the prosecutor said to be the law. Although already abolished as a practice in civil cases, it is permissible for a lawyer in criminal cases to read to the judge and the jury what the lawyer contends the law to be. The trial judge told the jury that the court will instruct them on the law. After closing arguments by both sides, defendant moved for a mistrial based on the prosecutor's reading of the law to the jury. Defendant claimed that the law read by the state was no longer valid and should not have been presented to the jury, and that the prosecutor's statements constituted reversible error.

Held, conviction affirmed. The Georgia Supreme Court found that the prosecutor's statements were not grounds for declaration of a mistrial; however, in the future, reading of the law by either party no longer will be permissible in criminal cases as well as in civil cases. The trial court in this case advised the jury that what the prosecutor said was the law should not be accepted by them as such, and that the court would instruct them on the law. Nonetheless, the evidence presented in this case as to defendant's state of mind "overwhelmingly establishes intent to kill, which is the only element of malice implicated by the quote. . . ." Moreover, the court decided that from then on reading of the law would no longer be permissible in criminal cases or in civil cases. The court stated that while it is acceptable for counsel to refer to applicable law, it is unacceptable for an attorney to cite laws that the court did not charge. Conklin v. State, 331 S.E.2d 532 (1985).

New Jersey Defendant was convicted of murder. At the sentencing trial, aggravating and mitigating factors were introduced, and the court instructed the jury that if each aggravating factor

was not outweighed by the combined mitigating factors, the sentence of death would be imposed under N.J. Stat. Ann. § 2C:11-3. The jury did not find mitigating factors to outweigh aggravating factors. Defendant appealed the resulting sentence of death.

Held, reversed and remanded. Although defendant did not raise the issue, the Supreme Court of New Jersey found that the trial court had failed to instruct the jury properly in the sentencing phase. During sentencing, the jury was not instructed that they had to be convinced that aggravating factors outweighed mitigating factors "beyond a reasonable doubt." Although Section 2C:11-3 did not explicitly so require, as a matter of fundamental fairness in all cases tried under the act, in order for the death penalty to be imposed, "the jury must find that aggravating factors outweigh mitigating factors, and this balance must be found beyond a reasonable doubt." Accordingly, the court concluded that the absence of such a finding mandated reversal and retrial of the penalty decision. State v. Biegenwald, 524 A.2d 130 (1987).

New York In the first of two cases considered together, defendant was convicted of criminal possession and sale of a controlled substance while defendant in the second case was convicted of attempted robbery. In the first case, defendant was arrested after selling cocaine to an undercover police officer. At trial, he raised the defense of agency, and in its instructions to jury, trial court gave an extensive charge with respect to the agency defense. Trial court then furnished the jurors with a copy of its instructions solely on the elements of the crimes charged; the court refused to add the agency defense in the written instructions despite defense counsel objections. In the second case, the trial court read its charges aloud and then distributed to each juror a document consisting of portions of the oral instructions. Defense counsel objected on the ground that the document highlighted certain aspects of the charge of robbery and left out others.

Held, convictions reversed and new trial ordered. The court stated that submission of a written charge, particularly in absence of any request from the jury for further instruction, creates the risk that the jury will perceive these charges as embodying the more important instructions. By leaving out the agency defense in the first case and the presumption of innocence or reasonable doubt in the second case, the court determined that the written charges had deprived each of the defendants of a fair trial. The court stated that errors made in submitting only portions of charge to a jury for use during deliberation cannot be deemed harmless because, unlike marshaling of evidence, distribution of written instructions to a jury are not expressly authorized by law. People v. Owens, 509 N.E.2d 314 (1987), 24 CLB 276.

§ 15.235 Supplemental instructions

Florida Defendant was convicted of sexual battery by oral penetration, pursuant to a state statute. The only evidence produced by the state at trial was the testimony of the victim. On appeal, defendant denied the sexual battery and attempted to show that the victim had fabricated the incident because of animosity between himself and the victim's boyfriend. Defendant requested the jury to be given the following instruction: "In a case where no other person was an immediate wit-

ness to the alleged act, the testimony of the prosecutrix should be rigidly scrutinized." The trial court denied the request, giving instead a standard instruction, and defendant, on appeal, claimed that the denial was an unconstitutional abridgement of his right to full and fair cross-examination guaranteed by the Sixth Amendment to the U.S. Constitution.

Held, affirmed. The Supreme Court of Florida found that such a jury instruction, which singled out the testimony of a sexual battery victim as deserving more rigid scrutiny by a jury than other testimonies, should no longer play a role in Florida jurisprudence. The standard instruction given by the trial court was adequate, offering guidance to the jury without impermissibly commenting on the weight to be given the evidence or credibility of any one witness. Counsel for both the state and the defense made it explicitly clear in their opening and closing arguments that this case turned on the jury's belief of the victim's testimony. Asking the jury to "rigidly scrutinize" the testimony of the prosecutrix was proper when it came from the counsel but improper when it came from the bench, clothed as principles of law. Marr v. State, 494 So.2d 1139 (1986).

West Virginia Defendant was convicted of being an accessory before the fact to the delivery of marijuana. At trial, it was established that he furnished two others with marijuana which they then sold to an undercover agent. Defendant contended on appeal that he was prejudiced by the trial court's jury instruction that "in drug-related offenses the infiltration of drug operations and limited participation in their unlawful practices by law enforcement personnel is a recognized and permissible means of detection and apprehension."

Held, affirmed. The Supreme Court of West Virginia noted that the instruction did not portray defendant as a member of a "drug operation" nor did it constitute a personal attack on his character; rather, it merely explained the undercover agent's role in the police investigation, said the court, an explanation to which the State was entitled. State v. Dameron, 304 S.E.2d 339 (1983), 20 CLB 178.

DELIBERATION

§ 15.245 Juror not impartial —substitution of alternate

Kansas Defendant was convicted of first-degree murder and aggravated battery of a law-enforcement officer. One day after the initial jury was instructed and began deliberating, one of the jurors delivered a short note to the court requesting that she be excused. The presiding judge discussed the situation with counsel for the state and defendant, both of whom urged that the juror be examined to determine why she wanted to be excused. The court felt that a hearing was unnecessary, as there was no issue of jury misconduct involved. The judge excused the juror for incapacity, based on her note and voir dire statements to similar effect, that is, that she was not up to the stress caused by the case and her duties as a juror. One of the alternate jurors was chosen to replace the discharged juror. The judge then instructed the jury to commence deliberations anew. The alternate juror, who had been sequestered during the initial deliberations, was not examined to find out if he had been influenced

in any way during this period. On appeal, defendant argued that it was reversible error for the original juror to be excused without a hearing for cause, thereby denying him the right to have his guilt or innocence decided by the jury that he had selected. Specifically, defendant argued that the replacement of the original juror denied him the right to have a mistrial declared in the event of a hung jury. In addition, defendant alleged that the trial court erred by not questioning the replacement juror as to whether he had been tainted during his sequestration period after the close of the evidence stage of the trial.

Held, conviction affirmed. The Kansas Supreme Court found that the trial judge had not abused his discretion by not holding a formal hearing to determine why the original juror should be excused. A hearing for cause as to impartiality or prejudice when a jury is impaneled is a different matter than the discharge of a juror for incapacity. In this case, the judge acted permissibly in finding reasonable cause for the excusal of the juror. Also, it was not reversible error for the trial court to substitute a juror without asking him whether he had been unduly influenced during his absence from initial deliberations. Defendant had not been prejudiced by the substitution of jurors because the alternate had never been discharged, and after replacement the court ordered the jury to begin deliberations anew, thereby ensuring defendant his right to a verdict decided by the jury that ultimately returned the verdict. It is permissible for a juror to be discharged after the commencement of deliberations, and there is no requirement that the original jury panel deliver the verdict, even if substitution of jurors means a possible change in the eventual verdict. As to the question of the impartiality of the alternate juror, defendant did not object to the court's failure to examine him at trial, and defendant thus waived his right to appeal this issue. State v. Haislip, 701 P.2d 909 (1985).

§ 15.255 Time element as error

North Carolina Defendant was convicted of rape, kidnapping, and armed robbery, and he appealed. Defendant contended that the trial judge's inquiry into the numerical division of the jury was reversible error because it tended to coerce a verdict. More specifically, defendant argued that asking the jury how it was divided numerically violated his right to due process of law and trial by jury under the Federal Constitution as well as his right to trial by jury under the state constitution.

Held, conviction affirmed; no error. The Supreme Court of North Carolina affirmed, concluding that the U.S. Supreme Court ruling in Brasfield v. United States, 272 U.S. 448, 47 S. Ct. 135 (1926), was based on its supervisory power over the federal courts and therefore was not binding on the state court. At most, the court stated, *Brasfield* sets out a rule of federal practice and is not binding on the courts of North Carolina. The court, therefore, held that a trial court's question on the division of the jury does not as a matter of law violate a defendant's right to due process of law and trial by jury under either the Federal or North Carolina Constitutions. With respect to the question whether in the totality of the circumstances the trial court's question concerning the division of the jury was coercive, the high court found it to be not coercive so that defendant was not prejudiced

in any way. State v. Fowler, 322 S.E.2d 389 (1984).

§ 15.265 Extrajudicial communications

Pennsylvania Defendant was convicted of murder in the first degree and sentenced to death. After the trial, a juror swore to an affidavit stating that after the verdict of guilty had been returned and before sentencing had occurred, an alternative juror told several of the jurors that defendant was wanted in two other states on murder charges. The testimony varied as to when certain jurors heard the information, but it was clear that half of the jury heard that defendant was wanted on other murder charges prior to the verdict on defendant's penalty. In response to the juror's affidavit, the lower court conducted a hearing in which most of the jurors who heard the rumors were permitted to testify that they rendered that defendant be given the sentence of death independent of this information. Defendant charged that this extraevidentiary information tainted the jury's deliberations, and he appealed his sentence.

Held, reversed and remanded. The Supreme Court of Pennsylvania reasoned that the extra-evidentiary information gave the jurors a reinforced confidence in their decision, which enabled them to convince the court that the verdict was rendered on only proper considerations. The court, citing Commonwealth v. Santiago, 456 Pa. 265, 268-270, 312 A.2d 737, 739-740 (1974), stated that if the evidence had been admitted at the guilt-determining stage, the proper remedy would have been to grant a new trial. However, the court did not have the authority to remand for a new trial on the penalty question alone. Reviews of the sentence of death were limited by 42 Pa. Cons. Stat. Ann. § 9711(a), which stated the general assembly's intention that the death penalty be fixed only by the same jury that determined guilt. The court's authority was also limited by Section 9711(h)(2), which stated that in addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment. Accordingly, the sentence of death was reversed and remanded for the imposition of a life sentence. Commonwealth v. Williams, 522 A.2d 1058 (1987).

§ 15.270 Right to have exhibits

Minnesota Defendant was convicted of criminal sexual conduct with an eleven-year-old girl. On appeal, defendant contended that a new trial was required based on the fact that the trial court responded to two requests by the jury without notifying counsel or allowing counsel to be present. Specifically, where the jury asked to see police reports, the court told the jury that the reports were not in evidence, and when the jury asked for "jury guides," the court provided the jury with a copy of parts of his typewritten instructions and an instruction that if any jurors wanted other parts they could have them.

Held, affirmed. The Supreme Court of Minnesota stated that normally the trial court should notify counsel under the state statute, and that any contact with the jury should be in open court. Although this statutory requirement was not followed, any error by the trial court clearly was not prejudicial. State v. Richardson, 332 N.W.2d 912 (1983).

§ 15.275 Other unauthorized or improper conduct

Colorado Defendant, convicted of assault, argued on appeal that there should be a reversal because of misconduct by a juror. The jurors had been permitted to return to their homes for the night when they had not reached a verdict after a day's deliberations. One juror consulted her dictionary at home for the definitions of "reasonable," "imaginary," and "vague," all terms used during the trial court's reasonable doubt instruction. During the following day's deliberations, she discussed the definitions with another juror and both decided that any doubts they harbored about defendant's guilt were "vague" and not "reasonable."

Held, conviction reversed and remanded for new trial. The Supreme Court of Colorado stated that the jury is bound to accept the court's definition of legal concepts and "to obtain clarifications of any ambiguities in terminology from the trial judge, not from extraneous sources." This improper juror conduct required reversal, continued the court, because the record established that two jurors used the dictionary definitions in concluding that their doubts were not reasonable; their decisions to vote for conviction thus resulted from the misconduct. Accordingly, it held, the misconduct was sufficiently prejudicial to warrant reversal. Alvarez v. People, 653 P.2d 1127 (1982), 19 CLB 487.

Nevada Defendant was convicted of grand larceny. He appealed, claiming that the trial court abused its discretion in denying his motion for a new trial on the ground of juror misconduct. At the trial, defendant's employer testified that defendant had been at work in Reno on the day the offense occurred until approximately 5:00 P.M., and perhaps even later. The offense had taken place in Carson City sometime between 5:30 P.M. and 5:45 P.M. Defendant's counsel argued that defendant would not have been able to get to Carson City from Reno in time to commit the offense. During a recess in the trial proceedings, a juror drove to Reno, and then measured the time it took him to drive to Carson City from defendant's place of employment. He then informed the other jurors that it had taken him twenty-five minutes to travel this distance. Upon being informed of the juror's actions, defendant moved for a new trial. The trial court found that the juror's actions constituted misconduct, but concluded that the misconduct was harmless beyond a reasonable doubt.

Held, reversed and remanded. The juror's independent "research" was particularly egregious and related to a crucial aspect of the defense. Defendant's case was therefore significantly harmed by his inability to cross-examine the juror concerning the many variables which may have affected his driving time. Furthermore, the evidence presented against defendant was not so overwhelming as to render the juror's misconduct harmless beyond a reasonable doubt. Russell v. State, 661 P.2d 1293 (1983).

Utah A jury found defendant guilty of second-degree murder. In an affidavit, a juror claimed extraneous information influenced the jury, including the fact that one juror told others during deliberations that she had prayed for a sign during the closing arguments as to defendant's guilt. She professed to have received a revelation that if defense counsel did not make eye contact with her when he pre-

sented his argument, defendant was guilty. Defense counsel did not make eye contact. Defendant argued that when the juror who reported to have received an answer to her prayer communicated that fact to the other jurors, an "outside influence was brought to bear on any juror" against the state's rule of evidence.

Held, conviction affirmed. The court said that to rule that reliance on prayer was improper would infringe upon the religious liberties of the jurors. Prayer is almost certainly a part of the personal decision-making process of many people, even when serving on a jury. Therefore, prayer and supposed responses to prayer are not included within the meaning of the words "outside influence." Although a juror might abandon his or her judgment as to what he or she perceives to be oracular signs, the court said that this fact did not save defendant's challenge to the verdict for two reasons. First, the affidavit in this case did not aver facts that would disqualify any juror. Second, defendant could not use the post-trial affidavit to raise the issue of juror's inability to show impartiality. That matter should have been raised at voir dire. State v. DeMille, 756 P.2d 81 (1988).

§ 15.285 Supplemental instructions

Georgia Defendant's conviction for murder was affirmed by the supreme court, but the death sentence was set aside. On remand, defendant was again sentenced to death. He appealed, on the ground that when the jury could not agree on the sentence to be imposed, the trial court must accept the deadlock and impose a life sentence. Instructions to deliberate further, according to defendant, suggest to the jury that it should return a death sentence. To support his argument, defendant cited Delaware and Florida cases and urged the court to follow their lead.

Held, conviction affirmed. The Georgia Supreme Court noted the differences between Georgia law and the law of the other two states. Georgia law required the jury to endeavor to reach a unanimous verdict. Either verdict (life imprisonment or death) must be unanimous in Georgia. Thus, instructions to deliberate further to a divided jury did not suggest to the jury to return a death sentence as such instructions would in Delaware. Florida did not require unanimous agreement for either a life or death sentence, and the verdict of the Florida jury was not binding. Thus, in Georgia, in cases in which a jury was unable to agree unanimously on a verdict, disagreement was not in itself a verdict. Whether a jury is hopelessly deadlocked was a decision to be made by the trial court. The trial court did not abuse that discretion. The jury foreman indicated his doubt of the jury's ability to reach a verdict after less than four hours, and the instructions to deliberate further were not coercive in any way. The trial court's instructions comported with ABA standards, did not single out minority jurors as being the only ones who might reasonably reexamine their views, or imply that a mistrial would result in retrial. Romine v. State, 350 S.E.2d 446 (1986), 23 CLB 494.

VERDICT

§ 15.320 Requirement of unanimity (New)

Alaska Defendant was convicted of first-degree assault for the stabbing of another man with a knife. At trial, the jury was instructed that it could find defendant guilty if (1) he caused physi-

cal injury to a person by means of a dangerous instrument, with an intent to cause serious injury; or, (2) he intentionally performed an act that resulted in serious physical injury to another person, under circumstances manifesting extreme indifference to the value of human life. The jury was not required to reach unanimity as to exactly which statutory subsection defendant violated, only that he was guilty of the general offense of first-degree assault. The jury returned such a verdict. On appeal, defendant argued that the jury should have been required to be unanimous in its interpretation of the statute and exactly which subsection he violated. Consequently, defendant's due process rights had been violated because proof beyond a reasonable doubt was not assured on each element of the offense charged in the particular subsection.

Held, reversed and remanded. The Alaska Supreme Court found that the jury did not have to agree unanimously as to a particular theory of the statutory crime charged, only as to whether defendant committed the single offense described in the statute, as determined by the evidence. If there is sufficient evidence in the record that defendant committed the crime charged according to either or both definitions of the crime, the jury may convict him of that crime without deciding unanimously as to exactly which subsection of the statute he violated. State v. James, 698 P.2d 1161 (1985).

Connecticut Defendant was found guilty of one count of murder, one count of capital felony, and one count of sexual assault in the second degree. At the penalty stage, defendant elected a trial by jury. The jury had to decide two questions: whether the state had proved beyond a reasonable doubt the existence of an aggravating factor, and whether the defendant had proved by a preponderance of the evidence the existence of a mitigating factor. Although the state had proved the existence of an aggravating factor, the jury was unable to reach unanimous agreement on the second question. The court discharged the jury and subsequently gave defendant a life sentence. Both the state and defendant appealed.

Held, remanded with direction. The state claimed that defendant did not meet his burden of proof and deserved death, maintaining that once it has established the existence of an aggravating factor, a defendant can escape the death penalty only by persuading the trier of fact that a mitigating factor exists. Defendant claimed that the death sentence is not authorized unless there has been an unconditional and unanimous finding by the trier of fact that no mitigating factors exist. The court held that a jury verdict in the penalty phase of a capital case must comport with the guidelines governing the validity of jury verdicts generally, including the requirement of unanimity. Because a non-unanimous jury cannot render any finding of fact, the court believed unanimity was necessary in capital sentencing to assure the reliability of the ultimate verdict. Although the trial court was correct in not imposing death, they were also incorrect in sentencing defendant to life imprisonment. State law puts the burden of establishing aggravating and mitigating factors on the state and the defendant, respectively. Both have to prove or completely fail to prove their contention. Although the statute provides that life imprisonment must be given to those who do not receive

the death penalty, the record, in this case, revealed an unchallenged finding that an aggravating factor existed. The court concluded that imposition of the death penalty must be premised on two unanimous findings by the trier of fact: that the state has proved beyond a reasonable doubt that an aggravating factor exists, *and* that the defendant has not proved by a preponderance of the evidence that a mitigating factor exists. State v. Daniels, 542 A.2d 306 (1988).

North Carolina Defendant was convicted of first-degree murder and sentenced to death. He appealed his sentence, arguing that trial court committed an error when it instructed the jury, after the jury's inquiry, that it was required to return a unanimous verdict.

Held, remanded for a new sentencing hearing. It is not an error to fail or refuse to instruct a jury that a sentence of life imprisonment will be imposed in the event it is unable to reach an agreement on the proper sentence of a defendant who has been convicted of first-degree murder. The jury in this case, however, inquired as to the effect of its failure to attain unanimity. The trial court, rather than informing the jurors that their inability to reach a unanimous verdict should not be their concern and should simply be reported to the court, instructed the jury to return a unanimous verdict. In doing so, trial court probably caused the divided jury to reach its verdict to impose a sentence of death. Thus, the court's failure to instruct the jury properly, combined with the misleading instructions given, was an error warranting a new sentencing hearing. State v. Smith, 358 S.E.2d 329 (1987).

Wisconsin Defendant was charged with one count of sexual assault. At trial, the complaintant testified that, over the course of several hours, defendant and another forced her to engage in six separate acts of sexual intercourse. The jury found defendant guilty as charged; thereafter, defendant moved for a new trial on the ground, inter alia, that his right to a unanimous verdict was violated because the jury was not instructed that it must unanimously agree on the specific criminal act committed by defendant. The trial court disagreed, holding that a single criminal act was involved; that decision was reversed by an intermediate appellate court.

Held, reversed and conviction reinstated. The acts committed were part of a continuous criminal transaction and properly chargeable as one offense. Even though evidence of different acts was introduced, "the jury did not have to be unanimous as to which specific act the defendant committed in order to convict the defendant, since the acts were conceptually similar." State v. Lomagro, 335 N.W.2d 583 (1983), 20 CLB 169.

16. POST-TRIAL MOTIONS

§ 16.05 —Newly discovered evidence

Minnesota Defendant, convicted of arson and insurance fraud for burning his bar and grill, argued on appeal that he was entitled to a retrial based on

newly discovered evidence. A month after defendant's conviction, his attorney learned that another person, Schumann, had been bragging that he was responsible for the fire, which he had set to "get even" with defendant. Prior to the fire, defendant had told his daughter not to socialize with Schumann and it had been known that Schumann had access to the keys for defendant's business. The trial court refused to grant a new trial, because Schumann, the source of the newly discovered evidence, had a poor reputation for truthfulness.

Held, reversed and remanded for new trial. The Supreme Court of Minnesota found it probable that evidence of Schumann's incriminating statements would produce a different result at a second trial, particularly since the case against defendant was circumstantial. The court concluded:

> Here the newly discovered evidence is not cumulative nor impeaching; rather, the evidence offers an alternative hypothesis inconsistent with defendant's guilt. The new evidence does not dispute the state's proof at the first trial that the fire was intentional but instead suggests that the fire was set by someone other than the defendant. Plainly, if believed, the new evidence probably would make a difference. At a new trial, the issue is not whether Randy Schumann is guilty of arson beyond a reasonable doubt but whether defendant is.

While acknowledging that the credibility of Schumann's statements was subject to question, the court stated the "new evidence [was] not so doubtful as to make a different result improbable and . . . a jury should be the final arbiter." State v. Jacobson, 326 N.W.2d 663 (1982), 19 CLB 385.

New Mexico Defendant, convicted of homicide in the beating death of a fellow inmate at a state prison, argued on appeal that reversal was required because the state had failed to disclose the identity of an essential and exculpatory witness. Following defendant's trial, a prison corrections officer revealed that defendant had left the area where the killing took place prior to its occurrence; the officer also disclosed that he had so informed prison officials during their investigation of the homicide. Neither the availability of the corrections officer nor the substance of his exculpatory statements had been given to the defense during pretrial discovery.

Held, motion for post-conviction relief denied. The New Mexico Supreme Court stated that there was no evidence in the record that the prosecutor knew of the witness's identity or statements, finding no deliberate or negligent nondisclosure that would warrant the granting of a new trial. The court "decline[d] to impute to the prosecutor as 'knowledge' every conversation, or every statement, made to a prison official regarding a prisoner who may be charged with commission of a crime." A defendant has an affirmative obligation to exercise due diligence in discovering exculpatory witnesses, said the court, continuing that "[t]he defense may not be unduly relaxed in their search for evidence that is favorable and expect deficiencies to be remedied with a motion for a new trial." Here, found the court, defendant had access to the prosecutor's files and, through his own investigation, could

and should have discovered the corrections officer's identity prior to trial; if defendant's case was prejudiced, concluded the court, it was substantially attributable to his own inaction, not the result of misconduct by the prosecution. State v. Stephens, 653 P.2d 83 (1982).

§ 16.15 Motion to vacate conviction

Kentucky Defendant was convicted of a felony and his punishment was enhanced by virtue of prior unrelated convictions. He then moved to vacate the prior convictions on the ground that the record failed to show that the guilty pleas on which the convictions were based were entered voluntarily and understandingly. By that time, defendant had completed the period of incarceration and parole to which the prior convictions subjected him. Until then, defendant made no effort to attack the validity of the prior convictions.

Held, affirmed. The motion to vacate the conviction was not a remedy available to defendant. Defendant should have, and had, the opportunity to directly appeal the prior convictions, stating every ground of error that it was reasonable to expect he or his counsel was aware of. He should then have availed himself of post-conviction relief while he was incarcerated or on parole. Defendant's failure to avail himself of those remedies foreclosed their consideration in a hearing on a motion to vacate judgment. Gross v. Commonwealth, 648 S.W.2d 853 (1983).

§ 16.20 State habeas corpus—grounds

Connecticut Defendants petitioned for writs of state habeas corpus, alleging that their constitutional right to timely prosecution of their appeals from their criminal convictions had been violated. Each of the petitioners had been convicted of a felony and was incarcerated. Each had filed a timely application that resulted in the appointment of the office of the chief public defender to represent the petitioner upon appeal. Due to delay, these appeals were pending from about two years to about four and one-half years. The delay experienced by the habeas petitioners resulted from the inadequate funding of the state public defender's office, which permitted a staff of only five attorneys to handle an appellate load that had grown from 81 cases in 1979 to 190 cases in 1983. The office had a policy of preparing appellate briefs in chronological order based on the date of sentencing since 90 percent of its clients were incarcerated. Compounding the problem was a similar shortage of attorneys in the chief state's attorney's office to file reply briefs.

Held, error in part and petition remanded. The Supreme Court of Connecticut stated that the petitioners' constitutional claims required the court to balance the competing interests of the state in the finality of a criminal conviction and of the petitioners in their fair and timely access to appellate review. The court pointed out that the petitioners, most of whom were serving concurrent sentences, had not actually been prejudiced to a great degree by the delays. The court stated that actual prejudice should play a relative minor role in the balancing test. This is especially appropriate when a denial of equal protection is added to a due process violation as is indicated in this case. The protracted delays experienced by the petitioners result from their indigency, since an appellant who can hire counsel has the

opportunity to have briefs filed in six months or less. This disparity, the court concluded, resulted in a constitutional violation that is not mitigated by the high caliber of legal representation that indigent appellants eventually receive. The court remanded the habeas corpus petitions to the trial court to consider remedial alternatives other than unconditional discharge of the petitioners for the denials of due process, equal protection, and effective assistance of counsel that they have demonstrated. Gaines v. Manson, 481 A.2d 1084 (1984), 21 CLB 266.

Utah Defendant and two co-defendants were convicted of first-degree murder, and their convictions were affirmed on appeal. In his appeal from the denial of post-conviction relief by habeas corpus, defendant asserted that by its grant of partial summary judgment, the district court incorrectly refused to hear evidence on four alleged errors at his trial. The alleged errors were as follows: (1) the jury was not insulated from pretrial publicity during the voir dire; (2) the court failed to require an individual determination of defendant's guilt; (3) the court failed to require the jury to reach a unanimous decision on whether the murder was committed in connection with a kidnapping or a burglary; and (4) the court failed to instruct the jury on the definition of second-degree murder that most clearly applied to the facts of the case.

Held, affirmed. Under Utah law, allegations of error that could have been but were not raised during regular appellate review cannot be raised by habeas corpus or post-conviction review, except in unusual circumstances. All four issues foreclosed by the partial summary judgment were issues that were known or should have been known to defendant and his attorney at the time of conviction, and so could have been raised on direct appeal. Defense counsel's alleged inexperience and deficiencies fell short of the "usual circumstances" that allow alleged errors not raised at trial or on direct appeal to qualify for habeas corpus review. Cordianna v. Morris, 660 P.2d 1101 (1983).

§ 16.30 Motion to dismiss due to mistrial (New)

Florida State appealed court ruling dismissing amended charges. After defendant's trial ended with a deadlocked jury and, consequently, a mistrial, state amended charges by raising the robbery charge to robbery with a deadly weapon and similarly raising the battery charge. Defendant moved to dismiss charges, claiming that state acted vindictively.

Held, reversed and remanded. The court could see no vindictiveness on the part of the prosecution. The court admitted that prosecutors have been known to act vindictively after a defendant appeals but not, as in this case, after a mistrial that occurs when there is a hung jury. The court concluded that the enhancement of charges after a mistrial is no different from the pretrial amendment that allows the state to alter charges at will. State v. Wilkins, 534 So.2d 705 (1988).

17. SENTENCING AND PUNISHMENT

SENTENCING

SENTENCING

§ 17.06 Right of defendant to represent himself (New)

Illinois Defendant was convicted in a jury trial of two murders. He chose to represent himself at the sentencing hearing, made a confession in open court, and asked that the death penalty be imposed. The jury sentenced him to death, and he requested that the sentence be carried out without delay. Defendant waived the filing of a post-trial motion, but the circuit court appointed counsel to represent him on appeal. Defendant, through his counsel, appealed directly to the Supreme Court of Illinois, since such an appeal could not be waived.

Held, death sentence affirmed. The court ruled that defendant who was allowed to proceed pro se during the sentencing phase of his capital murder trial was not entitled to have the death sentence set aside on automatic appeal on the basis of the trial judge's failure to order standby counsel to present mitigation evidence when it became clear defendant would not do so. The reviewing court observed that the trial court fully apprised the defendant of the substantive and procedural law involved in the sentencing proceeding. Defendant demonstrated an understanding of the law and asked intelligent questions. Therefore, his decision to represent himself in the manner in which he did was undertaken without any impairment of his reasoning ability. The court found that his waiver was a knowing and intelligent exercise of his right of self-representation under Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). Defendant's *Faretta* right did not interfere with "society's interest in the fair administration of justice" in view of the fact that the sentencing jury was the same jury that heard the evidence at trial, and, therefore, it had evidence that could be considered in mitigation of sentence. People v. Silagy, 461 N.E.2d 415, 21 CLB 80, reh'g denied, 469 U.S. 1067, 105 S. Ct. 552 (1984).

§ 17.15 —Right to examine pre-sentence report

Arizona Defendant was convicted of sexual assault and sentenced to 28

years in prison. While a motion for reconsideration was pending in the court of appeals, a newspaper publisher filed a motion seeking access to defendant's pre-sentence report. Jurisdiction was transferred to the superior court for the purpose of deciding the publisher's motion. After a hearing, the court ordered that the pre-sentence report be disclosed. Defendant appealed, contending that his pre-sentence report should remain confidential in order to protect his state constitutional right of privacy.

Held, order of trial court ordering disclosure was not an abuse of discretion. The Supreme Court of Arizona en banc declared that pre-sentence reports are presumptively open to public inspection after sentencing is completed. The court pointed out that pre-sentencing reports are a "matter of public record unless otherwise provided by the court." While confidentiality may be preserved on a case-by-case basis, the court recognized that the public's need for information about the disposition of offenders is compelling and that it is Arizona public policy to fulfill that need. The court placed the burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, on the party that seeks non-disclosure rather than on the party that seeks access. Mitchell v. Superior Court, 690 P.2d 51 (1984), 21 CLB 263.

§ 17.20 —Trial court's reliance upon material not contained in pre-sentence report

Maine Defendant was convicted of unlawful sexual contact with a 9-year-old girl. At a sentencing hearing, the prosecution offered three affidavits, two of which were admitted by the court. One affidavit came from the victim and the other came from a 14-year-old girl who had testified at trial. These affidavits stated that defendant had, on other occasions, engaged in conduct similar to that of which he was convicted in this case. The state offered these affidavits to establish aggravating circumstances in support of its sentencing recommendation. Defendant objected to the sentencing judge's admittance of the two affidavits, but the judge treated them as true and they admittedly influenced his sentencing decision. The judge imposed a three-year sentence with one and one-half years suspended. On appeal, defendant challenged the legality of the sentence, arguing that the sentencing judge deprived him of his rights to due process and to confront witnesses against him, by considering and relying on hearsay information in the two affidavits. Defendant argued that due process required that the affiants, who made allegations of unlawful conduct on defendant's part, be subject to cross-examination, since those allegations were offered by the state to show a continuing pattern of behavior and therefore to increase defendant's sentence.

Held, conviction affirmed. The Supreme Court found that the sentencing judge did not abuse his discretion when he considered the affidavits without allowing defendant an opportunity to cross-examine the affiants, absent a challenge to the accuracy or reliability of the affidavit allegations. The court declined to adopt a per se rule requiring that information offered by the state be subject to cross-examination. The allowance of such cross-examination lies within the discretion of a sentencing judge and the guiding principle is that a sentence be based on reliable

factual information. In the present case, the state had provided defendant with copies of the affidavits before offering them to the sentencing judge. At no time did defendant dispute the accuracy or reliability of the allegations of prior unlawful conduct similar to that for which he was convicted. The information supplied by the affiants was neither patently unreliable nor demonstrably false. In the absence of such a finding, the affidavits were properly admitted in the course of the sentencing proceedings. State v. Dumont, 507 A.2d 164 (1986).

§ 17.35 Delay in sentencing

West Virginia Defendant, convicted of burglary upon his plea of guilt, argued on appeal that the delay of twenty-one months between entry of the plea and imposition of sentence violated his due process rights. Defendant had pled guilty in June 1977 and a pre-sentence report was submitted to the court in October of that year; the record disclosed no further proceedings until February 1979, one month before defendant was sentenced, when a supplemental presentence report was filed.

Held, remanded with directions. The Supreme Court of Appeals of West Virginia considered the record before it as incomplete and remanded the case to the trial court. While the passage of time alone, it noted, would not bar imposition of sentence, a "purposeful or oppressive delay" would constitute the violation of an accused's due process rights. As the record did not contain the reasons for defendant's delayed sentencing, the court found that it could not determine whether the delay was purposeful and oppressive, whether it was legitimate, or whether it was caused by a simple administrative oversight. Accordingly, the court ordered remand for entry of the reason for the delay upon the record. Ball v. Whyte, 294 S.E.2d 270 (1982), 19 CLB 177.

§ 17.40 Standards for imposing sentence

"Criminal Sentencing: Trends and Tribulations," by Vincent O'Leary, 20 CLB 417 (1984).

"[The] California Determinate Sentence Law," by Jonathan D. Casper, David Brereton, and David Neal, 19 CLB 405 (1983).

"[The] Determinate Sentence and Its Impact on Parole," by Frederick A. Hussey and Stephen P. Lagoy, 19 CLB 101 (1983).

Florida Defendant was convicted of first-degree murder and sentenced to death. Although mitigating factors had been presented, the jury felt that the aggravating factors warranted the imposition of the death penalty. Defendant appealed his sentence, questioning whether it was appropriate given his extreme mental and emotional disturbance and his capacity to appreciate the criminality of his conduct.

Held, sentence vacated and reduced. The court said that the death penalty in Florida was to be imposed only for the most aggravated and the most indefensible of crimes. The record in this case, however, shows defendant's substantially impaired capacity, his extreme emotional disturbance, and low emotional age. These mitigating circumstances were substantially supported by health professionals and people who knew defendant. In contrast, the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated, and

premeditated were conspicuously absent. Therefore, the court found that defendant did not deserve the death penalty. Fitzpatrick v. State, 527 So. 2d 809 (1988).

Georgia Defendant was convicted of trafficking in cocaine. Two co-defendants were also tried with defendant, and another accomplice, who escaped from custody, was tried in absentia. Before trial, in accordance with a Georgia state statute, the district attorney offered defendant a reduced sentence if he would agree to provide information about his accomplices. In response, defendant unsuccessfully moved to dismiss the charge against him on the ground that the state had violated his Fifth Amendment right not to be compelled to be a witness against himself. On appeal, defendant argued that the relevant Code section places a person convicted of trafficking in cocaine in a dilemma: Either remain silent and receive a harsher, mandatory sentence or provide information about accomplices or other persons, which information might have the effect of implicating the convicted person in other crimes with no promise of immunity, in return for a more lenient, reduced sentence on the original conviction. In addition, defendant argued that the statute was unconstitutionally vague.

Held, conviction affirmed. The Georgia Supreme Court stated that the statute providing that the district attorney recommend the trial court reduce defendant's sentence for the cocaine trafficking conviction if he provided substantial assistance to authorities in trying his accomplices did not violate defendant's Fifth Amendment right not to be compelled to be a witness against himself and was not so vague as to violate his constitutional right to due process. The relevant statute, the court pointed out, provides that if a convicted cocaine trafficker gives "substantial assistance in the identification, arrest or conviction of any of his *accomplices, accessories, co-conspirators or principals,*" the district attorney may recommend that the trial court reduce his sentence. The court went on to state: "In clear language . . . the statute contemplates only that the convicted trafficker will provide information about *others involved in the crime for which he has been convicted.*" The statute, then, applies only to the crime of which defendant was convicted, and does not involve implication in any other crimes. In this case, defendant argued before trial that he was asked to exchange his Fifth Amendment right not to incriminate himself for the possibility of a reduced sentence upon conviction. The statute in question, though, did not leave defendant open to prosecution on any other charges than those against him already, and was not, therefore, unconstitutional on its face. In addition, the court opined, the Code section term "substantial assistance" was not too vague for persons of ordinary intelligence to understand, and was not, therefore, violative of due process. Brugman v. State, 339 S.E.2d 244 (1986).

Iowa Defendant, convicted of indecent exposure upon his plea of guilty, appealed from the sentence imposed on the ground that the sentencing judge improperly considered a burglary charge that had been dismissed as part of the plea bargain. Originally, defendant had been charged with burglary and indecent exposure for break-

ing into the complainant's residence, exposing himself, and making sexual remarks. During the plea allocation, defendant admitted exposing himself but claimed that the complainant had permitted him to enter her home; after the plea was entered on the indecent exposure charge, the prosecutor dismissed the burglary count. In imposing the maximum sentence, the judge stated that he could not ignore the factual basis for the charge, which included an illegal entry into a stranger's residence; the circumstances, he said, were of "such a severity that you need something to remind you that you do not enter people's houses without their permission."

Held, reversed in part and remanded for re-sentencing. The Iowa Supreme Court found that the burglary charge against defendant was no more than an unproven allegation that should not have been considered and relied upon by the sentencing judge; "only facts that are admitted to or otherwise established as true" should be considered in determining sentence, it said. Here, the sentencing judge erroneously relied upon the unproven burglary allegations; refusing to speculate on the weight assigned to those allegations by the judge, it ordered re-sentencing. State v. Black, 324 N.W.2d 313 (1982), 19 CLB 267.

Louisiana Defendant was convicted of burglary and sentenced to three years imprisonment with the first year to be served without benefit of parole, probation, or suspension of sentence. He argued on appeal that the trial court failed to comply with certain statutory sentencing guidelines by ignoring mitigating factors which included defendant's status as a first offender, his service in the military, his stable marriage, and his good employment record.

Held, sentence vacated and case remanded. The court, after noting that defendant's sentence was one-quarter of the maximum possible sentence, pointed out that sentences within statutory limits may be reviewed and that the sentencing judge does not possess unbridled discretion to impose a sentence regardless of mitigating factors. It noted that the applicable statute provided that certain factors, "while not controlling the discretion of the court, shall be accorded weight . . ." in sentencing. Since the trial judge failed to state for the record the considerations taken into account and the factual basis for the sentence imposed, and since the sentence appeared to be excessive, the three-year sentence was held to be unjustified. State v. Pike, 426 So. 2d 1329 (1983).

Michigan In this decision, two cases were consolidated. Both dealt with the consideration of defendant's perjury during sentencing. In the first case, defendant was convicted of breaking and entering an occupied dwelling with intent to commit larceny. In the second case, defendant was charged with larceny from a person. In both cases, defendants lied while testifying. The judge considered their perjury when imposing sentence, and defendants appealed. The question before the court was whether perjury may be used to assist a judge in sentencing or whether there is a prohibition against its use.

Held, reversed for both defendants. The court said that a sentencing judge is afforded wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed.

Citing United States v. Grayson, 438 U.S. 41, 98 S. Ct. 2610 (1978), the court said that a defendant's truthfulness or mendacity while testifying on his own behalf almost without exception has been deemed probative of his attitudes toward society and prospects for rehabilitation, and hence, was relevant to sentencing. When the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to willful, material, and flagrant perjury, and when such misstatements have a logical bearing on the question of the defendant's prospects for rehabilitation, the trial court properly may consider this circumstance in imposing sentence. The court concluded that there has never been a protected right to commit perjury, and they refused to hold harmless the creation of a wholly fabricated defense. People v. Adams, 425 N.W.2d 437 (1988).

Minnesota Defendant was convicted of simple robbery and sentenced to thirty months imprisonment. He appealed, asserting that the trial court erred in computing his criminal history score for sentencing purposes. Specifically, he claimed that the trial court erred in assigning defendant one point for his juvenile record to give him a score of three points. Had defendant scored only two points, he would have received a stayed twenty-seven-month sentence. At issue was the construction of the Minnesota Sentencing Guidelines, under which an offender is assigned one point for every two juvenile adjudications for offenses that would have been felonies if committed by an adult, if they were committed after he became sixteen years old and if he had not become twenty-one at the time he committed the current offense. Under the guidelines, no offender may receive more than one point for prior juvenile adjudications. Defendant claimed that four appearances before the juvenile court concerning incidents of felony-type conduct could not count as juvenile adjudications because the juvenile court referee did not use the words "adjudicated delinquent" at any time.

Held, affirmed. The juvenile court referee testified that after defendant's initial adjudication, the juvenile court had continuing jurisdiction over defendant until jurisdiction was formally terminated or until defendant was no longer a juvenile. Thus, there was no need for formal adjudication at each of defendant's appearances. Therefore, the point was properly added to defendant's criminal history score. State v. Peterson, 331 N.W.2d 483 (1983).

Minnesota Defendant was convicted of unlawful possession of a pistol by a felon, fleeing a police officer in a motor vehicle, and uttering a forged instrument. He appealed his sentence, contending that the court erred in computing his criminal history score. He argued that the possession and fleeing offenses were committed as part of a single behavioral incident or course of conduct and that therefore he could be sentenced for only one of them.

Held, affirmed. The trial court did not err in determining that the two offenses were not committed as part of a single behavioral incident. Because defendant possessed the gun before he entered the car and before he commenced fleeing from the officer, the possession offense can be explained without necessary reference to the fleeing offense. Defendant could have concluded that the police wanted to arrest him for the forgery offense,

and so the fleeing offense can be explained without necessary reference to the possession offense. That is, defendant would have fled the officer even if he had not possessed the gun. State v. Banks, 331 N.W.2d 491 (1983).

Nebraska Defendant was convicted of two counts of unlawful delivery of a controlled substance. He was sentenced to concurrent prison terms of one to two years on the first count, delivery of marijuana, and one and one-half to three years on the second count, delivery of cocaine. A co-defendant in the case was charged with identical offenses arising out of the same incident. The co-defendant made a plea bargain before a different judge, by which he pled guilty to the cocaine charge and had the marijuana charge dismissed. One week after defendant's sentencing, the co-defendant was sentenced by another judge to a two-year probation term. On appeal, defendant argued that the trial court in his case abused its discretion in sentencing him to a different, more severe punishment than the co-defendant.

Held, sentence affirmed. The Nebraska Supreme Court upheld defendant's sentence. The trial court did not abuse its discretion, and absent such abuse, a sentence within statutory limits will not be overturned on appeal. Likewise, the imposition of a probationary term rather than a prison term, if statutorily permitted, is within a sentencing judge's discretion. Furthermore, defendant was not entitled to relief on the basis of the sentencing disparity. The Nebraska Supreme Court held that, if one disregards the co-defendant's sentence, defendant's sentence was not excessive. While defendant's sentence was appropriate under the circumstances of the case, the co-defendant's sentence was in fact extremely lenient. The court stated that if there was an improper sentence that should be appealed, it was not defendant's, but rather the co-defendant's inappropriate sentence. The county attorney should have appealed the latter sentence. In any case, defendant was not entitled to relief simply because a co-defendant received a different, more lenient punishment: "Where it is apparent that the lesser sentence imposed upon a co-defendant is erroneous, the sentencing court is not required to reduce all more severe though properly imposed sentences just to obtain uniformity." State v. Morrow, 369 N.W.2d 89 (1985).

New Hampshire Defendant was convicted of three counts of sexual contact with a minor, and he appealed. Defendant argued, among other things, that the sentencing judge had abused his discretion by considering evidence of charges of which defendant had been acquitted.

Held, conviction affirmed and sentence vacated and remanded. The court ruled that the sentencing judge erred in imposing the maximum sentence for each misdemeanor conviction of sexual contact with a minor on the grounds that the conduct was not an isolated incident. It was not clear to what extent the sentencing judge had considered evidence from five misdemeanor charges of sexual contact with a minor on which defendant was ultimately acquitted. Although a trial court may consider evidence of pending charges (as well as charges that have proved short of conviction) in determining sentencing, the court stated that the sentencing judge may not consider evidence from charges on which

defendant has been acquitted by a full jury. The court added that the presumption of innocence ensconced in the due process clause is denied if a sentencing court uses charges on which defendant has been acquitted to punish the defendant. State v. Cote, 530 A.2d 775 (1987), 24 CLB 269.

New Jersey Defendant was convicted of acts of intercourse with his thirteen-year-old stepdaughter in violation of a state statute defining such acts as aggravated sexual assault, regardless of the presence or absence of force. The trial court sentenced the offender to sixty-three days in prison, five years' probation, and a $2,525 fine, and directed that he undergo psychiatric treatment. The state statute under which he was convicted did not expressly include a presumption of imprisonment until shortly before he was sentenced, and the trial court declined to apply the amendment retroactively. The State appealed the sentence, the Appellate Division affirmed, and the New Jersey Supreme Court granted certification to clarify a 1981 amendment to the 1979 Criminal Code. In 1981, the Code was amended to provide a presumption of imprisonment for all first- and second-degree crimes.

Held, reversed. The court concluded that the 1981 amendment should not be applied retroactively in this case. It found, however, that the undeniable intention of the Code's sentencing structure, even before the 1981 amendment, was to establish a general framework to guide judicial discretion in imposing sentences, and was based upon a philosophy that was offense-oriented and did not focus on the rehabilitation of offenders. The court concluded that the trial court relied on pre-Code sentencing guidelines. This approach balanced the capacity for rehabilitation with the other purposes of punishment, rather than following the offense-oriented analysis of the Code. Therefore, probationary sentences were precluded by the Code even though defendant was a first-time offender convicted of aggravated sexual assault, a first-degree offense. State v. Hodge, 471 A.2d 389 (1984), 21 CLB 78.

Pennsylvania Defendant was convicted of three counts of first-degree murder, three counts of robbery, and one count each of rape and possession of instruments of crime. For each of the homicides, the jury returned the death penalty finding five aggravating circumstances and no mitigating circumstances. Defendant, on appeal, asserted that the jury's findings were not supported by evidence.

Held, conviction affirmed. The court stated that the Commonwealth failed to establish that murder victim was a prosecution witness to a murder or other felony and was killed for the purpose of preventing the testimony in a grand jury or criminal proceeding involving the offense. Merely showing that an individual who witnessed a murder or other felony committed by defendant did not meet the prosecution's burden. Here, the jury was left to speculate whether the victim, killed in a multiple murder, would have been a prosecution witness. The court also stated that because trial judge did not instruct the jury on the issue of torture, leaving the jury to rely on the definition of a doctor, the aggravating circumstance of torture did not apply. There was also insufficient evidence to prove that defendant had a significant history of felony convictions involving the use or threat of violence to the person. The court determined, how-

ever, that the remaining aggravating factors were supported by evidence; defendant committed the killing in the perpetration of a felony, and he had been convicted of another federal or state offense, committed either before or at the time of the offense in issue for which a sentence of life imprisonment or death was imposable. Thus, because the jury found no mitigating factors, the sentence of death was sustained. Commonwealth v. Crawley, 526 A.2d 334 (1987), 24 CLB 272.

Wyoming Defendant pleaded guilty to aiding and abetting aggravated robbery and conspiracy to commit burglary. Defendant was sentenced to consecutive terms of not less than twenty-four years, eleven months, and twenty-nine days and not more than twenty-five years on the aggravated robbery count, and not less than nine years, eleven months, and twenty-nine days and a maximum of ten years on the conspiracy count. On appeal, defendant argued, among other things, that the district court violated the state's indeterminate sentencing statute in imposing determinate sentences on both counts whereby there was only a single day between the maximum and minimum sentences.

Held, affirmed. The Wyoming Supreme Court affirmed the district court ruling by holding that the sentences did not violate the indeterminate sentencing provision. The statute does not require any fixed period of time between the maximum and minimum limits of the sentence, and the primary responsibility for criminal sentencing rests with the legislature, which has the resources and mandate to create an effective corrections policy. The chance that the legislature overlooked the possibility that a judge might impose the sentence in the case at bar was a remote one; an earlier decision in Jahnke v. State (682 P.2d 991, 1010–1011 (Wyo. 1984)), in which defendant was sentenced "to not less than nineteen years, eleven months and twenty-nine days," established that similar sentences would be possible under statute. Because the legislature had not amended the statute in response to Jahnke v. State, sentences like those imposed in this case would be considered indeterminate and legal. Duffy v. State, 730 P.2d 754 (1986), 23 CLB 399.

§ 17.50 Invalid conditions

Louisiana As a result of a plea bargain, defendant pleaded guilty to aggravated battery, a felony. The trial judge sentenced defendant to eight years imprisonment at hard labor. However, the judge further ordered that two of the eight years be suspended, conditioned upon defendant's making restitution to the victim in the amount of $6,215 within two years of the date of imposition of sentence. Defendant appealed, contending among other things that the sentence was illegal.

Held, sentence set aside and case remanded. The Supreme Court of Louisiana concluded that when a trial judge decides to sentence a defendant to a term of imprisonment in the state penitentiary without suspending the sentence, the judge cannot control the length of the period of actual incarceration. After analyzing the language of the relevant articles of the state code, the court found a legislative choice to permit this sort of "split sentence" only in misdemeanor, but not in felony, cases. State v. Patterson, 442 So. 2d 442 (1983).

South Carolina Defendant sought post-conviction relief after being sentenced for the distribution of marijuana. His sentence included five years probation, during which he was forbidden to enter any place of business that sold alcohol. Defendant claimed that this condition was unreasonable and therefore invalid.

Held, reversed. The Supreme Court of South Carolina reversed the challenged portion of the sentence. The court noted that virtually every grocery and convenience store and many restaurants sold alcohol. To forbid defendant from entering these premises was unreasonable and disproportionate to any rehabilitative function the sentence might serve. Beckner v. State, 373 S.E.2d 469 (1988).

§ 17.55 Sentence not contemplated by plea

Hawaii As a result of a plea bargain with the prosecutor, defendant entered a plea of nolo contendere to kidnapping, first-degree sexual abuse, and indecent exposure. Seven months after defendant started serving his sentence, he moved the trial court to allow him to withdraw his plea. This motion was denied and defendant appealed, arguing that procedural safeguards provided under Rule 11 of the Hawaii Rules of Penal Procedure (HRPP) were not met. The trial court failed to inform defendant correctly of the nature of the plea agreement, the fact that the court was not bound by such an agreement, and the maximum sentence. The trial court, however, made an affirmative showing of an on-the-record colloquy between the court and the defendant, which indicated that defendant fully understood the connotation and consequence of the guilty plea.

Held, affirmed. The Hawaii Supreme Court stated that all procedural components should actually be complied with by trial judges. Nevertheless, after the sentence has been imposed, the court should set aside the conviction and permit defendant to withdraw his plea only upon a showing of manifest injustice. Here, failure to conform to HRPP Rule 11 amounted to harmless error. Although the court incorrectly stated the maximum sentence, defendant actually received a lesser term of imprisonment than the one stated. Hawaii v. Cornelio, 727 P.2d 1125 (1986), 23 CLB 404.

§ 17.65 Re-sentencing

New Jersey Defendant was convicted of murder and sentenced to death. Because of an impropriety at sentencing, defendant had to be re-sentenced. After the initial trial, but before re-sentencing, defendant was convicted of another murder. At issue was whether or not the second murder could be cited in the re-sentencing by the state as an aggravating factor. Defendant argued that the new information violated fundamental fairness. He also contended that he could not be sentenced to death again because it would violate the terms of double jeopardy. The state maintained that the information should be admitted at re-sentencing because it was merely additional evidence of a factor already established on the basis of defendant's earlier murder conviction.

Held, conviction reversed. The court concluded that the admission of the second conviction as evidence of an aggravating factor did not violate the double jeopardy clauses of the federal and state constitutions. The only constitutional restriction applied to re-

trials in criminal cases is that the defendant may not be subject to punishment beyond that imposed in the first trial, and since death was the verdict in the first trial, that issue was immaterial. The state and the defense were free to present new evidence, testimony, or documentation not presented at the original sentencing proceeding, and the new jury could reach conclusions concerning aggravating factors and mitigating factors different from and inconsistent with the findings at the original sentencing proceeding. There is no federal constitutional prohibition of seeking on re-sentencing an aggravating factor not found at the first sentencing phase where defendant is sentenced to death at the conclusion of the first sentencing phase. Previous convictions are always central to sentencing determinations. For the jury to make a knowledgeable decision, it is essential that it know the prior murder conviction record of defendant. In sum, the court found that in a re-sentencing phase, there was no constitutional limitation imposed on the use of a defendant's murder conviction when entered subsequently to defendant's original trial as an aggravating factor. The court said that given the punishment at stake in a capital prosecution, the state should be compelled to offer all its proof of any applicable aggravating factors against the defendant at his or her first trial, but they refused to foreclose the state from introducing new aggravating factors at re-sentencing on those truly rare occasions when the introduction of new factors would not offend the principles of double jeopardy or fundamental fairness. State v. Biegenwald, 542 A.2d 442 (1988).

Rhode Island Both defendants challenged the imposition of consecutive sentences as a result of revocation of their probationary status and removal of suspension from sentences previously imposed. Neither defendant challenged the adjudication of violation of his probationary status.

Held, cases remanded. The Supreme Court of Rhode Island remanded the cases with directions to enter judgments providing that all sentences executed upon both defendants shall be served concurrently where justices who imposed suspended sentences did not expressly provide that the period of probation or suspended portion of sentence, if executed, should be served consecutively. When two or more sentences to be served in the same institution are imposed at the same time, such sentences run concurrently unless expressly ordered otherwise. Pellica v. Sharkey, 292 A.2d 862 (1972). Any distinction based upon the fact that different judges imposed these suspended sentences for different charges at different times had no persuasive effect. State v. Studman, 468A.2d 918 (1983).

§ 17.67 Reduction of sentence (New)

Arkansas Defendant was convicted of murder. During the penalty phase of the trial, the state presented evidence of two other violent crimes allegedly committed by the defendant, for which he had not been tried. The judge allowed the jury to consider the evidence for one of the crimes, in which a police officer's testimony linked defendant to the crime based on a witness identification that the witness himself denied. The evidence presented to the jury regarding the second crime was so

insubstantial that the judge instructed the jury to disregard it. The defense requested a continuance to prepare a defense to the unexpected charges; it was denied. Arkansas law allows the state to offer evidence of the commission of other violent crimes during the penalty phase of capital murder cases to show aggravating circumstances. In 1977, the legislature deliberately deleted the restriction of such evidence to crimes for which the defendant had been convicted. The defendant was sentenced to the death penalty, and he appealed.

Held, affirmed as modified. The Supreme Court of Arkansas reduced the penalty to life without parole. When the state attempts to prove another unrelated crime during the penalty phase, without having evidence of a conviction, the trial court must prevent prejudicial evidence from reaching the jury. Evidence that utterly fails in its burden of proof, as here, creates prejudice which cannot be removed. Further, the defense must be granted the opportunity to present rebutting evidence. Miller v. State, 660 S.W.2d 163 (1983).

California Defendant pleaded nolo contendere to charges of robbery, false imprisonment, assault with a deadly weapon, and assault with a deadly weapon upon a peace officer, and he admitted allegations relating to three weapon-use enhancements. Defendant also admitted a prior felony conviction for which he served a separate prison term and another prior "serious felony" conviction of robbery. He was sentenced for the present convictions to fifteen years in prison, including a consecutive term of five years for the prior serious felony conviction. The record of the sentencing hearing indicated that the trial court believed the imposition of a consecutive five-year sentence for the serious felony enhancement was statutorily mandated. On appeal, defendant argued that the trial court erred in concluding that it had no discretion to strike the prior serious felony conviction for purposes of sentencing.

Held, vacated and remanded. The California Supreme Court ruled that the trial court retained the discretion to strike the prior conviction and forego the additional five-year enhancement sentence in the "interest of justice." The court stated that neither applicable sections of the California Penal Code nor applicable articles of the California constitution abrogate a trial court's traditional authority to strike a prior conviction. People v. Fritz, 707 P.2d 833 (1985).

§ 17.70 Illegal sentence

Kansas Defendant was convicted of aggravated indecent liberties with his ten-year-old daughter and was sentenced to ten-to-fifteen-years' imprisonment. On July 1, 1983, aggravated sexual battery became a class D felony, distinguished from aggravated indecent liberties with a child, a Class B felony, by lack of familial relationship between perpetrator and victim. On July 1, 1984, the offense of aggravated indecent liberties with a child was reclassified as a class D felony, punishable with a three-to-ten-year jail sentence. Defendant, on appeal, argued that the sentence of ten to fifteen years imposed against him violated the constitutional prohibition against cruel and unusual punishment, because a person committing the same offense two weeks

later would be subject to a lesser permissible sentence.

Held, affirmed. The Kansas Supreme Court held that the state's evidence was sufficient to sustain the conviction with the sentence imposed. At the time defendant was sentenced, the term prescribed for a class B felony was a minimum of not less than five or more than fifteen years and a maximum of not less than twenty years or more than life. The sentence imposed by the court was not the maximum term permitted and was within the statutory limits. Citing State v. Armstrong, 712 P.2d 1258 (1986), in which the court held that a new criminal statute passed in a field already occupied by an older statute will not apply to crimes already committed at the time the new statute is passed; in the present case, the amendment of the felony of aggravated indecent liberties with a child to a lesser sentence did not render invalid the sentence actually imposed. State v. Ramos, 731 P.2d 837 (1987), 23 CLB 494.

Louisiana Defendant was convicted of armed robbery and attempted second-degree murder, and sentenced to twenty years imprisonment at hard labor on each charge, with the sentences to run concurrently. Although the statute under which defendant was sentenced for armed robbery provided for no parole, the trial judge did not mention any limitation on parole eligibility. Defendant appealed his conviction on grounds unrelated to sentencing. The state filed no appeals and sought neither review nor modification of defendant's illegally lenient sentence. The appeals court affirmed defendant's conviction, but vacated his sentence for armed robbery and remanded his case to the trial court for resentencing. On application by defendant, the Louisiana Supreme Court granted certiorari to review the appeals court's judgment, particulary the sentence amendment.

Held, appellate judgment partially set aside and sentence imposed by trial court reinstated. The court declared that the appeals court cannot amend or set aside defendant's illegally lenient sentence when defendant alone appeals and the prosecutor does not seek review of defendant's sentence. If neither party seeks review of a sentence as to its legality but the conviction or sentence is appealed on other grounds, the scope of an appellate review is restricted. An appellate court may not correct an illegally lenient sentence about which the prosecutor does not complain. An appellate court, under the concept of patent error, may not correct an error when the correction is more onerous to the only party seeking review, in this case defendant. State v. Fraser, 484 So.2d 122 (1986).

§ 17.75 Imposition of sentence suspended

South Dakota On February 8, 1982, defendant pled guilty to a charge of sexual conduct with a child under the age of fifteen years and was sentenced to five years' imprisonment. The sentence was suspended until March 10, 1983, and the trial court was to consider modification of the sentence after February 1, 1983, and before March 10, 1983. At the time the above-described judgment was entered against him, defendant had been convicted of two prior felonies—indecent molestation of a child and grand theft. Following an incident with a fourteen-year-old boy on May 8, 1982, the state filed a complaint charging

defendant with attempting to engage in sexual contact with a child under the age of fifteen years. On July 12, 1982, the state moved to revoke the suspended sentence, and its motion was granted. Defendant appealed the revocation.

Held, revocation affirmed. The court felt it was unnecessary to address the due process argument presented by defendant, holding that the trial court lacked jurisdiction to either suspend imposition of the sentence and place defendant on probation or suspend execution of the sentence and place defendant on probation. Courts do not have unlimited discretion to stay executions of sentences, but can do so only when a statute so provides. The applicable South Dakota statute permits suspension of sentences and probation only if defendant has no record of prior convictions. The trial court's judgment against defendant, who had been convicted of two felonies, was void. State v. Griffee, 331 N.W.2d 576 (1983).

§ 17.80 Power to suspend portion of mandatory sentence

Iowa Defendant was found guilty of the simple misdemeanor of speeding and was sentenced to pay a fine of $30 plus court costs. Defendant's request for a deferred judgment was denied. He appealed, arguing that the magistrate erred in refusing to grant request for deferred judgment, which must be available in all simple misdemeanor cases because the statutes describing when deferred judgments may be granted do not specifically exclude scheduled-fine misdemeanors such as speeding.

Held, affirmed. The Supreme Court of Iowa held that deferred judgment was not a sentencing alternative authorized by statutes governing scheduled violations and thus the $30 fine was the correct sentence. The special scheduled-fine provisions prevailed over more general deferred-judgment provisions. Moreover, defendant cited cases that involved a legislative intent to give the sentencing judge discretion over entering a deferred judgment, but did not involve, as in this case, a scheduled misdemeanor offense, for which the legislature intended there to be no sentence other than a prescribed, mandatory fine. State v. Frazer, 402 N.W.2d 446 (1987), 23 CLB 498.

§ 17.85 Power to dismiss habitual criminal charge

South Dakota Defendant was convicted of issuing an insufficient funds check in the first degree and of being a habitual offender. As a result of the determination of habitual offender status, defendant was subjected to enhanced punishment, and was sentenced as a result to fifteen years in the state penitentiary. The habitual offender determination resulted from three prior felony convictions: one for first-degree robbery and two for forgery. On appeal, defendant attacked the determination of habitual criminal status, arguing that two of the convictions were constitutionally infirm. Specifically, he argued that his guilty pleas in the two forgery cases were not knowingly and voluntarily offered, due to the trial courts' failure to adequately apprise him of his constitutional rights. In one case, defendant contended, the plea was devoid of any advisement of constitutional privileges available to him and in the other, he contended, he was not informed of his right to a jury trial in the county in which the crime was committed.

Held, reversed and remanded. The

South Dakota Supreme Court found that one of defendant's prior convictions entered on a guilty plea had been devoid of any advisement of the constitutional privileges available to him and was constitutionally infirm on his subsequent conviction for purposes of determining his habitual criminal status. A constitutionally infirm conviction cannot be used to enhance a sentence under the state's habitual offender statute. A motion to strike, noted the court, is the proper way to attack such a constitutionally infirm conviction. Thus, the court held that the constitutionally infirm forgery conviction should not have been used to enhance defendant's sentence. In the other case in which defendant entered a guilty plea, the court ruled that defendant had been adequately informed of his constitutional right to a jury trial, although the trial judge did fail to inform defendant of his right to a jury trial in the county in which the crime was committed. According to the court, though, all the proceedings in that case occurred in the same county, so that defendant could not allege that he was unaware of his right to a jury trial in the county where the crime was committed. Nonetheless, since one of the convictions was constitutionally infirm and could not be used to enhance defendant's punishment, the court reversed the habitual offender conviction and remanded the case. State v. King, 383 N.W.2d 854 (1986).

PUNISHMENT

§ 17.90 Credit for time spent in custody prior to sentencing

Connecticut A proceeding for habeas corpus relief was instituted by a man charged in Connecticut with six counts of first-degree robbery. After his initial arrest, while he was incarcerated awaiting arraignment, the alleged robber escaped from custody and fled to Florida. He was rearrested in Florida and charged with being a fugitive from justice. He decided to resist extradition, but when his petition contesting the validity of the extradition was denied, he was returned to Connecticut. Upon his conviction and sentencing on the escape charge, the robber was committed to the custody of the commissioner of corrections. The commissioner credited the robber with time spent awaiting sentencing, but refused to credit him with the time spent in custody fighting extradition to Connecticut. The robber appealed, charging that he was subjected to a prolonged sentence, in violation of equal protection and due process guaranteed by the Fourteenth Amendment, because he was not credited with the time spent in confinement in Florida fighting extradition to Connecticut.

Held, habeas corpus should not have been granted. The Connecticut Supreme Court ruled that the robber was not subjected to an illegal confinement, because he was not under Connecticut jurisdiction during the time he was confined in Florida resisting extradition. A Connecticut statute regarding pre-sentence confinement credit for time served in a community correctional center authorizes credit for time served awaiting trial, but not awaiting extradition. The court stated that "the petitioner [robber] has pointed to nothing that demonstrates that the legislature intended to extend to fugitives from Connecticut justice awaiting extradition the credit he now seeks." The court went on to state in this regard that "the petitioner's claim that he was held in Florida on a Con-

necticut charge and was held under color of Connecticut law and is therefore entitled to equal protection under Connecticut law must fail." The robber had also charged a violation of his due process rights under the federal and state constitutions. In this regard, the court held that "the record contains no hard evidence of any vindictiveness, retaliation or punishment directed to the respondent [commissioner] in refusing the requested credit. . . . Certainly, it is anomalous to argue that the commissioner is violating due process because he has performed his obligation under the statute." Given the commissioner's statutory duty, and lacking clear evidence that punishment for resisting extradition was the commissioner's motive, the robber was not denied his due process rights. Johnson v. Manson, 493 A.2d 846 (1985).

South Dakota Defendant was charged on February 24, 1977, with three complaints of assault and battery, third-degree burglary, and assault with a dangerous weapon. Defendant applied for, and received, court-appointed counsel. After preliminary hearing proceedings, he was bound over on the latter two charges. On February 25, 1977, defendant escaped and remained at large until March 14, 1977, when he voluntarily returned to custody. Defendant entered a guilty plea on May 2, 1977, to the latter two charges, which resulted in concurrent sentences of eight and five years respectively. Defendant, an indigent, was incarcerated a total of fifty-two days prior to trial. On May 6, 1982, defendant moved to correct his sentence. Motion was denied.

Held, reversed and remanded with directions to allow defendant fifty-two days credit for his pre-sentence incarceration. The Supreme Court of South Dakota reaffirmed its holding that the Fourteenth Amendment equal protection clause requires that credit be given for all pre-sentence custody that results from indigency. State v. Tibbetts, 333 N.W.2d 440 (1983).

§ 17.101 Imposition of restitution (New)

Colorado In an altercation, Darr and Mastalski were respectively injured and killed. Defendant was charged with first-degree murder and accessory to first degree murder in connection with Mastalski's death but was not charged with any crimes relating to Darr. Defendant pled guilty to the accessory charge as part of a plea agreement and was sentenced to community service and probation and ordered to pay restitution to Mastalski's estate and to Darr, pursuant to Colo. Rev. Stat. § 16-11-204.5 (1983). Defendant appealed, and the order of restitution to Darr was reversed.

Held, affirmed. The Supreme Court of Colorado held although restitution may not be ordered paid to persons who were victims of a defendant's uncharged criminal activity, a defendant may, as part of a plea agreement, consent to the payment of restitution to persons or entities damaged as a result of his conduct. As defendant was not charged with any crimes relating to Darr and never agreed to pay him damages as part of the plea agreement, the court held it improper to order restitution to Darr. 735 P.2d 159 (1987).

New Hampshire The defendant was indicted for and convicted of second-degree murder. The trial court sentenced the defendant to a prison term

and to pay $36,000 in restitution to the victim's family. The defendant appealed, challenging, inter alia, the trial court's restitution order.

Held, reversed in part, and remanded. The Supreme Court of New Hampshire held that the trial court's application of the restitution statute was erroneous and that the assessment of $36,000 had to be vacated. The court first distinguished between "restitution" and "civil damages," noting that a restitution award does not restrict the victim's right to seek civil damages. The losses recoverable through a restitution award are stated in the preamble to the New Hampshire statute on the subject. In the preamble, which states purpose and limits, restitution may be ordered when three criteria are met: (1) restitution will serve to rehabilitate the offender; (2) restitution will compensate the victim; and (3) no other compensation is available. As to compensation, "economic loss" is defined by the statute to mean pecuniary detriment suffered by the victim, including the value of damaged, destroyed, or lost property, reasonable medical costs, and loss of employment income. The court believed that the legislature intended restitution to cover only such losses. The court interpreted the phrase "pecuniary detriment" to mean that only those losses that are ascertained and measured easily (i.e., only liquidated amounts) should be recovered under the statute. Hospital bills, the value of property, and lost employment income resulting from an offender's criminal acts are easily ascertainable; damages for pain and suffering, loss of earning capacity, and wrongful death, as contemplated by the restitution statute, are not. As to the requirement that no other compensation be available to the victim, a court should make such a finding as a practical matter, if a civil suit would result in an uncollectible judgment. Here, where the defendant had been sentenced to a long period of incarceration, was indigent, and therefore unable to pay any amount of restitution for a long time, neither the purpose of rehabilitating the offender nor the social objective of making the victim adequately whole would be served by requiring restitution. State v. Fleming, 480 A.2d 107 (1984).

Wisconsin Defendant was convicted of burglary, but instead of prison, he was given probation and ordered to pay restitution to the victims. The court ordered that the equity in defendant's home be used to secure the restitution payments and issued a lien against the property. Defendant accepted the terms but later, after making no attempt to repay, appealed the terms of probation. He claimed that the court had violated the homestead exemption statute and the Wisconsin Constitution, which provides that no conviction can automatically divest a person of his property.

Held, sentence affirmed. The court explained that the homestead exemption statute does not negate the restitution statute. The court also noted that defendant's home was not automatically taken away in violation of the Wisconsin Constitution. Instead, defendant gave up equity in his home as part of his probation. If the defendant felt that the terms offered by the court violated his rights, he should have objected before accepting them. The court determined defendant was estopped from claiming the homestead exemption and constitutional privilege after he had received the benefits of probation. To grant him these privi-

leges would undermine the sentence he received. State v. Dziuba, 435 N.W.2d 258 (1989).

§ 17.125 Multiple punishment—in general

Kentucky Defendant was convicted of four counts of receiving stolen cattle and sentenced to four consecutive terms of five years each. The cattle were stolen from four different owners on different occasions. Defendant contended that he should have been charged with one count rather than four, since the cattle were all discovered in his possession at one time, and there was no proof that he obtained them on separate occasions.

Held, conviction affirmed. The court said that the purpose of the statute in question is to protect owners, not to punish a continuous course of conduct. The fact that the cattle were stolen on separate occasions, together with evidence that defendant purchased cattle on at least four separate dates, was sufficient to permit jury's finding that he was guilty on four separate counts of receiving or retaining stolen property. Hensley v. Commonwealth, 655 S.W.2d 471 (1983).

Minnesota Defendant pleaded guilty to five crimes requiring imposition of minimum terms of three years pursuant to state statute. One conviction was for the aggravated robbery of a man. One conviction was for assaulting another man with a dangerous weapon. The other three convictions were for the aggravated robbery of three female residents of a house. The trial court, acting pursuant to state sentencing guidelines, sentenced defendant to five separate 54-month sentences, one per victim, and made four of the five sentences run consecutively. This gave defendant an aggregate sentence of 216 months. On appeal, defendant argued that his sentence violated the guidelines and also unfairly exaggerated the criminality of his conduct.

Held, convictions affirmed. The Supreme Court of Minnesota found that the sentence of 216 months was proper under prior cases interpreting and applying the guidelines and the so-called multiple-victim exception to the state statutes. State v. Kennedy, 342 N.W.2d 631 (1984).

Virginia Defendant was convicted of three counts of brandishing and pointing a firearm, and sentenced to sixty days jail on each count, for having drawn a pistol on three men with whom he had been arguing. Defendant appealed on the ground that his sentencing on three counts for a single act violated the constitutional prohibition against double jeopardy.

Held, conviction affirmed. The court affirmed the multiple sentences. Following the Supreme Court decision in Missouri v. Hunter, 103 S. Ct. 673 (1983), it held that the controlling factor in determining multiple punishments for a single act is legislative intent. It looked to the wording of the relevant statute, which prohibited pointing or brandishing a firearm "in such a manner as to reasonably induce fear in the mind of another," and concluded that the intent of the statute was to prohibit a crime against the person of the victim in whom the fear is induced. There was no doubt that the three victims were frightened by the one act, since all three backed away. Kelsoe v. Commonwealth, 308 S.E.2d 104 (1983).

§ 17.145 —Enhancement

Minnesota Defendant was convicted of robbery and sentenced to fifty-four

months' imprisonment under a statutory sentencing scheme which features a point system for previous convictions. On appeal, defendant argued that the trial court erred in computing his criminal history score. In particular, he complained of being allotted four points for prior Illinois convictions which were all based on his participation in a multiple-victim robbery and shootout. The evidence in that case showed that police arrived while defendant and an accomplice were in the middle of performing a robbery; that one of the two yelled "the cops are here" and the other responded "don't worry, we'll get him as he's coming in the door;" and that defendant pointed a gun at one of the officers. He argued that all the Illinois offenses were part of a single incident which should have generated no more than two felony points under the enhancement statute at issue.

Held, conviction affirmed. Although courts have held that crimes committed in merely attempting to avoid police apprehension are part of the same incident as the main crimes unless they are significantly separate in time and place, the court found that defendant's Illinois convictions for attempted murder and armed robbery were divisible. It agreed with the state's argument that defendant and his accomplice made a decision to try to "get" the police whether or not that was necessary to their escaping apprehension, and held that defendant's conduct represented an escalation of the incident to a far more serious level. Thus, held the court, the higher point allotment was justified. State v. McAdoo, 330 N.W.2d 104 (1983).

Rhode Island Defendant was convicted on information charging him with being an habitual criminal, and was sentenced to ten years' imprisonment consecutive with sentences that defendant was already serving. Rhode Island law on habitual criminality provides that if a person has been convicted of two or more felonies and is thereafter convicted of a third felony, a sentence of up to twenty-five years may be imposed in addition to any sentence imposed for the offense for which he was last convicted. Defendant appealed. contending that the statute did not establish a separate crime but constituted a sentence-enhancing measure, and that the state could not proceed by a separate information seven months after sentence had been imposed for defendant's last conviction.

Held, sentence vacated. A determination that a defendant is an habitual criminal must be immediately preceded by a felony conviction for which defendant has not been sentenced. The purpose of the filing of an habitual criminal information is to place the court in a position, when it gets ready to pronounce sentence, to base its sentence on defendant's previous record. The statute does not create a new substantive offense, but merely prescribes a longer sentence for an habitual criminal's latest conviction. State v. Sitko, 457 A.2d 260 (1983).

West Virginia Defendant initiated a habeas corpus proceeding to contest the state's imposition of a recidivist penalty of five years. He had been convicted originally of second-degree murder. That conviction was set aside, and he then was convicted of first-degree murder. The conviction was vacated and the case was remanded to the circuit court for re-sentencing on second-degree murder. The state filed an information for recidivist punish-

ment, alleging a previous felony conviction. Defendant filed a motion to dismiss, asserting that, according to the statute, such an information must be filed before the original sentencing. His motion was denied, and he then filed writs of habeas corpus and prohibition.

Held, writs denied. In upholding the state's right to deny the writs, the court's rationale for allowing further recidivist proceedings in this case was that the defendant, at resentencing, stood in essentially the same position he was in prior to his initial appeal. His conviction for second-degree murder had been affirmed, and he had a prior felony that permitted the recidivist proceedings. The delays in arriving at a correct and final conviction were simply the result of his appeals. State ex rel. Young v. Morgan, 317 S.E.2d 812 (1984).

§ 17.150 —What constitutes a prior felony conviction

Colorado Defendant was convicted of the crime of possession of weapons by a previous offender. The present conviction arose out of a traffic accident in which defendant was involved. When police officers arrived at the scene of the accident, they found defendant with a handgun on his person. Another gun and ammunition were found in defendant's car, and two other guns were found near the accident scene, which guns were allegedly abandoned by passengers in defendant's car. Defendant was arrested and eventually charged with violating Colorado's "felon with a gun" statute, which prohibits previously convicted felons from possessing weapons. Before his trial, defendant filed a motion to dismiss the charge on the ground that the prior felony conviction on which the present offense was based, a guilty plea to the crime of second-degree burglary, was invalid because it was obtained in violation of his constitutional right to be informed of the elements of the crime to which he pleaded guilty. The trial court ruled that the plea was invalid and could not, therefore, be used to impeach defendant's credibility should he choose to testify. Nonetheless, the court denied defendant's motion to dismiss the charge, holding that an invalid plea of guilty can still form the basis for a conviction. Defendant was subsequently found guilty by a jury of the present charge. On appeal, defendant argued that the trial court erred in denying his motion to dismiss the charge once it found that the underlying conviction was obtained in violation of his constitutional rights.

Held, reversed and remanded with instructions. The Colorado Supreme Court stated that an earlier conviction based on an invalid guilty plea cannot serve as the predicate felony for the violation of the statutory prohibition against possessing weapons by a previous offender. An unconstitutionally obtained conviction cannot be used in a later criminal prosecution to establish guilt or to enhance punishment. A valid underlying conviction is required if the purpose of the "felon with a gun" statute is to be realized. People v. Quintana, 707 P.2d 355 (1985).

Hawaii Defendant was convicted of theft and sentenced as a repeat offender to mandatory imprisonment of five years without parole. The instant offense, which represented his fourth theft conviction, had been convicted while he was awaiting trial for his third

offense; his second offense had been committed while he was awaiting trial for his first offense. On appeal he argued that the first two convictions should have been counted as only one conviction under the applicable statute because he did not have an opportunity to rehabilitate himself before committing the second offense.

Held, conviction affirmed. The court found that the language of the enhancement statute at issue was clear and unambiguous in its requirement that a defendant have a "prior" conviction and its lack of reference to a rehabilitation requirement. Thus, each conviction stood on its own for enhancement purposes and the mandatory sentence given here was proper. State v. Akao, 658 P.2d 882 (1983).

§ 17.165 —Consecutive sentences

North Carolina Defendant was convicted of first-degree burglary and felonious larcency, after being convicted of voluntary manslaughter in an earlier trial. At the time of the first trial, there had been insufficient evidence to charge defendant with burglary. All the convictions arose out of one incident, in which defendant shot a woman to death and took her purse. Defendant was sentenced to a prison term of fourteen years for the burglary, to run consecutively with a six-year sentence imposed for the manslaughter conviction imposed in the previous trial. He was sentenced to three years for the larcency conviction, to run concurrently to the term imposed for the burglary. At trial, the judge said that he imposed this consecutive sentence because he was mandated to do so by state statute. He stated that he would otherwise have ordered that the burglary sentence run concurrently to that of the manslaughter sentence. On appeal, defendant argued that the trial court's interpretation of the statute was erroneous, and that the only time a judge must impose a burglary sentence consecutively with another sentence is when the other sentence was also imposed for burglary. In this case, of course, the other sentence in question was imposed for voluntary manslaughter. Thus, defendant argued, the sentence imposed on him for the burglary conviction should run concurrently to the manslaughter sentence, not consecutively with it.

Held, sentence affirmed. The North Carolina Supreme Court upheld the imposition of the consecutive sentence. According to the court, "The plain meaning of [the statute] is that a term imposed for burglary under the statute is to run consecutively with *any other sentence* being served by the defendant." Thus the trial court was correct in imposing a sentence on the burglary conviction to run consecutively with that of the previous manslaughter conviction. State v. Warren, 328 S.E.2d 256 (1985).

§ 17.180 Indeterminate sentences (New)

New York Defendant was convicted, on guilty plea, of attempted robbery in the second degree, a class D violent felony under the Penal Law of New York State. On appeal, he argued that Section 70.02 of the Penal Law, providing that a defendant charged with an armed felony and permitted to plead guilty to a class D violent felony must receive an indeterminate sentence of one to three years unless the court finds that factors specified in the act warrant imposition of less than an indeterminate sentence,

violated the due process clauses of the federal and state constitutions.

Held, affirmed. First, the New York Court of Appeals ruled that the constitutional question could not be avoided by resort to unfounded assumptions that the trial court, had it not been subject to the statute in question, would still not have imposed a lesser sentence. It then held that the statute did not violate due process. It did not, as defendant claimed, subject him to enhanced punishment on the basis of an unproven charge in the indictment that he was "armed" without requiring the state to make any additional showing. The sentencing judge had discretion to reduce the prescribed minimum sentence if he found mitigating factors relating to the manner in which the crime was committed. Thus, the statute does not give an indictment preclusive effect as to an unadmitted charge. Nor did the statute improperly place upon defendant the burden of proving one or more of the mitigating factors. By pleading to the class D felony with the knowledge that an indeterminate sentence would result, defendant impliedly admitted that he was armed as charged in the indictment. Thus, the state's case had been sufficiently made so that the burden of proving mitigating factors shifted to defendant. Furthermore, burden shifting was justified because knowledge of any mitigating factors was peculiar to defendant. People v. Felix, 446 N.E.2d 757, appeal dismissed, 104 S. Ct. 47 (1983).

18. APPEAL AND ERROR

§ 18.00 Right to appeal

U.S. Supreme Court After petitioners, four Philadelphia police officers, were indicted on civil rights violations, the district court granted the government's motion to disqualify a law firm from its multiple representation of all four petitioners. The Court of Appeals for the Third Circuit affirmed the disqualification.

Held, reversed. A district court's pretrial disqualification of defense counsel in a criminal prosecution was not appealable immediately, and the Court of Appeals had no jurisdiction to review the order prior to entry of a final judgment in the case. The Court noted that the rationale behind 28 U.S.C. § 1291 is to eliminate piecemeal appellate review of trial court decisions that do not terminate the litigation. Flanagan v. United States, 104 S. Ct. 1052 (1984), 20 CLB 461.

Wisconsin Defendant entered a guilty plea to a burglary charge, after a pretrial ruling that he could not offer psychiatric testimony in support of his intoxication defense. A condition of the plea bargain among defendant, the prosecutor, and the court was that defendant preserved the right to challenge the ruling on appeal. The intermediate appellate court, however, refused to review the exclusion of proffered evidence, relying on the general principle that voluntary entry of a guilty plea waives all nonjurisdic-

tional defects. Defendant conceded that, ordinarily, appellate review of his claim would have been precluded but asserted that "review may be preserved when the plea of guilty is conditioned upon the right to assert the question on appeal and there is agreement by the prosecutor and acceptance of the plea by the trial judge."

Held, affirmed in part and remanded for further proceedings. The Wisconsin Supreme Court, after a full review of the rationale for the "guilty-plea waiver" rule, also concluded that it should be applied "even though a defendant expressly states his intent not to waive certain issues on appeal and makes that intention a condition of his plea and even though the prosecutor and the judge acquiesce in that intention." As a matter of public policy, it reasoned, the courts should not give effect to an agreement by the parties conditioning a guilty plea upon the preservation of appellate rights. Exceptions to the guilty-plea waiver rule, it declared, should only be as provided by statute, i.e., only to a defendant's right to appeal from denial of an order of suppression. Here, however, defendant pled guilty believing that he was entitled to appellate review; accordingly, his plea was neither knowing nor voluntary. Therefore, it remanded to give defendant an opportunity to withdraw his plea and stand trial on the charges. State v. Riekkoff, 332 N.W.2d 744 (1983), 20 CLB 71.

§ 18.20 Waiver of right to appeal

Indiana In a trial for murder, defense counsel objected to two remarks made by prosecutor, and stated his reasons for objecting. When his objections were overruled, he did not move for a mistrial or ask that jury be admonished to disregard the comments. The two remarks, and a third remark to which no objection was raised at trial, were part of the grounds on which defendant appealed his conviction.

Held, conviction affirmed. The court found objections to arguments by prosecutor to be similar to objections to a question that has been asked and answered, where a motion to strike the answer and admonish the jury is required to preserve the right of review. The correct procedure in the case of improper argument is to request an admonishment, then, if the admonishment was not sufficient to cure the error, to move for a mistrial. This procedure should have been followed, even though the fact that the court overruled those objections that counsel raised strongly indicated that motions for admonishment or mistrial would also have been overruled. Dresser v. State, 454 N.E.2d 406 (1983).

§ 18.45 Right to appeal on full record

Nebraska Defendant was convicted of operating a motor vehicle under the influence of alcohol. Defendant was sentenced to six months in prison and his operator's license was revoked for life. Defendant appealed, alleging that the sentence was excessive due to enhancement because of prior convictions, and in particular alleging that the statute did not require a mandatory permanent revocation of defendant's operator's license.

Held, conviction reversed and case remanded. In the absence of certified records of prior convictions or any evidence to show whether defendant was represented by counsel and waived such representation, the case was remanded. The court recognized that de-

fendant did not assign as error the issues concerning defendant's plea, the absence of proof of prior convictions, or the deprivation of the opportunity to review such convictions and make objections. However, the court reserved the right to note and correct plain error that appears on the face of the incomplete record, in the interests of substantial justice. State v. Prichard, 339 N.W.2d 748 (1983).

§ 18.61 —Appeal while in custody out-of-state (New)

Indiana Defendant was convicted of rape, robbery, and burglary in Indiana; he was transferred to an Oklahoma prison under the Uniform Agreement on Detainers while his appeal from the Indiana convictions was pending. Subsequently, he escaped from custody and was arrested and detained on other charges in Texas. The state of Indiana moved to dismiss his appeal in the courts of that state on account of his fugitive status.

Held, appeal dismissed and conviction affirmed. The Indiana Supreme Court found that "where the defendant in a criminal case escapes from lawful custody he is not entitled during the period he is a fugitive to prosecute his appeal." Although defendant was incarcerated elsewhere on other charges, the court stated, he still was not subject to the jurisdiction of the Indiana courts and, accordingly, remained a fugitive. It noted, however, that dismissal was not based upon the theory that defendant waived his right to appeal nor the theory that he should receive additional punishment for his escape. Rather, the court premised its action upon its "inherent discretion to refuse to decide what, at [that] point, [was] a moot case." Mason v. State, 440 N.E.2d 457 (1982), 19 CLB 276.

§ 18.66 Belated appeals (New)

Indiana Defendant was convicted of rape and other crimes on December 19, 1978. His motion to appeal was timely filed on March 16, 1979, but the court was informed by the sheriff on April 6, 1979 that defendant had escaped from jail and his whereabouts were unknown. On April 11, 1979, at the hearing on defendant's motion, the trial court granted the state's motion to dismiss on the grounds that defendant had deliberately removed himself from the jurisdiction of the court and therefore had no standing to appeal. Defendant was recaptured and returned to jail two years later on July 29, 1981. On June 3, 1982, defendant filed a petition for a belated appeal that was denied. Defendant appealed the denial of his petition for belated appeal because he did not knowingly waive his right to a direct appeal of his original convictions, and it was not his fault that the original motion to correct errors was not ruled on.

Held, judgment of trial court affirmed. The Supreme Court of Indiana stated that a defendant who has escaped and is recaptured before the time limit for bringing his appeal has expired is not entitled to a belated appeal because the act of escaping was a voluntary act, notwithstanding defendant's contention that he did not know that if he escaped and remained a fugitive during the time designated for perfecting his appeal, he would lose his right to appeal. Prater v. State, 459 N.E.2d 39 (1984).

§ 18.90 Scope of appellate review

Minnesota Defendant was convicted after a jury trial of two counts of assault in the second degree. He was

represented by court-appointed counsel. Defendant was sentenced to consecutive prison terms of 30 months for count I and 21 months for count II. The appointed state public defender directly appealed to the Minnesota Supreme Court, arguing insufficiency of evidence and inappropriateness of the length of defendant's sentence, but conviction was affirmed. Defendant then filed a pro se postconviction petition, after being denied federal habeas corpus, alleging nine claims for relief. The state public defender was again appointed to represent defendant. A postconviction hearing was held at which defendant was present and testified regarding his claims. The postconviction court addressed each issue on its merits and incorporated a memorandum outlining the court's reasoning and analysis of the applicable law. Defendant appealed to the court of appeals, which denied the appeal on procedural grounds, holding that defendant had no right to present his claims for postconviction relief because they were "known at the time of" or raised in defendant's direct appeal to the supreme court. On this appeal, the issue raised was whether the court of appeals erroneously decided not to address the findings of the trial court on their merits in deciding that defendant had no right to postconviction relief because the proffered grounds for such relief were known at the time of the direct appeal.

Held, judgment of court of appeals affirmed. The Supreme Court of Minnesota found that only where a claim is so novel that it can be said that its legal basis was not reasonably available to counsel at the time the direct appeal was taken and decided will postconviction relief be allowed. Citing Reed v. Ross, 104 S. Ct. 2901 (1984), the court expanded the *Reed* test to include all claimed error and not just that of constitutional deficiency in its application to state procedure. Case v. State, 364 N.W.2d 797 (1985).

Nevada Defendant had been convicted of kidnapping, battery with intent to commit a crime, and sexual assault. On appeal, his principal contention was that the district court had erred in denying a motion to dismiss based on the state's failure to impound and preserve material and potentially exculpatory evidence, namely the blouse and undergarment of the victim. The evidence, he claimed, would have been exculpatory on the issue of the use of force or a weapon during the assaults. He based his motion primarily on the court's decision in State v. Havas, 601 P.2d 1197 (1979), to uphold the dismissal of a forcible rape charge because of the state's failure to obtain and preserve the victim's undergarments, which were considered material and potentially exculpatory on the issue of the use of force.

Held, conviction affirmed. The motion to dismiss was properly denied. It is an established rule that when an accused seeks dismissal for the state's good-faith loss or destruction of material evidence, he must show prejudice resulting from the unavailability of the evidence. To establish prejudice, the accused must make some showing that it is reasonable to anticipate that the evidence sought would be exculpatory. The court had concluded, after reviewing the record, that the defendant could not demonstrate that it was reasonable that the evidence would exculpate him and thus would make the requisite showing of

prejudice. The case he had cited, *Havas,* had readily distinguishable facts. In the instant case, the victim's testimony that her undergarment had been torn and her blouse slashed with a knife during the assaults was not ambiguous and was corroborated amply by other testimony and by physical evidence. Deere v. State, 688 P.2d 322 (1984).

§ 18.120 Harmless error test

California Police who were investigating a series of burglaries apprehended defendant while driving late at night in a suspicious manner, and, after obtaining consent to a search of the car, found weapons and burglar's tools. The driver of the car, defendant's brother-in-law, made statements which formed the partial basis for issuance of a search warrant which led to the discovery of various stolen items. The affidavit in support of the warrant did not address the issue of the brother-in-law's reliability. Defendant was charged in a twenty-two-count information, which included eleven counts of burglary and several firearms and narcotics charges. He pled guilty to six counts of burglary; of the six burglaries, only one was directly linked to the items recovered under the search warrant, and three took place after the date of the search. On appeal, defendant argued that issuance of the search warrant was improper.

Held, conviction reversed. The prosecution conceded that the evidence uncovered through the search warrant should have been suppressed because, since the brother-in-law was not a "citizen-informant", his reliability had to be established as a prerequisite for issuance of a valid search warrant. The court held that the error could not be deemed harmless because of both the magnitude of the consequences of a guilty plea and the lack of an adequate basis for evaluating the impact of the erroneous failure to suppress on defendant's decision to plead guilty. It pointed out that a guilty plea simply establishes that a defendant, for some reason sufficient to him, decided to waive his trial rights. Furthermore, the court held, it was immaterial that some of the counts to which defendant pled guilty were not connected to erroneously admitted evidence, since he entered into one plea bargain which resolved all twenty-two counts of the information. People v. Miller, 658 P.2d 1320 (1983).

Kentucky Defendant was convicted of first-degree murder. He appealed, arguing that reversible error occurred where many jurors who were on the panel from which the jury was selected, and some who were selected, were present on a previous occasion when defendant entered a guilty plea accompanied by some incriminating admissions. Defendant did not deny killing the victim, but maintained that the level of the offense should have been reduced because he had suffered emotional problems that impaired his mental capacity at the time of the shooting. Although the jury was also instructed on first-degree and second-degree manslaughter, it found defendant guilty of the principal charge.

Held, reversible error occurred. The state incorrectly contended that error was harmless because defendant did not contest the shooting. The error harmed defendant's chances of getting a verdict on a reduced charge. Its harmful effect was enhanced by the prosecutor's opening and closing arguments in which the guilty plea was

expounded on to show that defendant had the mental capacity to commit first-degree murder. Miracle v. Commonwealth, 646 S.W.2d 720 (1983).

North Dakota Defendant was convicted of gross sexual imposition in violation of a state statute, which states that ". . . a person who causes another to engage in a sexual act is guilty of an offense if: a. He compels the victim to submit by force. . . ." During their deliberation, the jury submitted a note to the court asking if they could have a legal definition of force. Outside of the jury's presence, the court met with the prosecutor and defense counsel, but not the defendant, to approve the response to the jury. The court sent a written response to the jury. At issue was whether the rights of the defendant were violated under Rule 43(a) of the North Dakota Rules of Criminal Procedure, which states that "the defendant must be present . . . at every stage of the trial. . . ."

Held, affirmed. Defense attorney had the opportunity but failed to object to the trial court's procedure in responding to the jurors' request. The failure to object operated as a waiver of the issue on appeal, but the error may provide a basis for reversal if it constitutes obvious error affecting substantial rights of the defendant. If the trial error is one of constitutional magnitude, the court has to determine whether the error is harmless beyond a reasonable doubt by considering the probable effect of the error in light of all the evidence. In the court's view, it would have been unreasonable to conclude that defendant's personal presence could have or would have affected the proceedings or the result. The court held that the error was harmless beyond a reasonable doubt. State v. Smuda, 419 N.W.2d 166 (1988).

§ 18.125 —Constitutional errors

Kentucky Defendant was initially convicted of first-degree manslaughter, but conviction was reversed by the Supreme Court of Kentucky. On remand, defendant was convicted of second-degree manslaughter, and conviction was affirmed by the Court of Appeals. The opinion of the Court of Appeals on the second appeal held that error in the prosecution's cross-examination of defendant, about his failure to claim self-defense when first arrested, was harmless. Defendant appealed, claiming that the error violated his constitutional privilege against self-incrimination, and so was prejudicial. When defendant was arrested, he said nothing about acting in defense or about the victim having a gun. His explanation for not revealing a self-defense motive until eight months later was that he had no attorney with him when he was arrested, and that the attorney he subsequently obtained advised him not to raise the defense until the time was right.

Held, affirmed. Prosecution rebutted the presumption of prejudice attached to constitutional error. The court accepted defendant's argument that the fact that he received a minimum sentence could, as likely as not, indicate that the error was highly prejudicial. However, it noted that it would be as reasonable to surmise from the minimum sentence that the jury disregarded the error. In addition, the evidence of defendant's guilt was overwhelming, and defendant's reasonable explanation of his silence on the self-defense motive mitigated the possibility of any prejudice. Blake

v. Commonwealth, 646 S.W.2d 718 (1983).

19. PROBATION, PAROLE, AND PARDON

PROBATION

§ 19.00 Conditions for probation

Hawaii Defendant was convicted of promoting a dangerous drug in the second degree, pursuant to a guilty plea, and was placed on probation for five years on condition that she submit to searches and seizures of her person, property, and residence at any time. On appeal, defendant claimed that such a condition was an undue infringement of her constitutional right to be free of unreasonable searches and seizures.

Held, sentence vacated and case remanded. The Supreme Court of Hawaii stated that although the particular probation condition imposed on defendant may well serve the legislative goal of the protection of the public, it does not sufficiently further the other objective of probation, the rehabilitation of the offender. Furthermore, it is too restrictive of the defendant's liberty interest. The court doubted that near total surrender of privacy could be reasonably related to rehabilitation. The court held that any search by police of the probationer would probably be unrelated to either her prior conviction or her rehabilitation because the principal role of the police officer is to investigate and prosecute criminal activity. Therefore, the court concluded the condition that the probationer be subject to warrantless police searches is unconstitutional. A majority of the court found no such constitutional infirmity in subjecting the defendant to warrantless searches by her probation officer given the defendant's known proclivity for involvement in the trafficking of illicit drugs. Based on this, the court found the necessary connection between such searches and the rehabilitation of defendant. However, the court added, such warrantless searches by the probation officer would be unreasonable unless the officer could point to specific and articulable facts giving rise to a reasonable suspicion that drugs were being secreted by defendant. State v. Fields, 686 P.2d 1379 (1984), 21 CLB 269.

Tennessee Defendant entered a plea of guilty to a charge of driving under the influence of an intoxicant, first offense, and was sentenced to eleven months and twenty-nine days in jail plus a fine of $250. As a condition of probation, defendant was required to surrender use and possession of his 1984 Cadillac for the span of his license revocation, which was two years. The only stipulation regarding the forfeiture of defendant's car was that it would be held in McMinnville Police Department, where it could not be used. On defendant's appeal, the sentence and conditions of probation were affirmed, but defendant was granted his application for permission to appeal on the issue of forfeiture.

Held, reversed and remanded. The Supreme Court of Tennessee reversed and remanded for further proceedings to establish revised conditions of probation. The court found that the condition of probation requiring forfeiture

of property (defendant's car) was a matter that would best be formulated by legislation. Aside from the prohibition on use of the car by the McMinnville Police, the manner of storage of the car in the trial court's order was too vague. Proper maintenance of the car was not explicitly required, and no remedy for any recoverable loss or depreciation to the property during the period of forfeiture was prescribed. Whether defendant could choose to sell the car while it retained its highest resale value, rather than allow it to depreciate during two years of storage is not clear from the trial court's order. Moreover, there is no record that a possible third party with a security interest in the car, or a relative of defendant with a protectable interest, was notified of the forfeiture. State v. Bouldin, 717 S.W.2d 584 (1986), 23 CLB 298.

§ 19.10 Revocation of probation

Texas Defendant was convicted of aggravated rape. He and the state had stipulated that evidence heard at the rape trial would be considered by the court in defendant's probation revocation hearing for a prior conviction of burglary. (The trial and the probation revocation hearing were held simultaneously.) Defendant appealed the court's order revoking his probation on the burglary conviction on the grounds of ineffective assistance of counsel, that the order revoking probation did not contain a specific finding that defendant had committed the offense alleged in the revocation motion, and on several frivolous grounds.

Held, affirmed. The court properly revoked probation on the basis of evidence heard at the rape trial. Defense counsel's failure to call witnesses could not be found to be incompetent or careless absent a showing that such witnesses were available and willing to testify in defendant's favor. In addition, the revocation order was sufficient, even though it did not recite the findings and conclusions upon which the trial court acted, because defendant had never requested such findings. King v. State, 649 S.W.2d 42 (Crim. App. 1983) (en banc).

§ 19.30 —Procedure

California Defendant was on probation for offenses related to the sale and possession of drugs. He was required to supply a urine sample to his probation officer. When tested, the sample showed traces of PCP, and a hearing was set for revocation of probation. Defense sought to inspect the urine sample before the hearing, but the sample had been discarded. It was the practice of the laboratory not to keep positive samples beyond three months unless a special request had been made. A toxicologist testified that a retest might have been useful, since there was "a lot of incompetence in this work." Defendant was found to be in violation of probation, and he appealed.

Held, revocation of parole reversed. The government had an obligation to preserve and disclose the test sample. The practice of preserving the sample for three months was inadequate; the system "fail[ed] to employ rigorous and systematic procedures designed to preserve material evidence for the hearing in which its results are introduced" (666 P.2d 423). The toxicologist's testimony as to the possibility of incompetence established that the evidence might possibly have supported defendant's claim of innocence and thus was material. People v. Moore, 666 P.2d 419 (1983).

PAROLE

§ 19.50 Revocation of parole

California Defendant was convicted of first-degree murder. After serving over ten years of a life sentence, he became eligible for parole. The Board of Prison Terms (BPT) held a parole hearing and granted defendant a parole date five years from the hearing. After three years, defendant was examined by a psychiatrist who expressed doubt about his suitability for parole, although earlier psychiatric reports were favorable. The BPT ordered that defendant's parole be rescinded for two reasons. First, it found that the unfavorable report raised significant doubt about defendant's potential for violence, and the favorable reports acknowledged inability to predict defendant's behavior. Second, the BPT found the original parole hearing failed to consider defendant's attempted prison escapes during his early years of incarceration. Defendant appealed the BPT decision, contending the substantial evidence test should apply.

Held, affirmed. The court said that although the BPT has the broad authority to exercise control over paroles, its decisions must have a factual basis and may not be based on whim. While the BPT cannot rescind a parole date arbitrarily, it does not abuse its discretion when it has some basis in fact for its decision. An inmate has no vested right in his prospective liberty date even when the BPT has granted a parole date. Accordingly, the court held that due process requires only that there be some evidence to support a rescission of parole by the BPT. In re Powell, 755 P.2d 881 (1988).

20. PRISONER PROCEEDINGS

§ 20.00 In-prison proceedings

New York Inmates at Attica Correctional facility filed petitions for writ of habeas corpus after they were subjected to disciplinary hearings and actions. The disciplinary actions were taken after correction officers signed misbehavior reports, which reports were used as evidence at the hearings. The six inmates charged that the misbehavior reports did not constitute substantial evidence and that the imposition of disciplinary actions on the basis of these reports violated their due process rights. Specifically, the six inmates claimed that the disciplinary determinations could not stand because under New York State law the misbehavior reports did not constitute sufficient evidence for an administrative determination and because the due process clause of the U.S. Constitution required a fact finder to hear testimony.

Held, affirmed as modified in part and reversed in part. The Court of Appeals found that the misbehavior reports signed by the correction officers formed a sufficient basis for disciplinary actions, and the imposition of those actions on the inmates based on such reports met due process rights requirements. The court ruled that the written reports were sufficiently relevant and probative to constitute substantial evidence supporting the determinations that the inmates violated the institutional rules of the Attica Correctional Facility. Each report signed by a correction officer described specifically an incident that

the officer who signed the report claimed to have witnessed and described specifically which rules each incident violated. In addition, each report was dated the same day as the incident and was endorsed or initialed by one or more other correction officers. The inmates were offered assistance in preparing for the disciplinary hearings, no witnesses were requested in advance, the inmates were advised of their rights, and the inmates offered little more than denials of the charges. In regard to the question of whether the federal Constitution requires a fact finder to hear testimony, the court ruled that due process of law does not require disciplinary board members to interview correction officers who write misbehavior reports that lead to the imposition of disciplinary actions. People ex rel. Vega v. Smith, 485 N.E.2d 997 (1985).

§ 20.40 Communications of prisoners —privacy rights (New)

"[The] Law of Prisoners' Rights: An Overview," by Fred Cohen, 24 CLB 321 (1988).

"Prisoners With AIDS: The Use of Electronic Processing," by Patricia Raburn, 24 CLB 213 (1988).

Arizona Defendant was convicted of first-degree murder. On appeal, he argued that a note he sent to another inmate while in jail on a separate charge was not admissible into evidence. Two months before the killing with which defendant was charged, defendant asked a detention officer to deliver a note to a fellow inmate. The officer read the note and turned it over to his supervisor. The note offered the inmate "some quick cash" if when he got out of jail he would get rid of the murder victim. Although published jail rules provided that incoming U.S. mail was regularly opened to check for contraband, defendant testified that he did not expect or intend that the detention officer would read the note. Defendant claimed that the reading of the note and its admission into evidence violated his Fourth Amendment right of privacy.

Held, affirmed. Defendant had no legitimate or reasonable expectation of privacy. Prison officials may inspect and examine the communications of inmates even in a prison without published regulations allowing them to intercept and read such communications. Even if defendant had some justifiable expectation of privacy in the note, it was outweighed by the legitimate security needs of the prison. State v. Jeffers, 661 P.2d 1105 (1983).

21. ANCILLARY PROCEEDINGS

CONTEMPT

§ 21.15 —Right to jury trial

Oregon Defendant was found guilty of contempt of court for violating a restraining order issued under the Oregon States Abuse Prevention Act that prevented him from molesting, bothering or interfering with a woman in that state. The woman complained that defandant had broken into her house, assaulted her, and subjected her to other abusive acts. Defendant moved for a jury trial, which motion was denied by the trial court. The court found the proceeding to be one of civil contempt, not criminal contempt, making defendant ineligible for a jury trial. Defendant was thereafter found guilty of four counts of contempt, two beyond a reasonable doubt and two by a preponderance of the evidence. Defendant was sentenced to thirty days in jail on one count, and the court postponed sentencing on the other three counts pending a presentencing investigation. The trial court subsequently suspended the sentence of imprisonment, and placed defendant on one-year probation for the other three counts, to run concurrently. On appeal, defendant argued that the trial court erred in ruling that the contempt proceeding was one of civil contempt and not of criminal contempt and that defendant was not entitled to a jury trial on state statutory and constitutional grounds. Specifically, he asserted that because the infraction with which he was charged called for a six months' period of imprisonment or a $300 fine, it was by definition an offense, as such entitling him to a jury trial under Oregon law. In addition, defendant argued that he was entitled to a jury trial on constitutional grounds, because the acts he commmitted in violation of the restraining order were traditional criminal acts, namely burglary and assault.

Held, conviction affirmed. The Oregon Supreme Court declared that the contempt proceedings were criminal in nature and not civil; nonetheless, defendant was not thereby entitled to a jury trial. Although criminal contempt is by definition an offense, not all offenses under Oregon law provide for imprisonment or entitle a defendant to a jury trial. Under Oregon law, an offense may be an infraction if it is statutorily designated to be so or if it is punishable by only fine, forfeiture, suspension, or other civil penalty. Oregon law specifically states that a trial of any infraction shall be by a court without a jury. Defendant, charged with an infraction of the Abuse Prevention Act, was not entitled to a jury trial merely because the act provided for imprisonment as a sanction against its violation. As to defendant's constitutional argument, the court ruled that the proceeding in this case was exceptional in regard to Article I of the Oregon constitution's provision for a jury trial for criminal acts. The court stated that "the essence of criminal contempt is the violation of the court's order, not the nature of the act that violated the order." The court saw no valid distinction between criminal contempt proceedings based on whether the order was violated by a criminal or a noncriminal act. Defendant violated a restraining order entered pursuant to the Abuse Prevention Act, and was found guilty in this case of contempt of such order, not of assault and burglary. Thus, defendant was not entitled to a jury trial. State ex rel. Hathaway v. Hart, 708 P.2d 1137 (1985).

EXTRADITION PROCEEDINGS

§ 21.20 Extradition proceedings—requirements

Arkansas Defendant was placed on probation after pleading guilty to two felonies in Arkansas; subsequently, a petition to revoke his probation was filed, alleging that he had not reported to his probation officer. When defendant failed to appear at the hearing, an arrest warrant was issued. Defendant was thereafter convicted on another charge in California and sentenced to two years' imprisonment. A detainer, based on the outstanding Arkansas warrant, was placed on him. He then requested a final disposition of the alleged probation violation under the Interstate Agreement on Detainers Act, to which both Arkansas and California are signatories. His request for extradition and trial was denied, and he was not returned to Arkansas for a hearing until eight months had passed. He then moved to dismiss the petition, alleging that the Interstate Agreement requires the State to dispose of the complaint against him within 180 days of his request for final disposition. The hearing court denied defendant's dismissal motion, finding that the underlying felony charges had already been tried and that a probation revocation proceeding is not within the provision of the Interstate Agreement.

Held, affirmed. The Arkansas Supreme Court found that the Interstate Agreement applied only to detainers lodged against a prisoner which are based upon untried indictments, informations, or complaints. The probation revocation proceeding was instituted against defendant for failing to report to his probation officer and, as defendant had been convicted of the underlying felonies and the probation violation did not involve commission of a new crime, "there was nothing 'untried' within the meaning of the statute." The court concluded that "a charge of violation of probation, absent an allegation of the commission of an indictable offense, is not an 'untried indictment, information, or complaint' within the scope and meaning of the Interstate Agreement on Detainers Act." Padilla v. State, 648 S.W.2d 797 (1983), 20 CLB 74.

Florida Defendant was convicted and sentenced for attempted armed robbery and first-degree murder. Defendant had gone into a shop and attempted to take a gold chain from the owner, who had resisted and was shot twice. Defendant was later charged with attempted armed robbery and first-degree murder. He was extradited from California, where he was serving a sentence for a murder that had occurred subsequent to this offense. Florida authorities obtained his transfer under the Interstate Agreement on Detainers (IAD). Defendant argued that because he was not brought to trial on the instant charges within 180 days after requesting final disposition of the charges, his motion for discharge was improperly denied. He maintained that although the Florida authorities had never received notice of his demand for final disposition, he had substantially complied with the terms of the IAD by completing and sending a form containing written notice and request for final disposition on the pending Florida charges to the district attorney and judge in California. Defendant also took the position that because the request for final disposition was returned to him via the officials of the institution where he was incarcerated, the

warden or his agents were aware of the form and thus had a duty to forward it to the appropriate Florida officials.

Held, affirmed. The court stated that defendant failed to meet even a substantial compliance standard with regards to the IAD. If a prisoner makes a good faith effort to bring himself within the IAD's purview, and omits nothing essential to the IAD's operation, then his failure of strict compliance will not deprive him of its benefits. The Florida officials, however, never received the information necessary to process the detainer. The court rejected defendant's claim that the California warden failed to fulfill his obligation under the IAD. A custodial officer has no duty to forward a notice and request for disposition to the receiving authorities until a request is given to him by the prisoner. The court concluded that there could be no substantial compliance on the part of a prisoner absent actual notice to the receiving authorities or a clear failure by the sending authorities to carry out their obligations under the agreement. Torres-Arboledo v. State, 524 So. 2d 403 (1988).

Washington Defendant was convicted of negligent homicide in Washington. He disappeared before sentencing, and a bench warrant was issued for his arrest. It was subsequently learned that defendant had been convicted of robbery and was serving his sentence at a federal penitentiary in Kansas. Washington officials filed a detainer for defendant under the Interstate Agreement of Detainers (IAD). He received a copy of it, although he was not informed of his right to request a speedy disposition of his case, nor were his requests forwarded after being informed of those rights. The officials eventually did forward his request, but not in accordance with the IAD, which says that the trial must commence within 180 days of the request for disposition. Defendant claimed the case should be dismissed because sentencing did not occur within 180 days of his request.

Held, affirmed. The court said that Congress intended the IAD to apply to detainers filed in connection with criminal charges, not post-conviction proceedings. In this case, defendant's trial had begun before his imprisonment in the other state. Therefore, if a convicted defendant is returned for sentencing on a detainer more than 180 days after his request, his trial has commenced within the time period, regardless of the fact that the trial is not complete until sentencing. State v. Barefield, 756 P.2d 731 (1988).

JUVENILE PROCEEDINGS

§ 21.40 Right to be treated as a juvenile

Washington Defendants, sixteen years and seventeen years of age, were convicted of first-degree felony-murder. After defendants were arrested for robbing and killing an eighty-two-year-old man, the state filed criminal informations in juvenile court, charging each defendant with first-degree robbery and first-degree felony-murder. At the same time, the state also filed a notice of its intent to seek a declination of juvenile court jurisdiction, so that the cases could be transferred to adult criminal court for trial. Defendants sought to enter guilty pleas in juvenile court, but the judge held that defendants had no right to do so prior to the declination hearings. The declination hearings were held, and both defendants were remanded to

adult court for trial. Thereafter, one defendant entered a plea of guilty in the adult court and the other was found guilty after a jury trial. Defendants appealed, asserting a right to plead guilty in juvenile court.

Held, affirmed. Although Washington law grants juveniles the right to plead guilty in juvenile court, that right is subject to the state's right to request a declination hearing if the defendant is sixteen or seventeen years of age and has committed a class A felony. The court construed the language of the declination statute to require that the issue of jurisdiction over a juvenile be resolved as a prerequisite to any further proceedings on the merits, either in juvenile or adult criminal court. Thus, the juvenile court could not accept the guilty pleas as long as the declination motion was pending. State v. Frazier, 661 P.2d 126 (1983) (en banc).

West Virginia Defendant pleaded guilty and was convicted of aggravated robbery. Defendant, who was eighteen years old at time of the offense, was sentenced to the state penitentiary for a determinate term of ten years. Defendant filed an appeal of the trial court's determination that it had no jurisdiction to suspend the sentence and commit defendant to a youthful offender center, as provided by a state penal code, because he pleaded guilty to aggravated robbery, a criminal offense punishable by life imprisonment. Defendant had also used a firearm in the commission of his crime.

Held, reversed and remanded. The West Virginia Supreme Court held that pursuant to penal statutes, defendant who had attained his sixteenth birthday but had not reached his twenty-first birthday at time he committed the crime was eligible for suspension of sentence and commitment to a youthful offender center, and trial court had jurisdiction to suspend defendant's sentence. Addressing the lack of an express provision for a life term for aggravated robbery that the state argued defendant was punishable for, the court cited Thomas v. Leverette (273 S.E.2d 364 (W. Va. 1980)), which established that aggravated robbery was not a "capital offense" for the purpose of the state penal code, which excluded from the juvenile jurisdiction of the circuit court juveniles charged with crimes that would be "capital offenses" if committed by adults. Since the legislature had authorized the courts to consider special treatment of youthful offenders for the goal of reforming or rehabilitating such offenders, and it had not foreclosed eligibility for such treatment by expressly providing in the aggravated robbery statute for a maximum sentence of life imprisonment, defendant was eligible for suspension of his sentence and confinement to a youthful offender center for not more than two years. At that time, he would be placed on "probation" unless he proved to be unfit or had not satisfactorily completed the center's training program, in which case the court could impose the original sentence. State v. Turley, 350 S.E.2d 696 (1986), 23 CLB 398.

§ 21.50 Use of juvenile's records

New York Department of probation appealed decision forbidding mention of sealed documents that refer to prior arrests. After a juvenile was arrested for robbery, the court ordered the probation department to provide an updated Investigation and Report (I&R) for the dispositional hearing. The I&R

mentioned two prior arrests that were discussed in sealed reports. The juvenile contended that the sealing provisions of the Family Court Act requires that sealed documents not be included in I&R, and therefore the mention of those arrests should be removed.

Held, affirmed. The court noted that the legislature refused to allow sealed documents to be used by the courts, and it refused to establish a precedent contrary to the wishes of the legislature. Alonzo M. v. City Dep't of Probation, 532 N.E.2d 1254 (1988).

§ 21.55 Juvenile proceedings—sufficiency of charge

New Jersey The state charged a juvenile with delinquency based on sexual assaults committed upon a seven-year-old female on "diverse dates in January 1983 through August 1984." The trial court dismissed the complaint with prejudice because the twenty-month period was too inexact to permit defendant to prepare his defense. On appeal, the state argued that defendant was not entitled to more specific dates, and the state's prosecution outweighed any danger of prejudice to defendant. The New Jersey Superior Court affirmed in part and vacated in part, stating the complaint was too inexact in regard to the time of the offense to permit preparation of an adequate defense. The state appealed.

Held, reversed and remanded. The Supreme Court of New Jersey held that a failure to state a specific date of offense in the complaint did not require dismissal of the complaint. Because the precise date on which the sexual assault occurred was not an element of the crime charged, the date need not have been specified in the complaint, even though state statute called for its inclusion in a juvenile complaint. In deciding whether the juvenile had received fair notice of the charges against him, the court must have initially determined if the state had disclosed all information regarding the crime charged and then have balanced the juvenile's right to fair notice against the state's interest in prosecuting child molesters and protecting a vulnerable class of victims. The court did not enunciate a formula to determine this balance, stating only that the trial court must satisfy itself that all sources of information that would narrow the time frame of the crime charged have been exhausted. That an alibi defense suffered because of an inexact time frame was not a sufficient basis to dismiss the complaint. State in Interest of K.A.W., 503 A.2d 888 (1986), 23 CLB 292, reversed and remanded, 515 A.2d 1217 (1987).

§ 21.65 —Right to due process

Arizona Defendant, a thirteen-year-old male, was arrested for sexual abuse and sexual conduct with a fifteen-year-old girl. The defendant had a mental age of nine or ten years. A state statute provides that where a person is less than fourteen years of age at the time of the criminal conduct charged, the state must submit "clear proof that at the time of committing the conduct charged the person knew it was wrong." Defendant was charged with delinquency by a petition filed in juvenile court for his alleged act in the sexual abuse and sexual conduct incident. During trial review, defendant denied the allegations of the petition and, through counsel, requested a hearing to determine his legal capacity to understand the wrongfulness of his conduct pursuant to the state statute. The

state opposed the request for a hearing on the grounds that the statutory section is inapplicable to delinquency proceedings. On appeal, the issue presented was whether the statutory provisions in the criminal code are applicable to delinquency proceedings in juvenile court.

Held, relief denied. The majority of the Supreme Court of Arizona en banc concluded that the legislature did not intend for the criminal code provision creating a presumption of incapacity for children under 14 years of age to apply to juvenile proceedings because the provisions for disposition of juvenile offenders have always been separate from the criminal code. Therefore, the court concluded that the presumption of incapacity for children under 14 years of age is not a due process safeguard for all children accused of criminal behavior, whether charged in an adult criminal proceeding or in juvenile court. Gammons v. Berlat, 696 P.2d 700 (1985).

California A minor defendant sought a writ of mandamus to compel the respondent court to vacate an order declaring her unfit to be tried in juvenile court. She contended that the court erred in refusing to grant her immunity from use at trial of any statements she made in the fitness hearing or to her probation officer. The question on appeal was whether prior California law, which provided for such use immunities, was nullified by Section 28(d) of the California constitution, an amendment adopted at a 1982 election. The People filed a murder charge in juvenile court because defendant was 17 years old at the time. Subsequently, the People moved to have her declared unfit for juvenile court proceedings. At the fitness hearing, the minor presented no evidence. She declined to testify on advise of counsel, and her attorney chose not to introduce a psychiatric evaluation prepared for the hearing on the ground that any incriminating statement made by her at the hearing could be used against her at a subsequent criminal trial. The probation officer concluded that she was not amenable to treatment in the juvenile system. The respondent court agreed because of the gravity of her offense and the unlikelihood of her rehabilitation. Murder charges were pending against her in the superior court.

Held, peremptory writ issued. The California Supreme Court, en banc, held that Section 28(d) does not require that testimony a minor gives at a fitness hearing or statements he makes to his probation officer may not be used against him at a subsequent trial of the offense. The use immunities embodied in this rule were found to be mandated by the state constitutional privilege against self-incrimination. Ramona R. v. Superior Court (People), 693 P.2d 789 (1985).

Kansas Defendant was convicted of felony-theft and conspiracy to commit felony-theft. Defendant, who was seventeen years old, was initially charged as a juvenile offender. The state subsequently filed a motion for a waiver of the court's jurisdiction, under the Kansas juvenile offenders code, and sought to try defendant as an adult. The court appointed counsel for defendant, and set a hearing date. After two continuances requested by counsel were granted, a hearing date was rescheduled. On that date, counsel appeared, but defendant and her parents did not. Counsel stated that defendant was not present because she

had mistakenly been arrested that morning on a warrant issued for her sister. Despite defendant's absence, the court allowed the hearing to proceed, without any objection from counsel, who cross-examined the state's witnesses, but declined to testify on defendant's behalf. The court found that defendant should not be considered a juvenile, and waived its jurisdiction. The juvenile complaint was dismissed, and criminal charges were filed against defendant. On appeal, defendant argued that her due process rights were violated, because she was not present when the hearing was held.

Held, conviction affirmed. The Kansas Supreme Court found that since defendant was represented by counsel, her due process right was not denied, although she was involuntarily absent from the hearing. The court ruled that when the statutory provisions requiring a hearing, notice of same, and the right of the juvenile to be present at such hearing are met, along with the requirement of counsel, due process has been satisfied, even though the juvenile "fails" to appear. State v. Muhammad, 703 P.2d 835 (1985).

New Hampshire Defendant appealed her certification for trial as an adult on charges stemming from her involvement in an armed robbery at which she allegedly had been the gunman. At issue was whether the due process clauses of the constitutions of New Hampshire and the United States require a transfer of a juvenile to superior court for adult prosecution to be based on clear and convincing evidence. Defendant claimed that due process under the New Hampshire constitution and the Fourteenth Amendment to the U.S. Constitution mandates a showing of clear and convincing evidence that transfer is appropriate. Defendant characterized such proof as a balancing of three factors: the private interest affected by the proceeding; the risk of error created by the existing procedure; and the public interest in maintaining the procedure. The state argued that in the absence of a statutorily mandated standard of proof, the appropriate standard is proof by a preponderance of the evidence, because a juvenile certification hearing is investigatory in nature and does not determine the guilt or innocence of the defendant.

Held, affirmed. The court said that due process was satisfied in this case. The court agreed with the state that a juvenile certification hearing is an investigatory proceeding to determine the appropriate legal process for the defendant. In the context of a juvenile certification proceeding, no similar fundamental liberty interest or compelling individual interest attaches. The court said that a minor has no constitutional right to be tried as a juvenile, but rather juvenile treatment is a product of statutory grant. The court saw no compelling due process justification for limiting that discretion further by imposing a heightened standard by which the district court must marshal a quantum of evidence to support a transfer decision. State v. Riccio, 540 A.2d 1239 (1988).

§ 21.75 Sentencing and punishment

Nevada Defendant, a thirteen-year-old girl, was charged with battery of a schoolmate and committed to a training center for one year. Although defendant had no record of adjudicated delinquency and there was no indication that she had committed a serious

or aggravated battery on the schoolmate, defendant was arrested and placed in detention for a month before a dispositional hearing was conducted in the juvenile division. The only evidence presented at the hearing was a report by the juvenile authorities, who, in citing that defendant had a stable home life and that her problems seemed to stem from school, recommended that the child be placed on probation and given counseling, which defendant's attorney suggested be supervised through the child's church. Although the district attorney agreed with these recommendations, the trial judge nonetheless signed an order committing defendant to a one-year sentence in a training center, and defendant appealed.

Held, reversed and remanded. The Supreme Court of Nevada held that in all cases in which disposition included an order or commitment to a training center or comparable institution, the judge of the juvenile division must state on the record, in the presence of juvenile, the reasons for selecting a disposition and why it served the welfare of child, the interest of state, or both. Here, the judge showed neither why taking defendant away from her "lovely home and caring family" would serve the child's interest nor how incarcerating her would benefit the state. The defendant, at worst a misdemeanant, did not deserve long-term incarceration. Requiring juvenile court judges to state reasons on the record for decisions to incarcerate promoted a perception of fairness in proceedings and enabled the delinquent to understand the punitive basis of the court action. Since no one on behalf of the state urged or suggested committing defendant to the training center, the only conceivable precipitating event for the sentence occurred when the child smiled in the courtroom. The concern over what the judge perceived to be the child's flippant attitude did not justify the penalty imposed. Glenda Kay v. State, 732 P.2d 1356 (1987).

New York Newspapers, upon being refused information as to the sentences in two juvenile offender cases, commenced Article 78 proceedings seeking both a declaration that the actions of juvenile courts in closing the sentencing proceedings were illegal and a direction that portion of the sentencing transcript, or the sentence itself, be revealed.

Held, order that the sentences be revealed affirmed. The court ruled that the youthful offender law does not vest courts with discretion to conduct private sentencing proceedings in felony cases. The court added that it is improper for sentencing proceeding to be closed to the press and public simply because the defendant is a youthful offender. Under the statute, an accusatory instrument against a juvenile apparently eligible for youthful offender status must be sealed; and the trial court may in its discretion close that youth's arraignment and all subsequent proceedings to the public. CPL 720.15(1)-(2). But if the youth has been charged with a felony or is a repeat offender, under subsection (3), the provisions of subsections (1) and (2) "shall not apply." Subsection (3) removes the cloak of privacy from not only the adjudicatory portion of felony cases involving youths, but from the dispositional phases as well. Capital Newspapers v. Moynihan, 519 N.E.2d 825 (1988).

COMMITMENT PROCEEDINGS

§ 21.95 Evidentiary rules applicable at commitment hearing

New Hampshire State appealed the order dismissing the petition for involuntary commitment of defendant, who had murdered his uncle. The trial court said the state failed to prove dangerousness beyond a reasonable doubt, the requirement for a civil commitment. At issue in the appeal was the appropriate burden of proof that the state or any other petitioner had to satisfy in demonstrating that someone should be involuntarily committed.

Held, reversed and remanded. The court noted that in 1984, an amendment to the state constitution said that clear and convincing evidence that a person is potentially dangerous to himself or to others and that a person suffers from a mental disorder is the evidentiary requirement for a criminal commitment. The court noted that in both a civil and criminal commitment, respondent may be deprived of his liberty by commitment against his will. The court could not justify a higher burden of proof for one kind of commitment over another. Therefore, the court ruled that the petitioner's burden of proof in commitment proceedings shall be that of clear and convincing evidence rather than beyond a reasonable doubt. In re Sanborn, 545 A.2d 726 (1988).

Part III – FEDERAL CRIMES

22. VALIDITY OF CRIMINAL STATUTES

§ 22.00 Statute held not void for vagueness

Court of Appeals, 9th Cir. Defendants were convicted of violating 41 C.F.R. §§ 101-20.302 and 101-20.315, regulations prohibiting entry upon public property after normal working hours. One day during normal working hours defendants, members of an organization whose goal was the passage of the California Marijuana Initiative, set up a table on the corner of federal building property. The group sought to hand out leaflets and collect petition signatures in support of the initiative. It announced an intention to occupy the area continuously for seventeen days. One night, after refusing to follow orders of federal officials to vacate the premises, the group members were arrested. Defendants argued that the regulations were unconstitutionally vague and did not clearly define prohibitions or specify a standard of conduct. They argued that the phrase "entry upon property" does not warn against entry during normal working hours and presence afterwards. They also attacked as imprecise the phrase "normal working hours."

Held, the regulations were not unconstitutionally vague. Some lack of specificity in language does not render a statute void for vagueness if it gives fair notice to those who might violate it. The phrases "entry upon property" and "normal working hours," as they are commonly understood, encompass defendants' conduct. United States v. Christopher, 700 F.2d 1253, cert. denied, 461 U.S. 960, 103 S. Ct. 2436 (1983).

§ 22.05 —Obscenity

U.S. Supreme Court After defendant was convicted in Illinois state court of three counts of obscenity, the Supreme Court of Illinois denied review, and he petitioned for certiorari. The trial jury had been instructed that they must find that the magazines in question were without value and that the issue of whether the magazines were obscene was to be determined by ordinary adults in the whole state of Illinois.

Held, vacated and remanded. The standard to be applied in determining the "value" question was not a community standard; rather the issue was whether a reasonable person would find such value in the material taken as a whole. The Court thus found that the instruction violated the First and Fourteenth Amendments. Pope v. Illinois, 107 S. Ct. 1918 (1987).

§ 22.10 Statute held void for vagueness

Court of Appeals, 1st Cir. After defendant was convicted in the district

court of violating the Currency Transaction Reporting Act and related offenses, he appealed on the ground that he had not been properly forewarned of the criminal consequences of his acts.

Held, conviction reversed and indictment dismissed. The First Circuit ruled that the Currency Transaction Reporting Act (31 U.S.C. § 5311) imposed no duty on the defendant to inform the bank of the structured nature of the transactions in which he purchased three checks from one bank in one day, none of which exceeded $10,000 individually. The court explained that the Constitution requires that, before any person is held responsible under the criminal laws, the conduct prohibited must be outlined with sufficient specificity to forewarn of the proscription of such conduct, especially where the confusion and uncertainty in the law has been caused by the government itself. United States v. Anzalone, 766 F.2d 676 (1985).

23. CONSTRUCTION AND OPERATION OF CRIMINAL STATUTES

§ 23.00 Legislative intention as controlling

U.S. Supreme Court After defendant was convicted in the district court of unlawfully attempting to destroy by fire a building used in interstate commerce, he appealed on the ground that the subject two-unit apartment building being rented at the time of the fire was not "in" interstate commerce. The court of appeals affirmed.

Held, conviction affirmed. The Supreme Court found that the subject building destroyed in the fire was being used in an activity affecting interstate commerce. The Court reasoned that the legislative history indicated that Congress intended to protect all "business property," and the rental of real estate is unquestionably an activity that affects interstate commerce for purposes of the statute. Russell v. United States, 105 S. Ct. 2455 (1985).

24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 24.05 Assault

U.S. Supreme Court Defendants were arrested for assaulting an undercover

Secret Service agent with a loaded pistol in an attempt to rob him of $1,800 in "flash money" that the agent was using to buy counterfeit currency. After a jury trial, defendants were convicted of violating 18 U.S.C. § 2114, which proscribes the assault and robbery of any custodian of "mail matter, or of any money or other property" of the United States. The Court of Appeals for the Eleventh Circuit affirmed the convictions and certiorari was granted.

Held, convictions affirmed. The Supreme Court found that the legislative history of Section 2114 indicates that there was no intent by Congress to limit the statute to postal crimes and that government currency is "money or other property of the United States" under the statute. Garcia v. United States, 105 S. Ct. 479 (1984), 21 CLB 256.

§ 24.10 Bail jumping

Court of Appeals, 6th Cir. After being convicted of uttering and publishing U.S. Treasury instruments, defendant was released on bond. Six months after he failed to surrender for service of his sentence, he was apprehended while living in another state under an assumed name. His attorney had written letters to him notifying him of the date of his appearance and the failure of his appeal; the last of these letters was returned as undeliverable, and defendant did not advise his attorney of his location after he disappeared. Defendant was convicted of bail jumping and argued on appeal that the conviction could not stand because he never received actual notice from the court that he had been ordered to appear.

Held, conviction affirmed. After pointing out that defendant was not a stranger to criminal charges and procedures, the court found that proof of his actual knowledge was not required because he was deemed to have constructive knowledge through delivery by his attorney of the required notice. While a better district court procedure would have been to send the pertinent notice to defendant's last known address by registered or certified mail, such a procedure was not required here, particularly in light of the evidence that defendant had absconded and was attempting to conceal himself. United States v. Yates, 698 F.2d 828, cert. denied, 460 U.S. 1073, 103 S. Ct. 1532 (1983).

§ 24.15 Bank-related crimes generally

Court of Appeals, 2d Cir. The district court granted defendants' motion to dismiss several counts of an indictment charging violations of the reporting requirements of the Bank Secrecy Act, 31 U.S.C. § 5311 et seq., and they appealed.

Held, dismissal vacated and case remanded. The Second Circuit concluded that the allegations in the indictments, if proven, would be sufficient to establish that defendants jointly engaged as a business in dealing in currency within the scope of the Bank Secrecy Act. The court found that since defendants helped a third party to place large amounts in foreign bank accounts without reporting such transfers, defendants could be construed to be a "financial institution" within the meaning of the statute, even though they themselves held no interest in the foreign bank accounts. United States v. Goldberg, 756 F.2d 949 (1985), 21 CLB 470.

Court of Appeals, 4th Cir. After defendant was convicted in the district

court of making materially false statements on a loan application to a federally insured bank, he appealed on the grounds, among other things, that the bank would have made the loan to him regardless of the misrepresentation.

Held, conviction affirmed. The Fourth Circuit stated that the fact that the manager of the bank was making the loan to defendant to improve the branch's accounting status rather than because of defendant's misrepresentation did not preclude conviction of defendant for making materially false statements on a loan application. The court reasoned that the elements of the offense were met as long as the misrepresentations had the capacity to mislead the bank. United States v. Whaley, 786 F.2d 1229 (1986).

Court of Appeals, 4th Cir. The government appealed from an order of the district court vacating its prior ruling finding defendant guilty of misapplication of bank funds under 18 U.S.C. § 656.

Held affirmed. The Fourth Circuit held that since the check presented to the bank's board of directors, to persuade the board to extend a new loan to a bank customer, was worthless paper, no misapplication of funds took place, since the bank gave nothing of value for the check. The court further ruled that the defendant's misrepresentation of the circumstances surrounding the check to obtain board approval did not constitute value from the bank to the maker of the check. United States v. Kellerman, 729 F.2d 281 (1984), 20 CLB 467.

Court of Appeals, 4th Cir. After defendant was convicted in the district court for alleged violation of the statute governing loan and credit applications (18 U.S.C. § 1014) by conspiring to aid and abet a check-kiting scheme, he appealed on the ground that the evidence did not constitute a federal offense.

Held, reversed and remanded. The Fourth Circuit concluded that a check-kiting scheme is not an offense within the terms of the statute proscribing the making of a false statement or report for purposes of influencing a bank insured by the FDIC. The court thus found that defendant's efforts to fraudulently induce a bank to extend credit did not fall within the statute. The court commented that Section 1014 was not intended by Congress to be a "national bad check law." United States v. Carlisle, 693 F.2d 322 (1982), 19 CLB 265.

Court of Appeals, 7th Cir. Defendant was convicted of misapplication of funds of a federally insured bank where he had been an officer. On appeal, he argued that there was insufficient evidence, particularly of intent, to support a conviction. Defendant had arranged some business loans for co-defendant, even though the latter had already exceeded his $10,000 borrowing limit. To circumvent the limit, defendant arranged the loans in the names of third parties who were unaware of the use of their names. Some of the loan proceeds were kicked back to defendant. Defendant argued that proof of requisite intent was lacking because he did not intend to injure the bank, but rather to ameliorate co-defendant's financial plight.

Held, affirmed. Defendant had the requisite intent for the crime of misapplication of funds. Regardless of his motive, defendant knowingly engaged in conduct that had a natural tendency to injure or defraud the bank. A reckless disregard of a bank's in-

terests is equivalent to an intent to injure them. Uncontested evidence showed that defendant engineered a scheme of false documentation and kickbacks for the benefit of himself and co-defendant, and to the bank's detriment. United States v. Hansen, 701 F.2d 1215 (1983).

§ 24.20 Bank robbery

U.S. Supreme Court Defendant was convicted in the district court of bank robbery, bank larceny, and assault during a bank robbery by the use of a dangerous weapon. The Court of Appeals for the Fourth Circuit affirmed, and certiorari was granted.

Held, conviction affirmed. The Court declared that an unloaded handgun is a "dangerous weapon" within the meaning of the federal bank robbery statute, and therefore the display of an unloaded handgun during a bank robbery warranted an enhanced penalty for assault by use of a "dangerous weapon." McLaughlin v. United States, 106 S. Ct. 1677 (1986).

U.S. Supreme Court Petitioner opened an account at a savings and loan institution using his own name, but giving a false address, birth date, and social security number. Later that day, at another branch, he deposited into his account a third party's $10,000 check on which the endorsement had been altered to show petitioner's account number. Subsequently petitioner closed his account and was paid the total balance in cash. He was convicted of violating Section 2113(b) of the Bank Robbery Act after trial in Federal District Court. The Court of Appeals ultimately affirmed, concluding that the statute embraces all felonious takings—including obtaining money under false pretenses.

Held, affirmed. The Bank Robbery Act was not limited to common-law larceny, but also proscribed the crime of obtaining money under false pretenses. The Court reasoned that the congressional purpose was to protect banks from those who wished to steal banks' assets, even though no force was used in doing so. Bell v. United States, 462 U.S. 356, 103 S. Ct. 2398 (1983), 20 CLB 60.

Court of Appeals, 2d Cir. After defendant was convicted in the district court for armed robbery of a federally insured savings and loan association, he appealed on the ground that the federal statute did not apply to the bank in question.

Held, conviction affirmed. The Second Circuit concluded that, for a bank to fall within the protection of the federal bank robbery statute, a savings and loan association need not be specically insured against bank robbery by the Federal Savings and Loan Insurance Corporation. Lord v. United States, 746 F.2d 942 (1984), 21 CLB 257.

Court of Appeals, 5th Cir. Defendant had been arrested for robbery and wounding a police officer. Count I of the indictment charged a violation of 18 U.S.C. § 924(b) for receipt of a firearm with the intent to violate 18 U.S.C. § 2113, and alleged in part, "Paul M. Trevino, Jr. with intent to commit an offense . . . that is, bank robbery, in violation of Section 2113 United States Code . . . received a firearm." Section 2113 makes robbery of a bank's property a crime, and Subsection (f) of the Section defines "bank." Convicted below, defendant argued on appeal that the government's failure to prove that the robbery involved a "bank" as defined in

Section 2113(f) constituted insufficiency as a matter of law, because the bank's Section 2113(f) status was an essential element of the crime with which Trevino was charged and convicted.

The essence of the government's argument in response was that it is unnecessary to prove every element of a Section 2113 offense in order to obtain a valid conviction under Section 924(b). Thus, the issue presented to the court is whether, in a prosecution under Section 924(b), every element of the underlying crime must be proved in order to obtain a valid conviction.

Held, reversed; Count I dismissed. The government's contention that it had to prove only the elements of Section 924(b) and not those of Section 2113 was without merit. The government's assertion that the definition of "bank" under Section 2113(f) exists only to give federal courts jurisdiction over the offense was not valid. The definition constitutes an essential element of the criminal offense when a defendant is charged directly with a violation of Section 2113. The court quoted a number of decisions that addressed the nature of the requirements of Section 2113(f) and that unequivocally stated that the Section's purpose was two-fold. Since no evidence had been submitted on the Section 2113 (f) issue, the court was compelled to dismiss Trevino's conviction under Count I of the indictment. United States v. Trevino, 720 F.2d 401 (1983).

§ 24.25 Bribery

U.S. Supreme Court After defendants were convicted in the district court of violating the federal bribery statute, they appealed on the ground that they were prosecuted improperly under the statute, and the court of appeals affirmed.

Held, affirmed. The U.S. Supreme Court affirmed, holding that executives of a private nonprofit corporation having operational responsibility for the administration of a federal housing grant program were "public officials" within the meaning of the federal bribery statute. The Court explained that while the mere presence of some federal assistance does not bring a local organization and its employees within the jurisdiction of the statute, an individual is a "public official" if he possesses some degree of official responsibility for carrying out a federal program or policy. Dixon v. United States, 104 S. Ct. 1172 (1984), 21 CLB 462.

§ 24.35 Civil rights violations

U.S. Supreme Court Defendants were convicted in the U.S. District Court for the Eastern District of Michigan of holding two mentally retarded men (who were found working on defendants' farm in poor working and living conditions for little pay), in involuntary servitude and of conspiring to deprive them of their constitutional right to be free from involuntary servitude. Another defendant was convicted on a conspiracy charge. Defendants appealed. The court of appeals reversed and remanded for a new trial, reasoning that the trial court's definition of "involuntary servitude," which included psychological coercion, was too broad. Certiorari was granted.

Held, court of appeals affirmed, and case remanded. The Supreme Court declared that for the purposes of criminal prosecution, the term "involuntary servitude" necessarily means a condition of servitude in which the victim is

forced to work for the defendant by the use or threat of physical restraint or physical injury, or the use or threat of coercion through the law or the legal process. United States v. Kozminski, 108 S. Ct. 2751 (1988).

Court of Appeals, 5th Cir. A civil rights action was brought under 42 U.S.C. § 1983 against police officers for allegedly arresting and detaining plaintiff without probable cause and by use of unreasonable force. Plaintiff was arrested for "public intoxication" and for "disturbing the peace" after standing near his home, drinking beer, and playing a car stereo. Defendants argued that they had acted in good faith and with a reasonable belife in the lawfulness of the arrest. Judgment was entered for the defendants, and plaintiff appealed.

Held, affirmed. Defendants were entitled to "good faith" immunity from Section 1983 liability. Once defendants asserted and established the affirmative defense of qualified immunity, the burden shifted to plaintiff to rebut the "good faith" defense. Plaintiff did not meet his burden of proof because he did not establish that the arrest, even if made without probable cause, violated well-settled law. Saldana v. Garza, 684 F.2d 1159 (1982), cert. denied, 460 U.S. 1012, 103 S. Ct. 1253 (1983).

§ 24.43 Computer fraud and related crimes (New)

"Contemporary Legislation Governing Computer Crimes," by B. J. George, Jr., 21 CLB 389 (1985).

§ 24.45 Conspiracy

Court of Appeals, 2d Cir. After defendants were convicted in the district court of conspiracy to retaliate against a witness, they appealed on the ground that the evidence to prove a conspiracy was insufficient.

Held, affirmed in part and reversed in part. The Second Circuit found that the convictions for conspiracy to retaliate against a witness had to be reversed, since there was no showing of any formal or express agreement to retaliate against the witness. One of defendants simply passed along a message to "take care of" a witness, which was not enough to show there was a tacit understanding that they would deal harshly with "squealers." United States v. Wardy, 777 F.2d 101 (1985), 22 CLB 278.

Court of Appeals, 2d Cir. After defendant was convicted in the district court of conspiracy to distribute heroin, he appealed on the ground that the evidence supporting his conviction was insufficient.

Held, affirmed in part and reversed in part. The Second Circuit found that the mere evidence that defendant helped a willing buyer locate a willing seller is insufficient to establish the existence of an agreement between the facilitator and the seller. The only evidence introduced against defendant was that he spoke to an unidentified individual, who then approached the undercover officer and consummated a drug deal. The court, however, affirmed the aiding and abetting conviction of defendant. United States v. Tyler, 758 F.2d 66 (1985), 21 CLB 469.

Court of Appeals, 2d Cir. Defendant was convicted in the district court of drug conspiracy, and she appealed on the ground that the government's evidence was legally insufficient.

Held, conviction reversed with direction to enter a judgment of acquittal. The Second Circuit concluded that the evidence that the defendant had been living in an apartment which was used as a "cutting mill" and that the defendant was found in the same room as the narcotics was insufficient to sustain her conviction for conspiracy to distribute narcotics. The court noted that the evidence showed that the defendant was recently arrived from Puerto Rico, accompanied by a child of tender years, and there was no evidence that she had any alternative living space available to her. United States v. Soto, 716 F.2d 989 (1983), 20 CLB 168.

Court of Appeals, 2d Cir. Defendant moved to dismiss a count of an indictment charging them with having conspired to maliciously damage or destroy a piano store by means of explosives, which the district court granted on the ground that there was no link to interstate commerce sufficient for federal subject-matter jurisdiction.

Held, reversed and remanded. The Second Circuit found that if the government could prove that defendants intended to destroy by means of explosive a business establishment used in activities affecting interstate commerce, then the threat to commerce was clear. The court thus found that federal jurisdiction does not depend on proof that the objective of the conspiracy had been or could have been achieved. The court further observed that the government should be given every opportunity to prove that any piano store in New York State was engaged in activity affecting commerce. United States v. Giordano, 693 F.2d 245 (1982), 19 CLB 263.

Court of Appeals, 3d Cir. Pension fund trustees and general counsel were convicted in the district court of mail fraud, RICO conspiracy, and accepting kickbacks. On appeal, they argued that the convictions should be reversed, since they were based on an "intangible right" theory under the mail and wire fraud statute, which had been stricken by the Supreme Court.

Held, affirmed in part, reversed in part, and remanded for resentencing. The Third Circuit ruled that while the mail and wire fraud counts charged the defendants with having defrauded the fund of the right to their honest and faithful services without any allegations of monetary loss, the RICO conspiracy convictions did not have to be reversed, since the jury instructions required that the jury find kickback violations in addition to mail and wire fraud violations by the union pension fund trustees. The court further found that the indictment, alleging that the trustees solicited and received kickbacks from a mortgage company in exchange for helping the mortgage company obtain $21 million in pension fund moneys, satisfied the RICO conspiracy requirement by identifying the mortgage company as the "enterprise" in alleging that the trustees were associated indirectly with that enterprise. United States v. Zauber, 857 F.2d 137 (1988).

Court of Appeals, 5th Cir. Defendant was indicted with two others for conspiracy to suborn perjury. After the acquittal at trial of his co-conspirators, defendant moved to withdraw his previously interposed plea of guilty to misprision of the conspiracy, claiming among other things that it would be an abuse of discretion to allow him to be punished for failing to report

the conspiracy when the conspirators themselves had gone free. On appeal, he raised the issue of whether a guilty plea to misprision of felony can stand independently of the underlying conspiracy violation. Defendant claimed that his misprision conviction was precluded by the rationale of the common-law rule that the conviction of only one defendant in a single conspiracy prosecution cannot be held if all other alleged co-conspirators in the same trial are acquitted.

Held, conviction affirmed. The court found that, while the traditional common-law rule still stands in the Fifth Circuit, several recent decisions have limited reliance on the rule except in its narrowest application. It was found not to be applicable to this case. The court pointed out the acquittal of one's alleged co-conspirators does not conclude the fact of their non-complicity, since it has long been recognized that criminal juries are free to render not-guilty verdicts because of compromise, confusion, or other irrelevant factors. The court found no justification to extend the rule to negate defendant's conviction, which was obtained after a thorough hearing and under a plea-bargain agreement prior to the acquittal of the co-conspirators. Finally, although motions for withdrawal for guilty pleas before the imposition of sentence should be liberally construed in favor of the accused, the court found that the district court did not abuse its discretion in refusing defendant permission to withdraw the plea. It pointed out that defendant obtained advantages due to his plea bargain, and that he freely acknowledged his guilt in testimony at his co-conspirators' trial. Thus, the court would not allow him to be insulated from the consequences of his own tactical judgment to plead guilty. United States v. Davila, 698 F.2d 715 (1983).

Court of Appeals, 7th Cir. After eight city sewer inspectors were convicted for violating the Racketeer Influenced and Corrupt Organizations Act (RICO) statute, they appealed on the grounds, among other things, that the receipt of illegal gratuities in violation of the Illinois official misconduct statute could not constitute predicate RICO violations.

Held, convictions affirmed. The Seventh Circuit found that the receipt of an illegal gratuity by a state official constitutes a RICO predicate act. The court reasoned that the unlawful gratuity statute proscribes bribery for the purposes of the RICO statute, since an unlawful gratuity is an attack on the integrity of public officials. The court further found that the jury need not have found that the defendants failed to perform an official duty to be liable under the RICO statute. United States v. Garner, 837 F.2d 1404 (1988).

Court of Appeals, 7th Cir. Defendant was convicted of conspiracy to commit racketeering. Defendant was co-owner, with her husband, of a company that represented property owners appealing real estate tax assessments. The evidence established that the company bribed various government officials, and that this practice continued after the death of defendant's husband. On appeal, defendant argued that a fatal variance existed between the allegations raised in the indictment and the proof offered at trial, in that, although the indictment charged a single conspiracy, the evidence established two separate conspiracies which were divided by her

husband's death. Some different participants were involved after that death.

Held, conviction affirmed. The court held that the mere fact that some conspirators withdraw from a conspiracy, or that the methods used to perpetrate the scheme change slightly, does not indicate that one conspiracy has ended and another begun or that a fatal variance exists when the indictment alleges the existence of a single conspiracy. United States v. Lynch, 699 F.2d 839 (1982).

Court of Appeals, 9th Cir. Defendants, employees of Local 47 of the American Federation of Musicians, were convicted of conspiracy under the Taft-Hartley statute (29 U.S.C. § 186 (b)(1)), for having received payments from a promoter of Latin American dances in return for their approval of visa petitions of alien musicians. The union, as a condition for such approval, required that promoters and employers agree to hire local union musicians on a "one-to-one" basis with the foreign musicians. The union relied on defendants as field representatives to enforce and monitor compliance with these "one-to-one"' agreements in the Local 47 area. Defendants contended that the evidence did not show a single conspiracy extending from 1968 to 1977, but rather two conspiracies.

Held, affirmed. The Ninth Circuit ruled that the finding of a single conspiracy was supported by sufficient evidence where the suspension of payments did not necessarily imply a termination of the conspiracy. The court reasoned that the suspension of payments was not sufficient evidence that the conspiratorial objectives were abandoned, and that a single, overall agreement of a single conspiracy need not be manifested by continuous activities. United States v. Bloch, 696 F.2d 1213 (1982), 19 CLB 376.

§ 24.65 Drug violations

"Drug Paraphernalia in Perspective: The Constitution and the Spirit of Temperance," by Daniel Katkin, Charles D. Hunt, and Bruce H. Bullington, 21 CLB 293 (1985).

Court of Appeals, 1st Cir. After defendant was convicted of importation of a controlled substance, she appealed on the grounds that she had no knowledge that the airplane on which she was a passenger with the narcotics was going to land in Puerto Rico on its way from Colombia to Switzerland.

Held, conviction affirmed. The First Circuit found that the government was not required to prove defendant knew she would be coming into the United States in order to establish the required intent to import. The court noted that the offense was complete the moment defendant landed in Puerto Rico knowingly in possession of cocaine. United States v. Mejia-Lozano, 829 F.2d 268 (1987), 24 CLB 178.

§ 24.70 —Sale

Court of Appeals, 3d Cir. Defendant was convicted of attempting to distribute phenyl-2-propanone (P-2-P) in violation of 21 U.S.C. § 846 (1976). A customer of defendant, when he was arrested by an agent of the Drug Enforcement Administration (DEA) for possession of metamphetamine and P-2-P, both being non-narcotic controlled substances, revealed that defendant had sold him the drugs. The customer had several telephone conversations with defendant in which defendant agreed to sell P-2-P to the customer and a DEA agent posing as

another customer. The conversations were tape-recorded by the DEA. After receiving a sample of the drug from defendant, the agent made the arrest. When in custody, defendant made a statement to DEA agents in which he identified the sample as P-2-P. After an indictment charging defendant with illegal distribution and possession of P-2-P was entered, the DEA discovered that the sample was not P-2-P or any other controlled substance. The government then obtained a superseding indictment charging defendant with intentionally attempting to distribute P-2-P. Defendant moved for an acquittal of his conviction on that charge on the ground of legal impossibility. The federal district court granted the motion for acquittal, and the government appealed.

Held, acquittal reversed. The legislative history of Section 846 shows that Congress did not intend the common-law definition of "attempt." Instead, it defined "attempt" to punish efforts to violate Section 846 regardless of impossibility. Thus, the distribution of a non-controlled substance constitutes an attempt to distribute a controlled substance under Section 846. The government proved that defendant believed he was distributing P-2-P, and that he distributed the substance knowingly. United States v. Everett, 700 F.2d 900 (1983).

Court of Appeals, 8th Cir. Defendant was convicted of conspiracy and distribution of narcotics. Defendant's accomplice had agreed to make a single sale of four ounces of methamphetamine to undercover police officers, but this was changed at the last minute and two separate sales were set up. The accomplice, after transferring the first two ounces, left the scene and returned about ten minutes later with the additional two ounces. Defendant complained that he was improperly convicted of two counts of distribution, arguing that the government divided what was a single distribution into two parts in order to obtain two convictions.

Held, conviction affirmed. The court looked to the face of 21 U.S.C. § 841(a)(1), which defines distribution as "delivery," i.e. "the actual, constructive, or attempted transfer of a controlled substance." When there are distinct physical acts of transfer, the court held, each such act is a "delivery" under the statute even though occasioned by a single financial plan. The court pointed out that the two distributions were arranged by defendant's accomplice, that the drugs were transferred separately for separate payment, and that there was no assurance that the accomplice would return after he made the first sale. Thus, held the court, there was evidence sufficient to establish two separate criminal acts. United States v. Weatherd, 699 F.2d 959 (1983).

§ 24.90 False statement to federal department or agency

U.S. Supreme Court Respondent was convicted in the district court of violating 18 U.S.C.A. § 1001 for making false statements furnished to a defense contractor-employer in connection with a Department of Defense security questionnaire. At trial, the district court rejected respondent's request for a jury instruction that the statement must have been made with knowledge that it related to a matter within the jurisdiction of a federal agency. The court instead charged that the government must prove that the respondent "knew or should have known" that the information was to be submitted to a

federal agency. The court of appeals reversed.

Held, reversed. The plain language and legislative history of 18 U.S.C.A. § 1001 established that proof of actual knowledge of federal agency jurisdiction is not required to obtain a conviction under the statute. The U.S. Supreme Court observed that any natural reading of Section 1001 establishes that the terms "knowingly and willfully" modify only the making of "false, fictitious, or fraudulent statements," not the circumstances that those statements be made in a matter within the jurisdiction of a federal agency. United States v. Yermian, 104 S. Ct. 2936 (1984), 21 CLB 75.

U.S. Supreme Court Defendant was indicted for making false statements to the FBI and the Secret Service. He allegedly had lied in telling the FBI that his wife had been kidnapped and in telling the Secret Service that his wife was involved in a plot to kill the President. The district court granted his motion to dismiss, and the Court of Appeals for the Eighth Circuit affirmed. Section 1001 of Title 18 makes it a crime knowingly and willfully to make a false statement "in any matter within the jurisdiction of any department or agency of the United States."

Held, reversed and remanded. A criminal investigation falls within the meaning of "any matter" under the statute, and the FBI and the Secret Service qualify as departments or agencies of the United States. The U.S. Supreme Court thus rejected the more restrictive interpretation of the term "jurisdiction" as used in Section 1001 meaning "the power to make final and arbitrary determinations" by finding that the term covers all matters confided to the authority of an agency or department. United States v. Rodgers, 466 U.S. 475, 104 S. Ct. 1942 (1984), 21 CLB 74.

U.S. Supreme Court Defendant engaged in a series of transactions seemingly amounting to "check kiting" between his accounts in federally insured banks. Defendant was convicted in federal district court of check kiting and misapplication of bank funds in violation of 18 U.S.C. § 1014. On appeal, the Fifth Circuit affirmed. Certiorari was granted.

Held, reversed and remanded. The Supreme Court held that since, technically speaking, a check is not a factual assertion and cannot be characterized as "true" or "false," the petitioner's deposit in federally insured banks of several checks that were not supported by sufficient funds did not involve the making of a false statement within the meaning of the statute. The court thus found that petitioner's conduct was not proscribed by Section 1014, observing that there was nothing in the legislative history to support a broader interpretation of the statute. Williams v. United States, 458 U.S. 277, 102 S. Ct. 3088 (1982), 19 CLB 72.

Court of Appeals, D.C. Cir. After his conviction in the district court for making false statements in matters within the jurisdiction of a department or agency of the United States (18 U.S.C. § 1001), defendant, a former congressman, appealed on the ground, among other things, that his failure to disclose a bank loan to his wife on the financial disclosure report required of congressmen under the Ethics In Government Act was not a "material" misstatement under the statute.

Held, conviction affirmed. The Court of Appeals for the District of

Columbia stated that the failure of the former congressman to disclose a bank loan to his wife co-signed by a third party constituted a willful violation of the statute, since it tended to conceal information that would have prompted an investigation. The court explained that the use of credit of a third person, which the co-signature of the third party conferred, constituted a gift to the congressman's spouse that should have been reported on the annual disclosure report. United States v. Hansen, 772 F.2d 940 (1985), 22 CLB 162, cert. denied, 106 S. Ct. 1265 (1986).

Court of Appeals, 8th Cir. Individual and corporate defendants were convicted of making false statements in invoices for engineering fees submitted to various governmental bodies and concealing material facts in construction plans submitted to a federal agency for funding. Other individuals were convicted on a separate conspiracy charge. Defendants appealed, arguing that the "agency jurisdiction" and "materiality" elements of 18 U.S.C.A. § 1001, which prohibits false statements made within the jurisdiction of a department or agency of the United States, were not established, that there was insufficient evidence to sustain the conspiracy conviction, and that there was insufficient evidence to sustain the conviction on the substantive counts.

Held, conspiracy conviction vacated and remanded, and conviction on substantive charges affirmed. That the invoices for engineering fees covered by some of the counts were submitted to counties or cities did not take them out of federal agency jurisdiction as defined by Section 1001. All projects covered by the courts were partially funded by the federal government and were subject to the regulations promulgated by the Federal Highway Administration (FHA). Similarly, the fact that no federal agency actually relied on defendants' statements to its detriment did not make the statements immaterial. It was irrelevant that federal funds were not actually used to pay the engineering fees in connection with the projects, as the invoices had the capability of influencing the FHA's functions since counties would normally request reimbursement from FHA. On the issue of sufficiency of evidence, the Eighth Circuit affirmed the conviction on the substantive charges but vacated the conspiracy conviction. A conspiracy to defraud the United States must include an agreement or understanding, which need not be formal or express, and an act by one or more of the conspirators to effect the object of the conspiracy. Association with individuals engaged in illegal conduct or knowledge of or acquiescence in the object of the conspiracy is insufficient in the absence of an agreement to cooperate. The government placed improper reliance on the facts that the defendants charged with conspiracy (1) were family members who helped run defendant, a family corporation, and (2) benefited financially from the business. There was no evidence that those defendants were significantly involved in the billing process or were aware of discrepancies occurring therein. United States v. Righmond, 700 F.2d 1183 (1983).

Court of Appeals, 11th Cir. Defendant was convicted of making a materially false statement to an IRS auditor in violation of 18 U.S.C. § 1001. He appealed on the ground that § 1001 was inapplicable within the parameters of this case since his statement

could not have affected any governmental area.

Held, affirmed. The Eleventh Circuit ruled that it was immaterial that the government is not actually influenced by the statement. The court explained that the affirmative, unsolicited false statement made by the defendant, an accountant, to a tax auditor regarding a charitable contribution not previously claimed by a taxpayer fell within the scope of the statute (18 U.S.C. § 1001) even though the potential effect on the government did not involve pecuniary loss; the false statement must simply have the capacity to impair or pervert the functioning of a governmental agency. United States v. Fern, 696 F.2d 1269 (1983), 19 CLB 377.

§ 24.100 Firearms violations

U.S. Supreme Court A Pennsylvania statute provides for a mandatory minimum sentence of five years of imprisonment if the sentencing judge finds that the defendant "visibly possessed a firearm" during the commission of an offense. Each of the defendants was convicted of one of the act's enumerated felonies, but each of the sentencing judges found the act unconstitutional and imposed a lesser sentence than that required by the act. The Pennsylvania Supreme Court found the statute constitutional and vacated the sentences and remanded for sentencing pursuant to the act.

Held, affirmed. The Court ruled that a state may properly treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense that must be proved beyond a reasonable doubt. The Court noted that the applicability of the reasonable doubt standard depends on how a state defines the offense charged in any given case. McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986).

Court of Appeals, 4th Cir. Defendant was convicted on two counts of possession of a firearm by a convicted felon in violation of 18 U.S.C. app. § 1202(a), and consecutive sentences were imposed. The charges arose out of the discovery of two guns, which were found in the same room during the same search. On appeal defendant argued that the circumstances did not warrant the imposition of consecutive sentences.

Held, convictions and sentences affirmed. The Fourth Circuit held that, in a prosecution for possession of a firearm by a previously convicted felon, multiple prosecutions and consecutive sentences are permissible, notwithstanding seizure at the same time and place, if it can be shown that the seized weapons were acquired by defendant at different times and places or used in different manners. In this case, an employee of defendant had testified that defendant gave him one of the guns, which he kept for several months before returning it to defendant, and that he had seen the other gun in the handbag of defendant's wife. Thus, although there was no direct evidence that defendant initially acquired the two weapons in separate transactions, there was substantial testimony that his possessions of them were separate in use. Because the evidence sufficiently showed a disparate course of dealing with the two weapons, defendant was chargeable with two separate charges under § 1202 (a). United States v. Mullins, 698 F.2d 686, cert. denied, 460 U.S. 1073, 103 S. Ct. 1531 (1983).

Court of Appeals, 9th Cir. Defendants were convicted of conspiracy and

substantive charges relating to the transfer of an unregistered machine gun. The district court instructed the jury that the crime's essential elements were (1) knowing possession of a machine gun and (2) that such machine gun was unregistered. The trial court further instructed the jury that it was not necessary to prove that the defendant knew that registration of the weapon was required by law. The weapons involved had been manufactured as semiautomatics but had been internally converted to be automatic. Because of the internal change, the weapons appeared externally to be legal semiautomatics. Defendants argued that the instruction was erroneous because it permitted conviction without their knowledge that a perfectly legal weapon had been converted to be automatic.

Held, conviction reversed in part. The court found that there is no specific intent requirement relating to the crime of transferring unregistered firearms, and that the government need not prove either that the defendant knew that his possession or transfer was against the law or that the weapons in question were required to be registered. It is enough, the court held, to prove that a defendant knows he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. The court found that an ordinary firearm that is undetectably modified to be automatic, but is legal in appearance, cannot be deemed to be a dangerous device of such type as would alert one to the likelihood of regulation. Thus, the district court's instruction was erroneous except as to one defendant whose knowledge of the automatic character of the weapons was clearly demonstrated by the evidence. United States v. Herbert, 698 F.2d 981, cert. denied, 464 U.S. 821, 104 S. Ct. 87 (1983).

Court of Appeals, 9th Cir. Defendant, a prior felon, was convicted of possession of a firearm in violation of 18 U.S.C. app. § 1202(a). On appeal he argued that his 1964 state felony conviction could not be used as a predicate offense, citing a clause in the federal statute which expressly exempts from liability persons who have been "pardoned" and who have been "expressly authorized . . . to receive, possess or transport . . . a firearm" by the chief executive of a state. Although defendant had not received a governor's pardon, nor an express authorization to carry firearms, he argued that two state statutes gave him the functional equivalent of such a pardon and authorization. The statutes in question provided (1) that convicted criminals would have their rights of citizenship restored upon unconditional discharge after service of sentence and (2) that persons convicted of certain crimes may not possess a firearm for a period of only five years after discharge.

Held, conviction affirmed. The court looked to the language of the exemption clause in the federal statute, and found it significant that the statute makes no express or implied reference to state laws such as those cited by defendant. Rather, the federal statute specifically refers to pardons by the chief official of a state. Since defendant belonged to the large class of convicted felons whose civil rights have been restored by the effect of a general statute rather than individually by governors' pardon, he was not exempt from criminal liability. United States v. Allen, 699 F.2d 453 (1982).

§ 24.116 —Credit cards (New)

Court of Appeals, 2d Cir. After defendants were convicted in district court on conspiracy to commit bank and wire fraud and conspiracy to use counterfeit credit cards, they appealed on the ground, inter alia, that there was no evidence that the defendants intended to affect interstate commerce.

Held, convictions affirmed. The interstate commerce and $1,000 monetary threshold elements of the counterfeit credit card statute, 15 U.S.C. § 1644(a), are solely jurisdictional and do not relate to the element of intent. The court reasoned that it was the agreement that the particular cards whose credit limits exceeded $1,000 would ultimately be used in transactions affecting interstate commerce that gave rise to a sufficient threat to interstate transactions as to trigger federal jurisdiction. United States v. DeBiasi, 712 F.2d 785, 20 CLB 63, cert. denied, 464 U.S. 962, 104 S. Ct. 397 (1983).

§ 24.135 Hobbs Act

Court of Appeals, 6th Cir. After defendant's first conviction was reversed because certain evidence was admitted improperly at trial, defendant was convicted of obstructing interstate commerce by extortion in violation of the Hobbs Act, and he appealed.

Held, affirmed. Defendant's act of coercing his employees into an illegal agreement that required them to pay for pension contributions, which defendant should have paid, was subject to prosecution under the Hobbs Act, and such act was not within the legitimate labor negotiation activity that was excluded from Hobbs Act prosecution. The court thus agreed with the government's view that defendant's practice constituted a wrongful means to achieve a wrongful objective. United States v. Cusmano, 729 F.2d 380, 20 CLB 468, cert. denied, 104 S. Ct. 3536 (1984).

Court of Appeals, 7th Cir. After defendant was convicted in the district court of attempted extortion under the Hobbs Act arising from a letter threatening to lace Tylenol with cyanide, he appealed on the grounds that it was virtually impossible for him to obtain any funds from Johnson & Johnson by means of a letter.

Held, conviction affirmed. The Seventh Circuit stated that impossibility of success of an extortion scheme is not a separate defense, but is only an attack on the government's proof on the issue of intent. The court noted that the extortion statute does not require proof that the extortionist intended to receive the funds demanded as long as the victim was deprived of the right to make business decisions free of threats and coercion. United States v. Lewis, 797 F.2d 358 (1986), cert. denied, 107 S. Ct. 1308 (1987).

§ 24.145 Income tax evasion

Court of Appeals, 7th Cir. After defendant was convicted in the district court of tax evasion, he appealed on the grounds, among other things, that the evidence was insufficient to support the conviction.

Held, conviction affirmed. The Seventh Circuit ruled that the government's "net worth approach" was sufficient to prove tax evasion, since it circumstantially proved the existence of unreported taxable income. Specifically, evidence showed the defendant's net worth at the end of the tax period exceeded that at the beginning, and the increase could not be attributed to reported income. The court

noted that it was not necessary for the prosecution to prove a likely source of income or to negate other possible sources of nontaxable income. United States v. Marrinson, 832 F.2d 1465 (1987), 24 CLB 260.

§ 24.160 Interstate racketeering

"Criminal RICO and Organized Crime: An Analysis of Appellate Litigation," by James Meeker and John Dombrink, 20 CLB 309 (1984).

U.S. Supreme Court Defendant was convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c) and 1962(d), by becoming involved in an arson ring that resulted in his fraudulently receiving insurance proceeds in payment for the fire loss of a building he owned. The federal district court also ordered that the insurance proceeds be forfeited pursuant to 18 U.S.C. § 1963(a)(1), which provides that a person convicted under Section 1962 shall forfeit to the United States "any interest he had acquired or maintained in violation of § 1962." The Fifth Circuit affirmed.

Held, affirmed. The Court found that the insurance proceeds the petitioner received as a result of his arson activities constituted an "interest" within the meaning of the forfeiture provisions of RICO. The Court noted that while the term "interest" is not specifically defined in the RICO statute, it should be assumed that Congress intended that the term be used in its ordinary meaning, which comprehends all forms of real and personal property, including profits and proceeds. Russello v. United States, 464 U.S. 16, 104 S. Ct. 296 (1983).

Court of Appeals, 2d Cir. After defendants were convicted of Hobbs Act and RICO violations and of receiving benefits to influence an employee benefit plan, they appealed on the grounds, among other things, that the RICO forfeiture statute had been improperly applied.

Held, convictions affirmed. The Second Circuit found that the RICO forfeiture statute does not require that proceeds of racketeering activities be traced to identifiable assets. The court reasoned that since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, it follows the defendant as a part of the penalty and thereby does not require that the government trace it. United States v. Robilotto, 828 F.2d 940 (1987), 24 CLB 175.

Court of Appeals, 2d Cir. After defendants were convicted in the district court of conspiracy to violate RICO and related charges, they appealed on the basis, among other things, that the charges in the indictment only made out a case for deceptive liquor license renewal applications in successive years, which was insufficient to constitute a "pattern" for RICO purposes.

Held, affirmed. The Court of Appeals for the Second Circuit affirmed, holding that the acts alleged in the indictment were not a single, discrete crime but, rather, formed a pattern, especially since the jury was charged that the acts of mail fraud must be related to the enterprise and to continuous activity. United States v. Ianniello, 808 F.2d 184 (1986), 23 CLB 389, cert. denied, 107 S. Ct. 3229 (1987).

Court of Appeals, 2d Cir. After individual and corporate defendants were convicted in the district court of

mail fraud and Racketeer Influenced and Corrupt Organizations Act (RICO) violations, they appealed on the ground, among other things, that the RICO forfeiture amount had been improperly calculated.

Held, convictions affirmed. The Second Circuit ruled that gross rather than net profits should be used to determine the amount to be forfeited under RICO. The court noted that the Supreme Court, in Russello v. United States, 464 U.S. 16, 104 S. Ct. 296 (1983), had left open the issue of how the term "profits" in the RICO forfeiture statute should be interpreted. In so holding, the court observed that punishment best fits the crime when forfeiture is keyed to the magnitude of a defendant's criminal enterprise, and that calculation of forfeiture based on gross profits from illegal activity does not destroy this "rough proportionality." United States v. Lizza Indus., 775 F.2d 492 (1985), 22 CLB 280, cert. denied, 106 S. Ct. 1459 (1986).

Court of Appeals, 2d Cir. Defendants were convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), by fixing horse races. The convictions were based on proof that defendants had attempted several wagering coups by drugging some of the horses entered at races in various New York tracks and then betting on the undrugged horses. In return for benefits paid or promised by defendants, a licensed groom assisted defendants. In every instance, however, the groom helped defendants locate and drug horses other than those which he himself groomed. Defendants were in violation of the state statutory section that proscribed tampering with any animal involved in a sports contest contrary to the rules governing such contest. The offense was only a class A misdemeanor, permitting a one-year maximum sentence. This section did not fall within RICO's definition of "racketeering activity," which requires that a predicate state law violation be punishable by imprisonment for more than one year. 18 U.S.C. § 1961(1) Accordingly, the government based its RICO charge on another state statutory section, violation of which is a class D felony permitting imprisonment up to seven years.

Held, reversed and remanded with instructions. The Second Circuit found that defendants had not violated the sports bribery statute, since they had not asked a groom to refrain from giving his best efforts. The court explained that while defendants had sought the help of a licensed groom in drugging horses, such action was not a violation of the statute in question, which makes it a crime when someone "confers, offers or agrees to confer any benefit upon a sports participant with an intent to influence him not to give his best efforts. . . ." Consequently, the statute could not be used against the defendants as a basis for the RICO statute. United States v. Malizia, 720 F.2d 744 (1983).

Court of Appeals, 2d Cir. Defendant was convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), conspiracy to commit sports bribery, and interstate travel with intent to commit bribery in connection with a college basketball "point shaving" scheme. On appeal, defendant argued that the federal district court failed to explain to the jury that the "enterprise" element of a RICO violation, as defined in 18 U.S.C. § 1961(4) (1976), must

be separate and distinct from the "pattern of racketeering activity" element, as defined in 18 U.S.C. § 1962(c) (1976). According to defendant, the indictment alleged an enterprise identical to the alleged pattern of racketeering activity, to wit, a conspiracy formed for the sole purpose of shaving points in college basketball games. Defendant did not allege that the court failed to charge those elements or other elements of the crimes for which he was convicted.

Held, conviction affirmed. While the government was required to prove the existence of "conduct of [an] enterprise's affairs through a pattern of racketeering activity," proof of the separate elements did not have to be independent as long as the proof offered was sufficient to satisfy both elements. RICO's legislative history clearly shows that proof used to establish the "enterprise" and "pattern of racketeering activity" elements can coalesce. If this were not the case, a criminal organization, no matter how powerful, would not be subject to RICO's sanctions if it had only one purpose. United States v. Mazzei, 700 F.2d 85, cert. denied, 461 U.S. 945, 103 S. Ct. 2124 (1983).

Court of Appeals, 3d Cir. Defendants were convicted in federal district court of violating the Racketeer Influenced and Corrupt Organizations Act (RICO). They appealed on the ground that the government drafted an indictment that lumped together six unrelated conspiracies, and that the indictment description of the "enterprise" as "a group of individuals and a corporation associated in fact" did not conform to the statutory definition, 18 U.S.C. § 1961(4) (1976).

Held, convictions affirmed. The Third Circuit found that the indictment's description of RICO "enterprise" as a "group of individuals and a corporation associated in fact" conformed to the statutory definition. The court explained that the evidence at trial showed that the individuals and the corporation defined as the "enterprise" undertook construction projects for enrichment of its members, and that to promote the projects, the defendants committed bribery as well as mail and wire fraud, thus supporting the finding of a single conspiracy. United States v. Aimone, 715 F.2d 822 (1983), 20 CLB 168, cert. denied, 104 S. Ct. 3585, 3586 (1984).

Court of Appeals, 3d Cir. Defendant, an official of Teamster Local 560 in northern New Jersey, was convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, for running the union through a "pattern of racketeering" by receiving illegal payments from four trucking companies in order to secure "labor peace." On appeal, he argued, inter alia, that the payoffs did not constitute a pattern as required by the RICO statute.

Held, affirmed. The Third Circuit concluded that the fact that the labor union was harmed rather than benefited did not remove the illegal conduct from the ambit of the RICO statute. The court thus concluded that the record amply demonstrated that, by accepting bribes in exchange for allowing violations of the collective bargaining agreements to be overlooked, defendant was conducting his union office through racketeering activity since the acts were related to the union enterprise and his association with it. United States v. Provenzano, 688 F.2d 194, 19 CLB 170, cert. denied, 459 U.S. 1071, 103 S. Ct. 492 (1982).

Court of Appeals, 6th Cir. Defendants were convicted in the district court on Racketeer Influenced and Corrupt Organizations Act (RICO) charges stemming from evidence that defendants made improper kickbacks in exchange for judicial favors from Michigan state judges.

Held, conviction affirmed. The Sixth Circuit ruled that there is no requirement under RICO that all conspirators be involved in each of the underlying acts of racketeering, or that the predicate acts be interrelated in any way. The court noted that all that is required is that the acts be connected to the affairs of the enterprise, which in this case was conducted through a pattern of racketeering activity consisting of bribery, mail fraud, and obstruction of a criminal investigation. United States v. Qaoud, 777 F.2d 1105 (1985), 22 CLB 279, cert. denied, 106 S. Ct. 1499 (1986).

Court of Appeals, 7th Cir. After defendant was convicted of twenty counts under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq., he was sentenced to five years probation, ordered to make restitution of $150,000, and further ordered to forfeit one-half interest in his firm's legal fees, or $225,000. The government presented no evidence at trial that defendant possessed or controlled the money he received in legal fees at the time of his conviction.

Held, conviction affirmed. The Seventh Circuit ruled that the government need not prove beyond a reasonable doubt the existence, at the time of conviction, of any interest defendant acquired in violation of RICO before obtaining forfeiture of such interest. The court reasoned that since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, the government need not trace it even though forfeiture is not due until after conviction. United States v. Ginsburg, 773 F.2d 798 (1985), 22 CLB 159, cert. denied, 106 S. Ct. 1186 (1986).

Court of Appeals, 7th Cir. After defendant was convicted in the district court for violating the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Hobbs Act, he appealed on the ground that he had been improperly charged under RICO. The predicate RICO acts he was charged with included four actual or attempted armed robberies, two thefts, and an attempted murder. In essence, the defendant was indicted and tried under RICO on the theory that he had conducted his own affairs through a pattern of racketeering activity.

Held, reversed on RICO conviction and affirmed on Hobbs Act conviction. The Seventh Circuit stated that a defendant cannot be convicted under RICO as both the "person" and the "enterprise" that had its affairs conducted through a pattern of racketeering activity. The court reasoned that, to find otherwise, the RICO section would lead to the anomalous result that the entity could be employed by or associated with itself. United States v. DiCaro, 772 F.2d 1314 (1985), 22 CLB 163, cert. denied, 106 S. Ct. 1458 (1986).

§ 24.188 Kidnapping (New)

Court of Appeals, 4th Cir. Defendant was convicted of kidnapping a thirteen-year-old girl in violation of 18 U.S.C. § 1201(a). Defendant seized and confined the girl in West Virginia and transported her to Ohio, where

he beat her. On appeal, defendant argued that he did not have the requisite illegal intent prior to the interstate movement.

Held, conviction affirmed. The Fourth Circuit found that there was no requirement under the federal kidnapping statute that the victim know the kidnapper's intentions before they travel interstate. The court thus found that by inducing the victim by misrepresentation to enter the vehicle and accompany the kidnapper, knowing that the victim's belief as to the purpose and destination was different from the kidnapper's actual illicit purpose, the kidnapper has interfered with, and exercised control over, her actions. The Fourth Circuit found this conduct sufficient to satisfy the "involuntariness of seizure and detention" requirement of Chatwin v. United States, 326 U.S. 455, 66 S. Ct. 233 (1946). United States v. Hughes, 716 F.2d 234 (1983), 20 CLB 165.

§ 24.190 Mail fraud

U.S. Supreme Court Former state officials were charged with forcing an insurance agent who provided policies for the state to share commissions with an insurance agency in which defendants had an interest. Defendants were convicted in the district court of mail fraud and conspiracy charges, and the Court of Appeals for the Sixth Circuit affirmed.

Held, reversed and remanded. The language and legislative history of the mail-fraud statute demonstrated that it was limited in scope to the protection of money or property rights and did not extend to the intangible right to good government. The Court found that the words "to defraud" commonly refer to doing wrong to another in his property rights by dishonest methods. McNally v. United States, 107 S. Ct. 2875 (1987).

Court of Appeals, 1st Cir. After defendants were convicted in the district court of conspiracy to commit mail fraud, they appealed on the grounds that the court had improperly charged the jury under an intangible rights theory relating to the mail fraud statute.

Held, conviction vacated and remanded. The First Circuit ruled that an intangible rights jury instruction, which permits conviction of conspiracy to commit mail fraud without a finding of financial harm, was reversible error. In so holding, the court applied the rule of McNally v. United States, 107 S. Ct. 2875 (1987), even though that case was decided by the Supreme Court after completion of the proceedings in the district court in this case. The court further found, however, that although the subparagraph of the mail fraud conspiracy count pertaining to a violation of intangible rights did not charge an offense, that did not render the entire indictment invalid, since the count also alleged independent charges involving the deprivation of property. United States v. Ochs, 842 F.2d 515 (1988).

Court of Appeals, 2d Cir. Defendants were convicted on charges arising out of two separate check-kiting schemes for conspiracy to commit mail fraud in violation of 18 U.S.C. § 371, and of mail fraud in violation of 18 U.S.C. § 1341. On appeal, they claimed that the mailing of bank statements was an insufficient basis for prosecution under the mail fraud statute.

Held, convictions affirmed. The Second Circuit found that where the mailing of bank statements was crucial

to the operation of the check-kiting scheme to enable operators to know the speed at which the victim banks credited deposits and cleared checks and to make periodic reviews of their accounts for errors, the mailing of monthly statements satisfied the mailing requirement of the mail fraud statute. The court thus found that the mailing of the bank statements was sufficient proof that the defendants had caused a mailing "for the purpose of executing" a fraudulent scheme within the scope of 18 U.S.C. § 1341. United States v. Pick, 724 F.2d 297 (1983).

Court of Appeals, 2d Cir. Defendant, chairman of the Republican committees of both Nassau County and the Town of Hempstead, New York, was found guilty after a retrial of one count of mail fraud and five counts of extortion. He appealed, arguing that he was improperly convicted under the mail fraud statute since, as a party official, he owed no general duty to the public.

Held, affirmed. The Second Circuit found that defendant, an individual who was a de facto government leader and who was relied upon by individuals in government for the administration of government affairs, could properly be found to owe a fiduciary duty to the general citizenry of the town of Hempstead and Nassau County. Thus, a breach of that duty could serve as a predicate for violation of the mail fraud statute. The court thus concluded that public office is not a rigid prerequisite to the finding of a fiduciary duty in public-sector mail fraud cases, and the jury could have properly found that concealment of an insurance commission arrangement defrauded the public under the mail fraud statute by depriving it of a potential reduction in the cost of owning property. United States v. Margiotta, 688 F.2d 108 (1982), 19 CLB 169, cert. denied, 461 U.S. 913, 103 S. Ct. 1891 (1983).

Court of Appeals, 3d Cir. After defendant was convicted in the district court of two counts of mail fraud, he appealed on the ground that the evidence of the alleged mailing was insufficient.

Held, conviction reversed on one count of mail fraud. The Third Circuit found that the testimony by the insurer's claims representative that the insurer "sends" particular documents to claimants was not evidence sufficiently establishing that the alleged mailing in fact occurred for the defendant to have properly been convicted of mail fraud. The court explained that the "generic concept" encompassed by the term "sends" does not necessarily include the specific mode of transmission denoted as "mails." In other words, the document could have been "sent" without having been "mailed" since a personal messenger could have been employed in sending the document. The court thus concluded that the testimony was too ambiguous to meet the government's burden of proving that the claim form was mailed. United States v. Hart, 693 F.2d 286 (1982).

Court of Appeals, 3d Cir. Defendant was convicted on multiple counts of mail fraud, criminal violations of the Taft-Hartley Act, and conspiracy and substantive charges of racketeering. He was president of a union local, and participated in a scheme which involved the switching of labor-leasing contracts between various participating companies. Defendant accepted payoffs for his participation, and the indictment alleged that his conduct de-

frauded employees of their contractual rights to wages and benefits, their right to his services as union president, and certain rights to economic benefits guaranteed by the National Labor Relations Act.

Held, judgment reversed in part and case remanded for re-sentencing. The court reversed defendant's mail fraud convictions, holding that the mail fraud statute, 18 U.S.C. § 1341, does not apply to schemes to defraud people of rights derived exclusively from Section 7 of the National Labor Relations Act. Defendant's racketeering convictions were allowed to stand because they were found to be supportable independent of the mail fraud convictions. The court remanded for resentencing, finding that defendant's sentence could have been premised at least in part on the district court's consideration of the improper mail fraud convictions. United States v. Sheeran, 699 F.2d 112, cert. denied, 461 U.S. 931, 103 S. Ct. 2095 (1983).

Court of Appeals, 6th Cir. After defendants were convicted in the district court of mail fraud in violation of 18 U.S.C. § 1341, they appealed on the ground that their alleged conduct was not proscribed by the mail fraud statute.

Held, convictions affirmed. The Sixth Circuit found that the evidence was sufficient to support the defendants' convictions for mail fraud based on their inducement of individuals to become mortgage brokers through false or fraudulent representations and further causing the new brokers and their clients to submit advanced fees to the defendants' companies in reliance on fraudulent representations. The court further found that the government was not required to prove that each defendant was a mastermind of the scheme as long as each defendant willfully participated in the scheme with knowledge of its fraudulent elements. United States v. Stull, 743 F.2d 439 (1984), 21 CLB 181.

Court of Appeals, 9th Cir. After defendants were convicted of various offenses in connection with the sale/leaseback transactions in which investors would buy equipment from one company and lease it back to a trucking company, they appealed.

Held, affirmed. Defendants could be convicted of mail fraud where they caused a bank to mail notices of lease payments after agreements were entered into which reassured the investors that all was well, thus discouraging them from investigating the fraud. United States v. Jones, 712 F.2d 1316, 20 CLB 64, cert. denied, 464 U.S. 986, 104 S. Ct. 434 (1983).

Court of Appeals, 11th Cir. After defendant was convicted in the district court of mail fraud, he appealed on the grounds that the jury instructions were defective because they relied heavily on the intangible right of the citizenry to honest and fair government.

Held, conviction reversed and vacated. The Eleventh Circuit found that the jury instruction was fatally defective even though the jury was also instructed that it was required to find a violation of state bribery law as a predicate offense. The court noted that the recent Supreme Court decision in McNally v. United States, 107 S. Ct. 2875 (1987), substantially limited the mail fraud statute to schemes to deprive persons of their money and property. United States v. Italiano, 837 F.2d 1480 (1988).

Court of Appeals, 11th Cir. Defendant was convicted of using the mails in furtherance of a scheme to obtain money or property by means of false representations in violation of 18 U.S.C.A. § 1341. On appeal, defendant argued that the trial court's instructions improperly ignored the requirement of specific intent. Specifically, he objected to the court's negation of the need to prove an intent to defraud.

Held, affirmed. The statute, which makes it a federal crime to "devise any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ," prohibits two separate acts, each constituting an independent ground for conviction of mail fraud. The trial judge properly explained and distinguished these two grounds for conviction. In doing so, he did not ignore the requirement of specific intent. The judge's negation of the need to prove an intent to defraud was harmless error at best because defendant was prosecuted for the latter ground, and not the ground involving a scheme to defraud. The court's lengthy and detailed instructions explaining that the jury must find a scheme to obtain property based on intentional misrepresentations in order to find defendant guilty adequately described the requisite intent. The instruction that this was not an intent to defraud case was made only to clarify which part of the statute defendant was being tried under. United States v. Scott, 701 F.2d 1340, cert. denied, 464 U.S. 856, 104 S. Ct. 175 (1983).

§ 24.205 Misprision of a felony

Court of Appeals, 5th Cir. After initially being indicted for conspiracy to suborn perjury, defendant reached a plea agreement under which he pled guilty to misprision of felony in violation of 18 U.S.C. § 4. Defendant, acting on behalf of a co-defendant, had offered money to a third party to persuade that party to change testimony he had given in court. Defendant was to be paid for his part in the scheme, and agreed to hold the payoff in escrow until the testimony was changed. On appeal he argued that there was an insufficient factual basis to support his guilty plea. Defendant particularly alleged that the factual basis of the plea did not demonstrate that he took "affirmative steps to conceal the crime" of conspiracy, as required by the statute.

Held, conviction affirmed. Although it is settled that mere knowledge of a crime and failure to report it is insufficient to support a misprision of felony conviction, defendant's affirmative action in agreeing to serve as stakeholder for the payoff money manifestly went beyond mere knowledge and failure to report. The court also rejected defendant's argument that his conduct was an extension of the underlying conspiracy, and only incidentally served to cloak the commision of the felony. The court recognized that this was not a traditional misprision case in that it did not involve concealment of a crime of others by a stranger to that crime, but refused to accept the proposition that participants in a crime cannot violate the misprision law. The court noted that the Seventh and Ninth Circuits have declared the misprision statute unconstitutional as applied to persons who have reasonable cause to believe that they will be prosecuted themselves if they report the crime to authorities, but found that this case involved no Fifth Amendment con-

cerns because of defendant's guilty plea. By so pleading, defendant waived all nonjurisdictional challenges to the constitutionality of his conviction. United States v. Davila, 698 F.2d 715 (1983).

"If the Client Pays Cash, Must the IRS Be Told? Attorney Reporting Under Code Section 60501," by Gary R. McBride, 23 CLB 213 (1987).

§ 24.207 Money laundering (New)

"Payment of Attorneys' Fees With Potentially Forfeitable Assets," by R. Hewitt Pate, 22 CLB 326 (1986).

§ 24.215 Obstruction of justice

Court of Appeals, 9th Cir. Defendant, a police officer, was convicted of obstruction of justice under 18 U.S.C. § 1503, for attempting to warn the target of a valid search warrant in order to prevent discovery and seizure of a quantity of heroin. Defendant appealed on the ground that such conduct did not fall within the ambit of Section 1503.

Held, reversed. The Ninth Circuit stated that the obstruction of justice statute (18 U.S.C. § 1503) may not be construed to proscribe conduct that takes place wholly outside the context of a judicial proceeding. The court thus concluded that defendant's alleged attempts to thwart the target of a valid search warrant in order to prevent discovery and seizure of a large quantity of heroin did not fall within the scope of the statute. United States v. Brown, 688 F.2d 596 (1982).

§ 24.225 —Grand jury testimony

Court of Appeals, 1st Cir. On appeal from a conviction of perjury in the district court based on false testimony given to a grand jury investigating a fire, defendant argued that he had properly recanted his testimony as to his whereabouts at the time of the fire.

Held, conviction affirmed. The First Circuit concluded that defendant's statement to a federal agent, after he had testified in the grand jury, that he "might" have been in error with respect to testimony as to his whereabouts at the time of the fire was not an effective recantation. The court observed that defendant's statements did not constitute a sufficiently specific and clear admission that his prior testimony was false so as to preclude prosecution for perjury. United States v. Goguen, 723 F.2d 1012 (1983).

§ 24.230 Possession of stolen goods

Court of Appeals, 1st Cir. After defendant was convicted in the district court of knowingly receiving stolen property, he appealed on the ground that he had been prosecuted improperly under 18 U.S.C. § 641, the federal criminal statute relating to receiving stolen property.

Held, affirmed. For purposes of the statute, two Social Security checks were defined as "things of value of the United States" upon which conviction could be premised. The court thus rejected the defense argument that the statute was inapplicable because the United States might not have been liable for loss caused by theft and the resulting fraud. United States v. Santiago, 729 F.2d 38 (1984), 20 CLB 465.

§ 24.245 Selective Service violations

U.S. Supreme Court After the Selective Service registration system was activated in 1980, the defendant wrote

a letter to various government officials stating that he had not registered and did not intend to do so. Subsequently, the Selective Service adopted a passive enforcement policy under which it investigated and prosecuted only those who advised that they had failed to register or were reported by others as having failed to register. The defendant was indicted pursuant to this policy, but the district court dismissed the indictment on selective prosecution grounds. The court of appeals reversed and certiorari was granted.

Held, judgment affirmed. The Supreme Court declared that the government's passive enforcement policy did not violate either the First or Fifth Amendments. The Court reasoned that the defendant had failed to show that the government's enforcement policy selected nonregistrants for prosecution on the basis of their speech, since the government prosecuted both those who reported themselves as well as those who were reported by others. The government thus treated all nonregistrants equally, since it did not subject vocal nonregistrants to any special burden. Wayte v. United States, 105 S. Ct. 1524 (1985), 21 CLB 465.

§ 24.255 Travel Act

Court of Appeals, 5th Cir. After the defendants were convicted in the district court of aiding and abetting one another in using and causing to be used a facility in interstate commerce with intent to carry on a bribery scheme in violation of the Travel Act, they appealed.

Held, convictions affirmed. The Fifth Circuit found that an interstate telephone call made by defendant requesting funds for bribery of a city councilman was sufficient to invoke Travel Act jurisdiction over the defendants. The court reasoned that the arrangement for the actual payment of the bribe made easier the commission of the scheme, and the telephone call to obtain the funds actually benefited defendant's plans to arrange payment for the city councilman and thus facilitated the unlawful bribery. United States v. Garrett, 716 F.2d 257 (1983), 20 CLB 166, cert. denied, 466 U.S. 937, 104 S. Ct. 1910 (1984).

§ 24.265 Wire fraud

Court of Appeals, 2d Cir. After defendants were convicted in the district court of a scheme to defraud the state of cigarette tax revenues in violation of the wire fraud statute, they appealed on the grounds that the telephone calls were insufficiently connected with the wire fraud.

Held, conviction of two defendants reversed as to two counts, judgments of conviction otherwise affirmed. The Second Circuit found that there was no nexus shown between the telephone calls and the scheme to defraud. The court noted that the telephone numbers in question were not listed in any of the defendants' names, and there was no evidence linking those calls to any of the defendants, either in connection with any bank deposits or the placing of any cigarette order. United States v. De Fiore, 720 F.2d 757 (1983), cert. denied, 466 U.S. 906, 104 S. Ct. 1684 (1984).

Court of Appeals, 2d Cir. After defendant, a freight forwarder, was convicted in the district court of one count of conspiracy to defraud the Agency for International Development (AID) and the World Bank and four counts of wire fraud, defendant appealed on the ground that the evidence was insufficient to support his conviction.

Held, conviction affirmed. The Sec-

ond Circuit stated that a wire fraud prosecution may be premised on the theory that a freight forwarder breaches his fiduciary duties where, in order to take for himself a portion of the freight charges, he causes his principal to breach an exclusive dealing agreement and conceals favorable freight rates. The court also found that the evidence was sufficient where the defendant caused AID to approve payment of freight charges of $158,000 rather than $106,000. United States v. Ventura, 724 F.2d 305 (1983).

Court of Appeals, 5th Cir. After defendant was convicted of aiding and abetting a wire fraud scheme, he appealed on the ground that he had never participated in any of the telephone calls on which the wire fraud charges were based.

Held, conviction affirmed. The Fifth Circuit found that defendant may be convicted of aiding and abetting wire fraud even though he did not participate in any of the telephone calls. The court noted that defendant's act of verifying information to a vendor's agent was part of a continuing scheme to defraud after a telephone call had taken place between the lender's agent and the principal. United States v. Westro, 746 F.2d 1022 (1984), 21 CLB 259.

Court of Appeals, 7th Cir. After defendant was convicted in the district court for wire fraud and possession of electronic eavesdropping equipment, he appealed on the ground that the evidence against him was insufficient. The evidence indicated that defendant, posing as a representative of the Illinois "Special Investigations Unit," had placed an order with a private firm for an electronic stethoscope and other illegal eavesdropping equipment.

Held, conviction affirmed. The Seventh Circuit determined that defendant's intent to defraud the company could be inferred from the fact that the company never received payment for the shipped merchandise delivered to defendant. The court also found that defendant's misrepresentation of his identity went to "the heart of the bargain" (i.e., the purchaser's creditworthiness) because the order would probably not have been accepted if defendant had made it in his individual capacity. United States v. Pritchard, 773 F.2d 873 (1985), cert. denied, 106 S. Ct. 860 (1986), 22 CLB 168.

25. CAPACITY

§ 25.10 Insanity

" 'Guilty But Mentally Ill' and the Jury Trial: A Case Study," by John Klofas and Janette Yandrasits, 24 CLB 424 (1988).

U.S. Supreme Court Petitioner was charged in the District of Columbia Superior Court with attempted petit larceny, a misdemeanor punishable by a maximum prison sentence of one year. The Superior Court found petitioner not guilty by reason of insanity and commiteed him to a mental hospital. At his subsequent 50-day hearing, the court found that he was mentally ill and constituted a danger to himself or others. A second release hearing was held after petitioner had been hospitalized for more than one year, the maximum period he could have spent in prison if he had been convicted. On that basis he demanded that he be released unconditionally or

recommitted pursuant to the civil-commitment procedures under the District of Columbia Code, including a jury trial and clear and convincing proof by the Government of his mental illness and dangerousness. The Superior Court denied his request for a civil-commitment hearing, reaffirmed the findings made at the 50-day hearing, and continued his commitment. The District of Columbia Court of Appeals ultimately affirmed.

Held, affirmed. The Supreme Court found that when a criminal defendant established by a preponderance of the evidence that he was not guilty by reason of insanity, the due process clause permitted the government to confine him in a mental institution until such time as he had regained his sanity or was no longer a danger to himself or society. Jones v. United States, 463 U.S. 354, 103 S. Ct. 3043 (1983), 20 CLB 161.

§ 25.15 —Burden of proof

Court of Appeals, 6th Cir. After defendant was convicted in Tennessee state court on rape and kidnapping charges, he sought habeas corpus relief on the ground that the prosecution failed to present sufficient evidence of his sanity at the time the crimes were committed.

Held, denial of habeas corpus vacated and case remanded. The Sixth Circuit concluded that a rational trier of the facts could not have found beyond a reasonable doubt that defendant was sane at the time the acts were committed. The court noted that the prosecution had a duty to prove sanity as an element of the crime for federal due process purposes, a burden that it failed to meet in view of the victim's own testimony as to defendant's bizarre conduct while she was abducted, including the fact that defendant seemed to be talking to a third person who was not there. Defendant had also been previously institutionalized for five years following a prior rape, and he testified that a "voice" directed him to commit the rape. Duffy v. Foltz, 772 F.2d 1271 (1985), 22 CLB 163.

§ 25.20 —Expert testimony

Court of Appeals, 4th Cir. After defendant was convicted in the district court of interstate transportation of a stolen motor vehicle and related charges, he appealed on the ground that the trial court had improperly excluded evidence of his pathological gambling.

Held, conviction affirmed. The Fourth Circuit determined that where the expert testimony did not establish any causal connection between defendant's alleged pathological gambling disorder and the charged offenses, the testimony about pathological gambling was properly excluded for lack of foundational relevance to defendant's insanity defense. United States v. Gillis, 773 F.2d 549 (1985), 22 CLB 164.

Court of Appeals, 7th Cir. After defendant was convicted in the district court of a scheme to defraud in which he forged government checks, he appealed on the grounds that the trial judge had improperly excluded evidence relating to his insanity defense.

Held, conviction affirmed. The Seventh Circuit found that expert testimony of his compulsive gambling was properly excluded since the testimony would not have assisted the jury to determine the controlling issue, which was why a compulsion to gamble would translate into an uncon-

trollable impulse to obtain money illegally. The court also found that any probative value of the evidence would have been outweighed by the danger of misleading or confusing the jury. United States v. Davis, 772 F.2d 1339 (1985), cert. denied, 106 S. Ct. 603 (1985), 22 CLB 164.

26. PARTIES

§ 26.00 Parties, aiders and abettors

Court of Appeals, 4th Cir. After defendant was convicted in the district court of aiding and abetting an embezzlement and making false entries on bank records, he appealed on the grounds that the evidence was not sufficient to sustain his conviction.

Held, affirmed. The Fourth Circuit found that the evidence was sufficient to sustain defendant's conviction as an aider and abettor in the embezzlement where defendant accepted the money which his so-called wife embezzled from the bank where she worked, and that he knew she had to conceal the theft by making entries on her books. The court observed that, to be an aider and abettor, one need not be physically present at the time of the commission of the crime, but must have some interest in the criminal venture. United States v. Ray, 688 F.2d 250 (1982), 19 CLB 169, cert. denied, 459 U.S. 1177, 103 S. Ct. 829 (1983).

27. DEFENSES

§ 27.00 Alibi

"The Anatomy of Defense Strategy in an Espionage Case," by Donna Brown Siers, 23 CLB 309 (1987).

"Old Age as a Criminal Defense," by Fred Cohen, 21 CLB 5 (1985).

Court of Appeals, 2d Cir. A state correctional facility inmate sought a writ of habeas corpus on the grounds that the jury had been improperly charged as to his alibi defense, which was granted in the district court.

Held, affirmed. The Second Circuit ruled that the trial court's instructions to the jury regarding petitioner's alibi defense shifted the burden of proof and thereby violated petitioner's right to a fair trial. The court adopted the reasoning of the district court, where it was concluded that the charge was erroneous and that the error could not be considered harmless. Simmons v. Dalsheim, 702 F.2d 423 (1983), 19 CLB 479.

Court of Appeals, 4th Cir. Having exhausted his state remedies, defendent filed a writ of habeas corpus, claiming that he had been denied effective assistance of counsel because his attorney did not object to an alibi instruction as having improperly shifted the burden of proof. He appealed from the denial of his petition.

Held, denial of petition affirmed. The Fourth Circuit stated that the instruction telling the jury that the defendant did not have to prove his alibi beyond a reasonable doubt or even by a preponderance of the evidence, but had only to introduce evidence which created a reasonable doubt regarding guilt, was not an impermissible shift to the defendant of the prosecution's burden of proving every element of the

crime charged beyond a reasonable doubt. The court reasoned that the instruction was no more than a comment on the weight of the evidence and had nothing to do with the burden of proof or the introduction of evidence. Frye v. Procunier, 746 F. 2d 1011 (1984), 21 CLB 259.

Court of Appeals, 6th Cir. After defendant was convicted in a Virginia state court for armed assault and malicious shooting and wounding, he sought habeas corpus in federal court on the grounds that the evidence introduced against him was legally insufficient. The district court denied the petition.

Held, denial of habeas corpus affirmed. The Sixth Circuit found that defendant's false alibi that he had never been with his two co-defendants on the evening of the crime could be used by the jury to infer guilt. The court noted that the concealment of the truth, along with the evidence that defendant left the house with his co-defendants prior to the commission of the crime, raised a rational inference that defendant was with the co-defendants when the crime was committed. Bronston v. Rees, 773 F.2d 742 (1985), 22 CLB 167.

§ 27.10 Collateral estoppel

Court of Appeals, 8th Cir. After defendant was convicted of filing false corporate income tax returns, he appealed on the grounds that the government's theory of the case was foreclosed by an earlier court decision.

Held, affirmed. The government's theory that defendant understated gross income by omitting from corporate returns most of the income from his bail bonding company was not foreclosed on collateral estoppel grounds by an earlier court decision in which the court found defendant's bonding business to be personal rather than corporate. The court reasoned that the parties in the prior proceeding did not dispute the characterization of the status of the bonding business, and the court's statement that the bonding business was personal was not necessary to the decision. United States v. Young, 804 F.2d 116 (1986), 23 CLB 290, cert. denied, 107 S. Ct. 3184 (1987).

§ 27.12 Duress (New)

Court of Appeals, 2d Cir. Defendant alleged that prison officials refused to treat him for kidney stones which were causing him great pain, that such refusal threatened him with "substantial bodily injury," and that further requests to prison officials for medication would have been futile. Defendant tried to establish duress based on the above allegations as a defense to a charge of escape.

Held, affirmed. Defendant was not entitled to a duress defense and the trial court properly ruled on the proffered duress defense prior to any defense testimony being taken before the jury. The court explained that in order to establish the duress defense, the prisoner charged with the attempted escape must have been faced with the specific threat of death or substantial bodily injury in the immediate future, there must have been no time for complaint to authorities, or have existed a history of futile complaints which made any benefit from such complaints illusory. The court further found that a prisoner must have had the intention to report immediately to the proper authorities after his escape in order to avail himself of the duress defense.

United States v. Bifield, 702 F.2d 342, 19 CLB 478, cert. denied, 461 U.S. 931, 103 S. Ct. 2095 (1983).

§ 27.15 Entrapment

U.S. Supreme Court After defendant, a Small Business Administration employee, was convicted of taking a bribe, he appealed on the grounds that the district court had improperly denied him the right to raise the entrapment defense. The district court ruled that entrapment was not available unless defendant admitted all the elements of the offense. The court of appeals affirmed the conviction.

Held, conviction reversed. The Court found that even if defendant in a federal criminal case denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. The Court thus rejected the government's contention that a defendant should not be allowed both to deny the offense and to rely on the inconsistent, affirmative defense of entrapment. Mathews v. United States, 108 S. Ct. 883 (1988).

Court of Appeals, 2d Cir. After defendant was convicted of bribery and related charges arising from the Abscam investigation, he appealed on the ground that he was entrapped.

Held, conviction affirmed. The Second Circuit found that the evidence did not show entrapment or outrageous government conduct. The court reasoned that where no agent of the government suggested to defendant that a condition for earning a commission on a casino project was his willingness to participate in bribing a congressman, entrapment was not available as a defense. The court explained that government agents had simply invited him to continue locating willing congressmen without offering any inducement other than what share of the bribe payments he was able to obtain from another individual. United States v. Silvestri, 719 F.2d 577 (1983).

Court of Appeals, 3d Cir. After defendant was convicted of conspiracy to violate the provisions of RICO and the Hobbs Act, the district court granted his motion for acquittal, and the government appealed. The court of appeals reversed and ordered reinstatement of the jury verdicts. Defendant then appealed after sentencing.

Held, affirmed. Although the entrapment charge was erroneous, since it improperly required defendants to show some evidence of inducement either by introducing their own proof or by reference to the government's evidence, the error was not reversible in view of the overwhelming evidence of defendant's predisposition. United States v. Jannotti, 729 F.2d 213, 20 CLB 467, cert. denied, 105 S. Ct. 243, 244 (1984).

Court of Appeals, 5th Cir. After defendant was convicted of conspiracy to travel interstate with intent to distribute cocaine, he appealed on the ground that the government had improperly paid a contingency fee to an informant.

Held, conviction affirmed. The Fifth Circuit declared that payment of a contingency fee to an informant does not violate due process as long as the government had not specifically targeted defendant or directed the informant to implicate him. United States v. Yater, 756 F.2d 1058 (1985), 21 CLB 469.

Court of Appeals, 8th Cir. Defendants were convicted of interstate

transportation of stolen food stamp coupons and receipt or sale of stolen food stamp coupons in interstate commerce. One defendant claimed he was entrapped by the conduct of a government informant who supplied him with the name and phone number of the undercover agent who ultimately purchased the food stamps from him.

Held, conviction affirmed. The informant's action only afforded him an opportunity to do what he was predisposed to do. Predisposition was evidenced by defendant's admissions that he knew of prospective sellers of stolen food stamps and had discussed brokering stolen stamps prior to any government involvement. United States v. Zabel, 702 F.2d 704, cert. denied, 464 U.S. 934, 104 S. Ct. 339 (1983).

§ 27.20 Immunity from prosecution

"[The] Prosecutor's Obligation to Grant Defense Witness Immunity," by Bennett L. Gershman, 24 CLB 14 (1988).

Court of Appeals, 2d Cir. After defendant was convicted in the district court of conspiracy to commit various substantive offenses relating to fencing operations and related charges, he appealed on the ground that a statement made by him to a prosecutor had been improperly admitted into evidence.

Held, conviction affirmed. The Second Circuit ruled that statements made by defendant to the prosecutor two months after a grant of limited use immunity were admissible. The court noted that while any subsequent meetings with a defendant after a grant of limited use immunity should be preceded by a caution that the agreement is no longer in effect, there was no such ambiguity here where there was a full two-month interval between the meeting specified in the agreement and the meeting when defendant's statements were obtained. United States v. Golomb, 754 F.2d 86 (1985).

§ 27.40 Statute of limitations

U.S. Supreme Court After defendant was indicted for conspiracy to possess cocaine with intent to distribute, the district court dismissed the indictment for violation of the Speedy Trial Act, which requires that a defendant be brought to trial within twenty days of an indictment. The court of appeals affirmed.

Held, reversed. The Supreme Court ruled that the district court abused its discretion in dismissing the indictment. The Court noted that the district court relied heavily on its unexplained characterization of the government's conduct as "lackadaisical" while failing to consider other relevant facts and circumstances. United States v. Taylor, 108 S. Ct. 2413 (1988).

Court of Appeals, 5th Cir. After defendants were convicted in the district court of intentionally conspiring to distribute cocaine, they appealed on the ground that they were prejudiced by a seventeen-month delay between the time of the alleged conspiracy and indictment.

Held, affirmed. The Fifth Circuit found that where, as here, the indictment occurred within the statute of limitations period, the seventeen-month delay did not prejudice defendants' due process rights even though they alleged that they could not remember events surrounding the criminal charges against them. The court noted that defendants failed to show that the de-

lay was a deliberate maneuver by the government to gain tactical advantage over them. United States v. Johnson, 802 F.2d 833 (1986).

Court of Appeals, 7th Cir. Defendant was convicted of conspiracy to defraud the government, making false statements, and mail fraud. He appealed, claiming to be entitled to habeas corpus relief because the statute of limitations had expired before the indictment was returned.

Held, affirmed. The statute of limitations does not pose a jurisdictional bar to prosecution unless defendant affirmatively asserts it. Defendant's failure to affirmatively assert the defense constituted a knowing and voluntary waiver. United States v. Meeker, 701 F.2d 685, cert. denied, 464 U.S. 826, 104 S. Ct. 96 (1983).

Part IV — FEDERAL PROCEDURES

28. JURISDICTION AND VENUE

§ 28.05 Jurisdiction over pretrial motions

Court of Appeals, 1st Cir. A Racketeer Influenced and Corrupt Organizations Act (RICO) complaint was dismissed in the district court for lack of jurisdiction on the basis that it failed to allege predicate acts or a pattern of racketeering activity. In essence, the complaint alleged the exclusion of plaintiff from a certain business.

Held, affirmed. The First Circuit found that the complaint failed to state a cause of action under RICO, since it failed to allege that defendant committed any of the predicate acts enumerated in the RICO statute. Moreover, the complaint failed to allege a "pattern of racketeering activity" as required under the statute. Ortiz Villafane v. Segarra, 797 F.2d 1 (1986).

§ 28.15 Venue

Court of Appeals, 2d Cir. Defendant was indicted in the Southern District of New York on perjury and obstruction of justice charges relating to statements made during his deposition in San Francisco in a pending civil case filed in the Southern District. The district court judge dismissed the charges for lack of venue, reasoning that perjury lies only in the district where the oath is taken.

Held, dismissal order reversed. The Second Circuit ruled that venue properly lay in the Southern District of New York since the venue for prosecution of a crime may be determined from the nature of the crime charged as well as the location of the act or acts constituting it. The court noted that defendant's deposition was taken in San Francisco for his convenience, and it with uncontested that the deposition was taken pursuant to Southern District rules. United States v. Reed, 773 F.2d 477 (1985), 22 CLB 165.

Court of Appeals, 11th Cir. Defendant was convicted in the U.S. District Court for the Middle District of Florida of conspiracy to distribute marijuana and of distribution. On appeal, defendant argued that the Middle District of Florida lacked proper venue because the alleged offenses occurred in the Southern District of Florida. The convictions arose out of defendant's attempt to sell a large quantity of marijuana to an undercover agent with the Florida Department of Law Enforcement. The locations at which defendant and the agent discussed the transaction and met the next day to execute it are in the Middle District. They drove into the Southern District to a warehouse where the marijuana was stored. After the marijuana was loaded into the agent's van, defendant and the agent drove back to the Middle District where defendant expected

to get paid. Instead, he was arrested. Defendant argued that venue was improper because the actual distribution of the marijuana occurred in the Southern District and he was no longer in possession of it by the time he drove back to the Middle District.

Held, affirmed. Venue was proper. The distribution was a continuing offense, parts of which occurred in both districts. The distribution comprised the acts prior and subsequent to the physical transfer of the marijuana as well as the transfer itself because such acts were perpetrated in furtherance of the transfer. Defendant's claim that he lacked constructive possession over the marijuana during the drive back to the Middle District was without merit. Defendant did not intend to relinquish his control over the marijuana until he was paid, and he took steps to retain control over the agent's van until then. United States v. Brunty, 701 F.2d 1375, cert. denied, 464 U.S. 848, 104 S. Ct. 155 (1983).

§ 28.25 Concurrent federal and state jurisdiction

"Turf Wars: Federal-State Cooperation and the Reverse Silver Platter Doctrine," by Jill E. Fisch, 23 CLB 509 (1987).

29. PRELIMINARY PROCEEDINGS

§ 29.00 Grand jury proceedings

U.S. Supreme Court Attorneys for the Antitrust Division discharged a grand jury investigating alleged price fixing and obtained a Rule 6(e) order allowing disclosure of grand jury materials to six named Government attorneys other than themselves. Under Rule 6(e)(3)(c)(i) of the Federal Rules of Civil Procedure, attorneys for the Civil Division of the Department of Justice must show "particularized need" before they can disclose grand jury materials for use in a civil suit. The district court denied respondent's motion to vacate the disclosure order, but the Court of Appeals reversed.

Held, reversed. The Supreme Court stated that an attorney who conducted a criminal prosecution may have continued use of grand jury materials in a civil phase of a dispute without obtaining a court order to do so under Rule 6(e). The Court observed that, by its plain language, the Rule merely prohibits those who already have access to grand jury material from revealing the material to others not authorized to receive it. United States v. John Doe, Inc. I, 107 S. Ct. 1656 (1987).

U.S. Supreme Court After petitioner was indicted on federal fraud charges, he moved for dismissal of the indictment on the ground that there was discrimination in the grand jury selection process. The district court denied the motion, and the petitioner was convicted after a jury trial. The court of appeals affirmed.

Held, conviction affirmed. The Supreme Court reasoned that even assuming that there was discrimination in the selection of a grand jury foreman, such discrimination does not warrant reversal of petitioner's conviction. The Court reasoned that dis-

crimination in the selection of a grand jury foreman, as distinguished from discrimination in the selection of the grand jury itself, does not in any sense threaten the interests of a defendant protected by the due process clause. Hobby v. United States, 104 S. Ct. 3093 (1984).

U.S. Supreme Court Respondent was the target of a grand jury investigation of certain commodity futures transactions. He was never indicted but, after plea negotiations, pleaded guilty to misdemeanor violations of the Commodity Exchange Act. Thereafter, the Government filed a motion under Rule 6(e)(3)(C)(i) for disclosure of grand jury transcripts and documents to the Internal Revenue Service (IRS) for use in an audit to determine respondent's civil income tax liability. While holding that disclosure was not authorized by Rule 6(e)(3)(C)(i), the District Court nevertheless allowed disclosure under its "general supervisory powers over the grand jury." The Court of Appeals reversed, agreeing that no disclosure is available under Rule 6(e)(3)(C)(i) but holding that the District Court erred in granting disclosure under "general supervisory powers."

Held, judgment of Seventh Circuit affirmed. The Supreme Court concluded that the grand jury documents could not be released for the intended purpose since the civil tax audit was not "preliminary or in connection with a judicial proceeding" within the meaning of Rule 6(e), Federal Rules of Criminal Procedure. The Court reasoned that Rule 6(e) contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated, and it is not enough to show that some litigation may emerge from the matter in which the material is to be used. United States v. Baggot, 463 U.S. 476, 103 S. Ct. 3164 (1983), 20 CLB 161.

U.S. Supreme Court Respondents, a company having Navy contracts and officials of the company, were indicted by a federal grand jury for conspiracy to defraud the United States and tax fraud. The parties later reached a plea bargain under which the individual respondents pleaded guilty to a count of conspiracy to defraud the Government by obstructing an Internal Revenue Service investigation, and other counts against respondents were dismissed. Thereafter, the Government moved for disclosure of all grand jury materials to attorneys in the Justice Department's Civil Division, their paralegal and secretarial assistants, and certain Defense Department experts for use in preparing and conducting a possible civil suit against respondents under the False Claims Act. The District Court granted disclosure, concluding that Civil Division attorneys are entitled to disclosure as a matter of right under Federal Rule of Criminal Procedure 6(e)(3)(A)(i) (hereinafter (A)(i)), which authorizes disclosure of grand jury materials without a court order to "an attorney for the government for use in the performance of such attorney's duty." The court also stated that disclosure was warranted because the Government had shown particularized need for disclosure. The Court of Appeals vacated and remanded, holding (1) that Civil Division attorneys could obtain disclosure only by showing particularized need, under Rule 6(e)(3)(C)(i) (hereinafter (C)(i)), which authorizes disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding," and (2) that the District Court had not applied a correct standard of particularized need.

Held, judgment of Ninth Circuit affirmed. The Supreme Court found that disclosure of grand jury materials to an attorney for the government is limited to use by those attorneys who conduct the criminal matters to which the matters pertain. The Court so found even though civil division attorneys are within the class of "attorneys for the government" under the Rule and access was sought in furtherance of governmental responsibilities. United States v. Sells Eng'g, Inc., 463 U.S. 418, 103 S. Ct. 3133 (1983), 20 CLB 161.

Court of Appeals, 2d Cir. The subjects of a grand jury investigation moved to vacate an ex parte order allowing disclosure of grand jury material for use in a civil case against them. The district court granted an ex parte order allowing disclosure of grand jury materials to the Civil Division of the Justice Department by the Antitrust Division. The Second Circuit reversed and remanded the order, stating that the government had failed to show the particularized need required to authorize disclosure. Certiorari was granted.

Held, reversed. The U.S. Supreme Court held that the government attorneys in the antitrust division had made a showing of particularized need under Fed. R. Crim. P.6(e)(3)(C)(i), allowing them to disclose grand-jury materials to other government attorneys in the civil division and to the local U.S. Attorney. The government attorneys sought the material for the valid purpose, of enabling them to make a decision as to whether to proceed in a civil action. The public benefit of disclosure, that is, a savings of time and expense, outweighed the dangers posed by the disclosure. Additionally, even if all the material could be obtained through civil-discovery tools, no *per se* rule existed against disclosure. In re Grand Jury Investigation, 774 F.2d 34 (1985), 22 CLB 160, reversed, 107 S. Ct. 1656 (1987).

Court of Appeals, 2d Cir. After defendants were convicted in district court on drug conspiracy charges, they appealed on the ground that the prosecutor's presentation before the grand jury required reversal.

Held, reversed and remanded with instructions to dismiss indictment. The misconduct of the prosecutor, who presented extensive hearsay and double hearsay before the grand jury regarding one defendant's involvement in two murders, and whose accusations appeared to have been made in order to depict the defendants as bad persons, mandated dismissal of the indictment. United States v. Hogan, 712 F.2d 757 (1983), 20 CLB 62.

Court of Appeals, 4th Cir. A civil forfeiture proceeding was brought against a car allegedly used in a drug transaction. The district court found probable cause and ordered the forfeiture. On appeal, it was argued that the government's disclosure of grand jury testimony concerning the model and color of the car used in the alleged cocaine sale in the civil forfeiture proceeding against the car violated grand jury procedures.

Held, reversed and remanded. The Fourth Circuit found that the disclosure of the information relating to the car was improper and that the district court's subsequent order approving the disclosure was not based on the showing of particularized needs. In remanding, the court observed that available remedies for the govern-

ment's violation of the grand jury disclosure rule included suppression of the grand jury material, and that the district court could make a probable cause determination without considering that testimony if it did not find particularized needs. United States v. Coughlin, 842 F.2d 737 (1988).

Court of Appeals, 4th Cir. After defendant was convicted in a district court of attempted bank robbery pursuant to a conditional plea of guilty, he appealed on the grounds that his indictment was improper. Specifically, the grand jury foreman, who had been convicted of a crime punishable by more than one year of imprisonment and who had not had his civil rights restored, was unqualified to serve on the grand jury.

Held, conviction affirmed. The Fourth Circuit declared that the conviction based on a conditional guilty plea would be affirmed on the basis of harmless error. The court reasoned that the testimony leading to defendant's indictments was not improper on the grounds that the grand jury foreman was not qualified to serve in that capacity, since that error did not affect the validity of witnesses' testimony or taint the return of the indictment. In so holding, the court observed that not every deficiency in a grand jury proceeding requires dismissal of an indictment. United States v. Hefner, 842 F.2d 731 (1988).

Court of Appeals, 6th Cir. After defendant was convicted in the district court of extortion and conspiracy to obstruct interstate commerce by force and violence, he appealed on the ground that the grand jury had improperly sworn in a federal investigative agent as an "agent of the grand jury."

Held, convictions affirmed. The Sixth Circuit ruled that the swearing-in of the agent was not prosecutorial misconduct and did not warrant dismissal of the indictment. The court reasoned that absent a showing of prejudice, such as a showing that the defendant would not have been indicted but for the swearing-in, the questioned practice would not undermine the foundation of public trust and confidence in the grand jury system. The court further found that the district court did not abuse its discretion by denying defendant's request for an evidentiary hearing. United States v. Jones, 766 F.2d 994 (1984).

Court of Appeals, 8th Cir. After being acquitted on conspiracy charges, defendant made an application to the grand jury regarding allegations of perjury by an FBI agent. When the U.S. attorney presented the allegations to the grand jury, it declined to take action. The applicant then filed a petition to have the matter re-presented to the grand jury on the grounds that it had not been fairly presented the first time. The district court issued an order directing the U.S. attorney to re-present.

Held, order affirmed. The Eighth Circuit declared that the district court's order was a proper exercise of its supervisory power and did not violate the separation of powers. In re Application of Larry Wood, 833 F.2d 113 (1987), 24 CLB 263.

§ 29.05 —Subpoenas

U.S. Supreme Court The president and sole shareholder of a corporation was found in contempt of court for refusing to produce the corporation's

books and records pursuant to a grand jury subpoena. The court of appeals affirmed.

Held, affirmed. The Supreme Court ruled that a corporate president may not fail to produce corporate records on Fifth Amendment grounds even if the act of production might prove personally incriminating. The Court reasoned that corporate records are held by officers in a representative rather than a personal capacity. Braswell v. United States, 108 S. Ct. 2284 (1988).

U.S. Supreme Court The owner of a sole proprietorship, upon whom grand jury subpoenas had been served demanding production of certain business records, filed a motion to quash the subpoenas. The district court granted the motion, and the Court of Appeals for the Third Circuit affirmed.

Held, affirmed in part and reversed in part. The U.S. Supreme Court held that although the contents of business records were not privileged, the act of producing the records was privileged and could not be compelled without a grant-of-use immunity. The Court reasoned that since the owner did not concede that the subpoenaed records actually existed or were in his possession, the act of producing the records might have been incriminating. United States v. John Doe, 465 U.S. 605, 104 S. Ct. 1237 (1984), 21 CLB 462.

Court of Appeals, 2d Cir. After a grand jury subpoena was issued on an individual, calling on him to produce a tape recording in his possession of conversations in which he and others discussed the payment of sales taxes and a sales tax audit, he was held in contempt by the district court for failing to comply.

Held, contempt order affirmed. The Second Circuit ruled that the tapes were not protected by the Fifth Amendment, since they pertained primarily to business matters. The court noted that the government had obtained an order directing the individual to provide the grand jury with the subpoenaed tape recording and granted him immunity for the act of producing the subpoenaed material. In re Grand Jury Proceedings, 767 F.2d 39 (1985).

Court of Appeals, 2d Cir. Defendant brought a motion to quash a grand jury subpoena served on his attorney calling for documents relating to fee arrangements, which was denied in the district court.

Held, reversed and motion granted. The Second Circuit declared that the subpoena was not being used for a proper grand jury purpose, since its primary purpose was for trial preparation. The court noted that the evidence had been sought previously by means of a trial subpoena, and there was no indication that the government's intent shifted merely because a grand jury subpoena was substituted for the trial subpoena. In re Grand Jury Subpoena, 767 F.2d 26 (1985).

Court of Appeals, 2d Cir. Defendant, a pharmacist, was convicted in the district court of conspiracy to distribute and possess with intent to distribute a controlled substance and falsifying records required to be kept by pharmacists. On appeal, he argued that the government had improperly been permitted to introduce evidence seized pursuant to "forthwith" grand jury subpoenas.

Held, conviction affirmed on this issue. The Second Circuit concluded that the government's use of subpoenas requiring production of the

pharmacies' records "forthwith" while the defendant-pharmacist was under arrest was entirely lawful. The court reasoned that the federal investigation had substantial reason to believe that the pharmacist was engaged unlawfully in distributing controlled substances, and they were motivated by reasonable and good faith concerns that the pharmacist would attempt to tamper with evidence if given the opportunity. United States v. Lartey, 716 F.2d 955 (1983), 20 CLB 176.

Court of Appeals, 5th Cir. The district court issued an order enforcing an IRS summons issued against the president of a liquor company during a tax investigation. The president appealed on the ground that he did not possess the subpoenaed documents. The summons required production of accounts receivable ledgers for a three-year period.

Held, enforcement of summons affirmed. The Fifth Circuit ruled that a corporate officer cannot defeat an IRS summons merely by asserting that the records are not in his possession. The court noted that while lack of possession and control of subpoenaed documents is a valid defense to an IRS application for an enforcement order, the party resisting enforcement bears the burden of producing credible evidence that he does not possess or control the documents sought. United States v. Huckaby, 776 F.2d 564 (1985), 22 CLB 281, cert. denied, 106 S. Ct. 1468 (1986).

§ 29.10 —Immunity

Court of Appeals, 3d Cir. Defendant, who was charged with income tax evasion, sought dismissal of the indictment on the grounds that his prosecution was barred by an agreement he entered into with the government when he testified before the grand jury. The district court denied the motion, and he was subsequently convicted of income tax evasion.

Held, conviction affirmed. The Third Circuit stated that the agreement between a defendant and the government was not an agreement providing for use or derivative use immunity; rather, it was simply an agreement not to prosecute if the defendant testified truthfully and completely before the grand jury regarding his activities in connection with a business associate. The court further found that defendant had materially breached that agreement by failing to disclose that he and an associate had received $250,000 as settlement proceeds from a lawsuit. The court noted that although defendant argued he was not obligated to volunteer information, the terms of the agreement indicated that the government expected defendant to disclose all information concerning his activities in connection with the associate, and the purpose of the investigation was to identify sources of the associate's income. United States v. Skalsky, 857 F.2d 172 (1988).

Court of Appeals, 3d Cir. Defendant was convicted of violating the anti-kickback statute, 41 U.S.C. §§ 51 and 54. The government charged that defendant, who was a purchasing agent for Amtrak, had accepted a new automobile as a gift from a subcontractor doing business with the railroad. Defendant was granted use immunity and compelled to testify before a grand jury about a crime for which he was later indicted. On appeal he contended that the Assistant United States Attorney who tried the case used the grand jury testimony as a "discovery deposition"

and thus violated the Fifth Amendment privilege against self-incrimination.

Held, remanded for further proceedings. Remanded to determine whether the government violated defendant's use immunity by giving the prosecutor access to defendant's grand jury testimony relating to the charged offense. The court observed that if such were the case, defendant would not have been substantially in the same position as if he had not testified since the trial prosecutor would have then known his intended defense. The court suggested that the way to avoid this problem was to have a different trial attorney for the government who had no prior access to defendant's grand jury testimony. United States v. Semkiw, 712 F.2d 891 (1983), 20 CLB 63.

Court of Appeals, 5th Cir. Several grand jury witnesses were held in contempt by the district court for refusing to testify under a federal grant of immunity pursuant to 18 U.S.C. § 6002. On appeal they argued that they refused to testify because they had a legitimate concern about state prosecution.

Held, affirmed. The Fifth Circuit stated that since the immunity provided a federal witness is co-extensive with the Fifth Amendment, fear of state prosecution is insufficient grounds for a refusal to testify. The court observed that state courts are required to respect immunity granted under the federal immunity statute so the witnesses had no legitimate fear of state prosecution based on testimony sought by the federal grand jury. In re Grand Jury Proceedings, 757 F.2d 1580 (1985), 21 CLB 467.

§ 29.20 Bail

"Detention Under the Federal Bail Reform Act of 1984," by Richard A. Powers III, 21 CLB 413 (1985).

U.S. Supreme Court Under the Bail Reform Act of 1984, the district court ordered that defendants, who had been charged with thirty-five acts of racketeering activity, be detained on the grounds that their release would constitute a danger to the community. The Court of Appeals for the Second Circuit reversed and remanded.

Held, reversed. The Bail Reform Act, authorizing pretrial detention on the basis of future dangerousness, constituted permissible regulation and did not violate substantive due process. The act's legislative history indicated that the detention provisions were formulated not as a punishment but rather as a solution to the pressing problem of crimes committed by persons on release. The Court thereby found that preventing danger to the community was a legitimate regulatory goal. United States v. Salerno, 107 S. Ct. 2095 (1987).

Court of Appeals, 3d Cir. After defendant was charged with offenses involving the production of false identification documents, the government moved to detain him on the grounds that there was a risk that he would flee. The magistrate found that there was a risk of flight as well as a danger that he would continue to engage in similar criminal activity, and he ordered dentention.

Held, reversed and remanded. The Third Circuit declared that the relevant statute did not authorize pretrial detention based on defendant's danger to the community other than for those

offenses that would support a motion for detention. The court noted that offenses involving false identification were not a valid basis for a danger-to-the-community claim. The court also found that there was no basis to conclude that defendant would flee. United States v. Himler, 797 F.2d 156 (1986).

Court of Appeals, 3d Cir. The district court determined after a hearing that defendant should be detained prior to trial, pursuant to the Bank Reform Act of 1984, on conspiracy and racketeering charges and defendant appealed.

Held, district court order affirmed. The Third Circuit decided that in a detention hearing, a court may admit hearsay evidence and refuse to subpoena witnesses whose out-of-court statements linked defendant to the conspiracy and other crimes. United States v. Delker, 757 F.2d 1390 (1985), 21 CLB 469.

§ 29.30 Competency proceedings

Court of Appeals, 2d Cir. After defendant was charged with criminal contempt, the district court judge ordered defendant to submit to a psychiatric examination to determine his dangerousness to the community and his mental competence to stand trial.

Held, reversed in part and affirmed in part. The Second Circuit stated that the Bail Reform Act does not authorize a judicial officer to order, as a condition of pretrial release, a psychiatric examination to determine a defendant's dangerousness. The court commented that dangerousness must be decided on the basis of the information available at the bail hearing. United States v. Martin-Trigona, 767 F.2d 35 (1985).

§ 29.35 Other preliminary proceedings

Court of Appeals, 2d Cir. After defendant was arrested on New York State charges for the criminal sale and possession of cocaine, his request for a preliminary hearing was denied by the Nassau County District Attorney's Office. Defendant was subsequently indicted by a grand jury and was found guilty after trial. While his appeal was pending, defendant brought a civil rights action based on an alleged unconstitutional deprivation of the right to a preliminary hearing. The district court dismissed the civil rights action, and an appeal was taken.

Held, dismissal of civil rights action affirmed. The Second Circuit declared that federal courts should abstain from enjoining pending state court criminal proceedings when there is no showing of bad faith, harassment, or other unusual or extraordinary circumstances. The court further commented that defendant here was free on bail during the entire state proceedings, so this was not a case of pretrial detention without the right to a probable cause hearing. Morano v. Dillon, 746 F.2d 942 (1984), 21 CLB 257.

Court of Appeals, 4th Cir. Arrestee brought a civil rights action against several police officers, charging violations of his constitutional rights. The district court granted a directed verdict for the defendants, and arrestee appealed.

Held, affirmed. Arrestee had no right to a face-to-face appearance before the magistrate during the probable-cause hearing. The judicial determination of probable cause, required to extend incarceration following arrest, did not involve any adversarial rights and could be based entirely on hearsay

and written testimony. King v. Jones, 824 F.2d 324 (1987).

§ 29.40 Right to have interpreter

Court of Appeals, D.C. Cir. Defendant was convicted of aiding and abetting a robbery. Defendant and two other youths approached a vending stand, and indicated they wanted to purchase some candy from the owner who spoke broken English. While the defendant and another youth were deciding which candy to buy, the third youth grabbed $45 from the cash box at the rear of the stand. They fled when the owner discovered the robbery. One week later the same youths approached the stand. Upon recognizing them, the owner summoned the police who arrested the three youths who later were found guilty. On appeal, defendant contended that the trial court erred in denying a defense request for the appointment of an interpreter to assist in the cross-examination of the owner, thereby precluding effective cross-examination and violating defendants rights under the confrontation clause of the Sixth Amendment.

Held, conviction affirmed. The court of appeals concluded that in refusing to appoint an interpreter the trial court neither abused its discretion, nor infringed defendant's right to confront the witnesses against him. In re Q.L.J., 458 A.2d 30 (1983).

§ 29.45 Administrative process (New)

U.S. Supreme Court The IRS issued a summons requesting financial information from the petitioner-company as well as from licensees of the company. When petitioner refused to comply with the summonses, the government successfully brought an enforcement action in the district court, and the court of appeals affirmed, finding that prior judicial approval to serve an IRS summons is necessary only when the summons is to an identifiable party with whom it has no interest in order to investigate the tax liability of unnamed third parties.

Held, affirmed. On certiorari the Supreme Court ruled that when the IRS serves a summons on a known taxpayer with the dual purpose of investigating both that taxpayer's tax liability and that of unnamed third parties, it need not obtain prior judicial approval as long as the information sought is relevant to a legitimate investigation of the summoned taxpayer. Here, on the record, the licensees' names "may be relevant" to the legitimate investigation of the petitioner-company, and thus the summonses were properly enforced. Tiffany Fine Arts, Inc. v. United States, 105 S. Ct. 725 (1985).

30. INDICTMENT AND INFORMATION

§ 30.00 In general

U.S. Supreme Court Defendant was indicted on mail fraud charges for having allegedly defrauded his insurer in connection with a burglary of his business both by consenting to the burglary in advance and by lying to the insurer about the value of the loss. Prior to trial, however, the government struck the allegation relating to his prior knowledge of the burglary, and he was convicted only on the charge relating to the false statement. Defendant appealed on the ground that the proof at trial fatally varied from

the scheme alleged in the indictment, and the Court of Appeals reversed.

Held, judgment reversed. The Supreme Court stated that as long as the crime and the elements thereof are fully and clearly set forth in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or means of committing it. The Court reasoned that defendant was not deprived of any substantial rights because he was tried on an indictment that clearly set out the offense for which he was committed. The Court thus rejected the argument that a narrowing of an indictment constitutes an "amendment" rendering the indictment void. United States v. Miller, 105 S. Ct. 1811 (1985), 21 CLB 464.

Court of Appeals, 1st Cir. After defendants were convicted in the district court of distribution of cocaine and related conspiracy charges, they appealed on the ground, among other things, that they were prejudiced by the ten-month delay between the alleged drug transaction and their indictment.

Held, conviction affirmed. The First Circuit found that defendants failed to establish that the delay prejudiced the right to a fair trial by impairing their ability to present alibi defenses. Commenting that a prosecutor is not obliged to file charges as soon as probable cause exists, the court noted the absence of any impairment of defendants' memories or their ability to locate witnesses resulting from the alleged delay. The court further found no evidence that the government intentionally delayed indictment in order to gain a tactical advantage over defendants. United States v. Acevedo, 842 F.2d 502 (1988).

Court of Appeals, 2d Cir. Defendant was convicted in the district court of theft of mail matter and opening mail without authority. On appeal, he argued that the government should have been prevented from reprosecuting him after the complaint against him was dismissed.

Held, conviction reversed and complaint dismissed with prejudice. The Second Circuit stated that while the statute mandating dismissal of a complaint if no indictment or information is filed within thirty days does not create a presumption that dismissal will be with prejudice, the facts of this case warranted dismissal with prejudice. The court noted that the complaint was not dismissed until fifty-one days after the defendant's arrest, the defendant's conduct did not constitute a "serious" crime, and the prosecutor's negligence was the sole cause of the failure to comply with the Speedy Trial Act's time requirements. United States v. Caparella, 716 F.2d 976 (1983), 20 CLB 167.

Court of Appeals, 4th Cir. After defendant was charged in an indictment with conspiracy to purchase stolen ammunition and equipment, the district court granted his motion to dismiss the indictment, and the government appealed.

Held, reversed and remanded. The Fourth Circuit determined that the fact that the indictment refers to "divers other persons" rather than naming the co-conspirators does not automatically render the indictment valid. The court reasoned that the existence of the conspiracy, rather than the particular identity of the con-

spirators, is the essential element of the crime. United States v. American Waste Fibers Co., 809 F.2d 1044 (1987), 23 CLB 392.

Court of Appeals, 9th Cir. Defendants were convicted of being present on federal property after normal work hours in violation of 41 C.F.R. §§ 101-20.203 and 101-20.315 (1981). One day during normal working hours defendants, members of an organization whose goal was the passage of the California Marijuana Initiative, set up a table on the corner of federal building property. The group sought to collect petition signatures in support of the initiative and to distribute information. It announced an intention to occupy the area continuously for seventeen days. One night, after refusing to follow orders of federal officials to vacate the premises, the group members were arrested. Defendants argued that the indictment was insufficient because it charged them with "presence" at the federal property while the regulation forbids only "entry upon." They argued that once a person has legally "entered" the property, remaining after working hours is not prohibited by the regulation. Another problem with the indictment, they alleged, was that it failed to specify the exact times of the trespass or what times are included in the phrase "normal working hours."

Held, the indictment was sufficient. While an indictment should set forth all the elements of the offense charged and all facts and circumstances, it should be construed according to common sense. Common sense dictates that illegal "entry" includes illegal "presence" on public property, and that defendants spent some hours on the premises which were outside of "normal working hours." Furthermore, any deficiencies in the indictment did not prejudice defendants. United States v. Christopher, 700 F.2d 1253, cert. denied, 461 U.S. 960, 103 S. Ct. 2436 (1983).

§ 30.05 Combining two or more separate offenses in a single count (New)

Court of Appeals, 5th Cir. Defendant was convicted in the district court of threatening the life of the President, and he appealed on the ground that the one-count indictment was duplicitous.

Held, conviction affirmed. The Fifth Circuit rule that more than one threatening statement could be consolidated in a single count of the indictment where they were part of a single, continuous scheme that occurred within a short period of time and which involved the same defendant. The court thus found that the indictment was not duplicitous, notwithstanding that each statement alone might constitute an offense. The court further commented that its decision was based on a finding that defendant was properly notified of the charges against him and would not be subjected to double jeopardy. United States v. Robin, 693 F.2d 376 (1982), 19 CLB 265.

31. PRETRIAL MOTIONS

§ 31.05 —Procedure for dismissing indictment

U.S. Supreme Court Defendants originally indicted in the Eastern District of Kentucky for conspiracy succeeded in obtaining a change of venue to the Central District of California. In the

latter district defendants were indicted on additional substantive counts so they moved to dismiss on the ground of prosecutorial vindictiveness, which was denied. On appeal the Ninth Circuit held that the denial of the motion to dismiss was immediately appealable as a final decision under 28 U.S.C. § 1291. Certiorari was granted.

Held, reversed with instructions. The Supreme Court held that an order denying a motion to dismiss based on vindictiveness on the part of the prosecutor is not one of those rights that must be vindicated before trial, if at all. The Court reasoned that while there was superficial plausibility to the contention that any constitutional claim would be dispositive of the entire case if decided favorably to a criminal defendant, the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions. United States v. Hollywood Motor Car Co., 458 U.S. 263, 102 S. Ct. 3081 (1982).

Court of Appeals, 5th Cir. Defendant was convicted in the district court of conspiracy and possession with intent to deliver heroin. On appeal, he argued that he should not have been tried on the superseding indictment after dismissal of the original one.

Held, conviction reversed. The Fifth Circuit st ' that the prosecutor's statement that the reason for dismissing the original indictment was that a superseding indictment would be sought was insufficient to support a dismissal. The court further found that the motion to dismiss was not made in good faith since the real reason for seeking the dismissal was the government's dissatisfaction with the jury, i.e., that there were some people on the jury that knew defendant. The court observed that such reasons for dismissal are contrary to the public interest. United States v. Salinas, 693 F.2d 348 (1982), 19 CLB 265.

§ 31.10 —Severance

Court of Appeals, 1st Cir. Two defendants were convicted in the district court of conspiracy and violating the Travel Act, and on appeal, they argued that they had been improperly joined at trial.

Held, convictions affirmed. The First Circuit reasoned that a conspiracy count can be a sufficient connecting link between codefendants and multiple offenses that tip the balance in favor of joinder as long as the conspiracy count is added in good faith. The court noted that the determination of what constitutes a single series of acts or transactions under the misjoinder rule involves balancing the benefit to the government of trying together multiple defendants involved in related incidents against each defendant's right to have his own guilt considered separately. United States v. Arruda, 715 F.2d 671 (1983), 20 CLB 168.

Court of Appeals, 3d Cir. Defendant was convicted of conspiracy to transport stolen goods in interstate commerce and several firearm offenses. He claimed on appeal, among other things, that the trial court improperly denied his motion for a severance.

Held, affirmed. The Third Circuit concluded that the district court did not abuse its discretion by denying severance even though the testimony of certain witnesses tended to implicate defendant in criminal matters unrelated to the charges for which he was then being tried. The court observed that a severance motion is directed to

the discretion of the trial judge, who is in the best position to waive possible prejudice to the defendant from a joint trial; and that the severance would not have affected such testimony since the witness would presumably have been called upon by the government to testify against each defendant. United States v. Frankenberry, 696 F.2d 239 (1982), 19 CLB 379, cert. denied, 463 U.S. 1210, 103 S. Ct. 3544 (1983).

Court of Appeals, 4th Cir. After defendants were convicted in the district court of assault and kidnapping charges, and acquitted on conspiracy and attempted escape charges, they appealed on the ground that the charges had been improperly joined at one trial.

Held, affirmed as to joinder of charges and reversed and remanded on other grounds. The Fourth Circuit sustained the joinder of the charges because the charges were connected in that they arose from the same occurrence and there was no potential for unfair prejudice because the evidence for each of the charges was admissible in proving each of the other charges. The court further found that acquittal on conspiracy and attempted escape charges did not establish misjoinder because the propriety of the joinder is determined at the time of the indictment, not retrospectively after a verdict. United States v. Lorick, 753 F.2d 1295 (1985).

Court of Appeals, 5th Cir. After the defendants were convicted in the district court on RICO and related charges, they appealed on the ground, among others, that the trial was an abuse of discretion.

Held, affirmed in part and reversed on other grounds. The court did not abuse its discretion by denying a severance motion brought by a defendant seeking to call a co-defendant as a witness, where the motion for severance contained only conclusory statements as to the exculpatory nature of co-defendant's testimony and the mere assertion that the co-defendant would indeed testify. United States v. Williams, 809 F.2d 1072 (1987), appeal pending, 23 CLB 392.

Court of Appeals, 5th Cir. Following his state court conviction of aggravated burglary and possession of a firearm by a convicted felon, defendant appealed on the ground that his severance motion had been improperly denied. The district court denied his habeas corpus petition.

Held, conviction affirmed. The Fifth Circuit ruled that the state court's denial of the severance motion did not violate defendant's right to due process and a fair trial, even though the charge of possession of a firearm by a convicted felon revealed to the jury the prior burglary conviction on defendant's record. The court observed that there was no undue emphasis placed on the prior conviction, that there was no objection to the jury charge, and that the evidence of guilt was overwhelming. Breeland v. Blackburn, 786 F.2d 1239 (1986).

Court of Appeals, 8th Cir. After defendants were convicted in the district court of attempted arson and mail fraud, they appealed. One defendant claimed that her motion to sever had been improperly denied where she asserted that she would have been able to examine co-defendant at a separate trial as to the fact that the co-defendant had ordered the insurance on the burned property.

Held, reversed in part on other grounds. The Eighth Circuit concluded that defendant was not entitled to a severance solely because the co-defendant could not legally testify as to the ordering of the insurance. The court noted that, in order to be entitled to a severance, defendant must show not only that the co-defendant would be called at a separate trial and that the co-defendant would testify, but also that the testimony would be exculpatory. United States v. Voss, 787 F.2d 393 (1986), cert. denied, 107 S. Ct. 286.

§ 31.20 —Court-appointed psychologist

U.S. Supreme Court After defendant was charged with first-degree murder and related charges, he was examined by a court-appointed psychiatrist and found to be incompetent to stand trial. However, after six weeks in a mental hospital, he was found to be competent if sedated with prescribed drugs. Defense counsel's motion for a psychiatric evaluation at state expense was denied, and defendant was convicted after trial on all counts and sentenced to death. The Oklahoma Court of Criminal Appeals affirmed, and certiorari was granted.

Held, conviction reversed and case remanded. The Supreme Court found that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a state provide psychiatric assistance to an indigent defendant. The Court noted that without a psychiatrist's assistance in conducting a professional examination of issues relevant to the insanity defense, to help determine whether that defense is viable, to present testimony, and to assist in preparing for cross-examination of the state's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. Ake v. Oklahoma, 105 S. Ct. 1087 (1985), 21 CLB 466.

32. DISCOVERY

§ 32.00 In general

Court of Appeals, 1st Cir. After defendants were convicted in district court on charges arising from an armed bank robbery, they appealed on the ground that the government's failure to turn evidence over to them prior to trial required reversal.

Held, affirmed. The government's failure to disclose in a timely manner footprint, fingerprint, and handwriting reports in advance of trial did not warrant reversal of defendants' convictions. The court reasoned that defendants were not prejudiced, since they received the reports during the course of trial and used them in their defense. The court further observed that it did not appear that their timely disclosure would have resulted in a different defense strategy, and defendants' general discovery requests failed to establish a *Brady* claim, since the reports were not obviously exculpatory in nature. United States v. Hemmer, 729 F.2d 10, 20 CLB 464, cert. denied, 104 S. Ct. 2666 (1984).

Court of Appeals, 3d Cir. The district court precluded a key government witness from testifying at trial as a sanction against the government for

its failure to turn over to defendant certain exculpatory evidence prior to trial, and the government appealed.

Held, vacated and remanded. The Third Circuit, holding that absent prejudice to the defendant by the government's nondisclosure, the government's failure to disclose did not warrant precluding such witness from testifying. The court observed, however, that a prosecutor who intentionally fails to turn over exculpatory evidence to the defense violates standards of professional conduct and may be subject to disciplinary sanctions. United States v. Starusko, 729 F.2d 256 (1984), 20 CLB 467.

§ 32.05 —Statements of defendant

Court of Appeals, 1st Cir. After defendants were convicted in the district court of importing and possessing cocaine, they appealed on the grounds, among other things, that the government's failure to turn over taped conversations required reversal.

Held, convictions affirmed. The First Circuit found that the taped conversations that the government had not turned over to defendants were not exculpatory within the meaning of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). The court reasoned that the tape, wherein defendant stated that he strongly opposed any drug dealing, could not have been introduced at trial to show defendant's character, since the rules allow such proof only by reputation or opinion testimony. Nor could they have been introduced under any hearsay exception. United States v. Law, 828 F.2d 871 (1987), 24 CLB 174.

Court of Appeals, 2d Cir. Defendant was convicted of conspiracy to possess and distribute heroin, and of distribution and possession of heroin with intent to distribute. Counsel for defendant moved for a mistrial, claiming that the prosecution's failure to disclose to him in a timely manner that defendant had invoked his Miranda rights prior to making an incriminating statement prejudiced the defense and deprived defendant of a fair trial. Counsel claimed that had prosecution made a timely disclosure, counsel would have been able to move to suppress his client's admissions. Before trial, defendant's counsel requested discovery of defendant's post-arrest statements under Rule 16(a) of the Federal Rules of Criminal Procedure. The prosecution told defense counsel that defendant's post-arrest statements had been volunteered by defendant and had not been recorded in a written report. In fact, when defendant was first informed of his Miranda rights he expressed his refusal to make a statement to the arresting officers. Later, when defendant decided to talk to the officers, he was reminded of his Miranda rights. Defendant advised that he understood those rights and was still willing to talk to the officers. Counsel did not learn of this until he cross-examined the prosecution. The district court, while acknowledging prosecution's violation of Rule 16(a), found for prosecution, holding that defendant's counsel could have obtained the information needed to support a suppression motion from his client.

Held, conviction reversed. The availability of particular statements through the defendant himself did not negate the government's duty to disclose statements subject to Rule 16(a). The defense was entitled to plan its trial strategy on the basis of full disclosure by the government regardless of defendant's memory of the disclosed statement. Criminal defendants can-

not always remember the relevant facts of their cases, or do not always realize their significance. Many of them mistrust their attorneys and, thus, intentionally keep facts from them. The effect of the nondisclosure was aggravated by the prosecution's statement that defendant's admissions were voluntary. Such a statement could have misled counsel into believing that grounds for a suppression motion did not exist. United States v. McElroy, 697 F.2d 459 (1982).

§ 32.10 —Statements of witnesses

Court of Appeals, 2d Cir. Defendants appealed from their convictions in district court of various narcotics offenses on the ground that the *Brady* rule had been violated.

Held, affirmed. The Second Circuit held that failure to deliver promptly certain exculpatory material to the defendants did not warrant reversal. The court noted that there was no showing of prejudice, since the evidence, in fact, was produced eventually during trial, and the defendants did not request a continuance nor recall witnesses for further examination. The court also observed that the trial court had carefully scrutinized the possibility of prosecutory misconduct and had struck the testimony of one witness when the government inadvertently failed to produce one of the witness' reports. United States v. Mourad, 729 F.2d 195, 20 CLB 466, cert. denied, 472 U.S. 1007, 105 S. Ct. 180 (1984).

Court of Appeals, 2d Cir. After defendant was convicted in the district court of armed robbery, he appealed on the ground that the government had failed to produce an exculpatory FBI report.

Held, remanded for supplementation of the record. The Second Circuit stated that the record was insufficient on the critical issue as to whether the failure to introduce the FBI report was the result of ineffective assistance of counsel or a *Brady* (Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963)) violation by the government. The Court of Appeals explained that exculpatory evidence is not "suppressed" if the defendant either knew or should have known of essential facts permitting him to take advantage of the evidence. United States v. Torres, 719 F.2d 549 (1983).

Court of Appeals, 2d Cir. After defendant-contractor was convicted of making illegal payments to a union official and of perjury before the grand jury, he appealed on the grounds that the government had failed to disclose the grand jury testimony of three witnesses who had stated that they had received the proceeds of supplemental "travel expense" checks issued by defendant.

Held, affirmed. The Second Circuit found that the grand jury testimony of the three witnesses was not material within the meaning of the *Brady* rule (Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963)). Their testimony was completely unrelated to the jury conviction which was based upon defendant's denial before the grand jury that he had discussed "travel expense" checks with a union clerk and another. The court reasoned that failure to disclose material information under *Brady* violates due process only when the defendant is denied access to exculpatory evidence known only to the government, and the government is not obligated to supply a defendant with all evidence in its possession which might conceivably assist the preparation of his defense. United States v. LeRoy, 687

F.2d 610 (1982), 19 CLB 171, cert. denied, 459 U.S. 1174, 103 S. Ct. 823 (1983).

Court of Appeals, 4th Cir. The government appealed from a suppression order entered when it declined to obey an order to disclose to a defendant statements of a co-conspirator that were potentially imputable to defendant if admitted in evidence under the hearsay exception of Federal Rule of Evidence 801(d)(2)(E).

Held, affirmed. The Fourth Circuit stated that disclosure of co-conspirator statements may be ordered in appropriate cases, and that on the record before the district court that court did not err in ordering disclosure and imposing suppression sanctions. The court reasoned that "statements of the defendant" under Rule 16 should include any statements made by co-conspirators that may potentially be treated as admissions of a defendant under the hearsay rule. United States v. Roberts, 802 F.2d 682 (1986).

Court of Appeals, 5th Cir. State prisoner sought a writ of federal habeas corpus alleging that in connection with the sentencing phase of his trial for aggravated robbery, the prosecution violated the requirement of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), that it turn over to defendant upon demand all material, exculpatory evidence that is in its possession or available to it.

Held, reversed and remanded. The Fifth Circuit found that suppression of material favorable to the accused includes situations where the prosecution, although not soliciting false evidence, allows it to go uncorrected when it appears. The court thus found that an evidentiary hearing was needed to determine whether police records were suppressed or withheld by the prosecution and whether the prosecution failed to correct what it knew or should have known to be false or incorrect testimony of witnesses who identified the petitioner as a passenger of the getaway car. Austin v. McKaskle, 724 F.2d 1153 (1984).

Court of Appeals, 7th Cir. After defendants were convicted in the district court of racketeering and extortion charges, they appealed on the grounds, inter alia, that the prosecution had failed to turn over to them interview notes of government witnesses.

Held, convictions affirmed. The Seventh Circuit declared that prosecutor's notes of discussions with government witnesses need not be discoverable, even though the witness had testified, where the witness had not written, signed, adopted, or approved the notes and, thus, failed to qualify as "statements" under the Jencks Act (18 U.S.C. § 3500). United States v. O'Malley, 796 F.2d 891 (1986).

§ 32.15 —Identity of witnesses

Court of Appeals, 7th Cir. Defendant was convicted of federal bank robbery. On appeal, he claimed that the district court committed reversible error when it refused to strike the testimony of witnesses linking him to the scene of the crime on the ground that their identities had not been disclosed to him prior to the trial.

Held, affirmed. The Seventh Circuit concluded that due process did not require the government to furnish names of witnesses linking defendant to the scene of the crime even though defendant had made unsolicited disclosure of alibi witnesses. The court observed that Federal Rule of Criminal Procedure 16 does not entitle a defen-

dant in a non-capital case to lists of prospective government witnesses, and that discovery under the alibi rule may only be triggered by a prosecution request, which did not occur in this case. The court further found that the court had properly excluded the proffered testimony from two witnesses since the testimony was irrelevant to the charges against defendant. United States v. Bouye, 688 F.2d 471 (1982), 19 CLB 168.

33. GUILTY PLEAS

§ 33.00 Plea bargaining

U.S. Supreme Court Based on his monitoring of two telephone calls pursuant to a court-ordered wiretap, a Rhode Island state trooper prepared felony complaints charging respondents with possession of marijuana. The complaints were presented to a state judge, accompanied by arrest warrants and supporting affidavits. The judge signed the warrants and the respondents were arrested, but the charges were dropped when the grand jury failed to return an indictment. The respondents then brought a civil rights action against the trooper claiming that their rights under the Fourth and Fourteenth Amendments were violated, but the district court gave a directed verdict for the trooper. The court of appeals reversed.

Held, affirmed and remanded. The Court declared that petitioner was not entitled to absolute immunity, but only a qualified immunity, for liability for damages. The Court reasoned that absolute immunity should not be permitted, since the trooper's function in seeking the arrest warrants was similar to that of a complaining witness, and that complaining witnesses are not absolutely immune at common law. Malley v. Briggs, 106 S. Ct. 1092 (1986).

Court of Appeals, 4th Cir. After pleading guilty in the district court to having conducted a continuing criminal enterprise and filing false tax statements, defendant moved to withdraw the plea on the ground that the government had violated a plea bargain agreement. The district court denied the motion.

Held, affirmed. The Fourth Circuit found that the government did not violate its agreement not to use defendant's statements by providing information based on his statements to the probation department indicating that his drug activities continued during the period he was under investigation. The court reasoned that the promise not to use defendant's statements related to possible future prosecutions, not to sentencing procedures that gave effect to the guilty plea defendant had already entered into. United States v. Reckmeyer, 786 F.2d 1216 (1986), cert. denied, 107 S. Ct. 177.

§ 33.15 Accepting plea

Court of Appeals, 5th Cir. Defendant was indicted for escape from custody in violation of 18 U.S.C. § 751(a). On the day of trial, defendant and his counsel stated that they wished to waive a jury and try the case on stipulated facts. The trial court then entered a memorandum order finding defendant guilty. On appeal, defendant argued that his stipulation should be treated as having the same effect as a guilty

plea, thereby entitling him to the protections of Rule 11.

Held, conviction affirmed. The court examined the policy reasons behind the Rule 11 protections for guilty and nolo contendere pleas. It pointed out that a defendant who pleads guilty waives his Fifth Amendment right against self-incrimination and his Sixth Amendment rights to a jury trial and to confront adverse witnesses. In addition, noted the court, the guilty plea deserves special scrutiny because it may result from bargaining between the prosecutor and the accused. The court found that the primary difference between a guilty plea and a not guilty plea is the absence in the latter case of any officially sanctioned coercive element. And, although a defendant's waiver of any constitutional right must be voluntary, most waivers are not scrutinized with the special care mandated by Rule 11. The court held that defendant voluntarily waived his self-incrimination rights and his right to a trial by jury, but, importantly, he did not waive his right to challenge any nonjurisdictional defects in the trial proceedings. Thus, he preserved for appeal a range of issues which would have been waived by a guilty plea, and his plea did not warrant being treated as a guilty plea. United States v. Robertson, 698 F.2d 703 (1983).

§ 33.20 —Duty to inquire as to voluntariness of plea

Court of Appeals, 1st Cir. A state prisoner convicted of armed robbery and related charges appealed from a dismissal by the district court of his petition for habeas corpus on the ground that his forty-to-fifty-year sentence was the result of his refusal to plead guilty. The court of appeals ordered that the writ be issued, and on certiorari, the Supreme Court vacated and remanded.

Held, habeas corpus granted. The First Circuit concluded that the state prisoner was entitled to habeas corpus relief where the trial judge had informed him during trial that if he did not follow his advice to bargain and plead, a substantial sentence might be imposed if the jury convicted him. The court particularly noted that there was a gross disparity between the three-year sentence given his co-defendant, who pleaded guilty, and the forty- to fifty-year sentence given him. This disparity was too great to allay a reasonable apprehension that the judge's remarks were unjudicial urgings to plead and that the sentence was a retaliatory consequence of his refusal. Longval v. Meachum, 693 F.2d 236 (1982), 19 CLB 263.

§ 33.35 —Court's failure to advise defendant of consequences of plea

Court of Appeals, 2d Cir. After defendant pleaded guilty to one count of wire fraud, he was sentenced to three months' imprisonment, a $1,000 fine, and $266,000 in restitution to the government. On appeal, defendant argued that his guilty plea and conviction should be vacated because the district court failed to inform him, prior to accepting his guilty plea, that the maximum sentence could include restitution to the government.

Held, guilty plea vacated. The Second Circuit ruled that the district court's failure to inform defendant, during plea allocation, of the possibility that restitution could be required was a serious error. The court noted that because it is impossible to determine a defendant's calculus for determining how to plead, he must be af-

forded an opportunity to consider how to plead with a full and accurate understanding of the maximum sentence as required in Rule 11(c) of the Federal Rules of Civil Procedure. United States v. Kahn, 857 F.2d 85 (1988).

§ 33.55 —Promises

U.S. Supreme Court Defendant pled guilty in the district court to an information charging him with mail fraud after the government had agreed, as part of a plea bargain, to recommend probation on condition that restitution be made. At sentencing, defense counsel pointed out that the sentence report incorrectly stated that the government would stand silent. Counsel informed the court that the government instead recommended probation with restitution, whereupon the Assistant United States Attorney said: "This is an accurate representation." On appeal, the court of appeals reversed, concluding that the government had breached its plea bargain by making no effort to explain its recommendation.

Held, reversed. The Supreme Court ruled that the government was under no implied-in-law requirement to explain its reasons or to make its recommendation "enthusiastically." United States v. Benchimol, 105 S. Ct. 2103 (1985).

Court of Appeals, 5th Cir. After defendant was convicted before the district court of conspiracy to possess cocaine, he appealed on the ground that the prosecutor had violated the plea bargain agreement.

Held, vacated and remanded on other grounds. The provision of the plea bargain agreement that the prosecutor would "stand mute" at sentencing was not violated by the prosecutor's turning over its files to the probation department at the department's request. The court reasoned that the requirement that the prosecutor "stand mute" only required that "at the sentencing the government would not recommend anything one way or another." United States v. Dickson, 712 F.2d 952 (1983), 20 CLB 63.

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

ADMISSIBILITY AND WITNESSES

§ 34.15 Relevancy and prejudice

"Evidence and Trial Advocacy Workshop: Trial Objections; Lack of Foundation; Refutation," by Michael H. Graham, 22 CLB 47 (1986).

Court of Appeals, D.C. Cir. After defendants were convicted in the district court of various criminal offenses relating to a conspiracy to bribe public officials, they appealed on the ground, among other things, that the trial judge had improperly refused to admit four segments of a taped conversation, when portions of this tape were introduced by the government as part of its direct examination.

Held, affirmed. While the entire tape should have been admitted into evidence pursuant to Federal Rule of Evidence 106, the refusel of the trial judge to do so was harmless error where the other portions of the tape that were admitted did not substantially influence defendant's defense, and those admitted portions showed that defendant completely admitted his guilt in the conspiracy. United States v. Sutton, 801 F.2d 1346 (1986), 23 CLB 191.

Court of Appeals, 2d Cir. After defendant was convicted in the district court of possession of marijuana with intent to distribute, he appealed on the grounds, among others, that the cooperation agreement between the witness and the government was improperly admitted into evidence.

Held, conviction affirmed. The Second Circuit found that even if the witness's credibility had not been attacked on cross-examination, the admission of the agreement into evidence was harmless if no part of the agreement was read into evidence, the prosecutor made no reference to it in his closing argument, and the jury did not consult it during deliberations. United States v. Fernandez, 829 F.2d 363 (1987), 24 CLB 179.

Court of Appeals, 5th Cir. After defendant was convicted in the district court of filing materially false tax returns, he appealed on the ground that the district court had improperly admitted evidence based on allegations that he had failed to report income received for attempted assassinations.

Held, conviction affirmed. The Fifth Circuit found that defendant was not unfairly prejudiced by admission of evidence concerning the attempted assassinations where the trial court diligently and effectively restricted the government's proof as to what was relevant to show source of income and motive. United States v. Tafoya, 757 F.2d 1522 (1985), 21 CLB 468.

Court of Appeals, 5th Cir. Defendant was convicted of conspiracy, and importation and possession of marijuana. On appeal he argued that the government, by eliciting testimony from two co-conspirators about their guilty pleas, impermissibly suggested that he was also guilty.

Held, conviction affirmed. The court held that the general rule in the Fifth Circuit is that a witness/accomplice's guilty plea may be brought out at trial, provided that the evidence serves a legitimate purpose and the jury is properly instructed about the limited use they make of it. It noted that defense counsel had indicated at the outset of the trial his intent to use felony convictions for impeachment purposes, and that the government's questioning was done in anticipation of this plan. Thus, held the court, the government had a legitimate purpose in asking about the guilty pleas. Furthermore, the court found that defense counsel vigorously and extensively pursued the guilty plea aspect in his cross-examination, and that any emphasis placed on the guilty pleas could not be attributed solely to the government. Finally, the trial court clearly instructed the jury not to consider the pleas as evidence of defendant's guilt. United States v. Borchardt, 698 F.2d 697 (1983), cert. denied, 469 U.S. 757, 105 S. Ct. 341 (1984).

Court of Appeals, 6th Cir. After defendant was convicted in the district court of counterfeiting, he appealed on the grounds that his relative's guilty plea to related charges should never have been admitted against him.

Held, affirmed. The Sixth Circuit affirmed, holding that while the admission of the evidence objected to was improper, such error was harmless in view of (1) the other evidence admitted on the subject and (2) defense counsel's positive use of the evidence in closing argument. The court also found that defendant was not prejudiced by the prosecutor's closing argument referring to the size of one defendant's bank account where the jury had other evidence of defendant's wealth before it. United States v. Cunningham, 804 F.2d 58 (1986), 23 CLB 289, cert. denied, 107 S. Ct. 1972 (1987).

§ 34.20 Variance between pleading and proof

Court of Appeals, 1st Cir. After the defendants were convicted of conspiracy to import and possess marijuana and hashish, they appealed on the grounds that the evidence introduced at trial showed that there were, in fact, two separate conspiracies.

Held, reversed as to one defendant. The court ruled that when a defendant is charged with conspiring to import two different types of drugs and the evidence shows that he only participated in a conspiracy to import only one type, a new trial is mandated. The court noted that the jury could not have convicted defendant but for the erroneous jury charge and that defendant received an enhanced sentence based on the jury verdict finding him guilty of participating in both aspects of the conspiracy. United States v. Glenn, 828 F.2d 855 (1987), 24 CLB 174.

Court of Appeals, 2d Cir. After defendants were convicted in the district court of conspiracy to distribute and possess with intent to distribute heroin, they appealed on the grounds that there was a fatal variance between the conspiracy charged and that proven.

Held, conviction affirmed. The Sec-

ond Circuit found that even if variance existed between the conspiracy charge and the conspiracy proven, reversal was not required absent a showing of substantial prejudice. The court noted that whether the evidence shows multiple conspiracies or a single conspiracy is a question of fact for a properly instructed jury. The court here concluded that the variance created no substantial prejudice where there were no hearsay statements uttered by members of one of the conspiracies that were used to the detriment of a member of another; only four of nineteen defendants went to trial; and multiplicity of the verdicts indicated that there was no prejudicial spillover effect and no shocking or inflammatory evidence introduced. United States v. Carson, 702 F.2d 351, 19 CLB 478, cert. denied, 462 U.S. 1108, 103 S. Ct. 2456 (1983).

Court of Appeals, 8th Cir. Defendants were convicted of conspiracy to possess marijuana with intent to distribute and possession of marijuana with the same intent. On appeal, all three defendants contended that the government failed to prove the single conspiracy charged in the indictment, and instead proved two separate conspiracies, one involving activities on a 187-acre farm, and another involving defendants' marijuana-growing operation on a 240-acre farm. Defendants further contended that the variance between the crime charged in the indictment and the proof at trial prejudiced their right to a fair trial.

Held, all three conspiracy convictions were reversed. The Eighth Circuit found that while the variance required reversal of the conspiracy conviction, the evidence was sufficient to sustain the conviction on the possession charge. The court observed that the evidence that defendants had a possessory interest in a large marijuana crop harvested on a particular farm was so strong that the conviction on that charge should be affirmed despite the variance. United States v. Snider, 720 F.2d 985 (1983), cert. denied, 465 U.S. 1107, 104 S. Ct. 1613 (1984).

§ 34.35 Evidence received subject to connection

Court of Appeals, 7th Cir. After defendants were convicted in the district court for conspiracy to obstruct justice by corruptly influencing a witness who refused to testify before a federal grand jury, one of the defendants argued on appeal that a taped conversation regarding a prior, unsuccessful bribe attempt was improperly admitted at trial.

Held, conviction affirmed. The Seventh Circuit concluded that evidence of defendant's prior attempt to obstruct justice by attempting to bribe the silence of a witness was relevant and probative of his current intent to obstruct the grand jury's investigation of his loan sharking activity. The court noted that a prior criminal act is admissible if (1) the prior act is similar enough and close enough in time to be relevant; (2) the evidence of the prior act is clear and convincing; (3) the probative value of the evidence outweighs the risk of prejudice; and (4) the issue to which the evidence is addressed is disputed by the defendant. United States v. Arnold, 773 F.2d 823 (1985), 22 CLB 162.

§ 34.40 Character and reputation evidence

"Evidence and Trial Advocacy Workshop: Evidence as to Character—Other Crimes, Wrongs, or Acts," by

Michael H. Graham, 19 CLB 349 (1983).

"Evidence and Trial Advocacy Workshop: Evidence as to Character; Circumstantial Use," by Michael H. Graham, 19 CLB 234 (1983).

Court of Appeals, 2d Cir. After their conviction of conspiracy to intimidate witnesses and to prevent communications with law enforcement officers, defendants appealed on the grounds that they had been improperly denied their right to cross-examine a government witness as to her use of alcohol.

Held, affirmed. In the absence of evidence that the witness was under the influence of drugs or alcohol either at the time she had observed the events in question or at the time she was testifying, evidence concerning witness's drinking problem was inadmissible. The court reasoned that the use of alcohol does not involve a veracity trait or bear on moral character. United States v. DiPaolo, 804 F.2d 225 (1986), 23 CLB 291.

Court of Appeals, 3d Cir. After defendant was convicted in the district court of assault in the third degree, he appealed on the ground that he had been improperly denied a "good character" charge.

Held, conviction affirmed. The Third Circuit found that testimony of the absence of prior arrests is not admissible as character evidence and does not entitle a defendant to a good character charge. The court noted that while a defendant may introduce evidence of his own good character in order to suggest that he could not have committed the crime, specific instances of conduct—or, as in this case, the absence thereof—may not be introduced. The court further noted that evidence as to the absence of specific bad acts is generally less probative of good character than general reputation or opinion evidence. Government of the Virgin Islands v. Grant, 775 F.2d 508 (1985), 22 CLB 281.

§ 34.45 Proof of other crimes to show motive, intent, etc.

Court of Appeals, 1st Cir. After defendant was convicted of unlawful possession of marijuana with intent to distribute and related drug offenses, he appealed on the grounds that the evidence of his prior conviction for cultivating marijuana was improperly admitted at trial.

Held, conviction affirmed. The First Circuit ruled that the prior conviction in an Antigua court in 1980 was admissible in this prosecution for unlawful possession of more than fifty pounds of marijuana, in order to show defendant's knowledge that the package in fact contained marijuana and to show the absence of any accident or mistake. The court noted that defendant had testified that the package had been given to him by an unidentified airline passenger with overweight luggage. The court noted that a trial court has the legal power under Rule 404(b) to engage in a probative value-versus-prejudice balancing, and that while similar evidence of similar acts is inadmissible to show bad character or propensity to commit a crime, it is nonetheless admissible to show such things as intent, knowledge, or absence of mistake or accident. United States v. Simon, 842 F.2d 552 (1988).

Court of Appeals, 2d Cir. After defendant was convicted in the district court of bank robbery, he appealed on the ground that a prior robbery con-

viction had been improperly admitted at trial pursuant to Rule 609 of the Federal Rules of Evidence.

Held, conviction affirmed. The Second Circuit concluded that the trial court had not abused its discretion in ruling that defendant's prior robbery conviction was admissible for impeachment purposes. The court further noted that, in order to preserve the issue for review, defendant must establish on the record that he would in fact take the stand and testify if the challenged prior convictions are excluded and sufficiently outline the nature of his testimony so that the trial and appellate courts can do the necessary balancing. United States v. Washington, 746 F.2d 104 (1984), 21 CLB 261.

Court of Appeals, 6th Cir. After defendant was convicted of criminal possession of stolen property, he appealed on the ground that evidence was improperly introduced pertaining to his sale of television sets about one month prior to the dates charged in the indictment. The Sixth Circuit court reversed the conviction and remanded the case, stating that the evidence of prior misconduct of a similar nature was improperly admitted as no clear and convincing proof was presented that the goods involved in the prior transaction were stolen or that defendant knew they were stolen. The government petitioned for rehearing.

Held, judgment vacated and judgment of district court affirmed. The appeals court held that in light of another panel's recent decision in United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986), the court could admit evidence of prior bad acts if the government proved by merely a preponderance of evidence that the defendant did commit the acts. Any error caused by letting the jury know about the prior bad act was deemed harmless. United States v. Huddleston, 802 F.2d 874 (1986), vacated, 811 F.2d 974 (1987).

Court of Appeals, 11th Cir. Defendant was convicted of making false statements to banks and of using the mails in furtherance of a scheme to obtain money or property by means of false representations. On appeal, he challenged the district court's admission of extrinsic evidence of acts similar to the crimes charged in the indictment, on the grounds that it was not relevant to an issue other than defendant's character and that its probative value was substantially outweighed by undue prejudice.

Held, affirmed. The extrinsic evidence was properly admitted because it addressed the main thrust of the defense, a lack of intent. Defendant was permitted to introduce testimony demonstrating that he had paid up the accounts he had opened using the false representations and, thus, that he lacked the requisite intent. Accordingly, the government should have been permitted to introduce prior fraudulent applications for credit to rebut the inference of a lack of intent. Its evidence was highly relevant to the question of defendant's intent, which is an acceptable reason for admission under Federal Rule of Evidence 404(b). Further, the issue of intent is separate and distinct from the issue of character. United States v. Scott, 701 F.2d 1340, cert. denied, 464 U.S. 856, 104 S. Ct. 175 (1983).

§ 34.50 Proof of other bad acts

"Evidence and Trial Advocacy Workshop: Impeachment—Contradiction;

Partiality; Prior Acts of Misconduct; Character; Religious Beliefs," by Michael H. Graham, 21 CLB 495 (1985).

Court of Appeals, D.C. Cir. After defendant was convicted of possession with intent to distribute a controlled substance, he appealed on the ground, among others, that the trial judge had improperly permitted the prosecution to admit evidence of the circumstances of his prior guilty plea and prior drug use.

Held, affirmed. Prosecution properly cross-examined defendant on this prior conviction for receiving stolen property to rebut the inference established on direct examination that the circumstances surrounding the prior conviction showed defendant's responsible character. The court further found that defendant's testimony that he lacked knowledge and familiarity with drugs opened the door to cross-examination by the government on defendant's prior drug use. United States v. Eaton, 808 F.2d 72 (1987), 23 CLB 391.

§ 34.85 Opinion evidence

"Evidence and Trial Advocacy Workshop: Lay Witness Opinion Testimony; Opinion on Ultimate Issue by Lay or Expert Witness," by Michael H. Graham, 22 CLB 144 (1986).

"Social Sciences and the Criminal Law: Appellate Advocacy and Social Facts," by James R. Acker, 21 CLB 434 (1985).

§ 34.88 Evidence obtained under hypnosis (New)

U.S. Supreme Court Defendant was convicted in Arkansas state court of manslaughter, and the Supreme Court of Arkansas affirmed.

Held, vacated and remanded. The U.S. Supreme Court held that Arkansas' *per se* rule excluding all hypnotically refreshed testimony infringed impermissibly on a criminal defendant's right to testify on his or her own behalf. The Court noted that the procedure had been credited as instrumental in obtaining particular types of information, and it was subject to verification by corroborating evidence and other means of assessing accuracy. Rock v. Arkansas, 107 S. Ct. 2704 (1987).

§ 34.95 Identification evidence

Court of Appeals, D.C. Cir. After the jury returned a guilty verdict for armed robbery against the defendant, the district court granted his motion for a judgment of acquittal on the grounds that the "show-up" identification evidence was insufficient to sustain a conviction.

Held, judgment vacated in part, affirmed in part and case remanded. The Court of Appeals for the District of Columbia found that although the show-up identification was highly suggestive, it did not mandate a conclusion that the evidence was insufficient to sustain the armed robbery conviction. The court noted that the show-up took place under circumstances that would tend to promote its reliability in that it took place two or three minutes after the robbery at the scene of the crime, and the show-up involved witnesses who had ample opportunity to view the culprits at close range in good lighting conditions. United States v. Singleton, 702 F.2d 1159 (1983), 19 CLB 481.

Court of Appeals, 3d Cir. After defendant was convicted in district court on charges arising out of three bank robberies, he appealed on the ground that he should have been permitted to introduce psychiatric evidence of the unreliability of eyewitness testimony.

Held, affirmed in part and vacated and remanded in part. The Third Circuit stated that defendant was entitled to a hearing to determine the admissibility of a psychologist's testimony regarding the reliability of eyewitness identification. The court specifically noted that the identification testimony here was crucial to the government's case and the officer observed the defendant for only forty-nine seconds under highly stressful circumstances and did not identify defendant until eighteen months later. United States v. Sebetich, 776 F.2d 412 (1985), 22 CLB 281.

Court of Appeals, 5th Cir. Defendant was convicted of bank robbery. On appeal, he contended that the federal district court erred in refusing to authorize employment at government expense of a fingerprint expert pursuant to 18 U.S.C. § 3006A(e).

Held, conviction reversed and case remanded. The Fifth Circuit reasoned that where the government's case rests heavily on a theory most competently addressed by expert testimony, an indigent defendant must be afforded an opportunity to prepare and present his defense with the assistance of his own expert. The court noted that, in this case, the testimony of two eyewitnesses was inconsistent and not entirely conclusive, three of the government's four remaining witnesses testified with regard to fingerprint evidence, and the assistance of an expert would have facilitated either defendant's showing that latent palm prints lifted from the crime scene were blurred or defendant's cross-examination of the government expert. United States v. Patterson, 724 F.2d 1128 (1984).

§ 34.100 —Prior identification

U.S. Supreme Court Although the victim of an attack in federal prison suffered severe impairment of his memory, he described the attack to an FBI agent, named defendant as his attacker, and identified him from photographs. After this identification was introduced at trial, the victim admitted on cross-examination that he could not remember seeing the assailant or recall whether any hospital visitor had suggested the defendant was the assailant. After conviction, the court of appeals reversed.

Held, reversed and remanded. The Court ruled that a prior, out-of-court identification is admissible even though the witness, because of memory loss, is incapable of explaining the basis for the identification. The Court noted that there was ample opportunity to cross-examine, and the jury had had an opportunity to observe his demeanor. United States v. Owens, 108 S. Ct. 838 (1988).

Court of Appeals, 6th Cir. After defendant was convicted in the district court of armed bank robbery and related charges, he appealed on the grounds, among others, that a bank teller's identification of him was improperly admitted at trial.

Held, conviction affirmed. The Sixth Circuit ruled that the bank teller's identification of defendant as the bank robber did not deny him due process of law even though the teller viewed defendant in custody and in

jail clothing shortly before the trial. The court noted that the observation in the courthouse by the teller was inadvertent and there was substantial independent evidence of defendant's guilt. United States v. Monroe, 833 F.2d 95 (1987), 24 CLB 262.

Court of Appeals, 7th Cir. After the district court denied defendant's habeas corpus petition, based upon an immediate identification procedure, he appealed.

Held, affirmed. The Seventh Circuit stated that the failure of the witness to pick the defendant's photo out of a photo array, and the failure to identify defendant in a suggestive lineup procedure, did not preclude reliable identification at trial. The Court noted that the witness had an adequate opportunity to view the defendant at the scene of the crime, and the defendant had altered his appearance later by cutting his hair and shaving off his mustache. United States ex rel. Kosik v. Napoli, 814 F.2d 1151 (1987), 23 CLB 490.

§ 34.120 Competency of witness

"Evidence and Trial Advocacy Workshop: Competency of Judge, Juror, Lawyer, and Interpreter—Objecting to Competency," by Michael H. Graham, 20 CLB 233 (1984).

"Evidence and Trial Advocacy Workshop: Competency of Lay Witnesses," by Michael H. Graham, 20 CLB 141 (1984).

Court of Appeals, 4th Cir. Defendant was convicted of assault with intent to commit murder. McKinley, an inmate in a Virgina reformatory, sustained serious stab wounds from an assault in his cell. McKinley's fellow inmates, defendant and McDuffie, were investigated but only defendant was charged. McDuffie was not indicted because a court-appointed psychiatrist found him incompetent to stand trial and criminally insane at the time of the assault. At trial, the defense attempted to have McDuffie testify that only he and not defendant had assaulted McKinley. The court ruled McDuffie incompetent to testify because he had been found criminally insane and was subject to hallucinations. Defendant appealed.

Held, reversed and remanded. The Fourth Circuit held that defendant was denied a fair trial as a result of the trial court's disqualification of the alleged accomplice from testifying despite the fact that the alleged accomplice had been found criminally insane and incompetent to stand trial and was subject to hallucinations. The court reasoned that every witness is presumed to be mentally competent to testify unless it can be shown that he does not have the capacity to recall, and that in this case the physician for the alleged accomplice indicated that the witness had sufficient memory, and that he understood the oath. The court further found that since the district court chose not to conduct an in camera examination, it was improper to disqualify the alleged accomplice from testifying. United States v. Lightly, 677 F.2d 1027 (1982), 19 CLB 75.

§ 34.125 Coerced testimony

Court of Appeals, 9th Cir. After defendants were convicted of first-degree murder and robbery, they appealed on the ground that the testimony of a witness who had undergone a sodium amytal interview before trial should have been excluded.

Held, affirmed. The Ninth Circuit ruled that the trial court's refusal to

exclude one witness' testimony because he had undergone a sodium amytal interview before trial did not constitute an abuse of discretion. The court noted that the sodium amytal examination had been conducted under the direction of a board certified psychiatrist, and that there was no evidence to indicate that the examination was in any way suggestive or leading. United States v. Solomon, 753 F.2d 1522 (1985).

§ 34.135 Privileged communications

"Evidence and Trial Advocacy Workshop: The Lawyer–Client Privilege," by Michael H. Graham, 19 CLB 513 (1983).

"Evidence and Trial Advocacy Workshop: Privileges—Their Nature and Operation," by Michael H. Graham, 19 CLB 442 (1983).

U.S. Supreme Court After petitioner filed a complaint in the district court alleging violations of the Commodity Exchange Act, the respondent entered into a consent decree whereby his corporation agreed to have a trustee in bankruptcy appointed. The respondent then refused to answer questions at a deposition, asserting the attorney-client privilege. The petitioner then obtained a waiver of the privilege from the trustee as to any communication occurring prior to the date of his appointment as a receiver. The district court upheld a magistrate's order directing the respondent to testify, but the court of appeals reversed.

Held, reversal of magistrate's order affirmed. The Supreme Court found that the trustee of a corporation has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. The Court reasoned that when control of a corporation passes to new management, the authority to assert and waive the privilege also passes. Commodities Future Trading Comm'n v. Weintraub, 105 S. Ct. 1986 (1985).

Court of Appeals, 4th Cir. After defendant was convicted of conspiracy to import marijuana and other offenses, he appealed on the ground that his admission to an attorney that he committed perjury before the grand jury was improperly admitted.

Held, affirmed in part and reversed in part. The Fourth Circuit held that defendant failed to meet his burden of proving the existence of an attorney-client relationship, where he spoke to the attorney as a friend rather than as a professional legal adviser, did not seek legal advice from her, and did not expect the communication to remain confidential. The court noted that the lawyer was only required to reveal the substance of defendant's personal conversation, as separate from his legal defense. United States v. Tedder, 801 F.2d 1437 (1986), 23 CLB 191, cert. denied, 107 S. Ct. 1585 (1987).

Court of Appeals, 4th Cir. After defendant was convicted in the district court of tax evasion, he appealed on the ground that his attorney's statements to an IRS auditor had been improperly used against him.

Held, conviction affirmed. The Fourth Circuit ruled that statements made by the attorney to the auditor regarding additional unreported income were admissible in a subsequent tax prosecution where the statements were repeated by the attorney during the course of representation. The court noted that defendant had waived any confidentiality privileges by authoriz-

ing the attorney to represent him before the auditor. United States v. Martin, 773 F.2d 579 (1985), 22 CLB 165.

Court of Appeals, 7th Cir. After defendants were convicted in the district court of various drug charges, they appealed, arguing that tape recorded conversations between the married co-defendants had been improperly admitted into evidence at trial.

Held, conviction affirmed. The Seventh Circuit found that the marital privilege does not prohibit the admission of recorded conversations between married co-defendants. The court reasoned that neither the "adverse testimony privilege," which may be asserted by a witness-spouse, nor the "confidential communications privilege," which may be asserted by a defendant-spouse, was applicable here since neither privilege applies where both parties are "joint participants" in a crime. United States v. Keck, 773 F.2d 759 (1985), 22 CLB 159.

§ 34.150 Expert witness

"Evidence and Trial Advocacy Workshop: Expert Witness Testimony—Disclosure of Basis," by Michael H. Graham, 22 CLB 360 (1986).

"Evidence and Trial Advocacy Workshop: Expert Witness Testimony; Basis of Opinion Testimony—'Reasonable Reliance,'" by Michael Graham, 22 CLB 252 (1986).

"Enforcement Workshop: The Expert Witness in Suits Against Police (Part 2)," by James J. Fyfe, 21 CLB 515 (1985).

"Mental Health Professionals in the Criminal Justice Process: The ABA Standards," by Grant H. Morris, 21 CLB 321 (1985).

"Enforcement Workshop: The Expert Witness in Suits Against Police (Part 1)," by James Fyfe, 21 CLB 244 (1985).

U.S. Supreme Court Petitioner was convicted of capital murder of a police officer in a Texas state court after a jury trial. A separate sentencing hearing was then held before the same jury to determine whether the death penalty should be imposed. One of the questions submitted to the jury, as required by a Texas statute, was whether there was a probability that the petitioner would commit further criminal acts of violence and would constitute a continuing threat to society. In addition to introducing other evidence, the State called two psychiatrists, who, in response to hypothetical questions, testified that there was such a probability. The jury answered the question, as well as another question as to whether the killing had been deliberate, in the affirmative, thus requiring imposition of the death penalty. On appeal, the Texas Court of Criminal Appeals rejected petitioner's contention that such use of psychiatric testimony at the sentencing hearing was unconstitutional, and affirmed the conviction and sentence. Ultimately, after this court had denied certiorari and the Texas Court of Criminal Appeals had denied a habeas corpus application, petitioner filed a petition for habeas corpus in Federal District Court raising the same claims with respect to the use of psychiatric testimony. The District Court rejected these claims and denied the writ, but issued a certificate of probable cause pursuant to 28 U.S.C. § 2253, which provides that an appeal may not be taken to a court of appeals

from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court "unless the Justice or Judge who rendered the order or a Circuit Justice or Judge issues a certificate of probable cause." The Texas Court of Criminal Appeals again denied a habeas corpus application, as well as denying a stay of execution. Shortly thereafter, the Court of Appeals also denied a stay of execution pending appeal of the District Court's judgment. This Court, treating an application for stay of execution as a petition for a writ of certiorari before judgment, granted certiorari.

Held, judgment of district court affirmed. The high court found no merit to petitioner's argument that psychiatrists are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other future crimes and therefore represent a danger to the community. The jury should not be barred from hearing views of the state's psychiatrists along with the opposing views of the petitioner's doctors as to petitioner's dangerousness. The Court further found that expert opinions, whether in the form of opinion based on hypothetical questions or otherwise, may be admitted even in cases involving the death penalty. Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 20 CLB 162, reh'g denied, 467 U.S. 874, 104 S. Ct. 209 (1983).

Court of Appeals, 2d Cir. Defendant was convicted in district court on narcotics charges, and he appealed on the ground that the undercover officer who testified in the case should not also have been permitted to testify as an expert witness.

Held, conviction affirmed. The Second Circuit stated that it was not manifest error for the trial judge to permit the undercover officer to testify that street drug sales in Harlem generally involved the use of a "steerer." The court had greater concern about the officer's testimony that defendant himself was a "steerer" because that was an ultimate issue of fact to be decided by the jury. The court, however, decided that the testimony was admissible, since the officer's expert testimony was not essential to the establishment of a prima facie case against defendant. United States v. Brown, 776 F.2d 397 (1985), 22 CLB 281, cert. denied, 106 S. Ct. 1793 (1986).

Court of Appeals, 3d Cir. After defendant was convicted in the district court on charges of mail fraud, wire fraud, and related charges, he appealed on the ground that the court had improperly denied his application to introduce expert testimony regarding the unreliability of eyewitness identification testimony.

Held, vacated and remanded. The Third Circuit concluded that the trial court's failure to permit a defense psychiatrist to testify was not harmless, since defendant was convicted solely on the basis of eyewitness testimony. The court thus concluded that, under certain circumstances, expert testimony on the reliability of eyewitness identification can assist the jury in reaching a correct decision and, therefore, may meet the "helpfulness" requirement of Rule 702 of the Federal Rules of Evidence pertaining to expert testimony. United States v. Downing, 753 F.2d 1224 (1985).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of extortion and conspiracy to commit extortion, he appealed on the

ground that expert testimony on the reliability of eyewitness identification had been improperly excluded.

Held, conviction affirmed. The Fifth Circuit found that the exclusion of expert testimony on the reliability of eyewitness testimony was not in error. The court held that while such expert testimony may be admitted at the court's discretion, there is no basis to rule that such testimony must be admitted. The court also found that, in this case, the evidence of guilt was overwhelming even if the eyewitness identifications were completely disregarded. United States v. Moore, 786 F.2d 1308 (1986).

Court of Appeals, 5th Cir. After defendants were convicted in the district court of various crimes arising out of their use of personal "churches" to evade taxes, they appealed on the ground that the trial judge had improperly excluded the testimony of an expert defense witness.

Held, convictions affirmed. The Fifth Circuit found that the preferred witness' interpretations regarding the legality of the tax avoidance scheme had little probative value on the issue of defendants' state of mind at the time they acted because there was no evidence that they relied on his opinion at the time they acted. The court further noted that there was a great possibility of confusing the jury, since the expert witness may have given a statement of the law that would be at variance with the judge's jury charge. United States v. Daly, 756 F.2d 1076 (1985), 21 CLB 470.

§ 34.160 Disclosure of identity of informants

Court of Appeals, 2d Cir. When a police officer refused to comply with the district court's order that he disclose the names of two informants, he was held in contempt by the court and fined $100 for each day he continued in contempt.

Held, contempt order vacated. The Second Circuit concluded that the police officer should not have been held in civil contempt for having refused to disclose the names of the two informants. The court reasoned that the government's privilege to maintain the confidentiality of its informants' identities should not be breached unless disclosure is essential to the defense, such as when the informant is a key witness, a participant in the crime charged, or someone else whose testimony would be significant in determining guilt or innocence. Informant identities should not, however, be disclosed where, as in this case, it was argued that it is needed to challenge the credibility of a witness who controlled the informant. United States v. Russotti, 746 F.2d 945 (1984), 21 CLB 257.

Court of Appeals, 5th Cir. After defendants were convicted in the district court on drug conspiracy charges, they appealed on the grounds that the trial judge had improperly admitted the testimony of a paid government informant.

Held, conviction affirmed. The Fifth Circuit found that due process was not violated by the process of testimony by a paid informant, especially when the jury was instructed to take the amount paid into account in evaluating the informant's testimony. United States v. Santisteba, 833 F.2d 513 (1987), 24 CLB 266.

§ 34.170 Cross-examination procedure

"Evidence and Trial Advocacy Workshop: Cross-Examination—Scope and

Extent; Collateral and Noncollateral," by Michael H. Graham, 21 CLB 40 (1985).

"Evidence and Trial Advocacy Workshop: Cross-Examination—Attacking Credibility; An Overview," by Michael H. Graham, 20 CLB 521 (1984).

§ 34.180 —Impeachment by prior conviction

"Evidence and Trial Advocacy Workshop: Prior Conviction Impeachment—Procedural Considerations," by Michael H. Graham, 21 CLB 421 (1985).

"Evidence and Trial Advocacy Workshop: Prior Conviction Impeachment; Discretionary Balancing; Dishonesty and False Statement," by Michael H. Graham, 21 CLB 338 (1985).

Court of Appeals, 2d Cir. After defendant was convicted in the district court of possession of heroin with intent to distribute, he appealed on the grounds, among other things, that the trial court erred in admitting evidence of defendant's prior state court drug conviction.

Held, conviction affirmed. The Second Circuit found that the failure of defendant's counsel to object to the introduction of defendant's prior conviction at trial constituted a waiver of the claimed error. The court reasoned that defense counsel insisted on making an argument that the possession of six envelopes of heroin was an act consistent with personal use. Thus, it appears that defense counsel made a tactical decision to trade the potential benefit of the full argument on personal use of heroin in return for the risk that the evidence of defendant's prior conviction would be damaging to defendant. The court noted that when a defendant unequivocally relies on the defense that he did not do the act charged, evidence of other acts is normally not admissible for purposes of proving intent. Here, however, it appears that the primary defense was that while defendant did possess the heroin, he did not intend to distribute it. United States v. Ortiz, 857 F.2d 900 (1988).

§ 34.190 Impeachment by prior inconsistent statement

"Impeachment of Witnesses and the Federal Rules of Evidence," by Stephen A. Saltzburg, 22 CLB 101 (1986).

"Evidence and Trial Advocacy Workshop: Prior Inconsistent Statements—Effective Style and Technique," by Michael H. Graham, 21 CLB 227 (1985).

"Evidence and Trial Advocacy Workshop: Prior Inconsistent Statements—Requirements for Impeachment," by Michael H. Graham, 21 CLB 156 (1985).

§ 34.200 —Impeachment for prior illegal or immoral acts

Court of Appeals, D.C. Cir. After the defendant was convicted of possession of heroin with intent to distribute, he appealed on the grounds that the trial court had improperly admitted evidence of prior convictions of the defendant and some of his witnesses.

Held, conviction affirmed. The Court of Appeals for the District of Columbia ruled that the prior crime evidence under Rule 609(a), Federal Rules of Evidence, had been properly admitted. The court noted that the

district court has wide discretion to decide how much background information, if any, it needs to balance the probativeness of the evidence against the prejudice to the defendant in determining whether to admit evidence of prior convictions of defendants and witnesses for purposes of impeachment. The court thus found that the trial court did not abuse its discretion in admitting defendant's prior conviction of robbery in a prosecution for heroin possession, and it further found that the court properly permitted a defense witness to be impeached by a five-year-old armed robbery conviction since it involved theft and indicated conscious disregard for the rights of others. United States v. Lipscomb, 702 F.2d 1049 (1983), 19 CLB 480.

§ 34.207 —Impeachment by showing bias of witness (New)

U.S. Supreme Court After defendant was convicted in the district court of bank robbery, he appealed on the ground that evidence of his membership in a prison gang had been improperly admitted against him. The Court of Appeals for the Ninth Circuit reversed, and a petition for certiorari was filed.

Held, judgment reversed. The Supreme Court concluded that evidence of a witness' and a defendant's common membership in an organization with a creed requiring members to lie for each other is admissible for impeachment purposes to show bias. The Court further held that evidence indicating the full description of the prison gang and its tenets was admissible since the type of organization in which a witness and a party share membership may be relevant to show the source and strength of the witness' bias. United States v. Abel, 105 S. Ct. 465 (1984), 21 CLB 255.

§ 34.220 Hearsay evidence

"Evidence and Trial Advocacy: Hearsay Exceptions—Medical Diagnosis or Treatment," by Michael H. Graham, 24 CLB 167 (1988).

"Evidence and Trial Advocacy Workshop: Hearsay Exception—Then Existing Mental, Emotional, or Physical Condition," by Michael H. Graham, 23 CLB 568 (1987).

"Evidence and Trial Advocacy Workshop: Hearsay Exceptions—An Overview," by Michael H. Graham, 23 CLB 442 (1987).

"Evidence and Trial Advocacy Workshop: Hearsay Definition—Everyday Application," by Michael H. Graham, 22 CLB 445 (1986).

Court of Appeals, 4th Cir. After defendant was convicted in the district court of various drug-related offenses, he appealed, inter alia, on the ground that out-of-court statements had been improperly admitted into evidence at trial.

Held, conviction affirmed. The Fourth Circuit ruled that the out-of-court statements were not inadmissible hearsay, since they were offered not for the truth of the matter asserted but for the limited purpose of explaining why a government investigation was undertaken and why the officers made the preparations that they did in anticipation of defendant's arrest. United States v. Love, 767 F.2d 1052 (1985).

Court of Appeals, 4th Cir. After defendant was convicted in district court of income tax evasion, he appealed on the ground that a memorandum from a deceased attorney had been excluded improperly at trial.

Held, affirmed. The memorandum

was not admissible under the residual exception to the hearsay rule because the testimony of an officer of the bank would have been more probative of the third party's possession of $100,000 than was the memorandum of the deceased attorney. The court further found that the memorandum was not so probative of defendant's innocence as to give rise to a duty on the part of the government to turn it over to defendant. United States v. Heyward, 729 F.2d 297 (1984), 20 CLB 468, cert. denied, 105 S. Ct. 776 (1985).

Court of Appeals, 4th Cir. After defendant had been convicted of armed bank robbery, he appealed on the ground that a comment of a police officer had been improperly admitted into evidence against him.

Held, conviction affirmed. The Fourth Circuit found that the admission into evidence of the spontaneous comment of the interviewing officer after defendant had told him he would plead guilty to one of the bank robbery statutes was proper since it fell within the contemporaneous response exceptions to the hearsay rule (Rule 803(1)). The response of the interviewing officer was to advise the defendant that "this was a lesser charge and that it carried a ten-year maximum penalty." United States v. Hinton, 719 F.2d 711 (1983), cert. denied, 104 S. Ct. 1300 (1984).

Court of Appeals, 8th Cir. After defendant was convicted in the district court of assault with intent to commit rape, he appealed on the grounds that the district court had improperly admitted testimony of the five-year-old victim's foster mother regarding statements made by the victim about sexual abuse by her father.

Held, affirmed. The Eighth Circuit held that the district court did not abuse its discretion in admitting the hearsay statement of the foster mother under the "catchall" exception to the hearsay rule, since the victim was unable to testify meaningfully. The court also observed that the confrontation clause neither bars the admission of all out-of-court statements, nor requires that all declarants be subject to cross-examination. United States v. Dorian, 803 F.2d 1439 (1986), 23 CLB 287.

§ 34.225 Admissions and confessions

"Evidence and Trial Advocacy Workshop: Admissions of a Party-Opponent —Adoptive and Representative; Personal Knowledge," by Michael H. Graham, 23 CLB 374 (1987).

"Evidence and Trial Advocacy Workshop: Admissions of a Party-Opponent —An Overview," by Michael H. Graham, 23 CLB 275 (1987).

§ 34.230 —Business records exception

"Evidence and Trial Advocacy: Hearsay Exceptions—Business Records," by Michael H. Graham, 24 CLB 239 (1988).

"Evidence and Trial Advocacy: Hearsay Exceptions—Medical Diagnosis or Treatment," by Michael H. Graham, 24 CLB 167 (1988).

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of possession of a firearm following a felony conviction, he appealed on the ground that a Bureau of Alcohol, Tobacco & Firearms tracer form had been improperly admitted as a business record to show the weapon's movement in interstate commerce.

Held, conviction reversed. The District of Columbia Circuit concluded that the BATF tracer form should not have been admitted under the business records exception to the hearsay rule even though the actual records of the manufacturer, if properly authenticated, would have been admissible. The court explained that the document was prepared in response to a government request rather than prepared in the ordinary course of business. This was not harmless error. United States v. Houser, 746 F.2d 55 (1984), 21 CLB 260.

Court of Appeals, D.C. Cir. Defendant was convicted of selling government property in violation of 18 U.S.C. § 641. On appeal, he contended, among other things, that it was error to admit into evidence certain claim forms completed by intended payees of Treasury checks.

Held, conviction affirmed. The District of Columbia Circuit Court found that, while the forms did not fall within any hearsay exception, their admission was harmless error. The court explained that the forms completed by intended payees did not fall within the hearsay exception for records of regularly conducted activity since the intended payees were not acting in the regular course of business. However, the court concluded that the admission of the forms was harmless error since there was convincing, properly admitted evidence of all essential elements of the case, and the evidence of the defendant's guilt was overwhelming. United States v. Baker, 693 F.2d 183 (1982), 19 CLB 262.

§ 34.233 —Declarations against penal interest (New)

Court of Appeals, 2d Cir. After defendants were convicted of mail fraud, conspiracy and use of an explosive to destroy a commercial building owned by them, they appealed, inter alia, on the ground that evidence of "nodding" by the arsonist in response to questions had been improperly admitted against them.

Held, affirmed as to admission of evidence of "nodding" of injured arsonist's head. The Second Circuit found that evidence of "nodding" of the injured arsonist's head in response to hospital questioning by a friend was admissible under the penal interest exception to the hearsay rule. The court reasoned that under Rule 804(b)(3), Federal Rules of Evidence, the questioned evidence could be introduced to establish that the owners of the building had participated in the arson since the circumstances tended to confirm it trustworthiness. United States v. Katsougrakis, 715 F.2d 769 (1983), 20 CLB 169, cert. denied, 464 U.S. 1040, 104 S. Ct. 704 (1984).

§ 34.235 —Declarations of coconspirators

"Evidence and Trial Advocacy: The Impact of *Bourjaily* on Admissions by Co-conspirator," by Michael H. Graham, 24 CLB 48 (1988).

U.S. Supreme Court Defendant was convicted in the district court of conspiring to distribute cocaine, and the Court of Appeals for the Sixth Circuit affirmed.

Held, affirmed. A coconspirator's out-of-court statements were properly admitted against the defendant, and there was no merit in defendant's contention that a court, in determining the admissibility of the statement, must look only to independent indicia of reliability for the evidence to be admitted. The Court therefore found that

hearsay is admissible in such an inquiry. Bourjaily v. United States, 107 S. Ct. 2775 (1987).

Court of Appeals, D.C. Cir. After defendants were convicted in the district court of Racketeer Influenced and Corrupt Organizations Act (RICO) offenses and mail fraud in connection with certain contracts procured from the U.S. Postal Service, they appealed on the ground, among other things, that coconspirator statements had been improperly admitted at trial. Specifically, they argued that a "script" prepared by one conspirator for use by a coconspirator, which detailed everything that the coconspirator was supposed to have done under various agreements he had signed pursuant to the unlawful scheme, should not have been admitted against the defendants.

Held, conviction affirmed. The court ruled that the "script" prepared by one of the conspirators was properly admitted, since it was not hearsay within the meaning of Rule 801(c) of the Federal Rules of Evidence. The court reasoned that the "script" was not being offered to prove the truth of the matters asserted therein, but to show that the coconspirator knew little about the services supposedly rendered by him pursuant to those agreements he had entered into with his conspirators. The court further observed that, although a conspiracy had not been formally charged in the indictment, the "script" was highly probative of efforts by defendants to further an ongoing scheme to defraud and demonstrated conscious awareness of guilt by defendants. United States v. Perholtz, 842 F.2d 343 (1988).

Court of Appeals, 1st Cir. After defendants were convicted in the district court of conspiring to import cocaine and related charges, they appealed on the grounds, among other things, that one of defendants' statement was inadmissible hearsay and violated the confrontation clause. In response to a co-defendant's statement that he did not know defendant, defendant made a statement asserting that the co-defendant knew him and was attempting to pin blame on him.

Held, conviction affirmed. The First Circuit stated that defendant's statement had been properly admitted as admissible hearsay, since it was an excited utterance in response to a co-defendant's statement. The court further found that placing the two narcotic suspects together in a law enforcement office at the airport was not sufficiently likely to elicit incriminating statements and was therefore an "interrogation" for *Miranda* purposes. United States v. Vazquez, 857 F.2d 857 (1988).

Court of Appeals, 1st Cir. After dedant was found guilty in the district court of aiding and abetting the receipt of stolen property, the district court granted defendant's motion for a judgment of acquittal notwithstanding the verdict, and the government appealed. The court of appeals then vacated and remanded, and the district court reinstated the conviction.

Held, conviction affirmed. The First Circuit found that the failure of the trial court to declare a mistrial when the statements of an alleged coconspirator were not properly admitted at trial was not so plainly erroneous as to require reversal. The court noted that the trial judge had conditionally admitted the statements of the alleged coconspirator, as well as those of a government informant, and that after

both sides had rested, the court found that the government had failed to prove that defendant was part of the alleged conspiracy and carefully instructed the jury to disregard those statements as against defendant. The court also entered a judgment of aquittal for defendant on the conspiracy count. The court further observed that although there was a great danger of prejudicial spillover when the coconspirator's statements were deemed inadmissible after having been presented to the jury, the jury had sufficient independent evidence to convict defendant on the aiding and abetting charge. United States v. McNatt, 842 F.2d 564 (1988).

Court of Appeals, 1st Cir. After two defendants were convicted in district court of conspiracy and possession of cocaine, they appealed, arguing, among other things, that one co-defendant's post-arrest statement should not have been admitted against the other defendant.

Held, conviction affirmed. The First Circuit determined that co-defendant's post-arrest statements were hearsay as to the defendant and were not admissible as to him, since they were not made in furtherance of the conspiracy. The court found, however, that their admission was harmless beyond a reasonable doubt, since they were merely cumulative to a mass of similar evidence already introduced against defendant. United States v. Palow, 777 F.2d 52 (1985), 22 CLB 278, cert. denied, 106 S. Ct. 1277 (1986).

Court of Appeals, 2d Cir. After defendant was convicted of conspiring to import heroin, he appealed on the ground, among other things, that testimony of an alleged coconspirator as to his prior conviction created an improper inference that another jury had rejected his defense of lack of knowledge of the nature of the contraband.

Held, affirmed. The Second Circuit stated that a prosecutor may elicit testimony of an accomplice's own conviction provided he does so in a proper manner and for a proper purpose, such as disclosure of matter damaging to the credibility of an accomplice and contradiction of any inference that the government is concealing the accomplice's bias. United States v. Louis, 814 F.2d 852 (1987).

Court of Appeals, 2d Cir. Defendant was convicted in New York state court of felony murder and sentenced to a term of twenty-five years to life. Following his conviction, he brought a petition for a writ of habeas corpus on the grounds that the admissions of a co-conspirator had been improperly admitted into evidence at trial.

Held, reversed in part. The Second Circuit found that although defendant's confession was similar to that of co-defendant's in many details, the admission at trial of statements of his nontestifying co-defendant violated defendant's Sixth Amendment rights to confrontation under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 120 (1968). The court further found that violation of the *Bruton* rule regarding interlocking confessions of co-defendants did not constitute harmless error. Holland v. Scully, 797 F.2d 57 (1986), cert. denied, 107 S. Ct. 237 (1986).

Court of Appeals, 2d Cir. Defendant was convicted of conspiracy to distribute narcotics in violation of 21 U.S.C. § 841(a)(1). On appeal, defendant argued that a coconspirator's testimony as an out-of-court declaration by

another coconspirator, which implicated defendant as a partner in the conspiracy, was inadmissible hearsay, and that its admission violated defendant's right of confrontation.

Held, affirmed. The statement was admissible under the coconspirator's hearsay exception, Federal Rule of Evidence 801(d)(2)(E). There was abundant evidence, independent of the hearsay testimony, linking defendant to the conspiracy. Although each item of evidence itself might not have dispositively proved that defendant was a coconspirator, in combination they corroborated the hearsay testimony. Admission of the hearsay declaration did not violate defendant's right of confrontation under the Sixth Amendment. The declaration, which identified all members of the conspiracy and their roles, was made in furtherance of the conspiracy. Therefore, it bore sufficient indicia of reliability because its disclosure was against the declarant's penal interest. United States v. Perez, 702 F.2d 33, cert. denied, 462 U.S. 1108, 103 S. Ct. 2457 (1983).

Court of Appeals, 4th Cir. After defendant was convicted in the district court of conspiracy to illegally possess drugs with intent to distribute, he appealed on the ground that the district court had improperly admitted out-of-court statements of coconspirators.

Held, conviction affirmed. The Fourth Circuit concluded that the district court had properly admitted the out-of-court statements of coconspirators made in March even though the indictment charged that the conspiracy had started in April. The court explained that the evidence that the conspirators had engaged in drug transactions in March constituted the "substantial independent evidence" necessary under Rule 801(d)(2)(E) to prove that the conspiracy existed. United States v. Jackson, 757 F.2d 1486 (1985), 21 CLB 468.

Court of Appeals, 5th Cir. After defendants were convicted in the district court of offenses resulting from a fraudulent investment scheme, they appealed. One of defendants claimed that the district court failed to sever his case or to give proper limiting instructions when the testimony of a co-defendant referring to him was admitted without redaction.

Held, conviction affirmed. The Fifth Circuit stated that in view of overwhelming evidence against defendant, the failure of the court to order redaction of co-defendant's grand jury testimony did not prejudice defendant. The court found that the references to defendant in the unredacted grand jury testimony was relatively innocuous, since two of the references were probably exculpatory, one referred to a document already in evidence, and one referred to a friend of defendant. United States v. Lewis, 786 F.2d 1278 (1986).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of attempting, by means of an incendiary device, to destroy a building affecting interstate commerce in violation of 18 U.S.C. §§ 844(i) and 844(j), he appealed on the ground that hearsay evidence had been improperly admitted against him.

Held, conviction affirmed. The Fifth Circuit declared that where a witness had invoked his Fifth Amendment privilege and refused to testify, the witness was "unavailable" for purposes of the admission of his statement as a declaration against penal interest under Federal Rule of Evidence 804(b)(3). The court further commented

that the unavailable witness' declaration against penal interest (i.e., admitting his participation in the arson of a business owned in part by defendant) was fully corroborated by the evidence and shown to be trustworthy. United States v. Briscoe, 742 F.2d 842 (1984), 21 CLB 178.

Court of Appeals, 5th Cir. After defendants were convicted in the district court of federal drug violations, they appealed on the ground that the court failed to articulate its rationale for admitting hearsay statements in the absence of substantial independent evidence of a conspiracy as required by United States v. James, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917, 99 S. Ct. 2836 (1979).

Held, affirmed in part and reversed on other grounds. The Fifth Circuit declared that the trial judge's failure to specifically articulate his *James* findings as to the admissibility of hearsay statements did not constitute reversible error. The court noted that the *James* issue received "careful consideration," even though the judge had admitted the evidence "subject to later connections," since there had been independent evidence of the crime aside from the hearsay testimony. United States v. Winship, 724 F.2d 1116 (1984).

Court of Appeals, 7th Cir. After defendant was convicted in the district court of conspiracy and interstate transportation of stolen goods, he appealed, among other things, on the ground that coconspirator statements were improperly admitted against him.

Held, conviction affirmed. The Seventh Circuit found that the trial court correctly ruled that sufficient nonhearsay evidence established the stolen steel conspiracy, and thus correctly found that videotaped statements of a separately tried defendant were properly admitted as coconspirator statements made during the course of and in furtherance of the conspiracy. United States v. Murvine, 743 F.2d 511 (1984), 21 CLB 182.

Court of Appeals, 7th Cir. After defendant was convicted in district court of conspiracy to make a material false statement to a federally licensed firearms dealer, he appealed.

Held, affirmed. The reading by a co-conspirator of his immunity agreement, which indicated he would be subject to prosecution if he testified falsely, was not plain error. The court also refused to apply the plain error doctrine whereby defendant argued that by stating in the opening argument that the coconspirator would testify "truthfully," the prosecutor was improperly vouching for his credibility. United States v. Ojukwa, 712 F.2d 1192 (1983), 20 CLB 64.

Court of Appeals, 9th Cir. After defendants were convicted of conspiracy to smuggle, transport, and harbor illegal aliens, they appealed on the ground that coconspirator statements had been improperly admitted at trial, since there had been no prior presentation of independent evidence of the existence of a conspiracy.

Held, affirmed. The Ninth Circuit stated that there is no rigid requirement that a defendant's connection to the conspiracy be established by independent evidence before a coconspirator's statement may be admitted. The court reasoned that a trial judge has wide discretion to vary the order of proof in admitting a coconspirator's statement. United States v. Loya, 807 F.2d 1483 (1987), 23 CLB 391.

Court of Appeals, 10th Cir. After defendant was convicted in the district court of possession of stolen goods, he appealed on the grounds that certain tape-recorded conversations between his wife and a government informant had been improperly admitted at trial.

Held, conviction affirmed. The Tenth Circuit ruled that the tape-recorded conversations were admissible under the coconspirator's statement exception to the hearsay rule. The court noted that there was evidence that defendant and his wife were members of the conspiracy, that taped conversations between defendant's wife and the government informant were in furtherance of the conspiracy, and that the conversations occurred during the course of the conspiracy. United States v. Smith, 833 F.2d 213 (1987), 24 CLB 264.

§ 34.240 —Documentary evidence

"Evidence and Trial Advocacy: Hearsay Exceptions—Records of Vital Statistics," by Michael H. Graham, 24 CLB 444 (1988).

"Evidence and Trial Advocacy: Hearsay Exceptions—Public Records and Reports," by Michael H. Graham, 24 CLB 350 (1988).

Court of Appeals, 2d Cir. After defendant was convicted in the district court for filing false claims against the government, conspiracy, and racketeering, he appealed on the ground that Swiss bank records had been improperly admitted because had had not been given notice of the hearing at which the records were authenticated.

Held, conviction affirmed. The Second Circuit declared that the admission of the Swiss bank records did not violate defendant's Sixth Amendment right of confrontation. The court explained that the confrontation clause does not preclude the admission of all extrajudicial statements made when the defendant is not present as long as the statement has sufficient indicia of reliability to assure an adequate basis for evaluating the truth of the declaration. The court further noted that the records here had a high indicia of reliability, since defendant had admitted to their authenticity. United States v. Davis, 767 F.2d 1025 (1985).

§ 34.245 —Photographs

Court of Appeals, D.C. Cir. After the defendant was convicted in the district court of unlawful possession of a controlled substance with intent to distribute, he appealed on the grounds that five photographs introduced at a first trial resulting in a mistrial, depicting the environs in which the drug transactions took place, should have been introduced at the trial resulting in the conviction.

Held, conviction affirmed. The Court of Appeals for the District of Columbia ruled that admission of the photographs in the first trial did not require their admission in the second one. The court explained that the doctrine of law of the case did not operate under the circumstances since the previous trial was a nullity. The court further found that the trial court's ruling that the photographs were inadmissible was clearly within its discretion where none of the photographs depicted the view the officers had from the second-story window at the rear of the building from which they observed the principal transactions and articles which proved defendant's guilt. United States v. Akers, 702 F.2d 1145 (1983), 19 CLB 480.

§ 34.250 —Prior consistent statements

"Evidence and Trial Advocacy Workshop: Hearsay—Prior Consistent Statements; Prior Statements of Identification," by Michael H. Graham, 23 CLB 173 (1987).

§ 34.255 —Prior inconsistent statements as substantive evidence

"Evidence and Trial Advocacy Workshop: Hearsay—Prior Inconsistent Statements," by Michael H. Graham, 23 CLB 36 (1987).

§ 34.260 —Use of prior testimony

Court of Appeals, 4th Cir. After defendant was convicted in the district court of conspiracy to import marijuana and related offenses, he appealed on the ground that portions of a witness's grand jury testimony had been improperly admitted.

Held, affirmed. The Fourth Circuit found that any error in the exclusion of portions of the grand jury testimony was harmless. While questioning the propriety of admitting into evidence any grand jury testimony of a trial witness at all, the court concluded that the exclusion of portions of the grand jury testimony was harmless since the excluded portions could only have harmed, not helped, defendant's case. The court further found that since the excluded portions did not contain any established falsehoods, no unreliability would have been cast upon the witness's testimony by its admission. United States v. Walker, 696 F.2d 277, 19 CLB 380, cert. denied, 464 U.S. 891, 104 S. Ct. 234 (1983).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of three counts of mail fraud, he appealed on the grounds, among other things, that he was improperly prevented from admitting deposition testimony of a co-defendant from a civil case.

Held, conviction affirmed. The Fifth Circuit declared that the out-of-court civil deposition testimony of the co-defendant was properly excluded, since the motive to develop the testimony in the civil action was not sufficiently similar to the motive of the government in the criminal prosecution. The court explained that the trial strategies of the government in the criminal action and the civil litigant in the civil action were not sufficiently similar to authorize admission of the criminal co-defendant's civil deposition in the criminal prosecution, especially since the government had no opportunity to cross-examine the co-defendant at trial because he exercised his right not to testify. United States v. McDonald, 837 F.2d 1287 (1988).

§ 34.261 —Recorded statements (New)

Court of Appeals, 11th Cir. Defendant was convicted in a jury trial on charges arising out of a drug importation and distribution conspiracy. Defendant objected to the admission of a tape recording under Rule 404 of the Federal Rules of Evidence on the ground that it constituted inadmissible evidence of extrinsic offenses for the purpose of proving defendant's bad character.

Held, affirmed. The Eleventh Circuit concluded that the admissions of defendant in tape-recorded statements concerning the pitfalls of dealing in marijuana and the troubles he and several of his acquaintances had been involved in did not constitute an abuse of discretion. The court reasoned that

although the statements may have led the jury to believe that the defendant was involved in nonindicted, extrinsic offenses, they were relevant to prove his knowledge of drug importation and distribution. The probative value of the conversation thus was not outweighed by its prejudicial impact. United States v. Edwards, 696 F.2d 1277, 19 CLB 377, cert. denied, 461 U.S. 909, 103 S. Ct. 1884 (1983).

WEIGHT AND SUFFICIENCY

§ 34.265 Sufficiency of evidence

Court of Appeals, 11th Cir. Defendant was convicted on one count of conspiracy to violate the National Firearms Act and twelve counts of aiding and abetting the illegal transfer of firearms. On appeal, defendant argued that there was insufficient evidence to support the convictions.

Held, conviction affirmed. The proper standard of review of the trial court's findings was whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt," and the findings met that standard. In proving the conspiracy charge, the government did not have to prove that defendant knew all details of the conspiracy or participated in every action in furtherance thereof. The government's showing that defendant was aware of the essential objective of the conspiracy and helped to accomplish that objective was sufficient, and could be based on circumstantial evidence. The evidence supporting the aiding and abetting charge was also sufficient. The elements of aiding and abetting, the existence of an agreement and the cooperation of defendant, may be proved by circumstantial as well as direct evidence. Evidence of "presence" or "flight," if accompanied by other evidence of guilt, may provide adequate grounds for a conviction. Thus, the evidence was sufficient to support the convictions even though the government tied defendant to only three weapons directly. United States v. Smith, 700 F.2d 627 (1983).

35. THE TRIAL

§ 35.05 Defendant's right to continuance

Court of Appeals, 4th Cir. Defendants were indicted and convicted of income tax evasion and related charges. On appeal they argued that the Speedy Trial Act was violated, since the judge insisted that the trial

proceed within thirty days of their first appearance through counsel.

Held, reversed. The Fourth Circuit found that absent the written consent of defendants, the trial court cannot commence trial within thirty days from the date on which defendants, who never expressly waived counsel, first appeared through counsel. The court noted that the way to deal with a defendant who delays retaining an attorney, and will not expressly waive his right to counsel, is to bring the defendant into court and make a finding on the record that the defendant has knowingly relinquished his right to counsel. United States v. Wright, 797 F.2d 171 (1986).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of various drug offenses and wire fraud, he appealed on the ground that the trial court improperly denied his motion to reopen the evidence to permit him to testify in his own defense. Defendant did not make the motion until after the defense case and the government's rebuttal had closed.

Held, conviction reversed and remanded for a new trial. The Fifth Circuit noted that after weighing defendant's excuse together with the seriousness of the crimes with which he was charged, the nature and potential scope of his testimony, and the absence of any prejudice to the government or hardship to the court if reopening were allowed, the district court clearly should have allowed the defense to put defendant on the stand. United States v. Walker, 772 F.2d 1172 (1985), 22 CLB 162.

Court of Appeals, 8th Cir. After defendant was convicted in the district court of distribution of cocaine and related charges, he appealed on the ground, among other things, that the trial judge's denial of his application for a continuance due to the unavailability of an expert witness he intended to call was an abuse of discretion.

Held, affirmed. The Eighth Circuit ruled that the trial judge did not abuse his discretion in denying the application for a continuance, since defendant had presented direct evidence on the subject through his own oral testimony and the admission of several articles, and the defense had cross-examined a government witness on the distinction between the use and sale of steroids and the use and sale of cocaine. United States v. Eisenberg, 807 F.2d 1446 (1986), 23 CLB 391.

Court of Appeals, 10th Cir. After defendant was convicted of first-degree murder in the district court, he appealed on the grounds that he was deprived of his right to a fair trial by the court's denial of his request for a continuance.

Held, conviction reversed and case remanded. The Tenth Circuit found that the denial of the continuance deprived defendant of the opportunity to obtain the testimony of a key witness. The court reasoned that if defendant had been given the continuance, there was a reasonable possibility that the defense witness would have appeared the following day, and there was nothing on the record to indicate that a continuance until the next day would have seriously inconvenienced the government or the jury. United States v. West, 828 F.2d 1468 (1987), 24 CLB 177.

§ 35.20 Absence of defendant or counsel

U.S. Supreme Court During the trial of four defendants on cocaine distribu-

tion conspiracy charges, an in camera conference was held with one of the jurors. The judge and a defense counsel were present during this conference, where the juror expressed concern that one defendant was sketching portraits of the jury. No objections to this procedure were made by other defense counsel, and none of the others requested that they be present. After all defendants were convicted, the Ninth Circuit Court of Appeals reversed.

Held, judgment reversed. The Supreme Court found that the due process clause was not violated by the in camera discussion with the juror. The Court observed that the defense has no constitutional right to be present at every interaction between a judge and juror, and counsel could have done nothing had they been at the conference or gained anything by attending. The Court further found that the failure of defense counsel to express desire to be present or object to their exclusion constituted a waiver under Rule 43. United States v. Gagnon, 105 S. Ct. 1482 (1985), 21 CLB 466.

Court of Appeals, 2d Cir. After defendant was convicted in state court of possession of stolen property, he petitioned the district court for habeas corpus relief. The district court granted the petition, and the state appealed.

Held, conviction reversed. The Second Circuit found that the state court's determinations after a hearing on the merits of the issue of defendant's exclusion from his trial must be presumed to be correct unless they are unsupported by the record. In this case, the court noted that the state court made an implied factual determination that defendant's obstreperous behavior justified his exclusion from the courtroom. Saccomanno v. Scully, 758 F.2d 62 (1985), 21 CLB 467.

Court of Appeals, 5th Cir. Defendant was convicted in federal district court of conspiracy to transport illegal aliens into the United States. On the trial date, the jury, the attorneys and the witnesses appeared in court, but defendant did not. Defendant's attorney informed the court that he could not locate defendant. The judge decided to proceed with the trial in defendant's absence. Defendant's attorney did not object. The government called six witnesses in support of its case. Defendant's attorney cross-examined five of these witnesses, but did not call any witnesses for the defense. The jury found defendant guilty and the court set a date for sentencing. Defendant was not sentenced, however, until he surrendered to authorities some four years later.

Held, conviction reversed and case remanded. The trial court's decision to proceed with the trial in the defendant's absence, without further inquiry was an abuse of the trial court's narrow discretion. The court commented that the later discovery that the defendant was indeed a fugitive during his absence from trial would not excuse the failure of the trial court to make inquiry as to whether the trial could soon be rescheduled with the defendant in attendance. United States v. Beltran-Nunez, 716 F.2d 287 (1983), 20 CLB 166.

Court of Appeals, 7th Cir. After defendant was convicted in the district court of criminal contempt, he appealed on the ground, inter alia, that he had been denied his right to be present during jury deliberations.

Held, remanded on other grounds.

The Seventh Circuit found that defense counsel had plainly waived his right to be present at the reading of the jury's verdict and the poll of the jury on that verdict. The court was concerned, however, about the procedure whereby defense counsel waived both his own right to be present as well as that of defendant. Nevertheless, the court found no prejudice in the absence of defendant during jury deliberations, since the trial judge responded to jury questions in a "neutral and nonsubstantive manner." United States ex rel. SEC v. Billingsley, 766 F.2d 1015 (1985).

§ 35.25 Decisions of defense counsel as binding upon defendant

Court of Appeals, 4th Cir. After defendant was convicted in the district court of tax evasion, he appealed on the ground that his attorney's statements to an IRS auditor had been improperly used against him.

Held, conviction affirmed. The Fourth Circuit ruled that statements made by the attorney to the auditor regarding additional unreported income were admissible in a subsequent tax prosecution where the statements were made by the attorney during the course of representation. The court noted that defendant had waived any confidentiality privileges by authorizing the attorney to represent him before the auditor. United States v. Martin, 773 F.2d 579 (1985), 22 CLB 165.

§ 35.50 Conduct of trial judge

Court of Appeals, 7th Cir. After defendant was convicted of burglary in Wisconsin state court, he sought habeas corpus relief in the district court on the ground that he had been denied his rights to effective assistance of counsel and to trial by an unbiased tribunal. The district court denied the petition.

Held, reversed with directions. The Seventh Circuit declared that defendant was deprived of his constitutional right to assistance of counsel where the state trial judge implied that the court-appointed defense counsel would jeopardize his chance of future appointments by pressing too hard during trial. The court commented that, while there was no proof that defense counsel "pulled his punches" at trial, he had a conflict of interest between his client and himself. Walberg v. Israel, 766 F.2d 1071 (1985).

§ 35.55 —Examination of witnesses

Court of Appeals, 4th Cir. Defendant was convicted in Maryland state court of rape, felony murder, and burglary by a jury and was sentenced to life imprisonment. An alibi comprised practically defendant's entire defense, and if believed would have made it highly unlikely that defendant had committed the crime. The alibi presented by defendant and two of his friends was weakened by the conduct of the trial judge in openly and successfully pressing defendant's two key alibi witnesses to change their testimony. Defendant was granted a writ of habeas corpus in the district court.

Held, the granting of a writ of habeas corpus affirmed. The Fourth Circuit found that the trial court's conduct in openly and successfully pressing the defendant's two key alibi witnesses to change their testimony blatantly interfered with defendant's Sixth Amendment right to call witnesses in his own behalf. The court further found that defendant's Fourteenth Amendment due process right to a fair trial was violated where the state trial judge's remarks clearly indicated his disbelief

of the alibi witnesses' first testimony and unquestionably influenced the jury's appraisal of their credibility. The court observed that trial judge's comments must be neutral and must not be given so as to intimidate witnesses or otherwise interfere with the ascertainment of truth. Anderson v. Maryland, 696 F.2d 296 (1982), 19 CLB 380, cert. denied, 462 U.S. 1111, 103 S. Ct. 2463 (1983).

§ 35.70 —Exclusion of evidence

U.S. Supreme Court During defendant's trial in Illinois state court for attempted murder, the trial judge excluded the testimony of a material defense witness as a sanction for failure to identify the witness in response to a discovery motion. The Illinois appellate court affirmed the conviction.

Held, conviction affirmed. The Court found that the compulsory process clause of the Sixth Amendment does not create an absolute bar to the preclusion of testimony of a defense witness as a sanction for violating a discovery rule. The Court noted that such testimony may be precluded if the discovery violations are willful and motivated by a desire to obtain a tactical advantage. Taylor v. Illinois, 108 S. Ct. 646 (1988).

Court of Appeals, 4th Cir. After defendant was convicted in the district court of conspiracy to counterfeit, he appealed on the grounds that the court had improperly excluded testimony he had offered about improbable and farfetched, though legal, money-making schemes previously engaged in by him. The purpose of the defense was to demonstrate that defendant often took unrealistic fantasy trips and that his interest in counterfeiting was just another pipe dream.

Held, affirmed. The Fourth Circuit found that the district judge acted well within his discretion and did not abuse it in preventing the introduction of such collateral testimony, which would have distracted the jury from relevant evidence. The court reasoned that a trial judge has wide discretion as to relevance and materiality of evidence, and such a ruling will not be disturbed on appeal absent a clear showing of an abuse of discretion. United States v. Molovinsky, 688 F.2d 243 (1982), 19 CLB 170, cert. denied, 459 U.S. 1221, 103 S. Ct. 829 (1983).

§ 35.80 —Granting severance

Court of Appeals, 8th Cir. After a joint trial, eleven defendants were convicted of first-degree murder and related charges. On appeal, they argued, among other things, that they had been improperly joined for purposes of trial.

Held, convictions reversed and new trials ordered. The Eighth Circuit declared that although all eleven defendants had participated in the assault and murder of the victim, defendants were improperly joined, since the charges against five of defendants for witness tampering and perjury were not part of one overall scheme to cover up the circumstances of the victim's death. The court thus found that the misjoinder substantially tainted the jury's deliberations and verdicts. United States v. Grey Bear, 828 F.2d 1286 (1987), 24 CLB 176.

Court of Appeals, 9th Cir. Defendant was convicted of violating 18 U.S.C. § 922(h), prohibiting convicted felons from receiving firearms shipped in interstate commerce and 18 U.S.C. app. § 1202(a)(1), which prohibits possession of firearms by convicted felons.

Before his arrest on those charges, defendant had been arrested by Florida state authorities for murder. A count of both the firearms and murder indictments was illegal receipt of the gun used in the shooting. The federal district court, which denied defendant's request for a continuance until the state murder trial ended, also denied defendant's request to sever the count of illegal receipt of the murder weapon. Defendant appealed, claiming that the court erred in failing to sever the count.

Held, conviction affirmed. Severance of the count was properly denied because the interest in promoting judicial economy outweighed any prejudice to defendant. The proof involved with the count overlapped significantly with the proof of other counts, and so its joinder was logical. The Ninth Circuit rejected defendant's argument that denial of the severance violated his Fifth Amendment right to testify because it forced him to present testimony that could be used against him in the state trial. The government never forced him to testify on the count. All defendants who decide whether to testify must weigh the possibility that the testimony they give may later be used against them. Defendant, in effect, was asking the court to allow him to choose his strategic weapons without regard to the needs of the judicial system. United States v. Nolan, 700 F.2d 479, cert. denied, 462 U.S. 1123, 103 S. Ct. 3095 (1983).

§ 35.85 Restrictions on right of cross-examination

Court of Appeals, 9th Cir. After defendant was convicted in the district court of receiving stolen property, he appealed on the grounds that the court had improperly denied him the right to fully cross-examine the alleged victim.

Held, affirmed. The Ninth Circuit concluded that the court's refusal to admit prior sworn testimony of a government witness as to the dimensions of a stolen trailer was not improper since the defense counsel questioned the witness about his prior inconsistent statements and had a full opportunity to challenge the witness's credibility during the trial, both during questioning and summation. United States v. Miller, 688 F.2d 652 (1982), 19 CLB 172.

§ 35.90 —Motions for judgment of acquittal

Court of Appeals, D.C. Cir. Defendant was convicted of possession of an unregistered firearm. He appealed, contending that the district court erred in finding the government's evidence sufficient to withstand his motion for a judgment of acquittal made at the close of the government's case.

Held, affirmed. The government's evidence was sufficient to withstand a motion for acquittal. It was sufficient to show that defendant had control over the firearm in his car and that his possession was knowing. Although the government's evidence was hardly overwhelming, reasonable jurors could fairly conclude guilt beyond a reasonable doubt on the basis thereof. Under the circumstances, a reasonable jury could find that defendant, though not the actual owner of the car, knew of and had control over the shotgun. A reasonable jury could also find, absent credible evidence to the contrary, that it is highly unlikely that the operator and sole occupant of a car would be unaware that a shotgun was in the car when the shotgun was visible from out-

side the driver's seat. Acquittals are granted only when there is no evidence upon which a reasonable finding of guilt beyond a reasonable doubt can be made. United States v. Lewis, 701 F.2d 972 (1983).

§ 35.95 Conduct of prosecutor

"[A] Prosecutor's Communications With Represented Suspects and Defendants: What Are the Limits?" by Bruce A. Green, 24 CLB 283 (1988).

"Rebuttals and Rejoinders: Prosecutorial Behavior and Distorted Verdicts," by Randolph N. Jonakait, 24 CLB 254 (1988).

"[The] Ethical Prosecutor and the Adversary System," by Bruce A. Green, 24 CLB 126 (1988).

"Ethics Workshop: Prosecutorial Interference With Defense Access to Prospective Witnesses," by Steven W. Feldman, 21 CLB 353 (1985).

Court of Appeals, 1st Cir. After defendants' conviction for first-degree murder, they filed for a writ of habeas corpus in the district court on the grounds that the prosecutor had relied on perjured testimony from a key witness in that he failed to correct the witness's statement about a pending case against him. The petition was denied in the district court.

Held, convictions reversed. The First Circuit concluded that the alleged perjury of a key government witness did not establish a crucial element of the case, but merely presented some evidence that the witness may have had some reason to expect help from the prosecutor in the future without a promise in that respect. Campbell v. Fair, 838 F.2d 1 (1988).

Court of Appeals, 1st Cir. During the trial of defendant for narcotic offenses, the government prosecutor called a defense witness's attorney and threatened to indict the witness for perjury if she testified in a certain manner. Defendant was convicted without the witness being called to the stand after the defense claimed it was unable to locate her.

Held, conviction affirmed. The First Circuit found that there was no evidence of causation between the prosecutor's phone call and the witness' nonappearance. The court found that causation is an essential element in establishing a Sixth Amendment violation of the defendant's right to present witnesses. The court noted that it was never shown that the potential witness ever learned of the prosecutor's phone call or that the defendant made a diligent effort to locate the witness in order to secure her trial testimony. United States v. Hoffman, 832 F.2d 1299 (1987), 24 CLB 259.

Court of Appeals, 2d Cir. After defendant was convicted in the district court for bank robbery, he appealed on the grounds that the prosecutor's interruption during the jury charge by the trial judge required a mistrial.

Held, conviction affirmed. The Second Circuit declared that defendant was not entitled to a mistrial based on the prosecutor's interruption when, after the interruption, the trial court informed the jury that the prosecutor did not have good and sufficient reason to not turn over certain photographs. The court noted that the interruption took place when the judge was giving a charge regarding the prosecutor's reason for not turning over the enlargements of surveillance photos during the bank robbery. United States v. Mc-

Cormack, 829 F.2d 322 (1987), 24 CLB 179.

Court of Appeals, 5th Cir. After defendant was convicted in the district court of conspiracy to commit arson and related charges, he appealed.

Held, affirmed. On appeal after a remand, the Court of Appeals for the Fifth Circuit held that although the government's interference with defendant's right to call his wife as a witness was reprehensible, such misconduct was harmless. The court explained that the wife had previously given a statement to the FBI, which could have been used effectively to cross-examine her. United States v. Hammond, 815 F.2d 302 (1987), 23 CLB 491.

Court of Appeals, 6th Cir. After his conviction in Michigan state court for first-degree murder, defendant filed a habeas corpus petition in federal court, claiming multiple constitutional violations at his trial. The district court denied the petition.

Held, conviction affirmed and habeas corpus denied. The Sixth Circuit stated that while the prosecutor's comments on defendant's silence during the search of his blue Ford "approached the outer limits of fundamental fairness," the comments were harmless error. The court noted that the most incriminating part of the transaction was not defendant's silence during the search, but rather defendant's misstatement as to the location of the vehicle and the presence of defendant's identification in the car along with the murder weapon. The court also found that the prosecutor's comments to the jury that it was their civic duty to convict him because the victim "will never get out of that pine box" was not prejudicial error. Martin v. Foltz, 773 F.2d 711 (1985), 22 CLB 167.

Court of Appeals, 11th Cir. After his conviction in the district court on narcotics charges, defendant appealed on the ground that it was reversible error for the prosecutor to state during closing argument that defendant had dealt in illicit drugs and been caught and that defendant was "guilty."

Held, affirmed in part, vacated in part. The Eleventh Circuit found that the prosecutor's remarks during summation were harmless since the trial court gave an immediate curative instruction and since the evidence of defendant's guilt was overwhelming. The court observed that while it is clearly improper for the prosecution to express its personal belief in the accused's guilt, and there was the danger that the jury might be left with the impression that the prosecutor's statement was based in part on facts not in evidence, the prosecutor's misconduct alone does not require reversal unless the misconduct deprives defendant of a fair trial. United States v. Butera, 677 F.2d 1376 (1982), cert. denied, 459 U.S. 1108, 103 S. Ct. 735 (1983).

§ 35.100 Discretion to prosecute

Court of Appeals, 2d Cir. Defendants were charged under both state and federal indictments for firearms violations arising out of the same incident. After being assured by the state prosecutor that defendants would be prosecuted on state firearms charges which carried a minimum one-year prison sentence, the federal prosecutor dismissed charges, expressly stating that dismissal was "without prejudice to the rights of the United States to reinstitute proceedings. . . ." One year later defendants reached a plea agree-

ment, under which they pled guilty to lesser charges, with a new state prosecutor who had taken over the case. The U.S. Attorney moved to reinstitute federal charges, and defendants sought to dismiss the federal indictment on several grounds including an alleged due process violation based on the claim that the federal government's reinstitution of charges was in retaliation for their successful plea negotiations. The trial court found that although there was no evidence of prosecutorial bad faith, there was "an appearance of vindictive retaliation" which mandated dismissal of the federal indictment.

Held, judgment reversed and indictment reinstated. The court found that the fact that defendants were prosecuted by different sovereigns, each acting independently and without any control of or by the other, rendered the concept of prosecutorial vindictiveness inapplicable. It further held that both the original dismissal and the reinstitution of the federal indictment was within the prosecutor's discretion, and pointed out that dismissal would be inconsistent with the settled principle that federal prosecution of a person for the same acts forming the basis of a previous state conviction does not violate a defendant's double jeopardy rights. United States v. Ng, 699 F.2d 63 (1983).

§ 35.105 —Improper questioning of witnesses

Court of Appeals, 2d Cir. After defendant was convicted in district court of making extortionate extensions of credit and conspiracy, he appealed on the ground that the prosecutor had improperly questioned the victim on the stand.

Held, affirmed. The Second Circuit held that the questions and answers disclosing that the victim was afraid at the time of trial did not warrant reversal where the trial court struck the answer immediately and gave an appropriate curative instruction, and where proper evidence of the victim's fears during his dealings with defendant had been received previously. The court further found that neither the prosecution's reference to the defendant's alleged ties to organized crime nor admission of "other crimes" evidence gave rise to reversible error. United States v. Gigante, 729 F.2d 78, 20 CLB 465, cert. denied, 104 S. Ct. 2390 (1984).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of conspiring to file false tax returns and related charges, he appealed, arguing that the admission of prejudicial remarks by a government witness constituted reversible error.

Held, conviction affirmed. The Fifth Circuit ruled that it was not plain error to admit into evidence, on redirect examination, testimony of a government witness that defendant had physically abused her and forced her to have an abortion. The court reasoned that the redirect testimony was a legitimate effort to rehabilitate the witness' credibility in the face of her admission on cross-examination that she had run over defendant with a car and had fired shots in his presence. United States v. Austin, 774 F.2d 99 (1985), 22 CLB 161.

Court of Appeals, 9th Cir. After defedants were convicted in the district court of conspiracy to collect extensions of credit by extortionate means, they appealed on the ground that the government intentionally presented perjured testimony.

Held, affirmed. Ninth Circuit stated that while a conviction must be set aside if there is a reasonable likelihood that the false testimony would have affected the outcome of the trial, such was not a possibility here where the witness falsely stated that he was not a government informant. The court reasoned that the witness was so thoroughly impeached at trial by showings of prior bad acts and bias that any further impeachment would have been merely cumulative. United States v. Polizzi, 801 F.2d 1543 (1986), 23 CLB 192.

§ 35.110 —Comments made during summation

U.S. Supreme Court After defendant was convicted in the district court of mail fraud and knowingly making false statements to a government agency, he appealed on the grounds that prosecutorial remarks made during the trial required reversal. In his rebuttal argument, the prosecutor stated his opinion that defendant was guilty and urged the jury to "do its job." The Tenth Circuit Court of Appeals reversed, and certiorari was granted.

Held, petition denied. The Supreme Court found that upon reviewing the entire record, the prosecutor's remarks in this case did not rise to the level of plain error. The Court reasoned that the remarks, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice. The Court specifically took into account that the prosecutor was responding to defense counsel's closing arguments, which impugned the prosecutor's integrity. United States v. Young, 105 S. Ct. 1038 (1985), 21 CLB 465.

U.S. Supreme Court Respondents were convicted of kidnapping, transporting women across state lines for immoral purposes, and conspiracy to commit such offenses. The testimony of the three female victims included recitals concerning multiple incidents of rape and sodomy by respondents. The defense relied on a theory of consent and—inconsistently—on the possibility that the victims' identification of respondents was mistaken. None of the respondents testified. During the prosecutor's summation to the jury, defense counsel objected when the prosecutor began to comment on the defense evidence, particularly that respondents never challenged the kidnapping, the interstate transportation of the victims, and the sexual acts. A motion for a mistrial was denied, and the jury returned a guilty verdict as to each respondent on all counts. The Court of Appeals reversed the convictions and remanded for retrial, concluding that the summation violated respondents' Fifth Amendment rights under Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229 (1965). The court declined to rely on the harmless-error doctrine, stating that application of the doctrine "would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights."

Held, reversed and remanded. The Seventh Circuit improperly avoided application of the harmless error doctrine by asserting its supervisory powers. The Court reasoned that the supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless, such as the prosecutor's comments here. United States v. Hastings, 461 U.S. 499, 103 S. Ct. 1974 (1983), 20 CLB 59, cert. denied, 105 S. Ct. 1199, 1200 (1985).

Court of Appeals, 1st Cir. During closing arguments, the prosecutor commented that the jury should "see if [defendant] can explain the story." The district court immediately interrupted the prosecutor and reminded the jury that defendant had no obligation to prove anything.

Held, conviction affirmed. The First Circuit stated that while the prosecutor's comments were improper since they commented upon the defendant's failure to testify and shifted the burden of proof to defendant, the error was harmless in light of the overwhelming evidence against defendant. The court cautioned that it was equally improper for a prosecutor to rhetorically ask whether "counsel can explain," since defense counsel and defendant must be considered as one. United States v. Skandier, 758 F.2d 43 (1985), 21 CLB 467.

Court of Appeals, 2d Cir. After defendants were convicted in the district court of conspiracy to distribute and to possess with intent to distribute cocaine, they appealed on the grounds that improper comments by the prosecutor in summation required reversal. The prosecutor used the phrase "[the] defense . . . has to convince you" in summation.

Held, conviction affirmed. The Second Circuit ruled that although the prosecutor's remarks were improper, when viewed in light of the entire argument before the jury, the comments did not deprive defendant of a fair trial. The court of appeals noted that the court gave curative instructions directed specifically at the misstatements, and both the government and the court reminded the jury that the burden of proof rests with the prosecution at all times. United States v. Cruz, 797 F.2d 90 (1986).

Court of Appeals, 3d Cir. After Pennsylvania state prisoner had been convicted of attempted burglary of a bank, he sought federal habeas relief on the grounds that the prosecutor's closing argument was improper. The federal district court denied relief.

Held, affirmed. The Third Circuit found that it was not overreaching for the district attorney to ask the jury to draw the inference that the pro se defendant was talking about himself when he asked questions about the conduct of "the defendant" in the bank. The court commented that defendant could not properly reject the state's offer to provide counsel and then claim a constitutional deprivation because he tried his case "so stupidly." Oliver v. Zimmerman, 720 F.2d 766 (1983), cert. denied, 465 U.S. 1033, 104 S. Ct. 1302 (1984).

Court of Appeals, 4th Cir. After defendants were convicted in the district court of conspiracy to distribute cocaine, they appealed on the ground that the prosecutor's comments in summation deprived them of a fair trial. They argued that the prejudicial effects of these comments upon the jury can only be cured by a new trial.

Held, convictions affirmed. The Fourth Circuit stated that while the prosecutor's conduct was "senseless," reversal was not required because of the trial court's admonitions and other circumstances of the trial. The court noted that the verbal exchanges between opposing counsel throughout the trial were heated, which prompted the prosecutor to say in rebuttal summation that he "hated" both defendants and "what they're doing to our society." United States v. Harrison, 716 F.2d 1050 (1983), 20 CLB 168, cert. denied, 466 U.S. 972, 104 S. Ct. 2345 (1984).

Court of Appeals, 4th Cir. Defendant was convicted by a jury of bank robbery, bank larceny, and assault with a dangerous weapon during a bank robbery where identification was the central issue. The question on appeal was whether the prosecutor's closing argument, which stated that defendant's approaching and examining blowups of the bank's surveillance photographs and his explanation of those photographs to his lawyer constituted evidence of defendant's guilt, was reversible error.

Held, reversed and remanded. The Fourth Circuit found that identification was the central issue in the trial, and that the prosecutor's remarks constituted comment on the defendant's exercise of his rights to a fair trial and to counsel, and was an improper attempt to introduce evidence of the character of the accused solely to prove guilt. The court particularly noted that defense counsel immediately objected to the comment and was admonished by the trial judge for his "outbreak." United States v. Carroll, 678 F.2d 1208 (1982), 19 CLB 77.

Court of Appeals, 5th Cir. After defendant was convicted in the district court of drug offenses, he appealed on the ground, among other things, that the prosecutor improperly commented during summation on the unwillingness or inability of defense witnesses, whose depositions had been introduced, to come to the United States for the trial.

Held, affirmed in part and vacated in part. The Fifth Circuit stated that the government was entitled to draw the jury's attention to the witnesses' statements respecting their inability or unwillingness to come to the United States for trial, so that the jury might draw its own conclusions concerning the witnesses' credibility. United States v. Zabaneh, 837 F.2d 1249 (1988).

Court of Appeals, 6th Cir. During defendant's trial for first-degree sexual misconduct and robbery, the prosecutor suggested during closing arguments that, to some extent, the job of trying to prove the defendant innocent is left to the defense. The district court affirmed in part and reversed on other grounds.

Held, affirmed in relevant part. The Sixth Circuit found that the prosecutor had not improperly shifted the burden of proof by telling the jury that the defense had a duty to produce evidence of his innocence in the form of additional blood tests. The court noted that the prosecutor's comment was in response to a defense argument that the government ought to have performed more serological tests than it did. Beam v. Foltz, 832 F.2d 1401 (1987), 24 CLB 260.

§ 35.115 —Comment on defendant's failure to testify

"[The] Prosecutor's Obligation to Grant Defense Witness Immunity," by Bennett L. Gershman, 24 CLB 14 (1988).

U.S. Supreme Court During defendant's trial on mail fraud charges, defense counsel commented during closing arguments that the government had not allowed defendant to explain his side of the story and had denied him the opportunity to explain his actions. In rebuttal summation, the prosecutor remarked that defendant "could have taken the stand and explained it to you." After his conviction, the court of appeals reversed.

Held, reversed. The court declared that the prosecutor's comment did not violate defendant's Fifth Amendment privilege to be free from compulsory self-incrimination, holding that the prosecutor's remarks were in fair response to a claim made by defendant's counsel. United States v. Robinson, 108 S. Ct. 864 (1988).

Court of Appeals, 3d Cir. After defendant was convicted in New Jersey state court of murder and related offenses, he was granted a writ of habeas corpus in the district court on the ground that the prosecutor had improperly commented on his failure to testify. At trial, the state judge took the unusual step of permitting defendant, who had not testified, to deliver a summation to the jury in addition to that made by counsel. On rebuttal, the prosecution pointed out the defendant's failure to discuss crucial elements of the case.

Held, writ of habeas corpus vacated. The Third Circuit concluded that the prosecutor did not comment on the defendant's failure to testify. The court explained that the prosecutor's rebuttal was directed not at the defendant's lack of testimony as such, but rather to the closing argument, and that the prosecutor's questioning about the gaps in the defendant's narrative is a common way of attacking a defense summation. Bontempo v. Fenton, 692 F.2d 954 (1982), 19 CLB 266, cert. denied, 460 U.S. 1055, 103 S. Ct. 1506 (1983).

§ 35.120 —Comment on defendant's silence while in custody

U.S. Supreme Court During defendant's trial for kidnapping, robbing, and murder, the prosecutor improperly cross-examined the defendant about his post-arrest silence. The judge instructed the jury to ignore the question. After the trial jury convicted the defendant, the Illinois Appellate Court reversed and remanded, and the Illinois Supreme Court reversed and remanded. The district court denied habeas corpus, and the court of appeals reversed.

Held, reversed and remanded. The U.S. Supreme Court held that the prosecutor's misconduct, in attempting to violate the rule prohibiting questioning of a defendant on post-arrest silence, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. The Court reasoned that because the single question was immediately followed by an objection and too curative instructions were given the jury, it should disregard any questions on which an objection was sustained; therefore, the rule prohibiting impeachment by post-arrest silence was not violated. Greer v. Miller, 107 S. Ct. 3102 (1987).

§ 35.145 Motion to reopen evidence (New)

Court of Appeals, 5th Cir. After defendant was convicted in the district court of various drug offenses and wire fraud, he appealed on the ground that the trial court improperly denied his motion to reopen the evidence to permit him to testify in his own defense. Defendant did not make the motion until after the defense case and the government's rebuttal had closed.

Held, conviction reversed and remanded for a new trial. The Fifth Circuit noted that after weighing defendant's excuse together with the seriousness of the crimes with which he was charged, the nature and potential scope of his testimony, and the absence of any prejudice to the government or hardship to the court if

reopening were allowed, the district court clearly should have allowed the defense to put defendant on the stand. United States v. Walker, 772 F.2d 1172 (1985), 22 CLB 162.

36. THE JURY

SELECTION

§ 36.00 Requirement of an impartial jury

Court of Appeals, 7th Cir. Defendant was convicted of assaulting a guard in a federal penitentiary. On appeal, he questioned the constitutional fairness of the jury selection in his case.

Held, affirmed. An important requirement under the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 et seq., is that the district court clerk take steps to make sure that a qualified jury list is representative of a cross-section of the eligible population when a large portion of persons receiving qualification forms fail to respond. Defendant's contention of Sixth Amendment violation was based on the fact that apparently many people who receive juror qualification forms do not complete and return them. This, he claimed, becomes a selection process that winnows out blacks and "antiauthoritarian" types. There was no statistical support for his claim that blacks were underrepresented. As to the underrepresentation of the "antiauthoritarian" types, who are likely to ignore the requirement of completing and returning the form

(see 28 U.S.C. § 1864(a)), neither the letter nor the spirit of the Act *requires* that they be represented on the qualified jury list, let alone in the same percentage as they bear to the general population. Legislative history of the Jury Selection and Service Act makes it clear that although the statute speaks of litigants' rights to juries "selected at random," that phrase is not intended literally, and self-screening is not held to be a violation of the statute. United States v. Gometz, 730 F.2d 475, cert. denied, 105 S. Ct. 155 (1984).

§ 36.07 Jury venire representative of community (New)

Court of Appeals, 1st Cir. After his conviction in Massachusetts state court on narcotics charges, and denial of his appeal in the state appellate courts, defendant sought a writ of habeas corpus in the federal court, arguing that he had been denied his constitutional right to an impartial jury by the alleged systematic exclusion of young people from the jury panels. A report on the subject indicated that young adults (ages 18–34) were underrepresented by 50 percent in the jury selection process. The district court denied the petition.

Held, denial of habeas corpus affirmed. The First Circuit found that young adults are not a distinctive group required to be proportionately represented in jury panels. The court observed that a distinctive group requiring representation must be defined and limited by some clearly identifiable factor, requiring that a common thread or basic similarity in attitude, ideas, or experience run through the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process. Barber v. Ponte, 772 F.2d 982 (1985), 2[illegible] CLB 163.

§ 36.10 Systematic exclusion of minority group members

"Exercising Peremptory Challenges After *Batson*," by James R. Acker, 24 CLB 187 (1988).

U.S. Supreme Court The two criminal cases in question—one originating in the Oklahoma federal district court and the second in Kentucky state court—were pending on direct review when the U.S. Supreme Court decided Batson v. Kentucky (106 S. Ct. 1712 (1986)), holding that a criminal defendant could establish a prima facie case of racial discrimination based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire. The petitions for certiorari in both cases were filed in the Supreme Court before *Batson* was decided.

Held, reversed and remanded. A new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. Griffith v. Kentucky, 107 S. Ct. 708 (1987), 23 CLB 386.

U.S. Supreme Court During the criminal trial in Kentucky state court of defendant, a black man, the prosecutor used his peremptory challenges to strike all four black persons on the venire. A jury composed only of white persons was selected, and defendant was convicted. The Kentucky Supreme Court affirmed.

Held, conviction reversed and case

remanded. The Court ruled that the equal protection clause is violated when a defendant is put on trial before a jury from which members of his race have been purposely excluded. The Court reasoned that although a defendant has no right under the equal protection clause to a petit jury composed in whole or in part of persons of his own race, the clause forbids the prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case. Batson v. Kentucky, 106 S. Ct. 1712 (1986).

U.S. Supreme Court The state of California applied for a stay of a judgment of the California Supreme Court reversing a capital murder conviction on the basis that the trial jury was not drawn from a fair cross-section of the community. The California Supreme Court had found that there was a substantial disparity between the representation of Blacks and Hispanics on the voter lists as compared to their representation in the population at large.

Held, stay denied. Justice Rehnquist found that since it appeared that the state had failed to preserve for appeal one of the issues that was presented to the Supreme Court, it was doubtful that the case would attract enough votes in the Supreme Court to grant certiorari. California v. Harris, 105 S. Ct. 1 (1984), 21 CLB 254.

Court of Appeals, 11th Cir. After defendant was convicted in the district court of conspiracy to possess cocaine with intent to distribute, he appealed on the grounds that the prosecution's use of peremptory challenges violated his equal protection rights. Defendant's case was pending on direct appeal at the time the U.S. Supreme Court decided *Batson v. Kentucky,* which held such practices to be unconstitutional.

Held, vacated and remanded. The Eleventh Circuit ruled that the *Batson* ruling should be applied retroactively. The court decided, however, that a remand was necessary to determine whether the government's use of its challenges to strike three black jurors was racially discriminatory and, if so, whether the prosecution could rebut such a prima facie showing. United States v. David, 803 F.2d 1567 (1986), 23 CLB 28.

§ 36.20 Exclusion of jurors in capital cases

U.S. Supreme Court Defendant was tried for murder and related crimes. The court permitted the jury to be "death qualified," permitting exclusion of all potential jurors for their stated inability to sentence a defendant to death, even though the prosecution only sought the death penalty against one co-defendant. Defendants were convicted and the Supreme Court of Kentucky affirmed.

Held, affirmed. The U.S. Supreme Court held that defendant was not deprived of his right to an impartial jury because the prosecution was permitted to "death qualify" the jury. The Court noted that the state had a legitimate interest in holding a joint trial in which defendants' conduct arose from the same events. Bachanan v. Kentucky, 107 S. Ct. 2906 (1987).

U.S. Supreme Court Defendant was convicted in Mississippi state court of capital murder and sentenced to death, and the Supreme Court of Mississippi affirmed.

Held, reversed in part and remanded. The U.S. Supreme Court held that the exclusion of a juror for cause in a capital case, when the juror was not irrevocably committed to vote against the death penalty, was a reversible error not subject to harmless error review. That a potential juror have conscientious scruples against the death penalty is not enough for his or her exclusion; rather, exclusion is only permitted for cause when the potential juror's stated opposition to the death penalty would prevent or substantially impair the performance of his or her duties as a juror. Gray v. Mississippi, 107 S. Ct. 2045 (1987).

U.S. Supreme Court At the trial of defendant in Arkansas state court for capital felony murder, the judge removed for cause all prospective jurors who opposed the imposition of the death penalty. Defendant was convicted after trial and sentenced to life imprisonment. The conviction was affirmed on appeal, but habeas corpus relief was granted in the district court on the ground that the "death qualification" of the jury prior to the guilt phase of the bifurcated trial violated both the fair cross-section and the impartiality requirements of the Federal Constitution. The court of appeals affirmed.

Held, reversed. The Court stated that the Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial. The Court further found that "death qualification" of a jury does not violate the fair cross-section requirement of the Sixth Amendment. Lockhart v. McCree, 106 S. Ct. 1758 (1986).

U.S. Supreme Court Defendant, a black man, was indicted in Virginia on charges of capital murder for fatally shooting the white proprietor of a jewelry store during a robbery. During voir dire, the state trial judge refused defendant's request to question prospective jurors about racial prejudice. Defendant was convicted after trial and sentenced to death. The Virginia Supreme Court upheld the death sentence, and habeas corpus relief was denied in the district court and court of appeals.

Held, reversed and remanded. The Court ruled that a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias. The court commented that the risk that racial prejudice may have infected petitioner's capital sentencing is unacceptable in light of the ease with which that risk could have been minimized. Turner v. Murray, 106 S. Ct. 1683 (1986).

U.S. Supreme Court After defendant was convicted of first-degree murder in a Florida state court and sentenced to death, he argued on appeal that several prospective jurors had been improperly excluded for cause because of their opposition to capital punishment. The Florida Supreme Court, however, affirmed the conviction and sentence. His habeas corpus petition was denied by the district court, but the court of appeals reversed and granted the writ, applying the standard that a juror may properly be excluded for cause if he makes it "unmistakably

clear" that he would "automatically" vote against capital punishment.

Held, reversed. The Supreme Court found that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether a juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." The Court thus dispensed with the requirement that a juror's bias lead to "automatic" decision-making and that it be established with "unmistakable clarity." Wainwright v. Witt, 105 S. Ct. 844 (1985).

Missouri Defendant was convicted of capital murder, first-degree robbery, three counts of sodomy, and four counts of kidnapping. He was sentenced to death for the capital murder conviction. Before trial, potential jurors were excused for cause when they stated that they could not, under any circumstances, assess a death sentence on defendant if the jury found him guilty. On appeal, defendant argued that the trial court erred in allowing the state to disqualify jurors opposed to the death penalty, resulting in a "conviction-prone" jury, thereby violating his constitutional right to a fair and impartial jury.

Held, conviction and death sentence affirmed. The Missouri Supreme Court ruled that the exclusion for cause of jury panel members who state on voir dire that they could not, under any circumstances, assess the death sentence, did not violate defendant's constitutional right to a fair and impartial jury. The court stated that it did not know of any decision

> that even remotely suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly stated that they would ignore the law and the instructions of the trial judge, and decide the issue of punishment not on the basis of what the law is, but on the basis of what they think it should be under their own standards.

State v. Nave, 694 S.W.2d 729 (1985).

§ 36.25 Conduct of voir dire

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of possession with intent to distribute heroin and related charges, he appealed on the grounds that the jury was improperly impaneled because he was not present.

Held, conviction reversed and case remanded. The District of Columbia Circuit ruled that defendant's complete absence from the impaneling of the jury was reversible error. The court noted that a defendant's right to be present during voir dire and jury selection cannot be waived merely through a representation of defense counsel. Rather, it requires a personal waiver in open court by defendant so that the court can determine whether defendant has knowingly and intelligently relinquished a known right. United States v. Gordon, 829 F.2d 119 (1987), 24 CLB 178.

Court of Appeals, 5th Cir. After defendant was convicted in the district court of stealing government property, he appealed on the grounds that the magistrate had improperly been delegated authority to preside over jury selection.

Held, affirmed. The appeals court held that although the Federal Magistrates Act does not grant judges the authority to delegate to magistrates as

"additional duty" power to preside over jury selection in felony cases, such an error was harmless when neither the government nor the defendant objected, and the subsequent trial was fundamentally fair. United States v. Ford, 824 F.2d 1430 (1987).

Court of Appeals, 11th Cir. Defendant was convicted of conspiracy to distribute marijuana and of distribution. He appealed, contending that the trial court's voir dire examination was inadequate and that its restrictions on questioning deprived him of his Sixth Amendment right to be tried by an impartial jury. Prior to trial, defendant moved to permit counsel to conduct voir dire, or alternatively, to have the court propound a list of specific questions to the prospective jurors. The asserted purpose of the motion was to discover bias against persons charged with drug-related crimes for purposes of challenges for cause and effective use of peremptory challenges. The court denied the motion, but agreed to ask 34 of the 204 questions defendant submitted. Defendant requested that 73 of the questions be heard by each juror in isolation. The court asked three of these, but not to isolated jurors.

Held, affirmed. Trial courts are given broad discretion to determine the proper method and scope of voir dire. Their decision whether to propound questions proffered by counsel and whether to question jurors collectively or individually should be upheld unless an abuse of discretion is found. An abuse of discretion will not be found if the court's method of voir dire can give reasonable assurance that prejudice would be discovered if present. The questions propounded by the trial court were clearly sufficient to assure that any prejudice against defendent, due to his being charged with narcotics violations, would be uncovered. If fact, many of the proffered questions were plainly aimed at determining, and perhaps influencing, the views of jurors on the propriety of the marijuana laws. Defendants are not entitled to sympathetic juries, but merely to impartial ones. The trial court did not abuse its discretion in refusing to question jurors in isolation because defendant's allegations of prejudice were general and unsupported. United States v. Brunty, 701 F.2d 1375, cert. denied, 464 U.S. 848, 104 S. Ct. 155 (1983).

§ 36.30 Peremptory challenges

"Exercising Peremptory Challenges After *Batson*," by James R. Acker, 24 CLB 187 (1988).

U.S. Supreme Court Habeas corpus petitioner, a black man, moved for consideration of a denial of relief, which was denied in the district court and the court of appeals. He argued that the holding of Batson v. Kent, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), which changed the standard for proving unconstitutional abuses of peremptory challenges, should be applied retroactively.

Held, affirmed. The Court ruled that the *Batson* decision should not be applied retroactively on collateral review of convictions that became final before the *Batson* opinion was announced. The Court reasoned that the *Batson* decision was only partially designed to serve the truth-finding function of trials, and all participants in the judicial system had justifiably relied on the *Swain* case, which was overruled by *Batson*. Allen v. Hardy, 106 S. Ct., 2878 (1986).

Court of Appeals, 2d Cir. After defendant was convicted of aiding in the sale of narcotics, he appealed on the grounds that the jury selection process was improper.

Held, affirmed. The Second Circuit court held that the method of jury selection involving the joint voir dire of the entire panel for two narcotics cases did not improperly dilute defendant's right to exercise peremptory challenges. The court observed that there was no reason to conclude that the fact that an individual had been peremptorily challenged by a similarly situated defendant was relevant to the individual's ability to serve as a juror in the defendant's case. United States v. Resto, 824 F.2d 210 (1987).

Court of Appeals, 4th Cir. After seven defendants were convicted in the district court of conspiring to distribute heroin and related offenses, they appealed on the grounds that they had been improperly denied additional challenges during jury selection.

Held, affirmed. The Fourth Circuit court held that defendants were properly denied more than the ten statutorily mandated peremptory challenges and allowed one additional challenge to strike a prospective juror with a hearing impairment, when defense counsel offered no convincing responses when asked why denial of additional challenges would be prejudicial. United States v. Meredith, 824 F.2d 1418 (1987).

§ 36.40 Exposure of jurors to prejudicial publicity

Court of Appeals, 1st Cir. The petitioner in a habeas corpus proceeding appealed from an order of the district court denying his writ, based upon the argument that he had been denied a fair trial by the trial court's handling of a newspaper report appearing on the second day of his trial reporting that he had been indicted for murder in three counties.

Held, affirmed. The U.S. Constitution does not require an individual voir dire of all jurors exposed to potentially prejudicial publicity. The court observed that the trial judge had questioned the jurors collectively and had repeatedly emphasized to the jurors the importance of ignoring press accounts and of deciding the case solely on the basis of evidence presented at trial. Jackson v. Amaral, 729 F.2d 41 (1984), 20 CLB 465.

§ 36.45 Substitution of jurors

Court of Appeals, 2d Cir. Defendants were convicted on various counts stemming from their participation in a large-scale heroin operation. They appealed arguing that the substitution of an alternate for an ill juror after commencement of deliberations violated Rule 24(c) of the Federal Rules of Criminal Procedure. After two and one-half days of deliberations, followed by a three-day holiday recess, one of the jurors informed the district court that she was ill. Defendant did not agree to several suggestions made by the court, such as an eleven-juror verdict or a one-day adjournment, and the court rejected defendants' request for a mistrial. The court then decided to substitute one of two alternates for the ill juror. The selected alternate convinced the court that this discussion with other jurors had not affected his view of the case, and that he could deliberate fully and fairly with the other jurors. The jury was instructed to begin deliberations from scratch. After several days, the jury reached several separate verdicts.

Held, affirmed. While Rule 24(c) expressly prohibits the substitution of jurors after the commencement of deliberations, a violation does not require reversal per se, absent a showing of prejudice. Defendants' claim of prejudice from being tried, in effect, by fourteen jurors lacked merit. The alternates were kept apart from the regular jurors until the need for substitution arose. The selected alternate convinced the court that he was not swayed by his discussions with the other alternate, and that he could deliberate fully and fairly. Finally, the jurors were carefully instructed to start from scratch. Thus, any danger of prejudice was adequately minimized. The court noted that since defendants refused to agree to any course of action other than a mistrial, juror substitution was the least objectionable course of action. United States v. Hillard, 701 F.2d 1052, cert. denied, 461 U.S. 958, 103 S. Ct. 2431 (1983).

INSTRUCTIONS

§ 36.47 In general (New)

"Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics," by Edward J. Imwinkelried and Lloyd R. Schwed, 23 CLB 135 (1987).

§ 36.50 "Allen" dynamite charge

U.S. Supreme Court After defendant was convicted in Louisiana state court on charges of killing five people, the jury indicated during the penalty phase of the trial that it was having difficulty reaching a decision. The judge then polled the jurors and admonished them to consult and consider each other's views with the objective of reaching a verdict, but not to surrender their own honest beliefs in doing so. The jury then returned a verdict in thirty minutes, sentencing petitioner to death on all three first-degree murder counts. The Supreme Court of Louisiana upheld the convictions and sentences, the federal district court denied defendant habeas corpus relief, and the court of appeals affirmed.

Held, conviction affirmed. The U.S. Supreme Court stated that the two jury polls and a supplemental charge did not impermissibly coerce the jury to return a death sentence. Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

Court of Appeals, 8th Cir. Defendants were tried in the U.S. District Court for the District of South Dakota on charges of assault with a dangerous weapon and first-degree burglary, and were convicted of the lesser included offense of simple assault. They appealed, contending that the trial court gave a coercive supplemental instruction to the jury. After deliberating for six hours, the jury advised the court that it had reached an impasse. The next morning, the judge read an "Allen" instruction admonishing the jury to further consider the evidence, listen to the views of other jurors, and attempt to reach a verdict. Neither counsel objected to the instruction at that time. Two hours later, the jury reached verdicts on all but one count, on which a mistrial was subsequently declared.

Held, affirmed. The Eighth Circuit applied the test it set forth in United States v. Cook, 663 F.2d 808 (8th Cir. 1981), and determined that the Allen charge was not coercive. The four factors of the test are (1) the content of the instruction, (2) the length of time the jury deliberates following the Allen charge, (3) the total time of the jury deliberations, and (4) any indicia in

the record of coercion or pressure on the jury. There was no indicia of pressure or coercion in the record. The language of the instruction was innocuous, and the instruction was nothing more than a gentle reminder to keep trying to reach a verdict. Furthermore, defendants did not object to the instructions in a timely and specific manner as required by Rule 30 of the Federal Rules of Criminal Procedure, and so waived their right to object on appeal. Finally, defendants' argument that the Allen charge was prohibited by South Dakota law lacked validity. While this may be the appropriate state law, this in no way governs procedure in the U.S. District Court. Federal Rules of Criminal Procedure, which did not prohibit the use of Allen charges in specific circumstances, governed the case. United States v. Young, 702 F.2d 133 (1983).

§ 36.65 Burden of proof

U.S. Supreme Court After defendant was convicted of murder and other offenses, and sentenced to death, the Supreme Court of South Carolina affirmed. During the trial, the jury was instructed that "malice is implied or presumed from the use of a deadly weapon." The U.S. Supreme Court remanded for reconsideration in light of Francis v. Franklin, 471 U.S. 307 (1985), which requires reversal of convictions due to improper burden-shifting instruction. The South Carolina court denied the petition.

Held, reversed and remanded. The U.S. Supreme Court found that the *Francis* rule must be applied retroactively, since it does not represent a newly articulated constitutional rule. Rather, it is merely an application of the governing principle that the due process clause of the Fourteenth Amendment prohibits jury instructions that have the effect of relieving the state of its burden of proof on the critical question of intent in a criminal prosecution. Yates v. Aiken, 108 S. Ct. 534 (1988).

U.S. Supreme Court At his trial for first- and second-degree murder, the court instructed the jury that all homicides are presumed to be malicious in the absence of evidence that would rebut this implied presumption. The Tennessee Court of Appeals affirmed the conviction, but the district court granted the habeas corpus writ and the court of appeals affirmed.

Held, vacated and remanded. The Court found that the harmless error standard applies to erroneous malice instructions. The Court reasoned that defendant was tried by an impartial jury clearly instructed that it had to find him guilty beyond a reasonable doubt on every element of both first- and second-degree murder. Rose v. Clark, 106 S. Ct. 3101 (1986).

Court of Appeals, 1st Cir. After a Massachusetts state prisoner was convicted of first-degree murder in state court, he petitioned for habeas corpus in the district court, which denied his petition. In the petition, the prisoner argued, among other things, that a jury charge at his trial impermissibly shifted the burden of disproving malice aforethought to him.

Held, conviction affirmed. The First Circuit declared that while the burden-shifting instruction was erroneous, there was no reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict. The court commented that a review of the trial transcript indicated that the jury al-

most certainly found "deliberate premeditation," and that such a finding made it almost inconceivable that a jury could have relied on the erroneous malice instruction. Doucette v. Vose, 842 F.2d 538 (1988).

Court of Appeals, 4th Cir. Defendant was convicted of first degree murder and the Fourth Circuit granted a certificate of probable cause. The judge had instructed the jury that the state had the burden of proving all elements of the crime, including specific intent to kill, premeditation, and deliberation, but that defendant had the burden of proving his legal insanity at the time of the murder. The judge refused to instruct the jury specifically that evidence of defendant's mental illness could be considered with regard to specific elements. Instead, he said that their decision on reasonable doubt should be "based on reason and common sense arising out of some or all of the evidence." Defendant contended that refusal to grant the specific instruction shifted the burden of disproving specific elements to him.

Held, conviction affirmed. Defendant was not entitled to a specific jury instruction that evidence of his paranoid schizophrenia was to be considered in determining whether the state had proven specific intent, premeditation, and deliberation. North Carolina may make insanity an affirmative defense to be proven by the defendant. The judge's somewhat imprecise instructions might have caused the jury to believe that they could consider the insanity evidence only with respect to the affirmative defense of insanity. However, the defendant had failed to show the offending instruction made the trial fundamentally unfair. The instructions were not misleading when viewed in their entirety. The judge had instructed the jury (1) to consider whether all reasonable doubts had been excluded by "some or all of the evidence" and that the state had the burden of proving all the specific elements; and (2) that "with deliberation" meant "while in a cool state of mind." Cooper v. North Carolina, 702 F.2d 481 (1983).

Court of Appeals, 9th Cir. After defendant was convicted in the district court of racketeering and fraud, he appealed on the grounds, among other things, that the government had failed to show that it had not improperly used his immunized testimony before the grand jury.

Held, conviction affirmed. The Ninth Circuit ruled that the government met its burden on the use of defendant's immunized testimony through affidavits and grand jury testimony establishing that no direct evidentiary or derivative use was made of defendant's testimony and that there were independent sources available for all evidence introduced at trial. United States v. Crowson, 828 F.2d 1427 (1987), 24 CLB 177.

Court of Appeals, 9th Cir. Following his conviction in Alaska state court for robbery, kidnapping, and other offenses, defendant brought a petition for habeas corpus, arguing that the trial court improperly placed on him the burden of proving duress.

Held, conviction affirmed. The Ninth Circuit found that the trial court did not impermissibly shift the burden of proof on intent to defendant by requiring him to prove the defense of duress. The court noted that due process does not require the prosecution to prove the absence of duress in order

to prove "criminal intent." Walker v. Endell, 828 F.2d 1378 (1987), 24 CLB 177.

§ 36.70 Character evidence

Court of Appeals, 3d Cir. After defendants were convicted of extortion, they appealed on the grounds that the trial court had failed to give a requested jury instruction that character evidence could, in and of itself, create reasonable doubt as to their guilt.

Held, convictions affirmed. The Third Circuit declared that the trial court properly denied defendants' requested jury charge, since the jury was adequately instructed to take character evidence into account with all other evidence in deciding whether the government had proven its charges beyond a reasonable doubt. United States v. Spangler, 838 F.2d 85 (1988).

§ 36.85 Duty to charge on defendant's theory of defense

Court of Appeals, 2d Cir. Defendant, a New York state senator, was convicted after trial on mail fraud, tax evasion, and related charges. On appeal, one of his grounds for reversal was that the trial court had erred in instructing the jury that political contributions used for personal purposes constituted taxable income.

Held, conviction reversed. The Second Circuit found that the failure to submit to the jury the issue as to whether political contributions received by defendant and used for personal, rather than political, purposes were nontaxable gifts on taxable income constituted plain error. The court noted that one of defendant's central contentions at trial was that the money contributed to his campaign by his supporters constituted nontaxable gifts to him because the money was donated without restriction as to use. The court thus concluded that it was unfair not to treat the issue as a factual one for the jury to decide. United States v. Pisani, 773 F.2d 397 (1985), 22 CLB 165.

Court of Appeals, 2d Cir. Following their conviction in the district court of unlicensed exportation of firearms, defendants appealed, inter alia, on the ground that the district court had failed to instruct the jury on the defense of reasonable reliance on the apparent authority of an informant.

Held, convictions affirmed. The Second Circuit found that defendants were not entitled to an instruction on the defendants' theory of reasonable reliance on the apparent authority of an FBI informant since they had failed to establish that the behavior of government officials and the informant was so outrageous and shocking as to deprive them of due process of law, especially in view of the evidence that one defendant admitted that it was he who sought out the informant for assistance in gunrunning activities. United States v. Duggan, 743 F.2d 59 (1984), 21 CLB 179.

Court of Appeals, 2d Cir. After defendant was convicted of possession of a controlled substance, he appealed on the ground that the trial court was in error in its charge relating to the type of cocaine in possession of the defendant.

Held, conviction reversed and new trial ordered. The Second Circuit concluded that the trial court erred in instructing the jury that D-cocaine was the chemical equivalent of L-cocaine, the only cocaine isomer regulated by federal statute. The court noted that

there are eight cocaine isomers, only one of which is covered by the federal statute, and the jury could have reasonably determined that the substance was either L-cocaine or D-cocaine. United States v. Ross, 719 F.2d 615 (1983).

Court of Appeals, 6th Cir. After defendant was convicted on murder charges in state court, he brought a habeas corpus petition, claiming that the court had improperly charged causation to the jury. Specifically, it was claimed that the court failed to instruct that if there was intervening grossly negligent medical treatment then defendant would not have been responsible for the victim's death. The district court denied the petition.

Held, affirmed. The Sixth Circuit ruled that the failure to give the requested causation charge did not deny the defendant's due process of law, where the defendant's counsel clearly presented the issue of intervening cause through the defense that the victim died as a result of a stomach infection, which was unrelated to the shooting. Cook v. Foltz, 814 F.2d 1109 (1987), 23 CLB 490.

Court of Appeals, 9th Cir. After defendant was convicted at trial of second-degree murder, he appealed on the grounds, among other things, that the trial court failed to give the jury his requested instruction on killing by accident.

Held, conviction reversed and case remanded. The Ninth Circuit ruled that defendant was entitled to the jury instruction on killing by accident where defendant's theory that the killing had been by accident had some support in the record. The court also found that the jury should have been charged that the government was required to prove beyond a reasonable doubt that defendant did not act in the heat of passion or on sudden quarrel where there was evidence in the record that defendant stabbed the victim when the victim attempted to intervene in a fight between defendant and his girl friend. United States v. Lesina, 833 F.2d 156 (1987), 24 CLB 263.

Court of Appeals, 11th Cir. Defendants were convicted of smuggling illegal aliens into the United States in violation of 8 U.S.C. § 1324(a)(1) and 18 U.S.C. § 2. On appeal, they claimed that the district court judge had improperly failed to give defendants' requested instruction to the jury embodying a purported theory of defense.

Held, affirmed. The Eleventh Circuit stated that terming a proposed jury instruction as a "theory of defense" does not automatically require that it be given. The court further observed that the requested instruction was unnecessary since the first part was included in the jury charge and the remainder was either not supported by the testimony or was substantially covered in the instructions given. United States v. Pierre, 688 F.2d 724 (1982), 19 CLB 170.

§ 36.95 Duty to charge on essential elements of crime

Court of Appeals, 2d Cir. After defendants were convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO) for having conducted the affairs of their law firm through a pattern of racketeering, they appealed on the ground that the trial judge had failed to charge the jury that at least two, and possibly more, predicate acts must be found.

Held, affirmed. The Second Circuit

declared that under RICO, two acts could be sufficient if there was continuity plus a relationship indicating that the acts were not "sporadic activity," but part of a pattern. The court also held that a RICO conspiracy conviction could be predicated upon an agreement to commit two predicate acts, even though a defendant was convicted of only one predicate act of mail fraud. United States v. Teitler, 802 F.2d 606 (1986).

Court of Appeals, 6th Cir. Defendant was convicted by a jury for conspiracy to distribute, distribution, and possession of cocaine. Defendant was sentenced to a five-year term on the conspiracy count and a single five-year sentence on the other two counts. Both sentences to run concurrently. He appealed on the ground that the trial judge gave merely a general charge on the law of conspiracy without relating the law to the facts of the case.

Held, reversed and remanded for resentencing. The Sixth Circuit stated that without an instruction that sets out specifically what acts would constitute defendant's agreement in the conspiracy count, the jury could not adequately consider the conspiracy count since the essential ingredient in the crime of conspiracy is agreement. What the jury needed to consider and find is that defendant shared in the conspiracy. The instructions given by the trial judge merely stated that willful participation is needed. The jury is required to find that defendant willfully acted with the intent to further the conspiracy. United States v. Piccolo, 696 F.2d 1162 (1983), 19 CLB 375, cert. denied, 466 U.S. 970, 104 S. Ct. 2342 (1984).

§ 36.110 Intent and willfulness

U.S. Supreme Court Defendant was convicted in the district court of unlawfully acquiring and possessing food stamps (7 U.S.C. § 2024(b)). At the trial, the government proved that he had purchased food stamps from an undercover agent for substantially less than face value. The trial court rejected defendant's proposed jury instruction that the government must prove that he knowingly did an act that the law forbids and purposely intended to violate the law. Instead, the court instructed the jury that the government had to prove that the defendant acquired and possessed the food stamps in a manner not authorized by statute and that he knowingly and willfully acquired the stamps. The court of appeals affirmed the conviction.

Held, conviction reversed. The Supreme Court stated that even though Congress failed to indicate explicitly whether mens rea is required, a conviction under Section 2024(b) requires a finding that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulation. The Court noted that criminal offenses requiring no mens rea have a generally disfavored status. Liparota v. United States, 105 S. Ct. 2084 (1985).

U.S. Supreme Court Defendant, a state prisoner, filed a petition for habeas corpus relief after his murder conviction was affirmed on appeal. The district court denied relief, but the Court of Appeals for the Eleventh Circuit reversed. At trial, the jury had been instructed that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."

Held, constitutional infirmity in jury instructions not harmless error. The Supreme Court stated that a jury instruction that creates a mandatory presumption whereby the jury may infer intent violates the due process clause, since it relieves the state of the burden of persuasion on an element of an offense. The Court commented that the fact that the jury was informed that the presumption was rebuttable did not cure the infirmity in the charge, since the jury could have understood the charge to mean that they were required to infer intent to kill from the act of firing a pistol unless defendant persuaded the jury that such reference was unwarranted. Francis v. Franklin, 105 S. Ct. 1965 (1985).

U.S. Supreme Court After the defendant was convicted in Connecticut State Court of attempted murder, kidnapping, robbery, and sexual assault, the Connecticut Supreme Court reversed his convictions for attempted murder and robbery, and certiorari was granted.

Held, affirmed. The Supreme Court found that where the trial court told the jury that intent may be inferred from conduct and that every person is conclusively presumed to intend the natural and necessary consequences of his acts, the convictions for attempted murder and robbery must be reversed since the error was not harmless. However, the Court further found that where the kidnapping instruction was couched in the permissive language of inference, the error as to that aspect of the charge was upheld. The Court also upheld the conviction as to sexual assault, since it is not a specific intent crime. Connecticut v. Johnson, 460 U.S. 73, 103 S. Ct. 969 (1983), 19 CLB 476.

Court of Appeals, 2d Cir. After defendant was convicted in the district court for offenses relating to a planned shipment of helicopters from the United States to Iran, he appealed on the ground that the court improperly charged the jury that "everyone is presumed to know what the law forbids."

Held, reversed. The Second Circuit ruled that the information in question was erroneous, since a defendant must be proven to have whatever state of mind is required to establish the offense he is charged with committing, and sometimes that state of mind includes knowledge of legal requirements. United States v. Golitschek, 808 F.2d 195 (1986), 23 CLB 393.

Court of Appeals, 2d Cir. A corporation, its president, and its general manager were convicted in the district court of various counts of conspiracy, false filing of tax returns, and aiding and assisting the filing of employees' false tax returns in connection with payments to employees without withholding taxes. On appeal, defendants argued, among other things, that the government had failed to prove actual knowledge.

Held, convictions affirmed. The Second Circuit determined that while knowledge of the law is an essential element under the tax statute, the "deliberate ignorance" instruction given by the trial court was correct, since the defendants' "willful blindness to the existence of the fact" that their employees were not independent contractors could properly have been considered by the jury. Moreover, the court noted that knowledge of the law was inferable and proven from the fact that defendants did indeed pay withholding on behalf of union employees during their regular work weeks.

United States v. MacKenzie, 777 F.2d 811 (1985), 22 CLB 280, cert. denied, 106 S. Ct. 2889 (1986).

Court of Appeals, 2d Cir. After the defendant was convicted in the district court of escape, he appealed on the grounds that the trial court had improperly denied him a duress defense. Defendant, who had been confined to a correctional facility, escaped and was later apprehended. His appeal was based on lack of medical attention to an acute kidney stone condition, which condition, defendant stated, made it necessary for him to escape in order to obtain further medical care.

Held, conviction affirmed. The Second Circuit ruled that the defense was not entitled to a duress defense and the trial court properly ruled on the proffered duress defense prior to any defense testimony being taken before the jury. The court explained that in order to establish the duress defense, the prisoner charged with the attempted escape must have been faced with the specific threat of death or substantial bodily injury in the immediate future, and that there must have been no time for complaint to authorities or have existed a history of futile complaints which would have made any benefit from such complaints illusory. The court further found that a prisoner must have had the intention to report immediately to the proper authorities after his escape, in order to avail himself of the duress defense. United States v. Bifield, 702 F.2d 342, 19 CLB 478, cert. denied, 103 S. Ct. 2095 (1983).

Court of Appeals, 4th Cir. A federal prisoner brought a habeas-corpus petition seeking relief from a death sentence imposed after his conviction for murder and armed robbery. The district court denied the writ, the court of appeals vacated and remanded, and then the Supreme Court vacated and remanded.

Held, reversed. On remand, the Fourth Circuit court held that an error in the jury charge, that malice was presumed from the intentional doing of an unlawful act, was not harmless beyond a reasonable doubt. The court therefore found that the evidence of petitioner's intent was not so dispositive that the jury did not need to rely on the presumption of innocence. Hyman v. Aiken, 824 F.2d 1405 (1987).

Court of Appeals, 5th Cir. Defendant was convicted in the district court of possessing marijuana with intent to distribute. He appealed on the ground that the court had improperly given the jury a "deliberate ignorance" charge.

Held, affirmed. The Fifth Circuit court held that the charge of deliberate ignorance was warranted in a prosecution for possession of 2,200 pounds of marijuana, with defendant denying knowledge of the drug's presence in the truck he was driving and claiming he had rented the truck from a friend, whose last name he could not recall. United States v. Luna, 815 F.2d 301 (1987), 23 CLB 491.

Court of Appeals, 5th Cir. When defendant was convicted after a jury trial of willfully attempting to evade income taxes, he appealed on the ground that the jury had been improperly instructed as to the elements of the crime.

Held, conviction affirmed. The Fifth Circuit ruled that the trial court was not required to list willfulness as a separate element and to give a specific instruction on willfulness in an income tax prosecution. The court noted that,

where the trial judge made clear that willfulness of the crime of attempting to evade income taxes must be proved beyond a reasonable doubt, the trial court's failure to list the element of willfulness as a separate element did not render the charge erroneous. As long as the court made it sufficiently clear that the government was required to prove that defendant violated a known legal duty, failure of the court to give a specific instruction on intent did not render the instruction erroneous. United States v. Hughes, 766 F.2d 875 (1985).

Court of Appeals, 7th Cir. After defendants were convicted of mail fraud in the district court, they appealed on the ground that the court improperly gave an "ostrich" instruction, which essentially states that a person cannot intentionally avoid knowledge by closing his eyes to facts that should prompt further investigation.

Held, convictions affirmed. The Seventh Circuit found that the giving of an ostrich instruction was proper where police officers who submitted false accident reports argued that they were innocent dupes. The court commented that the jury is entitled to be told that a person who smells a rat and then avoids actual knowledge may already know enough for the purpose of the law. United States v. Schwartz, 787 F.2d 257 (1986).

Court of Appeals, 9th Cir. A Montana state prisoner sought habeas corpus relief, claiming that a *Sandstrom* instruction, to the effect that a defendant is presumed to intend the natural and probable consequences of his acts, impermissibly shifted the burden of proof and required reversal.

Held, affirmed. The Ninth Circuit held that the erroneous *Sandstrom* instruction was harmless error, where the predicate acts used to create the presumption existed beyond a reasonable doubt, and no rational trier of the facts could find that defendant committed the acts of kidnapping and murder without intending to cause injury. McKenzie v. Risley, 801 F.2d 1519 (1986), 23 CLB 192.

Court of Appeals, 9th Cir. Defendant was convicted in the district court of possession of cocaine with intent to distribute and conspiracy to distribute cocaine. He appealed on the grounds that the trial judge had improperly charged the jury that it could find that defendant had the requisite knowledge if he was aware of the high probability that a drug deal was taking place and deliberately avoided learning the truth.

Held, reversed. The Ninth Circuit concluded that the trial judge had erred prejudicially in granting the government's request that the "conscious avoidance" instruction be read to the jury since there was insufficient evidence for the jury to reasonably conclude that the defendant contrived to avoid learning of the drug deal. The court observed that even if the circumstances are highly suspicious, the instruction is improper unless the defendant acted deliberately to avoid learning the truth. United States v. Garzon, 688 F.2d 607 (1982), 19 CLB 171.

Court of Appeals, 10th Cir. After defendant was convicted in the district court of possession of marijuana with intent to distribute, he appealed on the grounds that the trial court had improperly charged the jury that it could consider the defendant's charade of ignorance as circumstantial proof of knowledge.

Held, conviction affirmed. The

Tenth Circuit found that the trial court's deliberate ignorance charge was proper where there was evidence that defendant's telephone calls to his accomplice referred to "tires" rather than the narcotics in question and the defendant was observed loading the narcotics into an automobile. The court noted, however, that the charge would have been improper if the evidence against defendant solely related to direct knowledge of the criminal venture. United States v. Manriquez-Arbizo, 833 F.2d 244 (1987), 24 CLB 264.

§ 36.115 Lesser included offenses

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of possession of narcotics with intent to distribute, he appealed on the ground that the trial court had improperly denied his request for a jury instruction as to a lesser-included offense.

Held, conviction affirmed. The District of Columbia Circuit declared that the district court did not err in refusing defendant's request for an instruction as to the lesser-included offense of simple possession of narcotics since there was no rational basis for a charge of mere possession. The court reasoned that where, as here, defendant presents a totally exculpatory defense, the lesser-included offense should not be given where the prosecution case provides no rational basis for the jury's finding that defendant was guilty of the lesser-included offense. United States v. Thornton, 746 F.2d 39 (1984), 21 CLB 260.

Court of Appeals, 2d Cir. A New York State prisoner, who was convicted for manslaughter and felony murder, petitioned for a writ of habeas corpus, which was denied in the district court. He argued that the trial court violated his due process rights when it denied him the Sixth Amendment right "to be informed of the nature and cause of the accusation" against him. The precise claim was that the trial court's failure to inform defense counsel that it would charge the lesser included offense of manslaughter prevented counsel from appropriately addressing such a charge.

Held, affirmed. The Second Circuit ruled that petitioner's failure to object in the state criminal trial to a lesser included offense instruction waived his right to raise the claim in federal court that the trial court's failure to inform defense counsel that it would charge the lesser included offense prevented counsel from appropriately addressing such charge. Edwards v. Jones, 720 F.2d 751 (1983), cert. denied, 105 S. Ct. 178 (1984).

Court of Appeals, 11th Cir. Having been convicted in Georgia state court of armed robbery and murder, and sentenced to death, defendant filed a petition for habeas corpus relief in the district court, claiming that the trial judge had impermissibly shifted the burden of proof by charging the jury that he was presumed to have intended the natural and probable consequences of his acts.

Held, remanded after the U.S. Supreme Court vacated and remanded for further consideration. The Eleventh Circuit found that the burden-shifting charge in the murder case, where defendant was relying on the insanity defense, was not mere harmless error. Corn v. Kemp, 837 F.2d 1474 (1988).

Court of Appeals, 11th Cir. While awaiting execution after his convic-

tion for first-degree murder in Florida state court, defendant brought a petition for a writ of habeas corpus in the district court on the grounds that the jury instructions during the sentencing phase of his trial had been improper.

Held, reversed in relevant part. The Eleventh Circuit ruled that the jury instruction to the effect that death was presumed to be the appropriate sentence impermissibly tilted the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state. Jackson v. Dugger, 837 F.2d 1469 (1988).

Georgia Defendants were indicted for felony murder during the commission of a robbery. During jury deliberation, a juror asked whether there was a lesser charge if the jury did not agree on the felony murder charge. The court replied, "No, this charge would be murder, guilty or not guilty." No objection was made by the defense. On appeal, defendants argued that robbery was a lesser-included offense of the felony murder in this case, and that they were entitled to have the jury consider it.

Held, conviction affirmed. There was no written request to charge on the lesser-included offense, and failure to charge on a lesser-included crime without a request is not error. Moreover, at each phase of the charge and recharge, defendants made no objection on this issue and never asked for the jury to consider a lesser charge. Therefore, the judge's reply to the jury that they could consider only the felony murder charge was not error. Peterson v. State, 317 S.E.2d 521 (1984).

§ 36.120 Limiting and cautionary instructions

Court of Appeals, D.C. Cir. After his conviction for unlawfully transporting falsely made, forged, and altered securities, defendant appealed on the ground that the admission of evidence concerning possible crimes and illegal acts other than those charged in the indictment was improper and required an immediate limiting instruction at trial.

Held, conviction affirmed. The District of Columbia Circuit Court found that the admission of similar act evidence was proper and that the lack of an immediate limiting instruction regarding such evidence did not require reversal. The court noted that the evidence in question was proper since it was admitted to show that defendant had a scheme which included offenses for which he was on trial. The court further explained that the failure to give an immediate limiting instruction was not reversible error since the evidence was not inflammatory, the trial court supervised the presentation of the evidence, and the court provided adequate cautionary instructions during the final charge to the jury. United States v. Lewis, 693 F.2d 189 (1982), 19 CLB 362.

Court of Appeals, 8th Cir. Defendant was convicted of armed bank robbery. He appealed, claiming that the trial court committed prejudicial error in refusing to give a cautionary instruction that the testimony of a prosecution witness should be considered with caution because of benefits the witness allegedly received from the government. The witness and his wife were arrested after police officers saw them flee into the getaway truck at the scene of the robbery. After being told by the

arresting officers that more than likely he would not be prosecuted if he cooperated, the witness named defendant as the driver of the getaway truck.

Held, affirmed. Defendant was not entitled to the cautionary instruction. The testimony did not clearly reflect that any benefit was promised to the witness. Though defendant hoped to benefit himself and his wife by testifying against defendant, no evidence existed of any promise of immunity. The arresting officers' statement was not a firm promise, but merely advice that it would be wise for the witness to tell the truth. Under the circumstances, a general instruction on the credibility of the witness was all defendant was entitled to. United States v. Klein, 701 F.2d 66 (1983).

§ 36.125 "Missing witness" instruction

Court of Appeals, 1st Cir. After defendant was convicted in the district court of possessing cocaine with intent to distribute, he appealed on the grounds that it was improper for the court to have admitted evidence regarding his twenty-one-month absence from the jurisdiction in violation of his bail agreement.

Held, conviction affirmed. The First Circuit found that the error, if any, in admitting such evidence of defendant's flight and the instruction to the jury regarding such flight was not prejudicial where there was overwhelming evidence that the defendant was conscious of his guilt regarding some kind of drug offense. The court noted, however, that courts should exercise caution in admitting evidence about flight, since it is often only marginally probative on the ultimate issue of guilt or innocence. United States v. Hernandez-Bermudez, 857 F.2d 50 (1988).

§ 36.135 Guilt based on recent and exclusive possession

Court of Appeals, 1st Cir. After defendant was convicted in the district court of possession and interstate transportation of stolen goods, he appealed on the grounds that the jury instructions improperly shifted the burden of proof. The court had charged that the unexplained possession of recently stolen property in a state other than the one from which the property is stolen is ordinarily a circumstance from which the jury may reasonably draw the inference that the person in possession knew the property was stolen.

Held, conviction affirmed. The First Circuit ruled that the instructions did not shift the burden of proof on the issue of the state of mind of defendant. The court noted that the trial judge had emphasized to the jury that they were not required to make such an inference. United States v. Thuna, 786 F.2d 437 (1986), cert. denied, 107 S. Ct. 100 (1986).

§ 36.150 Prejudicial comments by trial judge during charge

Court of Appeals, 1st Cir. Petitioner filed a writ of habeas corpus challenging the legality of the trial court's charge to the jury in a murder trial.

Held, conviction affirmed. The First Circuit stated that the jury instructions on intent to kill and malice did not contain constitutional error even though the judge included phrases such as "if you accept that story." The court found that while such phrases were not particularly well chosen, they were not constitutional error in view

of the overall charge, which was not intended to imply denigration or disbelief of a defendant's testimony. Lannon v. Hogan, 719 F.2d 518 (1983), cert. denied, 465 U.S. 1105, 104 S. Ct. 1606 (1984).

Delaware Defendant was convicted of first-degree reckless endangering, a felony, and possession of a deadly weapon during commission of a felony; he had fired a shotgun at the complainant during an argument which arose over a traffic incident. At trial, the court also instructed the jury on the lesser included offense of second-degree reckless endangering, a misdemeanor, and charged that the jury could not find defendant guilty of the weapons charge unless it found him guilty of the felony-level reckless endangering offense. After an hour's deliberation, the jury returned and asked the court if leniency could be requested for defendant if he were found guilty as charged. The trial judge stated, in substance, that he was responsible for sentencing and had broad discretion to consider background information and other factors favorable to defendant in imposing sentence. The jury's function, explained the court, was to reach a determination based on the evidence. In actuality, though, the weapons charge carried with it a mandatory minimum five-year prison sentence without the possibility of suspension, probation, or parole for five years. Shortly after retiring to deliberate, the jury returned with a verdict of guilty of the felony reckless endangering and weapons charges. Defendant asserted on appeal that the jury was induced, by the judge's comments, to reach a more severe verdict.

Held, reversed and new trial ordered. The Supreme Court of Delaware stated that "the jury's task was to decide guilt or innocence, and instructions going beyond that issue distract the jury from its role and are impermissible." Even though the trial judge cautioned the jury that its only function was to determine guilt or innocence, he gave the impression that he had greater latitude in sentencing than was the case, said the court, noting that "the cautionary remarks did not negate the possibility that the jury's deliberations would be affected by the potential leniency to be shown by the judge after he received the presentence report." As there was evidence tending to establish that defendant was guilty of the lesser included offense and not the higher degree felony, the court refused to find the erroneous comments harmless beyond a reasonable doubt. Kauffman v. State, 452 A.2d 945 (1982), 19 CLB 386.

§ 36.165 Reasonable doubt

U.S. Supreme Court After the jury returned a guilty verdict in the penalty phase of a Texas capital murder trial, the trial court submitted two "special issues" questions. If the jury answered "yes," the prisoner would be sentenced to death. To direct the jury's consideration of the special issues, prisoner submitted five "special requested" instructions, which implied that if there was any mitigating evidence against the death penalty, that was enough to answer "No," even if they felt a "Yes" was warranted. The court refused to give the instructions. The prisoner was sentenced to death. Prisoner petitioned for habeas corpus relief. The court of appeals vacated the stay of execution and affirmed. Certiorari was granted.

Held, conviction affirmed. The Supreme Court ruled that the prisoner did not have an Eighth Amendment

right to instruction that the jury could consider residual doubts about guilt as mitigating circumstances in the penalty phase. Franklin v. Lynaugh, 108 S. Ct. 2320 (1988).

DELIBERATION

§ 36.185 Extrajudicial communications

Court of Appeals, 5th Cir. After having been convicted in Texas state court for aggravated rape and sentenced to sixty years in jail, defendant sought habeas corpus relief in the federal district court on the ground that he was denied a fair trial by virtue of third-party contacts with several members of the jury after the jury had returned a guilty verdict but before the sentencing phase of the trial. Apparently, a crowd of irate citizens confronted the jurors outside the courthouse after the return of the guilty verdict.

Held, affirmed in part and reversed in part. The Fifth Circuit found that the contacts did not deprive defendant of a fair trial since the transcript revealed that there was no discussion of the jury contacts during deliberations by the jury on the sentencing phase. The court further observed that it was entirely unpredictable whether the contacts moved the jurors to be more harsh or more lenient, and defendant did not receive the maximum sentence available. Miller v. Estelle, 677 F.2d 1080, 19 CLB 75, cert. denied, 459 U.S. 1072, 103 S. Ct. 494 (1982).

§ 36.195 Other unauthorized or improper conduct

U.S. Supreme Court Defendant was one of six inmates involved in a 1971 San Quentin prison escape that resulted in the death of three prisoners and three correction officers. During the course of the seventeen-month-long trial, evidence was introduced of an unrelated murder of which one of the jurors had some knowledge. Upon hearing this evidence, the juror twice went to the judge's chambers to tell him of her personal acquaintance with the murder victim, but assured him that her disposition of the case would not be affected. The judge made no record of the conversations, and he informed neither the defendants nor their counsel about them. The defendant was convicted of murder and the California Court of Appeal affirmed. A writ of habeas corpus was then granted in the district court, and the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court vacated and remanded, holding that unrecorded ex parte communications between a trial judge and a juror can be harmless error.

Held, judgment vacated and case remanded. The Court reasoned that the prejudicial effect of the failure to disclose an ex parte communication between judge and juror can normally be determined by a post-trial hearing. Rushen v. Spain, 464 U.S. 114, 104 S. Ct. 453 (1983), reh'g denied, 104 S. Ct. 1336 (1984).

Court of Appeals, 1st Cir. After defendant was convicted of three counts of wire fraud and other charges, he appealed on the grounds that the trial court improperly replied to a jury request concerning dates of alleged telephone conversations.

Held, affirmed in part and reversed in part. The First Circuit stated that the trial court improperly provided substantive testimony in response to a jury query. The court noted that the trial court usurped the jury's fact-finding function by refusing to have critical testimony read to the jury as requested

by defense counsel, but rather informed them of the substance of the testimony. United States v. Argentine, 814 F.2d 783 (1987), 23 CLB 488.

VERDICTS

§ 36.205 Special verdicts

Court of Appeals, 5th Cir. After defendants were convicted in the district court of violating federal conspiracy and forgery statutes, they appealed on the ground that the judge had improperly taken a partial verdict.

Held, affirmed. The Fifth Circuit stated that although the line is a fine one as to whether a judge should send back a jury that has reached a partial verdict, the trial judge here did not abuse its discretion in determining that further deliberations would prove fruitless. The court noted that no party objected to the partial verdicts at the time, and defendants must be bound by their apparent strategic decision not to object to the partial verdicts for fear that the jury would use the extra time to find them guilty on additional counts. United States v. Wheeler, 802 F.2d 778 (1986), cert. denied, 107 S. Ct. 1354 (1987).

§ 36.210 Requirement of unanimity

Court of Appeals, 3d Cir. After defendant was convicted of embezzling union funds, he appealed on the grounds, among other things, that the court failed to instruct the jurors that they must reach a unanimous verdict on the factual basis for a conviction.

Held, conviction reversed in part. The Third Circuit ruled that a general unanimity instruction is necessary to ensure that the jury is unanimous on the factual basis of a conviction when the government chooses to prosecute under an indictment advancing multiple theories. United States v. Beros, 833 F.2d 503 (1987), 24 CLB 266.

§ 36.220 Inconsistent verdicts

U.S. Supreme Court After defendant was acquitted on conspiracy and possession charges and convicted of using the telephone in facilitation of the alleged conspiracy and possession, he appealed on the ground that the verdict was inherently inconsistent. The Court of Appeals for the Ninth Circuit reversed, and certiorari was granted.

Held, reversed and convictions reinstated. The Supreme Court stated that acquittal on conspiracy and possession of cocaine charges did not require that a telephone "facilitation" count be vacated. The Court reasoned that although the verdicts may not be rationally reconciled, vacation of the convictions would be imprudent since it would require inquiry into the jury's deliberations, a course of action that courts will generally not undertake. United States v. Powell, 105 S. Ct. 471 (1984), 21 CLB 255.

§ 36.235 Juror's impeachment of verdict

U.S. Supreme Court After defendants were convicted in the district court of conspiring to defraud the United States, the court of appeals affirmed. Prior to sentencing, defendants had filed a motion seeking permission to interview jurors, an evidentiary hearing, and a new trial based on a trial juror's statement that several juror's had consumed alcohol at lunch throughout the trial.

Held, affirmed. The U.S. Supreme Court held that a hearing on the issue was properly denied, because a jury verdict may not be impeached with a

juror's testimony unless it related to whether any outside influence was improperly brought to bear on any juror. The Legislative history of the Fed. R. of Evid. 606(b) clearly indicated that juror testimony was not permitted on any matter or statement that occurred during the course of deliberations, including testimony on juror intoxication. Tanner v. United States, 107 S. Ct. 2739 (1987).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of transporting illegal aliens, he appealed on the ground that the jury verdict had not properly been reached since his attorney received a call from a juror indicating that the guilty verdict was not truly his own.

Held, conviction affirmed. The Fifth Circuit concluded that the evidence did not support a claim that the jury engaged in any misconduct or based its verdict on matters outside the record or other improper considerations. The court noted that only where there is a showing of illegal or prejudicial intrusion into the jury process will the court sanction an inquiry. United States v. Varela-Andujo, 746 F.2d 1046 (1984), 21 CLB 260.

§ 36.240 Post-verdict inquiry into juror's competency

"Ethics Workshop: Post-Trial Juror Interviews," by Steven W. Feldman and Lawrence D. Kerr, 20 CLB 449 (1984).

37. POST-TRIAL MOTIONS

§ 37.00 Motion for new trial

Court of Appeals, 10th Cir. After defendant was convicted in the district court on racketeering charges, he moved for a new trial based on the recantation of a government witness. The motion was denied by the district court.

Held, conviction affirmed. The Tenth Circuit ruled that a new trial was not required if the district court, after holding an evidentiary hearing, concluded that the witness' affidavit and his testimony at the hearing were false. United States v. Page, 828 F.2d 1476 (1987), 24 CLB 177.

Court of Appeals, 11th Cir. Defendant appealed the denial of his motion for a new trial on his firearms convictions. In his petition, defendant asserted "newly discovered evidence," in the form of an alibi witness, who would say that he was out of town when the crime was said to have occurred. Defendant's counsel made no argument and presented no evidence of the alibi at the trial; nor did defendant claim in his petition for a new trial to have been unaware of the alibi witness at the time of the trial.

Held, denial affirmed. A new trial based on "newly discovered evidence"

will be granted only if the evidence was unknown to defendant at the time of the trial, is material, will probably result in an acquittal, and failure to learn of it was not due to lack of diligence on defendant's part. Had defendant actually been out of town on the dates in question as asserted in his petition, it is hard to see how he could have not known about the alibi witness before the trial. Furthermore, defendant did not prove that this failure to obtain an affidavit from the witness before the trial was not due to his lack of diligence. Bentley v. United States, 701 F.2d 897 (1983).

§ 37.10 Motion to vacate conviction

Court of Appeals, 7th Cir. After defendant was convicted by a jury on various charges arising from a murder-for-hire scheme to kill his business partner, he appealed on several grounds.

Held, conviction affirmed. The Seventh Circuit declared, among other things, that the incorrect testimony of a grand jury witness regarding the date on which the shooting incident took place was not perjured testimony affecting the grand jury proceedings. The court further found that testimony of a prosecuting witness in defendant's second of two related trials, which tended to impeach the witness's testimony in the first trial, was not newly discovered evidence that would entitle the defendant to a new first trial, even though the second trial resulted in the defendant's acquittal. The court reasoned that while the witness's testimony that he had previously lied to federal agents impeached his credibility, the witness's credibility had already been impeached in the first trial, so it was unlikely that the new evidence would lead to acquittal. United States v. Leibowitz, 857 F.2d 373 (1988).

§ 37.15 —Grounds

Court of Appeals, D.C. Cir. Defendant was convicted of giving an illegal gratuity to a judge to obtain lenient treatment of traffic tickets issued to his company. The particular instance of bribery, for which he was convicted by a jury, involved moving the judge's household goods. Neither direct nor circumstantial evidence suggested that he had consciously assisted in the movement of the goods in any way. The trial judge granted defendant's post-verdict motion for judgment of acquittal owing to insufficient evidence. The government appealed.

Held, acquittal affirmed. The jury's verdict must be overruled if a reasonable juror would not accept the evidence as proving defendant's guilt beyond a reasonable doubt. Defendant's Rule 29(c) motion for judgment of acquittal was properly granted since the jury had no evidentiary basis for its verdict. Of particular importance to the trial court was testimony by the employee directly responsible for the bribery that defendant had played no role in moving the judge's household goods. United States v. Campbell, 702 F.2d 262 (1983).

§ 37.20 —Right to an evidentiary hearing

Court of Appeals, 1st Cir. After defendant was convicted of distributing marijuana, he appealed from an order of the district court denying his motion for reduction of sentence. He argued that he had been improperly denied an evidentiary hearing on the motion.

Held, affirmed. The First Circuit declared that there is no right to a

hearing on a motion for reduction of sentence on the grounds that mitigating evidence was not presented at the original sentencing hearing. In so holding, the court commented that defendant had the opportunity at the sentencing to present to the court whatever he felt was in his best interests, and that he could not later complain when he opted to try to convince the sentencing court that the marijuana laws should be reformed. United States v. Heller, 797 F.2d 41 (1986).

Court of Appeals, 9th Cir. Defendant was convicted of mail fraud and aiding and abetting in violation of 18 U.S.C. §§ 2, 1341. The district court summarily dismissed defendant's petition seeking post-conviction relief pursuant to 28 U.S.C. § 2255. Defendant appealed, arguing that he was entitled to an evidentiary hearing on the issue of whether the indictment was defective. He claimed that the charges of mail fraud and aiding and abetting made the indictment duplicitous.

Held, the indictment was not duplicitous. The aiding and abetting statute, 18 U.S.C. § 2, provides a means of establishing liability but does not itself define a crime. Furthermore, an attack on the validity of the indictment could not be raised collaterally absent a showing of "cause" why the claim was not raised before trial. Defendant's argument that the "cause" was ineffective assistance by his attorney who failed to challenge the indictment's validity was rejected. The court, finding that such a challenge would be without merit, held that the attorney's failure to present it did not constitute ineffective assistance of counsel. Baumann v. United States, 692 F.2d 565 (1981).

§ 37.25 —Failure to raise claim at trial or on direct appeal as bar

U.S. Supreme Court After defendant was indicted for murder in Virginia state court, he told a court-appointed psychiatrist that he had previously torn the clothes off a girl on a school bus. He was convicted at trial, and during the sentencing hearing, the prosecutor elicited testimony from the psychiatrist regarding defendant's statement. On appeal, counsel did not raise the issue, but he raised it later in a federal habeas corpus petition, which was denied. The court of appeals affirmed.

Held, affirmed. The Court ruled that defendant defaulted his underlying claim as to the admission of the psychiatrist's testimony by failing to press it before the Virginia Supreme Court on direct appeal. The Court observed that counsel's failure to raise the claim on appeal was a deliberate, tactical decision that would not warrant excusing a defendant's failure to adhere to a state's rules. Smith v. Murray, 106 S. Ct. 2661 (1986).

U.S. Supreme Court After defendant was indicted in Virginia state court on a charge of rape and abduction, the trial judge denied defense counsel's pretrial motion to discover the victim's statements to police. After defendant was convicted, his appeal failed to raise this issue. His habeas corpus petition was then denied in the district court, which held that the discovery claim was barred by procedural default, but the court of appeals reversed.

Held, reversed and remanded. The Court ruled that a federal habeas petitioner cannot show cause for a procedural default by establishing that competent defense counsel's failure to

raise a substantive claim of error was inadvertent rather than deliberate. The Court noted that the mere fact that counsel failed to recognize the factual or legal basis for a claim does not constitute cause for a procedural default. Murray v. Carrier, 106 S. Ct. 2639 (1986).

Court of Appeals, 1st Cir. Defendants were convicted in the district court of mail fraud and racketeering and, on appeal, they argued that the evidence produced by the government relating to the mailing was insufficient to support a conviction.

Held, affirmed. The First Circuit ruled that defendants had waived their original motion for acquittal by failing to renew the motion after presenting evidence. The court explained that this rule based on the sound principle that evidentiary challenges should be put in the first instance to the trial judge, who is in the best position to rule on such matters, and that this rule should be waived only when a defendant demonstrates "clear and gross" injustice. United States v. Greenleaf, 692 F.2d 182 (1982), 19 CLB 264, cert. denied, 460 U.S. 1069, 103 S. Ct. 1522 (1983).

§ 37.35 Federal habeas corpus

"Comment: Restrictions on State Prisoner Habeas Corpus Review by Federal Courts," by Richard A. Powers III, 23 CLB 30 (1987).

"Habeas Corpus: Stoned but Not Dead," by David M. Snyder, 19 CLB 197 (1983).

U.S. Supreme Court After defendant was convicted in state court, he filed a petition for habeas corpus, which was granted in the district court. The court of appeals vacated and remanded, holding that Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037 (1976), which held that federal courts should withhold habeas corpus review where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, should not be extended to bar federal habeas corpus consideration of Sixth Amendment claims.

Held, affirmed. The Court declared that the restrictions on habeas corpus review of Fourth Amendment claims do not extend to Sixth Amendment ineffective-assistance-of-counsel claims, which are founded primarily on incompetent representation with respect to a Fourth Amendment suppression issue. The Court reasoned that federal courts may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986).

U.S. Supreme Court A Pennsylvania state prisoner temporarily confined in the Philadelphia county jail brought a federal civil rights suit against various county officials, alleging that they had beaten and harassed him. The federal magistrate issued a habeas corpus writ directing state prison officials to transport the prisoner to the county jail nearest the federal court, and then directing the U.S. Marshal Service to transport the prisoner from the county jail to federal court. The court of appeals reversed the order.

Held, reversal of order of district court affirmed. The Supreme Court found that the All Writs Act does not confer power on the district court to compel noncustodians to bear the expense of producing the prisoner-witnesses. The Court further found that the All Writs Act does not authorize

courts to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. Pennsylvania Bureau of Correction v. United States Marshal Service, 106 S. Ct. 355 (1985), 22 CLB 276.

U.S. Supreme Court Defendant was convicted in 1969 of first-degree murder in North Carolina state court and sentenced to life imprisonment. At trial, the judge instructed the jury that defendant had the burden of proving lack of malice. In 1975, Mullaney v. Wilbur, 421 U.S. 684, struck down the requirement that the defendant bear the burden of proving lack of malice. Defendant's habeas corpus proceeding was barred by the district court for failing to raise the issue on direct appeal, and the court of appeals affirmed. The Supreme Court vacated and remanded for further proceedings. On remand, the court of appeals reversed, holding that the defendant had shown "cause and actual prejudice" permitting habeas corpus relief because the *Mullaney* issue was so novel at the time of his state appeal that his attorney could not reasonably be expected to have raised it.

Held, affirmed. Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures. Reed v. Ross, 468 U.S. 1, 104 S. Ct. 2901 (1984), 21 CLB 75.

U.S. Supreme Court After defendant was convicted of first-degree murder and was sentenced to death, his appeals were exhausted and the Supreme Court denied certiorari. His petition for habeas corpus was denied in the district court; the court of appeals affirmed; and the Supreme Court again denied certiorari. After the warrant of execution had issued, a second petition was filed, which was denied by the district court and the court of appeals.

Held, petition for writ of certiorari and application for stay denied. The court stated that defendant's presentation of claims in a second petition constituted an abuse of the writ where petitioner had presented each of those claims in state court before the first petition was filed and where the substance of those claims may have been presented in the first habeas petition. Antone v. Dugger, 465 U.S. 200, 104 S. Ct. 962 (1984).

U.S. Supreme Court Applicant, a state prisoner, was sentenced to death for killing two people while robbing a store. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals. Applicant then sought habeas corpus in the state system; that request was denied. He then filed for habeas corpus in the federal district court, presenting some of the same claims that had been unavailing in the state courts. The District Court held a hearing and filed an opinion denying the writ. In a detailed opinion, 706 F.2d 1394, the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. It denied rehearing, 712 F.2d 1416, as well as a stay pending the filing of a petition for certiorari. Applicant then sought a stay from the Circuit Justice, who referred the application to the Court. Absent a stay, applicant was to be executed on October 5, 1983.

Held, application for stay denied. The Supreme Court stated that where the grounds on which his request for review were amply evident from his application and from the opinions and

proceedings in the lower courts, and where he failed to convince four members of the Supreme Court that certiorari would be granted on any of his claims, he failed to satisfy the basic requirements for the issuance of a stay. The Court thus rejected the claim that a stay on a death row prisoner's first federal habeas corpus petition should be granted as a matter of right. Autry v. Estelle, 464 U.S. 1, 104 S. Ct. 20 (1983), 20 CLB 164.

U.S. Supreme Court After the defendant was convicted in Alaska state court, his petition for habeas corpus relief was denied in the district court after he claimed that certain evidence should have been suppressed. The Court of Appeals affirmed, but the defendant sought bail on the basis that the State did not oppose his release on bail.

Held, habeas corpus petitioner's application for bail denied, notwithstanding the fact that the State of Alaska did not oppose it. Justice Rehnquist found that the possibility of the Supreme Court granting certiorari to review the judgment of the Court of Appeals approached zero. The Court commented that it is not part of the function of the federal court to allow bail in federal habeas review of state proceedings simply because the state does not object. McGee v. Alaska, 463 U.S. 1339, 104 S. Ct. 16 (1983), 20 CLB 164.

U.S. Supreme Court During an Ohio State Court proceeding resulting in respondent's murder conviction, the state court judge conducted a hearing to determine whether respondent's guilty plea to an Illinois murder charge was knowing and voluntary. After the court found that respondent had intelligently and voluntarily entered his plea of guilty, the Ohio Court of Appeals affirmed. The respondent was then denied federal habeas corpus relief in the district court, but the Court of Appeals reversed, since there was no express finding made concerning respondent's credibility as a witness.

Held, reversed. The Supreme Court ruled that the Court of Appeals erroneously applied the "fairly supported by the record" standard for reviewing state court findings. The Court observed that Section 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court but not by them. The Court, observing that the respondent must have been informed of the charges on which he was indicted in Illinois, thus found that his plea of guilty to the Illinois charge was voluntary. Marshall v. Lonberger, 459 U.S. 422, 103 S. Ct. 843 (1983).

Court of Appeals, 4th Cir. After defendant was convicted of murder, criminal sexual conduct, armed robbery, and kidnapping, habeas corpus relief was sought in the district court on the ground that he should have been entitled to a hearing as to whether he had Huntington's Disease (HD). HD is an inherited disorder that manifests itself in involuntary movements and emotional disturbance. Defendant's mother had been diagnosed as having HD, which gave defendant a 50 percent chance of having the disease.

Held, denial of habeas corpus relief affirmed. The Fourth Circuit concluded that defendant was not entitled to an evidentiary hearing concerning HD. The court noted that medical literature confirmed trial testimony that no technique was available to make a presymptomatic detection of

HD, and even if defendant had the disease, that fact would not alter his conviction and death sentence. Roach v. Martin, 757 F.2d 1463 (1985), 21 CLB 468.

Court of Appeals, 5th Cir. Defendant successfully had sought habeas corpus relief from his life sentence for "robbery by assault" in the state district court where his trial had been held. The ground for the new trial was that a previous conviction had been used to enhance the sentence improperly because defendant had not been represented by counsel at the hearing for probation revocation on that conviction. The new indictment by the Texas court alleged that the robbery was accomplished with the aid of a firearm. Defendant was tried and convicted on the "robbery with fireams" charge under the same article 1408 of the 1925 Texas Penal Code. Defendant elected, however, to be punished under the then new 1974 Texas Penal Code, which set the limits of imprisonment for robbery with firearms at five years to life. The 1974 jury sentenced defendant to thirty years' imprisonment, the conviction and sentence were affirmed, and, after exhausting his state remedies, defendant commenced this habeas corpus proceeding in the federal district court. The magistrate recommended that the writ be granted on the basis of defendant's claim that the prosecutor had exercised vindictiveness in reprosecuting on a more serious offense than that of the original 1972 indictment and therefore defendant's due process rights were violated. The federal district court dismissed the petition, and defendant appealed.

Held, affirmed. Defendant's vindictiveness claim had as its strongest element the change of charge by the prosecutor to robbery with a firearm. The prosecution's election to change the charge was not motivated by vindictiveness but by the change in punishment brought about by the new Code in effect at the 1974 trial. Because of the change in the 1974 Texas Penal Code, robbery by assault (without firearms) carried a much less severe sentence (twenty years) than under the 1925 Texas Penal Code (life). Rather than any desire to punish defendant for his pursuit of legal remedies, it was the prosecutor's wish to subject defendant to the same maximum sentence he had faced under the first indictment that motivated the use of the charge of robbery with a firearm. Byrd v. McKaskle, 733 F.2d 1133 (1984).

Court of Appeals, 11th Cir. Defendant was convicted in state court of two counts of assault with intent to commit a felony. After exhausting his state remedies, defendant filed a petition for a writ of habeas corpus in federal district court, alleging that the state trial judge violated his Sixth and Fourteenth Amendment rights by excluding him from the courtroom during his trial without sufficient cause. During the third day of the trial, after defendant disrupted proceedings three times, the trial judge ordered him out of the courtroom. The next morning, under instructions by the court, the bailiff and defense counsel notified defendant that he could return to the courtroom if he agreed to behave himself. Defendant waived his right to return to the courtroom during the two remaining days of the trial because he did not receive a written order or in person permission from the judge. Defendant appealed the federal district court's denial of his petition for a writ of habeas corpus.

Held, conviction affirmed. Defendant's absence during the last two days of the trial was clearly voluntary. That the judge himself did not notify defendant of his invitation to return to the courtroom was irrelevant in light of the fact that the defense counsel and the bailiff issued the same invitation on the judge's behalf. The remaining issue was whether defendant's forced absence from the courtroom during part of the third day of the trial amounted to a constitutional violation. The Eleventh Circuit held that it did not because defendant received adequate warning from the judge that his behavior could result in expulsion. In addition, great deference is given to the decisions of trial judges in such matters. Further, defendant did not argue, and the record did not show, that the expulsion prejudiced the defense in any way. Finally, the trial judge's rejection of alternatives to expulsion was found to be reasonable. Foster v. Wainwright, 686 F.2d 1382 (1982), cert. denied, 459 U.S. 1213, 103 S. Ct. 1209 (1983).

§ 37.40 —Jurisdiction

U.S. Supreme Court State prisoner filed pro se petition for habeas corpus relief. The U.S. District Court for the Western District of Tennessee dismissed petition and appeal followed. The court of appeals dismissed petition as jurisdictionally defective because the petition was received by the court one day after the expiration of the thirty-day filing period.

Held, reversed. The Supreme Court declared that the general rule is that receipt by the court clerk constitutes filing; however, under appellate rule requiring habeas corpus appeals to be filed within 30 days, pro se prisoner's notice of appeal was filed at moment of delivery to prison authorities. Houston v. Lack, 108 S. Ct. 2379 (1988).

Court of Appeals, 11th Cir. Prisoner was convicted in a Texas state court of a state offense and sentenced to two to ten years imprisonment. After he had served approximately four months, he was sentenced by a federal district court in Texas to five years imprisonment based on a conviction for a federal offense. The state judge had ordered his state sentence to be served concurrently with any federal sentence subsequently imposed. Because the state sentence was longer, it would not be completed at the end of the five-year federal sentence without some action by the Texas Parole Board. Prisoner had been transferred to a federal prison in Alabama to serve the federal sentence. Texas lodged a detainer against prisoner so that he would be returned to Texas to complete the state sentence upon completion of the federal sentence. Although he had been eligible for state parole since November 1981, prisoner learned that the Texas Parole Board would not consider him for parole unless he was in Texas' physical custody. Prisoner brought a habeas corpus action seeking to rid himself of the detainer. He contended that when Texas relinquished him to federal authorities, it deprived him of parole eligibility without due process. Furthermore, he contended, Texas had lost jurisdiction over him so that any attempt to return him to Texas after service of the federal sentence would violate double jeopardy and due process. The federal district court denied the petition.

Held, affirmed. Texas did not lose jurisdiction over prisoner when it relinquished him to federal authorities

before he had finished his state sentence. It did not waive jurisdiction but, instead, lodged a detainer with federal authorities in an effort to assure that prisoner would have to return to Texas to complete his state sentence after his release from federal prison. Prisoner's other claim, that Texas wrongfully required him to serve his state sentence in installments, was invalid. Presumably, upon his release from federal prison and his return to Texas, prisoner will be considered for parole. Milstead v. Rison, 702 F.2d 216 (1983).

§ 37.45 —Requirement of custody

"Challenging State Convictions After Completion of Sentence: The Availability of Section 1983," by Russell S. Schwartz, 20 CLB 285 (1984).

Court of Appeals, 5th Cir. Petitioner, after having been convicted and fined for violating the Texas "failure to identify" law, brought a federal habeas corpus action challenging the constitutionality of the state statute. The federal district court granted the petition, and the state appealed.

Held, reversed and remanded. The Fifth Circuit found that an arrest warrant issued for willful refusal to pay a fine does not amount to "custody" in habeas cases challenging the constitutionality of a statute that imposes a fine. The court reasoned that to warrant a finding that a petitioner is "in custody" for purposes of federal habeas corpus jurisdiction in a "fine only" case, there must be present some sort of supervisory control over the petitioner. The court further found that the requisite supervision was entirely lacking and that there were no restraints on the petitioner's liberty. Spring v. Caldwell, 692 F.2d 994 (1982), 19 CLB 266.

§ 37.50 —Exhaustion of state remedies

U.S. Supreme Court The petitioner, an Illinois state prisoner, filed a habeas corpus action in federal court, which dismissed the petition. On appeal, the state raised for the first time the defense that the petitioner had not exhausted his state remedies, and the Court of Appeals remanded with instructions to dismiss without prejudice.

Held, vacated and remanded. Where a state fails to raise a non-exhaustion defense in the district court, the Court of Appeals should consider the merits of the habeas corpus application. Granberry v. Greer, 107 S. Ct. 1671 (1987), 23 CLB 485.

U.S. Supreme Court After a Michigan state prisoner's petition for federal habeas corpus was conditionally granted by the district court, and affirmed by the Court of Appeals for the Sixth Circuit, certiorari was granted.

Held, reversed and remanded. The U.S. Supreme Court found that the petitioner had failed to exhaust his state remedies as required by the federal habeas corpus statute. The Court noted that the district court's grant of relief was based on the doctrine that certain "mandatory presumptions" may undermine the prosecution's burden to prove guilt beyond a reasonable doubt and thus deprive a criminal defendant of due process, but the Michigan courts had not had a fair opportunity to review this constitutional claim. The Court further explained that it is not enough that all the facts necessary to support the federal claim were before the state courts if no fair opportunity was given to apply controlling legal principles to the facts. Anderson v.

Harless, 459 U.S. 4, 103 S. Ct. 276 (1982), 19 CLB 262.

Court of Appeals, 1st Cir. Defendant, who was serving a life sentence for murder and a ten-year sentence for conspiring to murder, filed a petition for a writ of habeas corpus and sought an evidentiary hearing based upon the administration of benzidine to his skin. The district court dismissed the action for failure to state a claim.

Held, affirmed. The First Circuit stated that defendant's due process rights were not violated when police officers applied benzidine directly to his skin to detect the presence of blood on the skin. The court also found that defendant was not entitled to an evidentiary hearing on whether state officials knew or should have known of the carcinogenic effect of benzidine when they applied it directly to the skin. Carillo v. Brown, 807 F.2d 1094 (1986), 23 CLB 389.

Court of Appeals, 2d Cir. Defendant was convicted in New York of felony murder, intentional murder, and robbery. His appeal concerned the standard for determining whether state remedies have been exhausted so as to permit federal habeas corpus review of a state court conviction. His petition was denied in the district court.

Held, vacated and remanded. The Second Circuit en banc stated that the general principle governing assessment of whether a fair trial claim in state court is of a constitutional dimension so as to satisfy the exhaustion requirement of the habeas corpus statute is that where the claim rests on a factual matrix that is well within the mainstream of due process adjudication, state courts must be considered to have been alerted to its constitutional nature. If, on the other hand, the claim is based on a fact pattern not theretofore commonly thought to involve constitutional constraints, there is little reason to believe courts were alerted to its supposed constitutional nature. Therefore defendant had exhausted his state remedies for the purpose of the habeas corpus statute with regard to his claim that he was deprived of his fundamental right to a fair trial due to the partiality of the trial judge in favor of the prosecution. Daye v. Attorney General, 696 F.2d 186 (1982), 19 CLB 378, cert. denied, 464 U.S. 1048, 104 S. Ct. 723 (1984).

Court of Appeals, 5th Cir. A state prisoner petitioned for a writ of habeas corpus, claiming a Fourth Amendment violation, which was denied in the district court.

Held, affirmed. The Fifth Circuit stated that where the state has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial. This rule places the burden on a habeas corpus petitioner to plead and prove the denial of a full and fair hearing in state court. Moreover, this doctrine may be applied sua sponte by the court. Davis v. Blackburn, 803 F.2d 1371 (1986), 23 CLB 287.

§ 37.55 —Waiver or deliberate bypass

Court of Appeals, 5th Cir. After defendant was convicted of murder in Louisiana state court, he filed a petition seeking a writ of habeas corpus on the ground that the state prosecutor had improperly commented on his post-arrest silence. The district court denied the petition.

Held, denial of habeas corpus petition affirmed. The Fifth Circuit determined that defendant raised no adequate claims for relief since he failed to explain why he raised no objections at trial to the prosecutor's comments on his post-arrest silence. The court also noted that the prosecutor's cross-examination of defendant did not refer to his silence in the grand jury; rather, it was defendant who raised this issue through his own objections at trial. Webb v. Blackburn, 773 F.2d 646 (1985), 22 CLB 166.

Court of Appeals, 10th Cir. Petitioner, a state prisoner, filed a federal habeas corpus petition after a motion for post-conviction relief was denied by the Oklahoma Court of Criminal Appeals. Following his conviction by the state trial court, petitioner appealed directly to the appellate court raising several evidentiary issues. The appellate court affirmed the trial court's decision on all the issues. Subsequently, petitioner filed his motion for post-conviction relief. Some of the issues in the motion had not been raised in the direct appeal. The appellate court denied petitioner relief, and held that petitioner had waived the new issues by not including them in his direct appeal.

Held, the federal court may consider issues not raised in a direct appeal to a state trial court's decision. The Tenth Circuit discussed two U.S. Supreme Court cases on the issue. In Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822 (1963), the Court held that failure to appeal a state court conviction does not preclude the examination of constitutional claims in a federal habeas corpus proceeding. However, it gave federal judges discretion to deny relief to applicants who have deliberately bypassed state court procedure. The Court in Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977), held that a federal habeas judge may not consider a claim not asserted at trial in compliance with a state contemporaneous objection rule, unless petitioner shows cause for noncompliance and actual prejudice from denial of such consideration. The court left open the question of whether the cause and prejudice test applies to a failure to appeal and a failure to raise an issue on appeal. The Tenth Circuit held that *Fay* was the law because it was not expressly overruled by *Wainwright* and is broad enough to apply in this instance. It found no reason for different rules to apply for failure to appeal and failure to raise an issue on appeal. Finding no deliberate bypass of state law on petitioner's part, it decided to consider the issues. However, it found the claims to lack merit and denied petitioner relief. Holcomb v. Murphy, 701 F.2d 1307, cert. denied, 463 U.S. 1211, 103 S. Ct. 546 (1983).

§ 37.65 —Procedure

U.S. Supreme Court The district court granted a state prisoner's petition for habeas corpus, ordering that he be released unless the state granted a new trial within thirty days. The court of appeals denied the state's motion for a stay of the order releasing the prisoner.

Held, vacated and remanded. The federal courts were not restricted to considering only risk of flight in deciding whether to stay a district court's order granting relief to a habeas corpus pending the state's appeal. In deciding whether to grant a stay, the court should be guided by the traditional standards governing stays of civil judgments, such as whether there is a likelihood of success on the merits and whether there will be irreparable injury

without a stay. Hilton v. Braunskill, 107 S. Ct. 2113 (1987).

U.S. Supreme Court After the Court of Appeals for the Fourth Circuit granted a habeas corpus petition asking for a stay of execution, the Supreme Court vacated the stay.

Held, application to vacate stay granted. The Court observed that this was another capital case in which a last-minute application for a stay of execution and a new petition for habeas corpus had been filed with no explanation as to why the claims were not raised earlier. After defendant's murder conviction and imposition of the death penalty, his state remedies and federal habeas corpus remedies were exhausted. The Court thus found that additional applications were an abuse of the writ that 28 U.S.C. § 2244(b) was intended to eliminate. Woodard v. Hutchins, 464 U.S. 377, 104 S. Ct. 752 (1984).

U.S. Supreme Court During an Ohio state court proceeding resulting in respondent's murder conviction, the state court judge conducted a hearing to determine whether respondent's guilty plea to an Illinois murder was knowing and voluntary. After the court found that respondent had intelligently and voluntarily entered his plea of guilty, the Ohio Court of Appeals affirmed. The respondent was then denied federal habeas corpus relief in the district court, but the Sixth Circuit reversed, since there was no express finding made concerning respondent's credibility as a witness.

Held, reversed. The Sixth Circuit erroneously applied the "fairly supported by the record" standard for reviewing state court findings. The Court observed that Section 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court but not by them. The Court, observing that the respondent must have been informed of the charges on which he was indicted in Illinois, thus found that his plea of guilty to the Illinois charge was voluntary. Because respondent's prior conviction was valid, this case is controlled by Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648 (1967), which was reaffirmed. The federal habeas corpus statute gives federal habeas courts no authority to engage in a finely tuned review of the wisdom of state evidentiary rules. Marshall v. Lonberger, 459 U.S. 422, 103 S. Ct. 843 (1983), 19 CLB 477.

Court of Appeals, 2d Cir. The district court denied habeas corpus relief sought on the ground of alleged jury tampering.

Held, affirmed. The Second Circuit held that statements by a co-defendant and an informant as to what they were told by another co-defendant concerning the alleged attempt to bribe a jury, which convicted petitioner, were hearsay in nature and insufficient to justify a full evidentiary hearing on the issue of jury tampering. The court noted that a petitioner seeking a hearing on a habeas corpus petition must set forth specific facts, which he is in a position to establish by competent evidence. Hayden v. United States, 814 F.2d 888 (1987), 23 CLB 489.

Court of Appeals, 5th Cir. After having been convicted of the crime of escape and given a life sentence in Texas state court, defendant was cited for abuse for having filed several state

habeas corpus petitions. He then filed three federal habeas corpus petitions, all of which were denied. After he filed his fourth habeas corpus petition, the state moved to dismiss for abuse of the writ, and the federal magistrate recommended that the petition be dismissed because the issues were substantially raised in prior petitions or should have been previously raised. The district court then dismissed the petition without granting a hearing or permitting petitioner to submit a form on which to explain his failure to previously raise the issues.

Held, order dismissing petition vacated and remanded. The Fifth Circuit stated that a petitioner must be given specific notice that the court is considering dismissal and at least ten days in which to explain the failure to raise new grounds in a prior petition. Urdy v. McCotter, 773 F.2d 653 (1985), 22 CLB 166.

Court of Appeals, 6th Cir. A habeas corpus petitioner facing the death penalty applied to the district court for a certificate of probable cause and a stay of execution, which was denied.

Held, denial of the application affirmed. The Fifth Circuit ruled that new claims in successive habeas corpus petitions must be dismissed if competent counsel should have been aware of the claims at the time of the prior petitions. The court also found that the issue of whether persons with scruples against the death penalty had been systematically excluded from the jury had been squarely raised in defendant's previous petition, and it was thus an abuse of the writ to raise the issue again. Moore v. Blackburn, 774 F.2d 97 (1985), 22 CLB 160, cert. denied, 106 S. Ct. 2904 (1986).

§ 37.75 Motion to modify sentence

Court of Appeals, 1st Cir. After defendant's motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to correct or reduce his five-year sentence for distributing material involving sexual exploitation of minors was denied in the district court, he appealed.

Held, denial of motion affirmed. The First Circuit found that the defendant's failure to bring his motion within 120 days of sentence or from the day of the Supreme Court's denial of his petition for writ of habeas corpus under Rule 35 deprived the district court of the power to consider the motion. The court further commented on the merits of the defendant's claim, stating that defendant had failed to establish that the five-year sentence was imposed in an illegal manner since he showed neither that the contents of a purported ex parte report were communicated to the district court nor that the court had relied on erroneous information in sentencing. United States v. Ames, 743 F.2d 46 (1984), 21 CLB 179.

Court of Appeals, 5th Cir. Defendant and other individuals were convicted of conspiring to possess unregistered firearms and controlled substances, and with the commission of various related substantive offenses. On April 15, 1981, 117 days after his sentence of five years in prison was imposed, defendant moved for a reduction of his sentence pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. In support of his motion, defendant claimed that he had no prior criminal record, that he felt remorse over his participation in the crimes, and that his sentence was too harsh

for his degree of culpability. On February 5, 1982, he federal district court granted defendant's motion and reduced his sentence to three years. The government asked the court to reconsider its decision, arguing that because it failed to act within the 120-day period established by Rule 35, it was without jurisdiction to reduce defendant's sentence. In the alternative, it argued that the court's ten-month delay was unreasonable.

Held, reduction of sentence affirmed. The Fifth Circuit held that a sentencing court's jurisdiction can exceed the 120-day period in certain circumstances. Thus, it held that delay was justified under the circumstances of this case, and that ten months of delay was reasonable. It noted that the delay was caused not by any act of defendant, but by the court's decision to review contemporaneously all the co-defendants' challenges to their sentences. Considering the quantity and complexity of issues involved, the court acted on the combined proceedings with reasonable dispatch. United States F.2d 198 (1985), 21 CLB 470.

Court of Appeals, 8th Cir. After defendant was found guilty of conspiracy to deliver cocaine and distribution of cocaine, he brought a motion for reduction of sentence, which was denied by the district court without a hearing.

Held, affirmed. The Eighth Circuit stated that the district court's failure to order an evidentiary hearing on the motion to reduce sentence was not an abuse of discretion. The court rejected the defense argument that the trial judge based his decision upon the defendant's failure to present his version of the facts at trial or sentencing, observing that the motion was denied on other grounds—namely, that the defendant offered no new facts that were not previously considered by the district court and that the sentence was correct. United States v. Kadota, 757 F.2d 198 (1985), 21 CLB 470.

Court of Appeals, 8th Cir. Defendant, who pled guilty to conspiracy to distribute cocaine, appealed the federal district court's denial of his motion for reduction of sentence. He claimed that the pre-sentence report relied on by the court in imposing its sentence contained erroneous information. Specifically, he challenged the government's assertions in the report that he was the central figure in the conspiracy, trafficked in large amounts of cocaine during the year after his indictment, and was a fugitive. On appeal, defendant argued that the trial court's reliance on the pre-sentence report in passing sentence and its refusal to add a hearing to determine its accuracy deprived him of due process.

Held, denial of motion to reduce sentence affirmed. The sentencing judge did not abuse his discretion in basing his sentence on the information in the pre-sentence report. Defendant had an opportunity at the sentencing proceeding to explain or rebut any information in the reports and so due process did not mandate an evidentiary hearing to establish the accuracy of the disputed information. In addition, the report contained defendant's as well as the government's version of the facts, and the record showed that the trial judge's belief that the government's version was more credible was a valid one. United States v. Papajohn, 702 F.2d 760 (1983).

38. SENTENCING AND PUNISHMENT

SENTENCING

SENTENCING

§ 38.05 Right of allocution

U.S. Supreme Court Defendant was convicted of capital murder and rape after a jury trial in a South Carolina court. At the sentencing hearing, defendant presented as mitigating evidence his own testimony and that of family members. However, the judge found inadmissible the testimony of two jailers and a "regular visitor" to the effect that defendant had "made a good adjustment" during his period of incarceration. The South Carolina Supreme Court affirmed the death sentence.

Held, judgment reversed and case remanded. The Court found that the trial court's exclusion from the sentencing hearing of the testimony of the jailers and the visitor denied defendant his right to place before the sentencing jury all evidence in mitigation of punishment. Skipper v. South Carolina, 106 S. Ct. 1669 (1986).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of possession of controlled substances with intent to distribute, he appealed, arguing that his sentence was invalid because his attorney had not been given a chance to speak before sentence was imposed.

Held, affirmed. The Fifth Circuit ruled that the trial court's failure to hear defendant's attorney's allocution before sentencing, and court's subsequent failure to change sentencing after hearing allocution, did not result in prejudicial error where the court remedied its initial mistake and heard allocution, and where the sentence imposed indicated that the court was predisposed toward leniency. United States v. Jackson, 807 F.2d 1185 (1986), 23 CLB 389.

§ 38.10 Pre-sentence report

"Corrections Law Developments: Defamation—References to Third Persons in Presentence Reports," by Frank S. Merritt, 19 CLB 362 (1983).

U.S. Supreme Court After defendant was convicted in Maryland state court of murder in the first degree, he was sentenced to death by the jury who had considered a presentence report prepared by the state. The report included a victim impact statement based on an interview with the family of the two victims. The Supreme Court of Maryland affirmed.

Held, vacated and remanded. The U.S. Supreme Court held that the introduction of a victim-impact statement at the sentencing phase of a capital-murder trial violated the Eighth Amendment. The admission of such

information creates the unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. Booth v. Maryland, 107 S. Ct. 2529 (1987).

Court of Appeals, 1st Cir. After defendants were convicted for the importation of and possession with intent to distribute cocaine, they appealed on the grounds, among other things, that the presentence report was erroneous.

Held, convictions affirmed. The First Circuit stated that, even assuming defendants were entitled to object to statements in the presentence report to the effect that other crew members were planning to deliver their cache of drugs to defendant, the statements were reasonable inferences and relevant to the question of sentencing. In any event, the court further found that the validity of the presentence report was not a proper subject for appeal when a full opportunity had been afforded at sentencing to challenge the report. United States v. Santiago, 828 F.2d 866 (1987), 24 CLB 174.

Court of Appeals, 3d Cir. A federal prisoner sought a reduction of sentence which was denied in the district court, under Fed. R. Crim. P. 35.

Held, affirmed. The Third Circuit court held that a court has jurisdiction to correct an imposed sentence when it fails to resolve all factual disputes in the presentence report or to determine that it will not rely on the disputed facts in sentencing. Courts have the responsibility to protect the accuracy of parole decisions and to protect defendants from the prejudicial effects on parole or prison custody decisions that may come from inaccuracies in the report. United States v. Katzin, 824 F.2d 234 (1987).

§ 38.20 —Trial court's reliance upon material not contained in pre-sentence report

Court of Appeals, 4th Cir. After defendant was convicted in the district court of kidnapping and murder charges, he appealed on the ground that the sentencing judge improperly considered certain testimony.

Held, conviction affirmed. The Fourth Circuit concluded that the sentencing court did not err in considering testimony given outside the jury's presence that had been excluded at trial, since defendant had an opportunity to challenge the testimony at the time of sentencing. The court pointed out that defendant had stated at the sentencing hearing that he did not even know the witness and challenged the part of the pre-sentence report that dealt with the witness' testimony. United States v. Hill, 766 F.2d 856 (1985).

§ 38.30 Standards for imposing sentence

"Corrections Law: The Role of Employment Factors in Sentencing," by Bradford C. Mank, 24 CLB 249 (1988).

"Sentencing Drug Offenders: The Need to Sensitize the Sentencing Judge," by Marcia G. Shein and Jana L. Jopson, 24 CLB 146 (1988).

U.S. Supreme Court Defendant was convicted of murder by the jury in Mississippi state court and sentenced to death. During the sentencing stage of the trial, the prosecutor urged the jury not to view itself as finally determining whether defendant would die, because the death sentence would be reviewed for correctness by the Mis-

sissippi Supreme Court. That court unanimously affirmed the conviction.

Held, death sentence vacated. The Supreme Court stated that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who was led to believe, as here, that the responsibility for determining the appropriateness of defendant's death sentence rested elsewhere. The Court noted that a "delegation" of sentencing responsibility would deprive a defendant of a fair determination of the appropriateness of his death, since appellate courts are ill-suited to perform that function. Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

Court of Appeals, D.C. Cir. Defendant pled guilty to interstate transportation of falsely made, forged, and altered securities. He appealed from a sentence of sixteen months to four years imprisonment. Defendant claimed that the sentencing judge improperly relied on the government's inaccurate and unreliable representations about his alleged membership in a group known as the Black Hebrews, in violation of the due process clause of the Fifth Amendment and the First Amendment guarantee of freedom of association.

Held, sentence vacated and case remanded for resentencing. The court concluded that the sentencing judge had improperly relied upon the defendant's alleged membership in the Black Hebrew sect, since such a religious sect was protected by the First Amendment. The court observed that its decision would be different if there was evidence linking the defendant with any illegal activities of the Black Hebrew sect. United States v. Lemon, 723 F.2d 922 (1983).

Court of Appeals, 5th Cir. After defendant's conviction of capital murder, he filed a habeas corpus petition in the district court, claiming that he had been improperly denied the right to introduce evidence of his mental condition in mitigation. The petition was denied in the district court.

Held, stay of execution denied. The Fifth Circuit ruled that the denial of the opportunity for defendant to introduce evidence of his mental condition in mitigation was not improper. The court noted that a court-appointed psychiatrist examined defendant at the time of his prosecution and found him to be mentally responsible and without serious mental problems. Williams v. Lynaugh, 837 F.2d 1294 (1988).

Court of Appeals, 5th Cir. After prisoner was convicted of first-degree murder and sentenced to death, he filed a habeas corpus petition, which was denied in the district court.

Held, affirmed. The Fifth Circuit court held that the death sentence imposed on prisoner was not made invalid by the use of aggravated rape as an element of the substantive crime and also as an aggravating factor at the sentencing phase. Even without the finding of aggravated rape during the sentencing hearing, the additional finding that "the offense was committed in an especially heinous, atrocious or cruel manner" was itself sufficient to sustain the death penalty. Brogdon v. Butler, 824 F2d 338 (1987).

Court of Appeals, 11th Cir. A Florida state prisoner, who was sentenced to death, brought a habeas corpus petition on the grounds that the advisory sentencing jury had been improperly limited to consideration of only statu-

tory mitigating factors in setting sentence.

Held, reversed and remanded. The Eleventh Circuit ruled that the jury instruction deprived defendant of the individualized sentencing determination required by the Eighth Amendment. Stone v. Dugger, 837 F.2d 1477 (1988).

§ 38.35 Invalid conditions

Court of Appeals, 1st Cir. After defendant was convicted in the district court of transporting fraudulently obtained checks in interstate commerce, he appealed on the ground that the court had imposed an illegal sentence on him by sentencing him to two years in jail followed by two years of probation conditioned upon his making "restitution in the amount of $32,577.98."

Held, conviction affirmed and restitution order modified. The First Circuit found evidentiary deficiencies with respect to proof of an $18,000 "loan," which made it improper for the trial court, as a condition of probation, to order restitution of an amount including the $18,000. The court further found that the Victim and Witness Protection Act of 1982 did not apply to offenses occurring before 1983 but, on the contrary, those acts were governed by a statute that allows restitution only of actual damages as a special condition of probation. United States v. Ferrera, 746 F.2d 908 (1984), 21 CLB 256.

Court of Appeals, 2d Cir. Defendant pled guilty to a violation of 21 U.S.C. § 331(b), which prohibits the adulteration or misbranding of drugs, which is punishable by a maximum fine of $1,000 and one year in jail. He also pled guilty as a corporate officer to a violation of the false statement statute (18 U.S.C. § 1001), a felony punishable by a maximum fine of $10,000. Defendant was fined $1,000 and his corporation was fined $10,000. As a condition of his probation, he was required to pay both the individual and corporate fines. His motion to correct the sentence was denied in the district court.

Held, reversed. The Second Circuit stated that defendant's probation was improperly conditioned on his payment of a fine imposed upon his corporation in excess of the maximum fine to which he was individually subject and which he was sentenced to pay. The court reasoned that the sentencing courts may not impose conditions of probation that circumvent the statutory maximum penalty set by Congress. Fiore v. United States, 696 F.2d 205 (1982), 19 CLB 379.

Court of Appeals, 3d Cir. After defendants pled nolo contendere to indictments under the criminal provisions of the Sherman Act, the district court judge placed the corporate defendants on supervised probation on the special condition that they devote $100,000 worth of their services for charitable purposes.

Held, writ of mandamus issued, order vacated, and case remanded for resentencing. The Third Circuit concluded that the district court had exceeded its authority by making the charitable contributions a special condition of probation since no charitable organizations were aggrieved by the offense. The court further noted that the amount of restitution ordered as a condition of probation may be only for such amount of actual damage or loss as has been determined to a certainty by a court or by stipulation of the parties. United States v. John

Scher Presents, Inc., 746 F.2d 959 (1984), 21 CLB 258.

§ 38.40 Sentence not contemplated by plea

Court of Appeals, 3d Cir. Defendant pled guilty to a one-count income tax violation pursuant to a plea agreement in which the government promised that if a sentence of over one year was imposed, he would serve no more than one third of the sentence. After he was sentenced to three years in prison, he moved to correct the sentence on the grounds that the U.S. Parole Commission Guidelines frustrated the agreement. His motion was denied by the district court.

Held, judgment vacated; case remanded. The Third Circuit found that defendant did not waive his right to object to the presence of certain information in the pre-sentence report when he failed to object prior to sentencing. The court reasoned that sentencing procedures and, especially, sentencing hearings need not conform to the procedural rules applicable at trial, particularly the rule that failure to make an immediate objection constitutes a waiver. The court found, however, that the parole guidelines did not violate the plea-bargain agreement. United States v. Baylin, 696 F.2d 1030 (1982), 19 CLB 375.

§ 38.50 Re-sentencing

U.S. Supreme Court After defendant was convicted in Pennsylvania state court for forgery and theft, he was sentenced to two-to-five years of imprisonment on a single theft count and five years of probation on one of the forgery counts. Sentence was suspended on the remaining counts. On appeal, the Pennsylvania Supreme Court affirmed the lower appellate court's ruling that the statute of limitations barred the prosecution of thirty-four of the theft counts, and it denied leave on double jeopardy grounds for resentencing on the remaining theft counts for which sentence had been suspended.

Held, reversed and remanded. The Supreme Court determined that, when a sentence of imprisonment on certain counts is vacated on appeal, the double jeopardy clause does not bar resentencing on other counts for which sentencing had been suspended and which were affirmed on appeal. The Court noted that sentencing in a non-capital case does not have the qualities of constitutional finality that attend an acquittal, so the defendant could not claim any expectation of finality in his original sentencing. Pennsylvania v. Goldhammer, 106 S. Ct. 353 (1985), 22 CLB 276, cert. denied, 107 S. Ct. 1613 (1987).

U.S. Supreme Court. Defendant was convicted of making false statements on a passport application. In sentencing defendant to two years of imprisonment with eighteen months suspended, the judge declined to consider mail fraud charges that were pending against defendant. The mail fraud charges were converted to possession of counterfeit certificates of deposit, for which defendant received two years probation. He successfully appealed the passport conviction, and his case was reversed and remanded to the same judge. This time, the judge sentenced petitioner to two years of imprisonment, neither of which was suspended. The judge explained that he was imposing a greater sentence because of defendant's intervening conviction for possession of counterfeit certificates of deposit. Defendant

appealed, claiming he could not receive a sentence greater than that received for the original conviction under North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072 (1969).

Held, affirmed. Since defendant in effect received a greater sentence of confinement following retrial than he had originally received, the presumption of the judge's vindictiveness did arise under *Pearce*. However, the presumption was amply rebutted by the judge's careful explanation of his reason for imposing the greater sentence. In his first sentencing, he made it clear that he considered only prior convictions, and not charges, in order to prevent a pyramiding of sentences. His consideration of the criminal conviction obtained in the interim between the original sentencing and the second sentencing after retrial was manifestly legitimate and amply rebutted any presumption of vindictiveness. Wasman v. United States, 468 U.S. 559, 104 S. Ct. 3217 (1984), 21 CLB 68.

U.S. Supreme Court After defendant was convicted of first-degree murder and armed robbery, he appealed, and the Supreme Court remanded for resentencing. On remand, the Arizona Superior Court imposed the death penalty, and the Arizona Supreme Court reversed.

Held, conviction affirmed. The Supreme Court declared that the double jeopardy clause prohibited Arizona from re-sentencing respondent to death after a life sentence was set aside on appeal, notwithstanding that failure initially to impose the death penalty was based on misconstruction of the capital sentencing law defining the aggravating circumstance of "pecuniary gain." The Court reasoned that reliance on an error of law does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits of the issue in the sentencing hearing, namely, whether death was the appropriate punishment for respondent's offense. Arizona v. Rumsey, 104 S. Ct. 2305 (1984).

Court of Appeals, D.C. Cir. After defendant's sentence was increased on resentencing, he appealed on the grounds, among others, that he was improperly denied the opportunity to rebut the government's sentencing memorandum.

Held, affirmed in part and reversed in part. The District of Columbia Circuit declared that it was not a denial of due process for the sentencing court to bar rebuttal testimony on the sentencing memorandum. The court stated that although a defendant has a right to rebut invalid information in a presentencing report, he does not have a right to have others testify for him at a sentencing. United States v. Fogel, 829 F.2d 77 (1987), 24 CLB 178.

Court of Appeals, 3d Cir. After defendant was convicted and sentenced by the district court, he appealed on the grounds that his sentence had been improperly changed to add a probationary term.

Held, increase in sentence affirmed. The Third Circuit found that although the modification in sentence to add probation failed to comply with the "split sentence" statute, it did not violate double jeopardy even though the result was an increase in the sentence. The court noted that there was no judicial vindictiveness involved and the sentencing judge made his intent clear in that the correction was simply to conform the sentence to the judge's

original intention. United States v. Guevremont, 829 F.2d 423 (1987), 24 CLB 179.

Court of Appeals, 4th Cir. After defendant was convicted of drug offenses, the court of appeals vacated in part and remanded for re-sentencing. He was initially sentenced on continuing criminal enterprise, charged to a sentence with no parole eligibility, followed by five years for cocaine conspiracy and distribution counts, which carry parole eligibility. After re-sentencing, defendant faced a sentence with no parole eligibility.

Held, remanded for re-sentencing. The Fourth Circuit concluded that a more severe sentence imposed on re-sentencing raises a presumption of vindictiveness, and that the presumption was not rebutted by the trial court's express desire to effectuate its original sentence. The court noted that the re-sentencing judge did not identify any conduct or event justifying a more severe sentence, and even noted that the defendant's two years in prison had resulted in some rehabilitation. United States v. Bello, 767 F.2d 1065 (1985).

§ 38.55 Commutation

U.S. Supreme Court At the guilt phase of respondent's state-court trial, the jury returned a verdict of guilt on a count of first-degree murder, which is punishable under California law by death or life imprisonment without the possibility of parole where an alleged "special circumstance" (here the commission of murder during a robbery) is found true by the jury at the guilt phase. In addition to requiring jury instructions at the separate penalty phase on aggravating and mitigating circumstances, California law requires that the trial judge inform the jury that a sentence of life imprisonment without the possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole (the so-called Briggs Instruction). At the penalty phase of respondent's trial, the judge's instructions included the Briggs Instruction. The jury returned a verdict of death. The California Supreme Court affirmed respondent's conviction but reversed the death penalty, concluding that the Briggs Instruction violated the Federal Constitution, and remanded the case for a new penalty phase.

Held, reversed and remanded. The Eighth and Fourteenth Amendments did not prohibit an instruction regarding the Governor's power to commute a life sentence. The Court reasoned that the failure of such an instruction to inform the jury of the Governor's power to commute a death sentence did not violate the Constitution since the instruction as given did not deflect the jury's focus from the central tasks of undertaking an individualized sentencing determination. California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446 (1983), 20 CLB 163.

PUNISHMENT

§ 38.60 Credit for time spent in custody prior to sentencing

Court of Appeals, 11th Cir. A Florida state prisoner brought a habeas corpus petition alleging that he was entitled to credit for time served in another state prison while awaiting extradition to Florida. The district court denied relief.

Held, reversed in relevant part. The Eleventh Circuit ruled that the equal protection clause of the Fourteenth Amendment required that petitioner be given credit for time spent in a

South Carolina jail while awaiting extradition to Florida due to his financial inability to post bail. The court noted that this was an exception for indigents to the general rule that a state prisoner has no constitutional right to credit for time served prior to a sentence. Palmer v. Dugger, 833 F.2d 253 (1987), 24 CLB 265.

Court of Appeals, 11th Cir. After his conviction for counterfeiting, petitioner filed a petition for a writ of mandamus to compel the attorney general to credit against his sentence time spent in a federal community treatment center subsequent to conviction but before sentencing. The district court issued the writ of mandamus and the government appealed.

Held, affirmed. The Eleventh Circuit ruled that failure to give the pre-sentence detainee credit for time spent in the center violated the equal protection component of the Fifth Amendment due process clause. The court reasoned that the time should be so credited because petitioner was treated in precisely the same fashion as, and under restrictions identical to, those imposed on inmates who were serving sentences already imposed. The court further explained that where the government actually tells a pre-sentence detainee that he is subject to the threat of prosecution for failing to return to the treatment center, it should not later claim that the threat of prosecution was merely a subjective and erroneous belief on the part of petitioner. Johnson v. Smith, 696 F.2d 1334 (1983).

§ 38.65 Increasing sentence upon retrial

Court of Appeals, 4th Cir. Defendant appealed a sentence of fifty years' imprisonment on conviction for four counts of robbery. In an earlier trial for the same robbery, he had plea-bargained for a conviction on one count, and had been sentenced to twenty years. After being denied his motion to vacate that sentence, he appealed, the sentence was vacated, and the retrial resulted in the fifty-year sentence. Defendant appealed on violation of his due process rights under North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072 (1969).

Held, reversed. In *Pearce,* the U.S. Supreme Court stated that, "[D]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." An increased sentence is only unconstitutional if it is imposed in retaliation for defendant's successful attack on his first conviction. Due process prohibits both the likelihood of actual vindictiveness and the apprehension of retaliation by either judge or prosecutor. Apprehension on the part of defendants might deter them from appealing their convictions if apparently vindictive increases in punishment upon retrial were allowed to stand. Therefore, the court did not look for actual vindictiveness by the district court because it was satisfied that, without a reasoned explanation to justify increased punishment, upholding the sentence would create a reasonable apprehension of vindictiveness that would have a chilling effect on defendants' exercise of their rights of appeal. United States v. Whitley, 734 F.2d 994 (1984), cert. denied, 106 S. Ct. 196 (1985).

§ 38.70 Multiple punishment

Court of Appeals, 9th Cir. After defendant was convicted in the district

court of felony possession of a firearm, he was sentenced under a statute permitting an enhanced sentence for a predicate offender. The "previous conviction" was a burglary offense that had occurred on the same night as the firearms offense.

Held, conviction affirmed. The Ninth Circuit found that the burglary conviction for sentencing purposes, even though the two offenses were committed on the same night, were prosecuted together and resulted in concurrent sentences, as long as the offenses were committed at two different places at two different times. United States v. Wicks, 833 F.2d 192 (1987), 24 CLB 264.

§ 38.85 Multiple offender sentences

U.S. Supreme Court Petitioner pled guilty to the charge of carrying a pistol without a license, and he was placed on probation for two years under the Youth Correction Act (YCA). At the end of the probationary period, he was unconditionally discharged from the YCA program. Petitioner was later convicted again for the same offense, and he was sentenced to imprisonment as a felon as a recidivist. The District of Columbia Court of Appeals affirmed.

Held, conviction affirmed. The Supreme Court found that the YCA conviction was properly used to enhance the sentence since the court had not exercised its discretion to set aside the conviction prior to the expiration of the period of probation. The Court observed that this limitation was fully consistent with the YCA's rehabilitation purposes as well as with Congress's intent to employ the set-aside as an incentive for positive behavior by youths sentenced under the YCA. Tuten v. United States, 460 U.S. 660, 103 S. Ct. 1412 (1983), 19 CLB 475.

§ 38.96 —Enhancement (New)

Court of Appeals, D.C. Cir. After defendants were convicted in the district court of drug offenses, they appealed on the ground, among others, that their sentence was improperly enhanced on the basis of prior state drug convictions.

Held, affirmed in part, and vacated and remanded in part. The statute providing for enhancement of sentence following a drug conviction of which the defendant had previously been convicted (21 U.S.C. § 841(b)(5)) applied only where a defendant has a prior drug conviction under Chapter 13 of Title 21 of the United States Code or under other federal law. Instead of striking only the illegal portions of the sentence, however, the court remanded for a complete resentencing. United States v. Gates, 807 F.2d 1075 (1986), 23 CLB 389.

§ 38.100 Concurrent sentences

Court of Appeals, 3d Cir. Defendant was convicted of engaging in a continuing criminal enterprise, conspiracy, and possession of marijuana with intent to distribute. He was sentenced by the district court to concurrent fifteen-year prison terms on the continuing criminal enterprise charge and conspiracy convictions.

Held, remanded with direction in part and otherwise affirmed. The Third Circuit found that a separate sentence for conspiracy could not be imposed in addition to a sentence for engaging in a continuing criminal enterprise. The court reasoned that the continuing criminal enterprise statute, which requires proof of three or more

violations of federal law, was intended by Congress to be used for sentencing purposes exclusively in a prosecution, and that cumulative sentences on the underlying predicate violations are not necessary to carry out the congressional purpose of severely punishing the leaders of narcotics rings. The court thus remanded to vacate the separate sentences and to impose a general sentence for the continuing criminal enterprise and conspiracy counts. United States v. Aguilar, 843 F.2d 735 (1988).

§ 38.105 Consecutive sentences

Court of Appeals, 2d Cir. After defendants were convicted in the district court for extortion and Racketeer Influenced and Corrupt Organizations Act (RICO) offenses, they appealed on the grounds, among other things, that their consecutive sentences were improper.

Held, convictions affirmed. The Second Circuit stated that the imposition of consecutive sentences for violations of separate RICO sections did not violate the double jeopardy clause. The court noted that a single transaction may give rise to liability for distinct offenses under separate statutes as long as the two offenses, as here, are sufficiently distinguishable. United States v. Biasucci, 786 F.2d 504 (1986), cert. denied, 107 S. Ct. 104 (1986).

Court of Appeals, 3d Cir. After defendant was convicted on four Racketeer Influenced and Corrupt Organizations Act (RICO) counts in connection with an arson-for-hire ring, he was sentenced to two consecutive twenty-year terms: one for a RICO substantive count and one for a RICO conspiracy count. Defendant then moved for correction and reduction of his sentence, alleging that the two RICO counts had merged for sentencing purposes.

Held, consecutive sentences affirmed. The Third Circuit declared that the "enterprise" element under the RICO substantive count did not merge with the RICO conspiracy count since it can be committed by an individual acting alone, while a conspiracy "enterprise" under the RICO statute cannot. The court thus concluded that consecutive sentences could be imposed since each count required proof that the other did not. United States v. Marrone, 746 F.2d 957 (1984), 21 CLB 258.

Court of Appeals, 7th Cir. After defendant was convicted of interstate transportation of stolen property, possession of an unregistered weapon, and possession of a firearm by a convicted felon, he was sentenced by the district court to two consecutive sentences for the weapons possession conviction.

Held, remanded for resentencing. The Seventh Circuit found that the Armed Career Criminal Act was a sentencing enhancement provision and did not create a new crime for sentencing purposes. Therefore, while a district court could properly sentence defendant to an enhanced sentence, it could not impose two separate consecutive sentences for the same conduct. The court also found that defendant's three prior state burglary convictions were sufficient to subject him to sentencing enhancement under the Act, even though defendant claimed that his prior burglaries were committed while he was unarmed. United States v. Dickerson, 857 F.2d 414 (1988).

39. THE APPEAL

§ 39.00 Right to appeal

U.S. Supreme Court A federal judge, who was under federal indictment, argued that a sitting judge may not be criminally prosecuted before being removed from office by impeachment. He contended that the government prosecuted him to punish him for judicial decisions. The Court of Appeals for the Ninth Circuit rejected these contentions.

Held, application for stay denied. The U.S. Supreme Court held that the argument that a sitting federal judge may not be prosecuted before impeachment had been rejected by two other courts of appeals and by the U.S. Supreme Court as well, citing United States v. Hastings, 103 S. Ct. 1188. The Court also held that the court of appeals was correct in concluding that the denial of relief on the "vindictive" prosecution claim was not immediately appealable under the "collateral order" doctrine. Claiborne v. United States, 104 S. Ct. 1401, 21 CLB 263, cert. denied, 105 S. Ct. 113 (1984).

Court of Appeals, 1st Cir. After their indictment for credit card fraud and conspiracy to obstruct a grand jury investigation, defendants appealed from the denial of their motion to dismiss based on various alleged abuses in the grand jury process.

Held, appeal dismissed. The First Circuit ruled that the denial of such a motion to dismiss is not immediately appealable. The court reasoned that it was not a foregone conclusion that if the claimed abuses were established (i.e., that secrecy provisions were violated, misleading hearsay evidence was presented, and the government tried the case in the press), relief after judgment would necessarily be precluded under a harmless error analysis. United States v. Larouche Campaign, 829 F.2d 259 (1987), 24 CLB 178.

Court of Appeals, 3d Cir. After defendant was sentenced in state court on sexual misconduct charges, he challenged his sentence on double jeopardy grounds. While his petition was pending, he escaped from prison, and the state trial judge dismissed his postconviction relief petition. Upon his return to custody, he filed a federal habeas corpus petition, which was denied.

Held, denial of petition affirmed. The Third Circuit found that defendant waived his right to have his double jeopardy claim considered by escaping during the pendency of the postconviction proceeding. The court noted that when a prisoner escapes, it might be considered as a knowing decision not to abide by the outcome of

the court's lawful processes. Feigley v. Fulcomer, 823 F.2d 29 (1987), 24 CLB 261.

Court of Appeals, 7th Cir. The government filed a motion for disqualification of defense counsel in a criminal prosecution because of the attorney's prior representation of a government witness. The district court denied the motion, and the government appealed.

Held, motion denied and appeal dismissed. The Seventh Circuit declared that the denial of a motion to disqualify a defense attorney in a criminal case because of the attorney's prior representation of a government witness is not appealable before trial. The court observed that although the issue raised by the denial of the motion to disqualify the defense attorney might properly have been one to certify for interlocutory appeal, the section governing certifications is applicable only to civil cases. United States v. White, 743 F.2d 488 (1984), 21 CLB 181.

§ 39.05 Right to appeal on full record

Court of Appeals, 1st Cir. A federal magistrate found that petitioner's challenge to the New Hampshire appellate court system procedure failed to state a cause of action. The district court denied petitioner's challenge and he appealed.

Held, reversed. The First Circuit stated that the New Hampshire Supreme Court's declination of acceptance order deprived petitioner of due process of law, where the decision was made without providing a transcript to defendant or an opportunity to persuade the court to accept his appeal. Bundy v. Wilson, 815 F.2d 125 (1987), 23 CLB 491.

§ 39.10 Jurisdiction

U.S. Supreme Court An application was made to Justice Blackmun, as circuit justice, to stay an order of a state district court.

Held, application denied. A U.S. Supreme Court Justice, as circuit justice, lacks jurisdiction to act on an application for stay of an order of a state district court committing applicants to jail for refusal to answer questions where the state court had entered an order dismissing the applicants' appeals for lack of an appealable order. Liles v. Nebraska, 465 U.S. 1304, 104 S. Ct. 1020 (1984), 20 CLB 461.

§ 39.15 —Appeal after guilty or nolo contendere plea

Court of Appeals, 11th Cir. Defendant, charged with escape from federal custody, pled guilty and was sentenced to three years imprisonment. He subsequently filed a motion to vacate sentence pursuant to 28 U.S.C. § 2225, claiming he received ineffective assistance of counsel in that his attorney failed to file an appeal after being instructed to do so. The district court denied the motion to vacate, and defendant appealed.

Held, judgment affirmed and motion denied. Although it has been frequently held that an attorney's total failure to file an appeal after being instructed to do so will always entitle a defendant to an out-of-time appeal regardless of the chances for success, defendant's guilty plea distinguished this case. Since a guilty plea constitutes a waiver of all nonjurisdictional defects in the proceeds against a defendant, such a defendant waives all but a few grounds on which to appeal. Thus, an attorney's failure to file a direct appeal in these circumstances does not constitute ineffective assistance of counsel,

since it causes no harm to the defendant. Ferguson v. United States, 699 F.2d 1071 (1983).

§ 39.20 —Failure to file timely notice of appeal

U.S. Supreme Court Defendant applied to Justice Rehnquist for a stay of dismissal of his appeal by the Ninth Circuit from the U.S. Tax Court. The ground for the application was that defendant was a fugitive from justice for convictions of willfully attempting to evade federal employment taxes. The Ninth Circuit had ruled that applicant could move to reinstate his appeal if within fifty-six days he submitted himself to the jurisdiction of the court from which he was a fugitive.

Held, application denied. Justice Rehnquist ruled that the stay, applied for on the last of the fifty-six days, would not be granted as there was no reasonable possibility that four Justices would vote to grant certiorari and since applicant failed to seek a stay in the court of appeals. Conforte v. Comm'r, 459 U.S. 1309, 103 S. Ct. 663 (1983), 19 CLB 374.

§ 39.30 —Nonfinal orders

Court of Appeals, 2d Cir. After petitioner filed a habeas corpus petition, four of the seven claims were dismissed by the district court.

Held, affirmed. The Second Circuit dismissed the appeal for lack of jurisdiction on the grounds that the judgment entered below lacked finality. The court commented that it has long been established that only final orders are reviewable by way of habeas corpus petition. The court reasoned that to allow separate claims to be dismissed and then heard on appeal while other claims remain to be adjudicated by the district court would encourage piecemeal and time-consuming litigation. Bermudez v. Smith, 797 F.2d 108 (1986).

§ 39.35 Scope of appellate review

U.S. Supreme Court Defendant confessed to murder after a fifty-eight-minute interrogation by the New Jersey State Police. At trial, he was found guilty of first-degree murder, but the New Jersey appellate court reversed, finding that the confession was the result of compulsion. The New Jersey Supreme Court then reversed, finding that the confession was voluntary, and the district court dismissed defendant's petition for habeas corpus without an evidentiary hearing. The Court of Appeals for the Third Circuit affirmed, holding that the state court's factual findings should be presumed to be correct.

Held, reversed and remanded. The Supreme Court stated that the voluntariness of a confession is not an issue of fact to be presumed, but is a legal question meriting independent consideration in a federal habeas corpus proceeding. The Court noted that, unlike such issues as impartiality of a juror or competency to stand trial, the voluntariness of a confession cannot be presumed because the taking of a confession invariably occurs in a secret and more coercive environment. Miller v. Fenton, 106 S. Ct. 455 (1985), 22 CLB 277.

§ 39.45 —Failure to object or file bill of exceptions as precluding appellate review

Court of Appeals, 7th Cir. Petitioner sought habeas corpus after being convicted of armed robbery and murder, arguing that his *Miranda* rights had been violated by police interrogation procedures. Although defendant vio-

lated a state contemporaneous-objection rule by failing to object at trial to the admissibility of the question in question, the district court concluded that the issue could be raised for habeas corpus review because defendant demonstrated both cause and prejudice. The district court based its finding of cause on the unsettled state of the law at the time of defendant's trial regarding the "fruit of the poison tree" document.

Held, judgment reversed and petition denied. Although it is an open question whether novelty of a constitutional claim can ever establish cause for a failure to object, the court disagreed with this defendant's claim that his objection would have been novel, since there was both state and U.S. Supreme Court precedent favoring defendant's argument in existence at the time of his trial. Where the basis of a constitutional claim is available, and other defendants have litigated that same claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default. Since defendant therefore had an ample basis for objecting to the testimony in question, he had no cause for failing to adhere to the contemporaneous objection rule. United States ex. rel. Hudson v. Brierton, 699 F.2d 917, cert. denied, 464 U.S. 833, 104 S. Ct. 114 (1983).

§ 39.60 —Concurrent sentence doctrine

U.S. Supreme Court After defendant was convicted in the district court of conspiracy to possess cocaine as well as two counts of possession with intent to distribute, he appealed. The appeals court declined to review the convictions on the two possession counts, applying the concurrent sentence doctrine.

Held, vacated and remanded. The Supreme Court held that the appellate court improperly applied the concurrent sentence doctrine. The district court had imposed a $50 assessment on each count in addition to concurrent prison and parole terms; therefore defendant's liability to pay the $150 fine depended on the validity of each of the three convictions. Ray v. United States, 107 S. Ct. 2093 (1987) (per curiam).

§ 39.65 Bail pending appeal

U.S. Supreme Court After defendant was found guilty of criminal contempt and sentenced to a prison term, he sought a stay pending review on certiorari of the judgment of the Massachusetts Supreme Judicial Court.

Held, application for stay denied. Justice Brennan, sitting as a circuit justice, denied the application for a stay, holding that even though the applicant who had been sentenced to ninety days in prison for criminal contempt had shown irreparable harm, the petition for a stay failed to demonstrate that the balance of equities in his favor was sufficient to warrant grant of a stay. Justice Brennan explained that he strongly doubted that certiorari would be granted or that the judgment would be reversed. Corsetti v. Massachusetts, 458 U.S. 1306, 103 S. Ct. 3 (1982), 19 CLB 261.

§ 39.66 Stay pending application for writ of certiorari (New)

U.S. Supreme Court A Florida state prisoner was convicted of first-degree murder and sentenced to death. After his conviction was affirmed by the Florida Supreme Court, he petitioned the U.S. Supreme Court for a stay pend-

ing the disposition of his petition for a writ of certiorari.

Held, application for stay denied. The Supreme Court denied the application for a stay where there was no threat of imminent harm. The Court explained that no execution date had been set and the state did not contemplate that one would be set in the near future. Moreover, there was no basis for determining whether certiorari would be granted since the application for a stay did not specify either the issues for which certiorari would be appropriate. White v. Florida, 458 U.S. 1301, 103 S. Ct. 1 (1982), 19 CLB 261.

§ 39.70 Frivolous appeal

"Frivolous Criminal Appeals: The *Anders* Brief or the Idaho Rule?" by Arthur Mendelson, 19 CLB (1983).

40. PROBATION AND PAROLE

§ 40.00 Conditions of probation

"Corrections Law Developments: Community Restitution—An Alternative Disposition for Corporate Offenders," by Frank S. Merritt, 20 CLB 355 (1984).

"Corrections Law Developments: Restitution Under the Victim and Witness Protection Act of 1982," by Frank S. Merritt, 20 CLB 44 (1984).

U.S. Supreme Court The Bail Reform Act of 1984 requires imposition of an additional prison sentence of two years for anyone who commits a felony while on release pending a judicial proceeding. The defendant, while released on a personal recognizance bond pending trial on narcotics charges, was arrested for selling heroin. The district court judge imposed an additional two years sentence under the Bail Reform Act, but suspended execution of the sentence and imposed two years of probation. The Court of Appeals reversed.

Held, reversed. The Supreme Court stated that the Bail Reform Act does not divest a judge of his authority to suspend execution of sentence and impose probation. The Court noted that it is reluctant to find that one statute repeals another one unless such an intent is "clear and manifest," or if there is an "irreconcilable conflict." Rodriguez v. United States, 107 S. Ct. 1391 (1987), 23 CLB 484.

U.S. Supreme Court Defendant pleaded guilty in Connecticut state court to a larceny charge based on her wrongful receipt of welfare benefits. The court suspended a prison term and placed her on probation for five years on the condition that she make restitution through monthly payments. Defendant then filed a bankruptcy petition under chapter 7, and the bankruptcy court granted her discharge of the restitution obligation, but later ruled that the debt was nondischargeable. The district court supported the bankruptcy court, but the court of appeals reversed.

Held, reversed. A restitution obligation, imposed as a condition of probation in state criminal proceedings, is nondischargeable since the Bankruptcy

Code preserved from discharge in chapter 7 any condition a state criminal court imposes as part of a criminal sentence. The Court reasoned that the basis for this judicial exception is the deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. Kelly v. Robinson, 107 S. Ct. 353 (1986), 20 CLB 286.

U.S. Supreme Court Petitioner pleaded guilty to indictments for the felonies of burglary and theft by receiving stolen property, but the trial court, pursuant to the Georgia's First Offender's Act, did not enter a judgment of guilt and sentenced petitioner to probation on the condition that he pay a $500 fine and $250 in restitution, with $100 payable that day, $100 the next day, and the $550 balance within four months. Petitioner borrowed money and paid the first $200, but about a month later he was laid off from his job, and, despite repeated efforts, was unable to find other work. Shortly before the $550 balance became due, he notified the probation office that his payment was going to be late. Thereafter, the State filed a petition to revoke petitioner's probation because he had not paid the balance, and the trial court, after a hearing, revoked probation, entered a conviction, and sentenced petitioner to prison. The record of the hearing disclosed that petitioner had been unable to find employment and had no assets or income. The Georgia Court of Appeals rejected petitioner's claim that imprisoning him for inability to pay the fine and make restitution violated the Equal Protection Clause of the Fourteenth Amendment. The Georgia Supreme Court denied review.

Held, reversed and remanded. The sentencing court could not properly revoke defendant's probation for failure to pay a fine and make restitution absent evidence and findings that he was somehow responsible for the failure and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983), 20 CLB 59.

§ 40.05 Revocation of probation

Court of Appeals, 3d Cir. After defendant was convicted on multiple counts in a federal indictment, he was sentenced by the district court to both a term of custody and a consecutive term of probation. Before he completed serving his custodial term, defendant committed a crime to which he later pleaded guilty. The district court revoked defendant's probation on the basis of that crime, and he appealed the revocation.

Held, conviction affirmed. The Third Circuit found that the district court has the authority to revoke probation on the basis of violation of conditions of probation for actions occurring prior to the commencement of probation while defendant was serving a term of incarceration. United States v. Camarata, 828 F.2d 974 (1987), 24 CLB 176.

Court of Appeals, 4th Cir. While petitioner was on state probation following his conviction for grand larceny, a search of his residence produced firearms and marijuana. At the state criminal trial, the evidence seized during the search was successfully suppressed, and the state of Virginia dropped the charges. At a subsequent probation revocation hearing, the evidence suppressed in the criminal proceedings was

admitted, and his probation was revoked. The district court granted habeas corpus relief and the state appealed.

Held, reversed. The Fourth Circuit found that the exclusionary rule does not apply to probation revocation proceedings. The court further ruled that federal habeas corpus could not be used to reexamine the admissibility of evidence offered in a state probation revocation proceeding even though such evidence was excluded under the exclusionary rule from petitioner's trial or charges alleging offenses committed while he was on probation. The court noted that while Fourth Amendment claims may be raised on direct appeal, they may not normally be raised by way of habeas corpus. Grimsley v. Dodson, 696 F.2d 303 (1982), 19 CLB 379, cert. denied, 462 U.S. 1134, 103 S. Ct. 3118 (1983).

Court of Appeals, 10th Cir. Petitioner pled guilty in Utah state court to a charge of aggravated robbery and was sentenced to five years to life imprisonment. The presiding judge stayed the execution of the sentence and placed petitioner on probation. One of the conditions of the probation was that petitioner not have any weapons in his possession. After petitioner was charged with possession of a firearm, a probation revocation hearing was held and the judge ordered petitioner to serve the original sentence. The judge made no written findings of fact or conclusions of law. Subsequently, a jury found petitioner not guilty of the weapons charge. Petitioner sought a writ of habeas corpus, first in state court and then in federal district court, alleging that the judge's failure to make written findings of fact and conclusions of law denied him due process of law under Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973). The state courts dismissed the petition, and the federal district court affirmed.

Held, affirmed. *Gagnon,* which requires written findings, deals only with administrative hearings and not with judicial hearings on probation revocation. The applicable law does not require written findings in judicial proceedings if the record before the judge who revokes probation would enable a reviewing court to determine the basis of the judge's decision. In this instance, the revocation was based only on one ground—the petitioner's possession of a firearm. Even though petitioner was subsequently acquitted of the firearms charge, the revocation order need not have been set aside since the standard of proof required for probation revocation is only a preponderance of the evidence rather than proof beyond a reasonable doubt. Furthermore, defendant made no factual allegations based upon the record of the revocation hearing. Morishita v. Morris, 702 F.2d 207 (1983).

§ 40.10 —Procedure

U.S. Supreme Court After defendant pled guilty in Missouri state court to drug offenses, he was put on probation and given a suspended prison sentence. Two months later, he was arrested for leaving the scene of an automobile accident. After a hearing, the judge who had sentenced defendant, finding that he had violated his probation conditions by committing a felony, revoked probation and ordered execution of the previously imposed sentence. Having exhausted his state remedies, defendant filed a habeas corpus petition, which was granted by the district court and affirmed by the court of appeals.

Held, reversed. The Supreme Court decided that the due process clause does not generally require a sentencing court to indicate that it had considered alternatives to incarceration before revoking probation. The Court noted that the procedures for revocation of probation—including written notice and the right to present witnesses and cross-examine—do not include or require an express statement by the fact finder that alternatives to incarceration were considered and rejected. Black v. Romano, 105 S. Ct. 2254 (1985).

Court of Appeals, 3d Cir. Probationer appealed from an order of the district court revoking his probation and imposing a five-year term of imprisonment. He contended that there should have been a grant of statutory immunity to defense witnesses who, as a result of refusal to grant them immunity, invoked their Fifth Amendment privilege when called to testify.

Held, order affirmed. The refusal to grant immunity to defense witnesses was not error where no representation was made at the hearing that the testimony of the witnesses would be exculpatory and no representation was even made as to what the testimony of the witnesses would be if granted immunity. United States v. Bazzano, 712 F.2d 826 (1983), 20 CLB 63, cert. denied, 465 U.S. 1078, 104 S. Ct. 1439 (1984).

Court of Appeals, 4th Cir. After probation revocation proceedings were brought against the probationer, the district court revoked probation and the probationer appealed on the ground that a letter from his program director at a Salvation Army center explaining why he had lost his job and was expelled from the center was hearsay evidence improperly admitted at the hearing.

Held, affirmed. The Fourth Circuit held that the Federal Rules of Evidence pertaining to hearsay do not apply to probation revocation hearings. The court relied on the Notes of the Advisory Committee for the Federal Rules of Evidence, which stated that the usual rules of evidence need not be applied in parole revocation hearings and that the court may consider documentary evidence, including letters that would not be admissible in a criminal trial. The court further observed that the contents of the letter in question were corroborated by the probationer's own testimony in which he admitted loss of his job and infractions of the center's rules. United States v. McCallum, 677 F.2d 1024, 19 CLB 477, cert. denied, 459 U.S. 1010, 103 S. Ct. 365 (1982).

§ 40.15 —Credit for time spent on probation before revocation

Court of Appeals, 2d Cir. A federal prisoner whose parole had been revoked brought a petition for a writ of habeas corpus seeking credit on his federal sentence for the twenty-five months that he served in state prison after federal authorities released him from federal prison to state authorities. The district court denied the petition.

Held, denial affirmed. The Second Circuit ruled that the parole commission had properly denied the prisoner credit for time served in state prison after parole from federal prison where the paroled prisoner commits another crime. The court reasoned that since the federal authorities no longer exercised control over the terms of imprisonment while the parolee was in state custody, his confinement in state

prison could not be considered a continuation of federal confinement. Weeks v. Quinlan, 838 F.2d 41 (1988).

§ 40.20 Standards for determining eligibility for parole

U.S. Supreme Court A Montana prisoner brought a civil rights suit, claiming due process violations in parole-eligibility standards. The district court dismissed, and the court of appeals reversed and remanded.

Held, affirmed. The U.S. Supreme Court held that a parole statute providing that the board "shall" release a prisoner on certain conditions created a liberty interest in parole release protected by the due process clause. Board of Pardons v. Allen, 107 S. Ct. 2415 (1987).

Court of Appeals, 5th Cir. After defendant was convicted of conspiracy to violate the Hobbs Act through extortion but acquitted of aiding and abetting attempted murder, he petitioned for a writ of habeas corpus, which was denied by the district court.

Held, vacated and remanded. The Fifth Circuit stated that the parole commission violated its own regulations in determining a probable parole date when it considered the attempted murder charge. The court noted that although the parole commission has broad discretion in making parole release decisions, its own regulations prohibit it from considering, in any determination, any charges upon which a prisoner was found not guilty. Ceniceros v. U.S. Parole Comm'n, 837 F.2d 1358 (1988).

§ 40.25 Revocation of parole

Court of Appeals, 8th Cir. A Missouri inmate brought a federal civil rights claim challenging the revocation of his presumptive parole date following a determination that he committed "riot" at the correctional center. The district court denied relief, and the inmate appealed.

Held, affirmed. The Eighth Circuit stated that the disciplinary board's finding that the inmate committed riot was supported by a written memorandum prepared by officers. The court commented that while the revocation of good-time credits is a deprivation of a liberty interest, it is not comparable to a criminal conviction and does not yield the degree of deprivation a parolee experiences when his parole is revoked. Brown v. Frey, 807 F.2d 1407 (1986), 23 CLB 391.

41. PRISONER PROCEEDINGS

§ 41.00 In general

"[The] Law of Prisoners' Rights: An Overview," by Fred Cohen, 24 CLB 321 (1988).

"The State of Corrections Today: A Triumph of Pluralistic Ignorance," by Allen Breed, 23 CLB 262 (1987).

"Drug Testing and Corrections," by Fred Cohen and Kate King, 23 CLB 151 (1987).

"Legal Issues Surrounding Private Operation of Prisons," by Connie Mayer, 22 CLB 309 (1986).

"Corrections Law Developments: Fire Hazards as Constitutional Torts," by James E. Robertson, 19 CLB 456 (1983).

"Corrections Law Developments: Attorneys' Fees in Prison Litigation—The Texas Prison Case Award," by Fred Cohen, 19 CLB 249 (1983).

"Corrections Law Developments: Prisoners' Rights Litigation in the 1980s," by Frank S. Merritt, 10 CLB 157 (1983).

U.S. Supreme Court After a Massachusetts prison inmate was charged with violating prior regulations following a fight, the disciplinary board refused to allow the inmate to call witnesses whom he had requested, but the record of the hearing did not indicate the board's reason for such refusal. The board found the inmate guilty, and he forfeited "good time" credits. The inmate then sought a writ of habeas corpus in Massachusetts state court, which was granted, and the Massachusetts Supreme Judicial Court affirmed.

Held, judgment vacated and case remanded. The Supreme Court found that the due process clause does not require that prison officials' reasons for denying an inmate's witness request appear in the administrative record. The Court, however, did find that the officials must, at some point, state their reasons for refusing to call witnesses either in the administrative record or by later presenting testimony in court that the deprivation involves a "liberty" interest such as "good time" credits. Ponte v. Real, 105 S. Ct. 2192 (1985).

U.S. Supreme Court An inmate of a Virginia institution filed a Section 1983 suit against an officer, alleging that he had conducted an unreasonable "shakedown" search. The district court granted summary judgment for the petitioner, and the court of appeals affirmed.

Held, affirmed in part and reversed in part. A prisoner has no reasonable expectation of privacy in his prison cell. The Court reasoned that it would be impossible to accomplish the prison objectives of preventing the introduction of weapons, drugs, and other contraband into the premises if inmates retained a right of privacy in their cells. Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194 (1984), 21 CLB 68.

Court of Appeals, 2d Cir. Former inmates of Attica Correctional Facility brought a suit against prison officials under 42 U.S.C. § 1983, claiming that their placement into protective custody violated their constitutional rights. Shortly after being placed in protective custody, the inmates were given a written statement of the reasons for doing so. The district court held certain officials liable.

Held, reversed and remanded with instructions. The Second Circuit ruled that the inmates were not entitled to a formal hearing either prior to or shortly after their placement in protective custody. The court further noted that while the inmates may have had a protected liberty interest to re-

main in the general prison population under state law, there was no such federal constitutional interest that could serve as the basis for a Section 1983 claim. Deane v. Dunbar, 777 F.2d 871 (1985), 22 CLB 279.

Court of Appeals, 4th Cir. After a West Virginia state prisoner filed a petition challenging jail conditions, the district court judge referred the matter to a U.S. magistrate and then sustained the magistrate's recommendation to dismiss the petition.

Held, reversed and remanded with instructions. The Fourth Circuit found that it was reversible error for the district court judge to fail to review the transcript of the testimony before the magistrate before approving the magistrate's findings. The court noted that while the magistrate may conduct an evidentiary hearing in a case, he lacks judicial authority to make a final determination. Thus, since a magistrate's determinations are subject to a final de novo review by a district court judge, the judge cannot ratify the magistrate's finding without reviewing a transcript of the prior proceeding and permitting the prisoner to object to specific findings of fact. Wimmer v. Cook, 774 F.2d 68 (1985), 22 CLB 161.

Court of Appeals, 5th Cir. A Louisiana state prisoner brought a Section 1983 action against various prison officials and guards, claiming that he had been denied due process in an administrative proceeding for alleged attempted theft, aggravated disobedience, and defiance that resulted in his commitment to extended lockdown. The district court dismissed the complaint, and the prisoner appealed.

Held, dismissal of action affirmed. The Fifth Circuit stated that the prisoner's complaint of a biased disciplinary tribunal did not allege violations of due process as long as the proceeding was conducted with apparent impartiality and prisoner was afforded an opportunity to clear himself of misdeeds which he did not commit. The court further found that the allegation that a biased high-ranking officer of the prison sat in on the prisoner's disciplinary case only to punish him for "beating" earlier, unrelated charges in a prior proceeding did not in itself allege a violation of due process unless the state procedures for redress of alleged improper proceedings were constitutionally inadequate. Collins v. King, 743 F.2d 248 (1984), 21 CLB 180.

§ 41.05 Cruel and unusual treatment

U.S. Supreme Court Respondent, an inmate in a Missouri reformatory for youthful first offenders, brought suit under 42 U.S.C. § 1983 in the Federal District Court, claiming that petitioner, a guard at the reformatory, had failed to prevent him from being harassed, beaten, and sexually assaulted by his cellmates in violation of his Eighth Amendment rights. Because of petitioner's qualified immunity, as a prison guard, from § 1983 liability, the trial judge instructed the jury that respondent could recover only if petitioner was guilty of "gross negligence" or "egregious failure to protect" respondent. The judge also charged the jury that it could award punitive damages in addition to actual damages if petitioner's conduct was shown to be "a reckless or callous disregard of, or indifference to, the rights or safety of others." The District Court entered judgment on a verdict finding petitioner liable and awarding both compensa-

tory and punitive damages. The Court of Appeals affirmed.

Held, affirmed. A guard may be held liable for punitive damages upon a finding of reckless or careless disregard or indifference to an inmate's rights or safety. Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625 (1983).

Court of Appeals, 5th Cir. A Texas state prisoner brought a Section 1983 action based on a county jail disciplinary proceeding, which was dismissed in the federal district court.

Held, reversed and action remanded. The Fifth Circuit stated that dismissal without a hearing was premature where the prisoner claimed he had been subjected to solitary confinement in an extremely cold cell and that he had been forced to sleep on a floor where rats crawled over him. The court noted that to maintain an Eighth Amendment claim, the prisoner need not allege lasting harm; all that was necessary was for the prisoner to allege sufficient pain, suffering, and mental anguish to warrant relief. Foulds v. Corley, 833 F.2d 52 (1987), 24 CLB 262.

Court of Appeals, 5th Cir. Texas prison inmates brought a Section 1983 action, claiming that their prison conditions violated the Eighth Amendment. Their action was denied in the district court.

Held, denial of petition vacated and action remanded. The Fifth Circuit found the allegations of overcrowding in the cell blocks, inadequate ventilation and lighting, and dirt and insect infestation raised legitimate Eighth Amendment concerns that were a proper subject for a civil rights action. The court noted that unlike Fourteenth Amendment due process claims, Eighth Amendment allegations do not require proof that the harm suffered was caused maliciously or deliberately. Gillespie v. Crawford, 833 F.2d 47 (1987), 24 CLB 261.

§ 41.10 Segregated prison facilities

"[The] Limits of Segregation in Prisons: A Reply to Jacobs," by Samuel Walker, 21 CLB 485 (1985).

U.S. Supreme Court Pennsylvania prisoner brought a civil rights action claiming that prison officials' actions in confining him to administrative segregation violated his due process rights after criminal charges based on a riot in the prison were filed against him. The district court rendered summary judgment for the prison officials. The Third Circuit Court of Appeals reversed, and certiorari was granted.

Held, reversed. The Supreme Court found that the prisoner's due process rights were not violated since an informal, nonadversary evidentiary review was sufficient both for the decision that an inmate represented a security threat and the decision to confine him to administrative segregation pending completion of an investigation against him. The Court observed that prison officials have broad administrative discretionary authority over the institutions they manage, and lawfully incarcerated persons retain only a narrow range of protected liberty interests. Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864 (1983), 19 CLB 477.

§ 41.15 Freedom of religion

U.S. Supreme Court State prison inmates brought a civil rights suit challenging certain prison regulations prohibiting them from attending Friday religious services. The district court

denied, but the court of appeals vacated and remanded.

Held, reversed. The U.S. Supreme Court held that prison officials had acted in a reasonable manner in precluding Islamic inmates from attending the services and that prison regulations to that effect did not violate the right to free exercise of religion. In so holding, the Court observed that it would not substitute its judgment on difficult and sensitive matters of institutional administration for the determination of those charged with the task of running a prison. O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987).

§ 41.20 Limitations on reading matter

U.S. Supreme Court Two prison inmates brought an action challenging prison mail policies that prohibited them from subscribing to a certain magazine. A declaratory judgment was issued in their favor in a district court and was affirmed by the Court of Appeals for the Sixth Circuit. However, the Supreme Court vacated and remanded. On remand, the district court affirmed its earlier award of attorney's fees to the inmates. The Sixth Circuit affirmed.

Held, writ of certiorari granted and decision reversed. The Supreme Court ruled that entry of a declaratory judgment did not automatically require the award of attorney's fees under the Civil Rights Attorneys' Fees Award Act. The Court explained that the declaratory judgment is no different from any other judgment and that in the absence of a class action, attorney's fees were not mandatory even though the Court had found that correction officials did not properly apply procedural standards. Rhodes v. Stewart, 109 S. Ct. 202 (1988).

§ 41.40 Access to legal assistance and courts

Court of Appeals, 1st Cir. Jail inmates in Massachusetts brought a federal civil rights action alleging denial of their right to meaningful access to the courts. They alleged that an attorney was made available only once a week, and that there was no law library. The district court entered a judgment in favor of defendants.

Held, affirmed. The First Circuit stated that the inmate legal assistance program in a jail without a law library provided sufficient meaningful access to the courts, even though attorneys were able to consult with inmates only a few hours per week. The court noted that the attorneys assisted inmates in determining meritorious claims, helped inmates marshal facts, and provided assistance with legal forms and procedures. Carter v. Fair, 786 F.2d 433 (1986).

Court of Appeals, 2d Cir. A prisoner brought a Section 1983 action against prison authorities for intentional deprivation of right of access to the courts by refusing to return certain legal materials. The district court dismissed the complaint, and the prisoner appealed.

Held, reversed and remanded. The First Circuit stated that the prisoner's allegation that he was deprived of legal materials needed for a pending case stated a cause of action for intentional deprivation of right of access to courts protected by the due process clause. The court further commented that this taking of legal property violated both substantive as well as procedural due process. United States v. Langella, 804 F.2d 185 (1986), 23 CLB 290.

§ 41.45 Other actions under Federal Civil Rights Act

U.S. Supreme Court Respondent inmate was found guilty of misconduct at a prison hearing, committed, and sentenced to six months of disciplinary confinement. He filed a civil rights action, which was denied in the district court, but the court of appeals reversed. On remand, the district court granted summary judgment for petitioners on the basis of qualified immunity, and the court of appeals affirmed. The district court denied the respondent's claim for attorney's fees, but the court of appeals reversed.

Held, reversed. The U.S. Supreme Court held that the respondent was not entitled to attorney's fees, since he was not the "prevailing" party. The Court explained that the respondent obtained neither a damage award, an injunction, nor other relief. Hewitt v. Helms, 107 S. Ct. 2672 (1987).

Court of Appeals, D.C. Cir. Former inmate brought a civil rights action to recover damages for injuries sustained in a fight with another inmate while incarcerated. The jury awarded $75,000 in damages based on the inmate's claim that the District of Columbia was responsible because of the severe overcrowding at the jail.

Held, affirmed. The appeals court held that although the state was not obligated to insure an assault-free environment, a prisoner had a constitutional right to be protected from unreasonable threats of violence from fellow inmates, and that the prison acted with "deliberate indifference" to protect prisoner from unreasonable risk of assault. Morgan v. District of Columbia, 824 F.2d 1049 (1987).

Court of Appeals, 1st Cir. A Section 1983 civil rights action was brought by the family of a prisoner who died in an overcrowded jail in Puerto Rico. The district court entered summary judgment in favor of the prison officials and, on appeal, the court of appeals for the First Circuit vacated and remanded. On remand, the district court entered a judgment for the mother, and an appeal was taken.

Held, affirmed in part. The First Circuit decided that the prison officials were not entitled to qualified immunity in the civil rights action brought as a result of the death of a psychiatrically disturbed prisoner. The court noted that when prison officials intentionally place a prisoner in dangerous circumstances and when they intentionally ignore a prisoner's serious medical needs, the prisoner's constitutional rights are violated. The court thus found that the evidence was sufficient to support a finding that the prison officials' failure to segregate the psychiatrically disturbed prisoner from the general jail population exhibited a "deliberate indifference" to the health and safety of the inmate who was found dead. The court further noted that at the time of the prisoner's death, the prison officials knew of a federal court decree finding the entire Puerto Rican jail system to be inadequate, unsafe, and medically deficient regarding the needs for segregation of mentally ill prisoners from the general population. Cortes-Quinones v. Jimenez-Mettleship, 842 F.2d 556 (1988).

Court of Appeals, 1st Cir. A New Hampshire pretrial detainee brought a civil rights action on the grounds that he was confined to his cell for twenty-two-to-twenty-three hours per day for

a twenty-day period, and that he was forced to sleep on a floor mattress. The district court dismissed the complaint.

Held, vacated and remanded. The First Circuit found that the conditions alleged by the prisoner were sufficient to state a Section 1983 cause of action based on a deprivation of liberty without due process. The court noted that subjecting a pretrial detainee to the use of a floor mattress for anything other than brief emergency circumstances may constitute an impermissible imposition of punishment. Lyons v. Powell, 838 F.2d 28 (1988).

Court of Appeals, 2d Cir. A New York inmate brought a civil rights action against a prison superintendent and others for alleged denial of due process by change in work assignments that was neither requested by him nor authorized by the prison's program committees. The district court dismissed the petition.

Held, affirmed in part and reversed in part. The Second Circuit held that a New York statute, providing that prison officials may provide jobs for prisoners, did not give inmates a liberty or property interest in a job and therefore, changes in work assignment were not protected by the due process clause. However, deliberate indifference of prison officials with an inmate's medically prescribed treatment for the sole purpose of causing the inmate unnecessary pain would subject them to liability under the Eighth Amendment. Gill v. Mooney, 824 F.2d 192 (1987).

Court of Appeals, 3d Cir. A state prisoner brought a civil rights action against corrections officers who were allegedly attempting to provoke him into committing an action that would result in a disciplinary violation and that he had been reclassified in retaliation for the original complaint. The district court set aside the inmate's classification and ordered that it be reevaluated under applicable state regulations.

Held, action reversed and remanded. The Third Circuit ruled that a federal court has no jurisdiction to order state corrections officials to conform their conduct to state law. Jones v. Connell, 833 F.2d 503 (1987), 24 CLB 266.

Court of Appeals, 4th Cir. Certain defendants brought a Section 1983 civil rights action against police officers to recover damages for alleged violations of constitutional rights in connection with warrantless searches. The district court denied the motions for summary judgment.

Held, affirmed in part, vacated in part, and remanded with instructions. The Fourth Circuit stated that the police officers were entitled to qualified immunity, explaining that unconstitutional conduct does not by itself remove qualified immunity extended to police officers in civil rights actions. The court observed that police officers who act in ways they reasonably believe to be lawful are entitled to qualified immunity in cases where they mistakenly believe that probable cause or exigent circumstances exist. In this case, it was held that police officers were entitled to qualified immunity for their warrantless search. After receiving a tip from a reliable informant, one officer had personally verified informant's description of one of the suspects and the suspect's automobile, and the informant had indicated that one sus-

pect was in possession of cocaine. Osabutey v. Welch, 857 F.2d 220 (1988).

§ 41.55 Medical treatment for prisoner

"Prisoners With AIDS: The Use of Electronic Processing," by Patricia Raburn, 24 CLB 213 (1988).

"AIDS in Correctional Institutions: The Legal Aspects," by Laura J. Moriarity, 23 CLB 533 (1987).

"Corrections Law Developments: The Mentally Disordered Prisoner," by Fred Cohen, 22 CLB 372 (1986).

U.S. Supreme Court Petitioner, who was treated for a leg injury sustained while incarcerated in state prison, was barred by state law from employing or electing to see his own physician. Petitioner sued respondent (a physician under contract with North Carolina to provide orthopedic services at a state prison hospital on a part-time basis) in federal district court for violation of his Eighth Amendment right, alleging that he was given inadequate medical treatment. The U.S. District Court for the Eastern District of North Carolina granted officials and physician summary judgment. Petitioner appealed and the Court of Appeals for the Fourth Circuit remanded. The district court dismissed the claim and appeal was taken. The court of appeals affirmed dismissal and petition was filed for writ of certiorari.

Held, reversed and remanded. The Supreme Court found that respondent's conduct in treating petitioner is fairly attributable to the state and that petitioner was acting "under color of state law." West v. Atkins, 108 S. Ct. 2250 (1988).

Court of Appeals, 4th Cir. The estate of a deceased prison inmate brought an action for deprivation of civil rights and for medical malpractice against various prison guards, and the district court granted summary judgment in favor of all defendants.

Held, reversed in part and remanded. The Fourth Circuit found that the evidence presented raised material issues of fact as to the deliberate indifference by the guards on duty during the last hours of the inmate's life. The court noted that in a summary judgment motion such as this, the truth of the plaintiff's allegations must be assumed. Sosebee v. Murphy, 797 F.2d 179 (1986).

Court of Appeals, 4th Cir. After a prison inmate's civil rights action against the chief medical officer and others for violating his constitutional rights was dismissed on a magistrate's recommendation, he appealed.

Held, affirmed in part and reversed in part. The Fourth Circuit declared that allegations of inadequate medical care were insufficient to state a civil rights claim in the absence of deliberate indifference to serious medical needs. The court explained that disagreements between an inmate and a physician over the inmate's proper medical care do not state a claim under Section 1983 unless exceptional circumstances are alleged, and the claims here were claims of mere medical malpractice. Wright v. Collins, 766 F.2d 841 (1985).

Court of Appeals, 6th Cir. A state prisoner sued the prison medical staff under 42 U.S.C.A. § 1983, alleging the staff's failure to give him adequate medical treatment. He claimed that when he complained of severe stomach

pains and swelling, the staff did not allow him to see a physician for almost two months. He also claimed that after his condition was diagnosed as cirrhosis of the liver and he was released from the hospital, the prison staff denied him the prescribed diet and medication for two days. Since then, he claimed, the staff had been providing the proper medication but had not been following the precise course of prescribed treatment. The federal district court dismissed the complaint as frivolous, and prisoner appealed.

Held, dismissal reversed and case remanded. Prisoner stated a claim that would entitle him to relief. While not every showing of inadequate medical treatment will establish a constitutional violation, the Eighth Amendment does protect a prisoner from actions amounting to a deliberate indifference to his medical needs. The medical staff, which allowed prisoner to suffer needlessly when relief was readily available, was deliberately indifferent. Therefore, the claim was not frivolous even though such indifference existed for only a short period of time. Byrd v. Wilson, 701 F.2d 592 (1983).

Court of Appeals, 7th Cir. A prison inmate brought a civil rights action against prison officials, alleging that he had been improperly transferred to a facility not equipped to deal with his psychiatric problems. The district court dismissed.

Held, dismissal affirmed in relevant part. The Seventh Circuit ruled that the prisoner did not state a claim for deliberate indifference to his medical needs, since mere negligence in diagnosing or testing a medical condition will not, in and of itself, show deliberate indifference to medical needs in violation of the Eighth Amendment. Murphy v. Lane, 833 F.2d 106 (1987), 24 CLB 262.

§ 41.60 Prison regulations

Court of Appeals, D.C. Cir. Inmates brought an action challenging the regulation of correspondence between inmates of different prisons. The district court entered a judgment permanently enjoining prison officials from applying the regulations but denied the inmates' First Amendment claims in other respects.

Held, reversed and remanded in part. The appeals court held that although deference must be accorded to the Federal Bureau of Prisons' expertise in determining whether publications subscribed to by inmates are likely to produce breaches of security, prison administrators have the burden of showing that rejection of a publication was "generally necessary" to protect a legitimate penological interest of security, order, or rehabilitation. Because it lacked causal nexus between possession of material and proscribed conduct, the regulation in question impermissibly allowed the warden to reject a publication if it "might facilitate criminal activity." Abbott v. Meese, 824 F.2d 1166 (1987).

Court of Appeals, 5th Cir. A federal prisoner and his wife filed a pro se complaint, seeking a declaratory judgment regarding the prison's policy of not permitting conjugal visits. The district court dismissed the complaint.

Held, affirmed. The Fifth Circuit found that there is no constitutional or common-law right to conjugal visits in prison. The court also rejected the contention that the Bureau of Prisons had an obligation to transfer the prisoner to a prison near the wife's resi-

dence, and that the prisoner's incarceration violated the wife's rights against cruel and unusual punishment. Davis v. Carlson, 837 F.2d 1318 (1988).

Washington Prisoners brought personal restraint petitions arising out of disciplinary actions imposed on them for marijuana use. Each inmate had tested positive for marijuana use at least once after taking a urinalysis test, known as the enzyme multiplied immunoassay technique (EMIT). A prison disciplinary hearing found all ten prisoners to have violated the prohibition against the use of marijuana based on the EMIT test results, and sanctions ranging from the loss of "good time credits" to mandatory segregation time were imposed. On appeal, the prisoners contended that the use of a single positive EMIT test as a basis for imposing sanctions violated their due process rights.

Held, petitions denied. Where a statute permits an inmate to earn good time credits, that inmate has a constitutionally protected liberty interest in those credits that prevents their deprivation absent observation of minimum due process requirements. However, as stated in Superintendent v. Hill, 472 U.S. 445, 105 S. Ct. 2768 (1985), the nature and scope of due process rights afforded inmates are necessarily limited in light of legitimate institutional needs to assure the safety of inmates, avoid burdensome administration requirements that might be susceptible to manipulation, and preserve disciplinary rehabilitation. Thus, the evidentiary requirements of due process in prison are satisfied if "some evidence" exists in record to support prison disciplinary decisions. A single positive result to the EMIT urinalysis test clearly provides "some evidence" of marijuana use; thus, the court held that use of the test as a basis to revoke good time credits and to impose sanctions on the prisoners did not violate due process. In addressing the prisoners' other contentions, the court determined that random urinalysis testing of prisoners was valid and that prisoners had failed to show how the unavailability of copies of test results and not being informed of the date on which alleged use of marijuana occurred prejudiced them in any way. Petition of Johnson, 745 P.2d 864 (1987).

§ 41.70 Transfer of prisoners

U.S. Supreme Court Petitioners, members of a prison "Program Committee," investigated disciplinary problems within the Hawaii State Prison outside Honolulu, and singled out respondent and another inmate as troublemakers. After a hearing, the same Committee recommended that respondent's classification as a maximum security risk be continued and that he be transferred to a prison on the mainland. Petitioner administrator of the Hawaii prison accepted the Committee's recommendation, and respondent was transferred to a California state prison. Respondent then filed suit against petitioners in Federal District Court, alleging that he had been denied procedural due process because the Committee that recommended his transfer consisted of the same persons who had initiated the hearing, contrary to a Hawaii prison regulation, and because the Committee was biased against him. The District Court dismissed the complaint, holding that the Hawaii regulations governing prison transfers did not create a substantive liberty interest protected by the due process

clause of the Fourteenth Amendment. The court of appeals reversed.

Held, court of appeals ruling reversed. The interstate prison transfer did not deprive the inmate of any liberty interest protected by the due process clause even though the transfer covered a substantial distance. Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741 (1983), 20 CLB 58.

U.S. Supreme Court A federal prisoner who was in the witness protection program applied to the Supreme Court for an emergency stay of his transfer to another federal facility while his appeal to the court of appeals from a denial of a preliminary injunction against the transfer was pending.

Held, application for emergency stay denied. Justice Rehnquist found that there was no indication that the officials responsible for the witness protection program would not continue to protect the federal prisoner, so there was insufficient evidence to overrule the district court's conclusion that the prisoner had not demonstrated the requisite irreparable injury. Beltran v. Smith, 458 U.S. 1303, 103 S. Ct. 2 (1982), 19 CLB 261.

42. ANCILLARY PROCEEDINGS

CONTEMPT

§ 42.10 Procedural requirements

Court of Appeals, D.C. Cir. Independent counsel investigating possible violations of federal law by persons secretly selling arms to Iran issued a subpoena for records to a witness in its grand jury investigation. The subpoena directed witness to produce, in his capacity as custodian, various documents pertaining to the operations of eight foreign companies. The district court held witness in contempt for failure to comply with the subpoena.

Held, contempt reversed. The District of Columbia Circuit found that a court only has jurisdiction to issue an order compelling production of subpoenaed documents if it has personal jurisdiction over the entity whose custodian was served. The court noted that the subpoena could not be enforced because there was no proof that the district court possessed personal jurisdiction over the companies whose records were sought. In re Sealed Case, 832 F.2d 1268 (1987), 24 CLB 259.

Court of Appeals, 2d Cir. Petitioner brought a habeas corpus action challenging his conviction for criminal contempt imposed by the Supreme Court of New York. The district court

granted the petition on the grounds that petitioner had been denied a hearing.

Held, reversed and remanded. The Second Circuit court held that the habeas petitioner was not denied due process when the defendant was served with notice of motion clearly informing him of the nature of the charges and he failed to appear. The documentary evidence before the court clearly showed that he had continually and willfully disobeyed court orders. Sassower v. Sheriff of Westchester County, 824 F.2d 184 (1987).

§ 42.18 Appointment of counsel (New)

U.S. Supreme Court In an agreement settling a civil trademark-infringement suit, petitioners consented to a permanent injunction prohibiting them from infringing on the respondent's trademark. Subsequently, the district court appointed the respondent's attorney as special counsel to represent the government in investigating and prosecuting a criminal-contempt action against the petitioners. After petitioners were convicted, the court of appeals affirmed.

Held, reversed. The U.S. Supreme Court held that whereas the district courts had authority to appoint private attorneys to prosecute criminal-contempt actions, it was improper for the court to appoint counsel for a party that is the beneficiary of the court order. The Court noted that too great a potential existed for the prosecutor's private interest to influence the discharge of his public duty in assessing whether and what charges should be brought for affronts to the judiciary. Young v. United States *ex. rel.* Vuitton et Fils., 107 S. Ct. 2124 (1987).

DEPORTATION

§ 42.25 In general

Court of Appeals, 9th Cir. Petitioner was convicted of aiding and abetting the distribution of cocaine, and was subsequently found to be deportable, pursuant to Section 241(a)(11) of the Immigration and Nationality Act. That section provides that any alien who is convicted of violating laws or regulations relating to possession or traffic in narcotic drugs shall be deported on order of the Attorney General. On appeal, petitioner challenged his deportation on the ground that his aiding and abetting conviction was not one for violating a law related to traffic in narcotics within the meaning of the Immigration and Nationality Act.

Held, judgment affirmed and deportation ordered. The court found that the aiding and abetting conviction was within the scope of Section 241(a)(11). It pointed out that the aiding and abetting statute does not define a separate offense, but rather makes punishable as a principal one who aids or abets another in the commission of a substantive offense. It further noted that one convicted as an aider and abettor is subject to the same penalties as one convicted under the statute defining the substantive offense. The court distinguished such a case from one which involves misprision of felony relating to an underlying narcotics charge, noting that misprison of felony is a statutorily-defined offense separate from the underlying felony concealed. Londono-Gomez v. Immigration Naturalization Service, 699 F.2d 475 (1983).

DEPRIVATION OF CIVIL RIGHTS

§ 42.30 In general

"Enforcement Workshop: Fleeing Felons and the Fourth Amendment,"

by James J. Fyfe, 19 CLB 525 (1983).

U.S. Supreme Court After a Wisconsin arrestee brought an action against police officers and others for violation of federal civil rights arising from his arrest, the trial court denied the motion to dismiss because of petitioner's failure to comply with the state's notice of claim statute. The Wisconsin Court of Appeals affirmed but the Wisconsin Supreme Court reversed.

Held, reversed and remanded. The Supreme Court found that the Wisconsin notice of claim statute was preempted with respect to federal civil rights actions. The court reasoned that there was no reason to suppose that Congress intended federal courts to apply state notice of claims rules in civil rights actions. Felder v. Casey, 108 S. Ct. 2302 (1988).

U.S. Supreme Court After an Illinois state court judge demoted and then discharged a probation officer, the officer brought a civil rights action against him, alleging that she was demoted and discharged on account of her sex. The jury found in her favor, but the court granted summary judgment in favor of the judge. The court of appeals affirmed.

Held, reversed and remanded. The U.S. Supreme Court ruled that a state court judge does not have absolute immunity from a civil rights damage suit for his decision to demote or dismiss a probation officer. The Court reasoned that the judge's decision to demote and discharge the officer was administrative rather than judicial or adjudicative in nature, and thus did not entitle him to absolute immunity. Forrester v. White, 108 S. Ct. 538 (1988).

U.S. Supreme Court After the respondent was arrested in New Hampshire and accused of tampering with a witness, he entered into an agreement with the prosecutor, whereby the prosecutor would dismiss the charges against him if he would agree to release all claims against the town and its officials. He subsequently filed a Section 1983 claim in federal court, alleging that the town and its officers violated his constitutional rights by arresting him. The district court dismissed the claim, but the Court of Appeals reversed.

Held, reversed. The Supreme Court stated that a per se rule invalidating release-dismissal agreements should not be applied. The Court reasoned that in many cases a defendant's choice to enter into such an agreement will reflect a highly rational judgment that certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action. Town of Newton v. Rumery, 107 S. Ct. 1187 (1987), 23 CLB 483.

U.S. Supreme Court When two deputy county sheriffs went to petitioner's medical clinic to serve notices on two of his employees, petitioner barred the door and refused to let them enter. After consulting with the County Prosecutor, who instructed that they "go in and get" the employees, the door was broken down with an axe. When petitioner brought a Section 1983 action, the district court dismissed the claim, finding that the officers were not acting pursuant to "official policy" because the acts complained of were an isolated instance. The court of appeals affirmed.

Held, reversed and remanded. The Court stated that municipal liability may be imposed for a single decision

by municipal policymakers under appropriate circumstances. Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986).

U.S. Supreme Court The father of a burglar who was shot while fleeing from an unoccupied house brought a wrongful death action under the federal civil rights statute against the officer who fired the shot. The district court ruled for the officer, and the Court of Appeals reversed.

Held, judgment affirmed and case remanded. The Supreme Court stated that deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. The Court observed that the Fourth Amendment should not be construed in light of the common-law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon. The Court further observed that the police had no reason to believe that the suspect—young, slight, and unarmed—posed any threat or was dangerous. Tennessee v. Garner, 105 S. Ct. 1694 (1985), 21 CLB 462.

U.S. Supreme Court After respondents were arrested for nonjailable misdemeanors, the magistrate in a Virginia county imposed bail, which respondents were unable to meet. The magistrate committed respondents to jail. Respondents then brought an action for injunctive relief under 42 U.S.C. § 1983, the successor to Section 2 of the Civil Rights Act of 1966, claiming that the magistrate's action was unconstitutional. The district court agreed and enjoined the practice. It also awarded respondents costs and attorney fees. The court of appeals affirmed.

Held, affirmed. Judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in a judicial capacity, nor is it a bar to an award of attorney fees under Section 1988. Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970 (1984), 21 CLB 71.

U.S. Supreme Court Respondent pled guilty to a charge of manufacturing a controlled substance at a hearing in Virginia state court where one of the petitioner police officers who participated in a search of respondent's apartment gave an account of the search. Thereafter, respondent brought a damages action in Federal District Court under 42 U.S.C. § 1983, against petitioners, officers who participated in the search of his apartment, alleging that his Fourth Amendment rights had been violated. The District Court granted summary judgment for petitioners on the ground that respondent's guilty plea to the criminal charge barred his Section 1983 claim. The Court of Appeals reversed and remanded.

Held, affirmed. The Section 1983 action is not barred on the asserted ground that under principles of collateral estoppel generally applied by the Virginia courts, respondent's conviction would bar his subsequent civil challenge to police conduct, and that a federal court must therefore give the state conviction the same effect under 28 U.S.C. § 1738, which generally requires federal courts to give preclusive effect to state-court judgments if the courts of the State from which the judgments emerged would do so. In addition, the Section 1983 action did not constitute a waiver of Fourth Amendment claims. Haring v. Prosise,

462 U.S. 306, 103 S. Ct. 2368 (1983), 20 CLB 60.

U.S. Supreme Court Convicted state defendants brought a Civil Rights Act suit against state and local police officers seeking damages based on alleged giving of perjured testimony at their criminal trial. The district court rendered judgment for the defendants; and the Seventh Circuit Court of Appeals affirmed.

Held, conviction affirmed. The Supreme Court stated that the Civil Rights Act of 1871 does not authorize a convicted person to assert a damage suit against a police officer for giving perjured testitmony at his criminal trial. The Court found that it would not carve out an exception to the general rule of immunity in cases of alleged perjury. Briscoe v. LaHue, 460 U.S. 325, 103 S. Ct. 1108 (1983), 19 CLB 475.

Court of Appeals, 1st Cir. In a civil rights action brought by a prison inmate against corrections officers, alleging that they had beaten him while he was housed in a segregation unit, the district court entered a judgment for the corrections officers.

Held, reversed and remanded for new trial. The First Circuit stated that in a civil rights action it is prejudicial error to admit the past disciplinary record of the inmate to show that he was the aggressor. The court reasoned that, under Rule 404 of the Federal Rules of Evidence, prior bad acts may not be admitted to prove, in a case involving alleged violence, that plaintiff had a penchant for violent conduct. Lataille v. Ponte, 754 F.2d 33 (1985).

Court of Appeals, 4th Cir. A Civil Rights action was brought against police officers for allegedly neglecting a pre-trial detainee's medical needs. The officers moved for a directed verdict, which was denied in the district court.

Held, affirmed. The Fourth Circuit ruled that it was a proper jury question whether the police officers acted with deliberate indifference by ignoring the detainee's repeated pleas for attention to a gunshot wound. The court further found that a paramedic's negligent failure to discover the gunshot wound during an examination did not absolve the officers of liability. Cooper v. Dyke, 814 F.2d 941 (1987), 23 CLB 490.

Court of Appeals, 4th Cir. An inmate brought a civil rights action against a deputy sheriff to recover for injuries sustained when he slipped and fell on a pillow left on the stairs by the deputy. The district court granted the deputy's motion for summary judgment, and the inmate appealed.

Held, motion for summary judgment affirmed. The Fourth Circuit concluded that the inmate's claim of negligence failed to state a procedural due process claim because the State of Virginia's common-law tort action provided the inmate with a remedy that would fully compensate him for alleged liberty deprivations. Daniels v. Williams, 720 F.2d 792 (1983).

Court of Appeals, 5th Cir. The plaintiffs, who had been improperly arrested for violating the Texas "failure to identify" law, brought an action against various officials and police officers under the federal civil rights act. The federal claims were dismissed as moot, but the plaintiffs prevailed on

pendent state law claims, and the district court awarded fees to plaintiff's attorneys.

Held, vacated and remanded. The Fifth Circuit stated that, in deciding whether plaintiffs were "prevailing parties" entitled to fees under the civil rights statute, the court was required to determine whether the lawsuit was a substantial factor or significant catalyst in ending their unconstitutional enforcement of the Texas identification law. Heath v. Brown, 807 F.2d 1229 (1987), 23 CLB 390.

Court of Appeals, 5th Cir. A jail inmate in Louisiana brought suit against the municipal body—a police jury—under 42 U.S.C. § 1983, claiming that the beating he suffered at the hands of four other inmates would have been less likely to happen if the jail had been better equipped and administered. The district court dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.

Held, dismissal affirmed and cause remanded with instructions. The Fifth Circuit found that while the subject matter could properly give rise to a § 1983 claim, the complaint was properly dismissed since it failed to state in detail how the jail was in any respect physically inadequate or that the police jury knew of its inadequacies. The court, however, remanded to permit the claimant to amend his complaint by alleging sufficient facts to support a claim. O'Quinn v. Manuel, 773 F.2d 605 (1985), 22 CLB 166.

Court of Appeals, 9th Cir. Defendant brought an action against the City of Los Angeles and certain police department employees under 42 U.S.C. § 1983, seeking damages caused by his arrest without warrant or probable cause for murder. Four days after defendant's arrest, the district attorney filed a criminal complaint against him, but, ultimately, the murder charges were dismissed and he was released. A civil jury found that the officers had no probable cause to arrest him, and it awarded $250,000 in damages. The Court of Appeals for the Ninth Circuit reversed, but on remand the district court ruled for defendant.

Held, vacated and remanded. The Ninth Circuit stated that absent evidence rebutting the presumption that the district attorney acted properly, the police officers could not be held liable for damages incurred after the prosecutor filed the criminal complaint. Smiddy v. Varney, 803 F.2d 1469 (1986), 23 CLB 288.

Court of Appeals, 10th Cir. Members of Steamboat Springs, Colorado, police department were sued under Section 1983 for damages arising from the alleged unlawful search of plaintiff's home and office. The district court found in favor of plaintiff, and defendants appealed.

Held, district court affirmed. The Tenth Circuit found that when police officers encouraged and affirmatively facilitated the unreasonable search of the premises by private parties, they are liable for damages if a constitutional violation occurs. The court thus permitted the action to continue, since there was a sufficient fact issue as to whether the police officers' conduct was such that the searches in issue occurred under color of state law. Specht v. Jensen, 832 F.2d 1516 (1987), 24 CLB 261.

EXTRADITION

§ 42.45 Requirements

Court of Appeals, 2d Cir. The United States, on behalf of the United Kingdom, sought a declaratory judgment reviewing an order of the district court denying extradition. The district court entered an order dismissing the action for failure to state a claim upon which relief can be granted.

Held, affirmed. The Second Circuit declared that the government could not bring a declaratory judgment action to collaterally review an order denying extradition. The court noted that the government was limited to the recourse of submitting the request to another extradition magistrate. United States v. Doherty, 786 F.2d 491 (1986).

FORFEITURE

§ 42.60 In general

U.S. Supreme Court The government instituted forfeiture proceedings, following a gun owner's acquittal for knowingly engaging in the business of dealing in firearms without a license. The district court struck the owner's defense, but the court of appeals remanded.

Held, reversed. Neither collateral estoppel nor double jeopardy bars a civil forfeiture proceeding following an acquittal on unrelated criminal charges. The Court explained that there is a difference in the burden of proof between a criminal gun control action and a civil in rem forfeiture action. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S. Ct. 1099 (1984), 20 CLB 461.

U.S. Supreme Court Claimant entered the United States and declared that she was not carrying more than $5,000 in currency, but a customs inspector discovered and seized from her $8,850 in U.S. currency. The Custom Service informed claimant by letter on September 18, 1975 that the seized currency was subject to forfeiture and that she had a right to petition for remission or mitigation. A week later, she filed such a petition. Thereafter, from October 1975 to April 1976, the Customs Service, suspecting Claimant of narcotics violations, conducted an investigation of the petition, but concluded, after contacting federal, state, and Canadian law enforcement officials, that there was not evidence of any violations. Claimant, however, was indicted in June 1976 for, and convicted in December 1976 of, knowingly and willfully making false statements to a customs officer. In March 1977, a complaint seeking forfeiture of the currency under 31 U.S.C. § 1102(a) was filed in Federal District Court. Claimant contended that the 18-month delay between the seizure of the currency and the filing of the forfeiture action violated her right to due process, but the District Court held that the time that had elapsed was reasonable under the circumstances and declared the currency forfeited. The Court of Appeals reversed and ordered dismissal of the forfeiture action.

Held, reversed and remanded. The eighteen-month delay in filing the claim was justified, since the balancing test applicable to speedy trial claims of Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972) provides a relevant framework for determining reasonableness of delay in filing a forfeiture action. United States v. Eight Thousand Eight Hundred & Fifty Dollars, 461 U.S. 555, 103 S. Ct. 2005 (1983), 20 CLB 5.

Court of Appeals, 2d Cir. Defendant was indicted and convicted of possessing and attempting to distribute cocaine. The jury also found that $4,000 was subject to forfeiture but found that another $28,500 was not. The government then instituted civil forfeiture proceedings against the $28,500, and defendant moved to enjoin the action, which was granted by the district court.

Held, reversed. The Second Circuit ruled that the government may prosecute a civil forfeiture proceeding after a prior criminal forfeiture proceeding has been unsuccessful. The court observed that it was not the intent of Congress that the remedies of criminal and civil forfeiture be mutually exclusive. United States v. Dunn, 802 F.2d 646 (1986), cert. denied, 107 S. Ct. 1568 (1987).

Court of Appeals, 4th Cir. In three cases, the Fourth Circuit Court of Appeals addressed the issue of whether attorney's fees are subject to forfeiture. In two of the cases, the district court had held that the forfeiture provisions did not encompass bona fide attorney's fees, and in the third case the district court had refused to exempt attorney's fees from forfeiture.

Held, affirmed. The Fourth Circuit stated that the Comprehensive Forfeiture Act of 1984 included within its scope property interest contracted to be paid or paid as attorney's fees unless its effect was to deprive an accused of the ability to employ and pay legitimate attorney's fees to private counsel to defend against criminal charges. The court noted that prejudice is presumed from a denial of counsel of choice, and thus a violation occurs as soon as governmental action either directly affects or immediately threatens to deprive the accused of effective assistance of counsel. United States v. Harvey, 814 F.2d 905 (1987), 23 CLB 488.

JUVENILE DELINQUENTS AND YOUTHFUL OFFENDERS

§ 42.70 —Due process

"[The] Constitutionality of Executing Juvenile Offenders: *Thompson v. Oklahoma*," by Steven N. Gersten, 24 CLB 91 (1988).

U.S. Supreme Court Fourteen-year-old Gregory Martin was arrested in New York City and charged with first-degree robbery, second-degree assault, and criminal possession of a weapon. Martin had possession of the gun when arrested. The incident occurred at 11:30 p.m., and Martin lied to the police about where and with whom he lived. He was consequently detained overnight. The next day, the first proceeding before the Family Court resulted in the judge ordering Martin detained. A probable cause hearing was held five days later, and probable cause was found to exist for all the crimes charged. The New York Family Court Act authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." Appellees, juveniles who had been detained under the Act, brought a habeas corpus class action in federal district court, seeking a declaratory judgment that a section of the Act violates, among other things, the due process clause of the Fourteenth Amendment. The district court struck down the statute as permitting detention without due process and ordered

the release of all class members. The Second Circuit affirmed.

Held, reversed. The court declared that the statutory section is not invalid under the due process clause of the Fourteenth Amendment. Preventive detention under the statute serves the legitimate state objective, held in common with every state, of protecting both the juvenile and society from the hazards of pretrial crime. That objective is compatible with the "fundamental fairness" demanded by the due process clause in juvenile proceedings, and the terms and conditions of confinement under the statutory section are compatible with that objective. Pretrial detention need not be considered punishment merely because a juvenile is subsequently discharged subject to conditions or put on probation. Moreover, the procedural safeguards afforded by the Family Court Act to juveniles under the statutory section prior to factfinding provide sufficient protection against erroneous and unnecessary deprivations of liberty. Schall v. Martin, 104 S. Ct. 2403 (1984), 21 CLB 74.

§ 42.80 —Youthful offender

Court of Appeals, D.C. Cir. Defendant had been convicted and sentenced to probation under the Federal Youth Correction Act (FYCA), 18 U.S.C. § 5010(a). He was unconditionally discharged from probation before its expiration and his conviction was set aside under § 18 U.S.C. § 5021(b). The district court also ordered the FBI to seal the records of conviction to all persons except for law enforcement authorities using the records in criminal investigations. Defendant moved to have his court file sealed and also moved for an order that the District of Columbia Metropolitan Police Department (MPD) remove his arrest records from publicly accessible files. Both requests were denied by the court, which stated that under Doe v. Webster, 606 F.2d 1226 (1979), the set-aside provision of the statute never requires expunction of arrest records.

Held, reversed and remanded. The *Webster* opinion, although it provided for the physical removal of conviction and not arrest records, was based on the "crystal clear" intent of the Act "to give youthful ex-offenders a fresh start, free from the stain of a criminal conviction, and an opportunity to clean their slates to afford them a second chance in terms of both jobs and standing in the community." This analysis is equally relevant to court records documenting the existence of a conviction already set aside. Such records, if open to public scrutiny, are no different in their effect from conviction records in the hands of the FBI; they leave the conviction of the rehabilitated youth a matter of public record. Therefore, the court ruled that court records revealing a set-aside conviction of a FYCA individual should not be generally available to the public. It did, however, recognize the needs of court officers or law enforcement officials to examine those records in regard to related cases or investigations. In such cases, access was not to be restricted. United States v. Doe, 730 F.2d 1529 (1984).

COMMITMENT TO MENTAL INSTITUTION

§ 42.90 In general

U.S. Supreme Court After the Illinois state court found petitioner to be sexually dangerous, he appealed on the ground that his Fifth Amendment privilege against self-incrimination had

been violated because his statements made to a psychiatrist had been introduced at trial. The Illinois appellate court reversed, but the Supreme Court of Illinois reversed and reinstated the trial court's findings.

Held, affirmed. The Court stated that admission of defendant's statements did not violate his Fifth Amendment rights because proceedings under the Illinois statute were not "criminal." The Court reasoned that the statute's aims were to provide treatment, not punishment, for persons adjudged sexually dangerous. Allen v. Illinois 106 S. Ct. 2988 (1986).

Part V — CONSTITUTIONAL GUARANTEES

43. ADMISSIONS AND CONFESSIONS

GROUNDS FOR EXCLUSION; GENERALLY

VIOLATIONS OF *MIRANDA* STANDARDS AS GROUNDS FOR EXCLUSION

GROUNDS FOR EXCLUSION; GENERALLY

§ 43.00 Involuntariness and coercion

"Mutt and Jeff Meet the Constitution: The Propriety of Good Guy/Bad Guy Interrogation," by David Abney, 22 CLB 118 (1986).

U.S. Supreme Court At defendant's trial for murder, he sought to introduce testimony describing the length of his interrogation and the manner in which it was conducted. Defendant hoped to show by this testimony that the confession was unworthy of belief. The trial court excluded such testimony, and he was convicted. The Kentucky Supreme Court affirmed.

Held, conviction reversed and case remanded. The Court found that the exclusion of testimony at trial concerning circumstances of defendant's confession deprived him of a fair trial. The Court reasoned that evidence

about the manner in which a confession was secured often bears on its credibility, a matter that is exclusively for the jury to assess. Crane v. Kentucky, 106 S. Ct. 2142 (1986).

Georgia Defendant was convicted of murder and the unlawful concealment of the victim's death. On appeal, he contended that the trial court violated his due process right to prevent the state from impeaching the credibility of a nondefendant witness by means of a prior involuntary statement. He argued that the reasons for excluding the use of a defendant's involuntary statement apply with equal force to statements of nondefendant witnesses. The witness gave a signed written statement that shortly after the victim's disappearance, defendant asked him to help him dig a hole. It further stated that after the hole was dug, the witness saw defendant throw a dress and bury a box in the hole. At the trial, the witness denied any knowledge of the burial. He testified that the officers who recorded his statement coerced him and put words into his mouth.

Held, affirmed. The use of a nondefendant witness's coerced statement does not violate a defendant's due process rights. The due process principle of excluding involuntary confessions rests not on the potential unreliability of such statements, but on the defendant's position in our system of justice. Prosecution may not prove the guilt of an accused by coerced statements from his own mouth. In the case at bar, however, defendant had a full opportunity to inquire into the circumstances surrounding the making of the statement, thereby giving the jury the opportunity to judge the veracity of the witness' written statement and oral testimony. Wilcox v. State, 301 S.E.2d 251 (1983).

Georgia Defendant, a sixteen-year-old juvenile with a ninth-grade education, was convicted of malice murder. He appealed, contending error in the trial court's admission into evidence of an incriminating statement he made while in police custody. While in custody, he admitted to the shooting. Before signing a written statement, defendant was told that his victim had died, and that defendant would be treated as an adult and charged with murder. Defendant's mother and a juvenile officer were present before the signing, and he allegedly waived his right to have an attorney present.

Held, affirmed. Defendant's confession was freely and voluntarily given and therefore was admissible. The interrogation was found to be fair and not oppressive even though defendant admitted responsibility for the shooting prior to learning that the victim had died, and defendant's mother was not advised of his right to counsel. Howe v. State, 301 S.E.2d 280 (1983).

Kansas Defendants were charged with burglary and felony theft. They were police offcers, and sought suppression of statements they made in interrogations of them by the internal affairs division of the police department. The record showed that defendants were advised at the interrogations that some questions had been raised about alleged wrongdoing, and that the questions were purely an administrative matter. The trial court granted the suppression motion and the state appealed.

Held, judgment affirmed. The court first pointed out that the ultimate issue was whether the statements were freely, voluntarily, and intelligently made. It

found that the advice given defendants at their interrogations clearly implied that they were not the subject of criminal investgation, and that their alternative to answer the questions was disciplinary penalty by their employer. The court held that, under Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616 (1967), when the choice imposed is between self-incrimination and the imposition of a disciplinary penalty by a public employer, any resulting statement is deemed involuntary. State v. Mzhickteno, 658 P.2d 1052 (App. 1983).

New Hampshire Defendant was convicted of burglary, theft of firearms, and disposing of stolen firearms. Before trial, defendant moved to suppress his statements to the police, alleging that after his arrival at the police station and before making any statements, he had four times requested and had been denied access to an attorney. The trial court denied the motion to suppress. On appeal, defendant did not claim that his right to counsel was denied, but relied on the rule that the state must prove beyond a reasonable doubt that any confession introduced into evidence was made voluntarily. He argued that his testimony at the suppression hearing concerning threats and promises made by the detective, coupled with the state's failure to call the detective as a witness, was sufficient as a matter of law to create a reasonable doubt as to the voluntariness of his confession.

Held, conviction affirmed. The Supreme Court of New Hampshire found that the evidence, including the testimony of the arresting officer to whom defendant made an inculpatory statement and the waiver of rights form signed by defendant, was sufficient to support a finding that defendant's confession was voluntarily made. The only contrary evidence was defendant's own testimony, which was inconsistent with his motion to suppress, which failed to allege that his confession was coerced. State v. Copeland, 467 A.2d 238 (1983).

North Carolina Defendant was convicted of murder. He appealed, claiming that the trial court erred in admitting his confession into evidence. At the trial, defendant's counsel entered an objection to testimony concerning the confession. The trial court conducted an extensive voir dire examination concerning the voluntariness of the confession during which defendant testified that he admitted guilt only because the officers promised him a shorter sentence if he did. In addition, he testified that he was drunk at the time. Finding defendant's testimony "unbelievable," the court concluded that defendant knowingly and voluntarily waived his rights when he confessed.

Held, affirmed. The findings of the trial court were binding on the Supreme Court of North Carolina because such findings were supported by competent evidence and themselves support the trial court's conclusions. The trial court's ruling could not be disturbed on appeal, notwithstanding the fact that there was evidence from which a different conclusion could have been reached. State v. Williams, 301 S.E.2d 335, reh'g denied, 104 S. Ct. 518 (1983).

South Carolina Defendant was convicted of housebreaking. He argued on appeal that the trial court erred when it refused to submit to the jury the question of whether his post-arrest incriminating statements were voluntarily given to police. The interroga-

tion of defendant had been recorded; the recording disclosed that defendant was given his *Miranda* rights, acknowledged his understanding of them, and stated that he was prepared to proceed without the assistance of counsel. At no time during the ensuing interrogation did he show any reluctance in answering questions. At trial, defendant testified in his own behalf and admitted, on cross-examination, that he had made the incriminating statements voluntarily. The trial court found that defendant's statements were freely given and refused to submit the issue of voluntariness to the jury.

Held, affirmed. The Supreme Court of South Carolina ruled that the trial judge's finding of voluntariness could not be seriously challenged on the facts. A review of the record indicated "to the exclusion of all other reasonable inferences, that the Defendant's statements were . . . voluntary." As no true issue of fact was in dispute, concluded the court, there was no need to submit the question of voluntariness to the jury. Accordingly, it affirmed the conviction. State v. Linnen, 293 S.E.2d 851 (1982), 19 CLB 175.

§ 43.10 —Promises of leniency

Iowa Defendant, convicted of the robbery-murder of an elderly neighbor, argued on appeal that his confession should have been suppressed because it had been induced by an improper police interrogation. Defendant had admitted the killing to his mother, who advised police. Defendant acceded to a police request to come to the station house for questioning; there he was advised of his rights and was interrogated for several hours, during which time he maintained his innocence. A superior officer was consulted and spoke privately with defendant, advising him that "if he [gave] a statement to police there would be a much better chance of him receiving a lesser offense than first degree murder." Defendant thereupon admitted the crime and, subsequently, signed a transcribed confession.

Held, reversed and remanded. The Supreme Court of Iowa, in reviewing defendant's claim that his confession was not voluntary, observed:

> [M]any factors bear on the issue of voluntariness. These include the defendant's knowledge and waiver of his *Miranda* rights; the defendant's age, experience, prior record, level of education and intelligence; the length of time defendant is detained and interrogated; whether physical punishment was used, including the deprivation of food or sleep; defendant's ability to understand the questions; the defendant's physical and emotional condition and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admissions; and any mental weakness the defendant may possess [citations omitted].

The issue of voluntariness, it continued depends upon the "impetus" for the inculpatory statement; "If the statement is not the product of 'rational intellect and free will,' but results from a promise of help or leniency by a person in authority it is not considered voluntary and is not admissible." Police, stated the court, can:

> ordinarily tell a suspect that it is better to tell the truth. The line between admissibility and exclusion seems to be crossed, however, if the officer also tells the suspect what

> advantage is to be gained or is likely from making a confession. Ordinarily the officer's statements then become promises or assurances, rendering the suspect's statements involuntary.

Here, it found, the officer's statement went beyond advising defendant to tell the truth and amounted to an improper inducement to confess in hopes of leniency. Hence, the confession should not have been admitted. State v. Hodges, 326 N.W.2d 345 (1982).

Louisiana Defendant was charged with a series of burglaries. He moved, pretrial, to suppress his confession, contending that it had been improperly induced by police who promised that his cooperation would be brought to the attention of the prosecutor. The hearing court ruled that such a promise constituted an improper influence, rendering the confession inadmissible. The state then took an interlocutory appeal.

Held, reversed and remanded. The Supreme Court of Louisiana observed that the state has the burden of proving beyond a reasonable doubt that a defendant's inculpatory statement was made "freely and voluntarily and not under the influence of fear, duress, intimidation, menaces, threats, inducements or promises." However, it held, merely telling an accused that his cooperation in giving a statement would be brought to the attention of the district attorney does not amount to a disqualifying inducement. Therefore, it found that the hearing court had erred in ordering suppression. State v. Jackson, 414 So. 2d 310 (1982), 19 CLB 89.

Michigan Defendant was convicted of first-degree murder and was sentenced to life imprisonment. The conviction was based in part on his confessional statement, admitted into evidence over his objection. On appeal, the Michigan Court of Appeals affirmed, finding that the confession was admissible under the "totality of circumstances." Defendant then appealed to the Supreme Court of Michigan, claiming that the statement made by him pursuant to a plea agreement that he later refused to carry out was improperly admitted into evidence. Four months after the murder took place, defendant was arrested for unlawfully carrying a sawed-off shotgun. While in custody, defendant was asked to disclose any knowledge he had of the murder. He was advised that if he gave a statement implicating himself and a promise to testifying against others, the federal and state gun charges would be dropped and he could plead guilty to manslaughter. Defendant then made the confessional statement at issue implicating himself and two others. When he later refused to carry out the plea agreement, he was charged with murder. Defendant argued that the confession was inadmissible because it was involuntary.

Held, reversed and remanded. The use of confessions extracted by promises of leniency violates the Fifth Amendment right against self-incrimination. Because such confessions are involuntary, little reliance can be placed on them. Furthermore, the method used to extract them violates an underlying principle of our criminal law system, that is, that the state must prove guilt by evidence independent of that coerced out of an accused's mouth. There was no doubt in the court's mind that the confession at issue would not have been obtained but for the promise of leniency. The state's accusation that defendant ini-

tiated the plea-bargaining process was irrelevant. People v. Jones, 331 N.W.2d 406, cert. denied, 103 S. Ct. 1775 (1983).

§ 43.15 —Trickery

Court of Appeals, 3d Cir. After defendant was convicted of murder, he petitioned for a writ of habeas corpus, which was denied in the district court and court of appeals. Defendant claimed that his confession was rendered involuntary by the police officer's false statement at the beginning of the interrogation to the effect that the victim was still alive, and his later statement during the interview that the victim had just died, when in fact she had been found dead several hours earlier.

Held, conviction affirmed. The Third Circuit ruled that the police officer's statements did not constitute sufficient trickery to overcome defendant's free will and thus did not render his confession involuntary. Miller v. Fenton, 796 F.2d 598 (1986), cert. denied, 107 S. Ct. 585.

§ 43.16 —Intoxication (New)

Court of Appeals, 6th Cir. Defendant was convicted of assault resulting in serious bodily harm, illegal possession of a firearm, and use of a firearm to commit a felony. He appealed, arguing that a motion to suppress his statements of confession should have been granted because they were not voluntary. After defendant, who was intoxicated at the time, shot a police officer, he confessed to the shooting. He was then taken to police headquarters where he was advised of his *Miranda* rights, and he signed a waiver of rights form. Then he made another statement, which was reduced to writing and signed by him. The defense presented expert testimony by a psychologist that defendant's ability to understand and knowingly waive his constitutional rights was severely impaired at the time in question.

Held, conviction affirmed. The trial court's determination that defendant's statements were voluntary was not clearly erroneous. There was conflicting testimony regarding the extent of defendant's intoxication and coherence at the time of the shooting. Several witnesses found him to be cognizant of his surroundings and able to communicate. The trial court properly explored all the evidence in a lengthy suppression hearing where it had the opportunity to judge the credibility of the witnesses, and so great deference should be afforded its findings unless they are clearly erroneous. United States v. Dennis, 701 F.2d 595 (1983).

§ 43.20 —Mental illness

Arkansas Defendant was convicted of attempted capital murder. On appeal, the Supreme Court of Arkansas remanded the case for the trial court to make a specific finding of whether defendant's confession that he tried to shoot a police officer was voluntary. The trial court heard additional evidence and held that the statement was voluntary and admissible. Defendant appealed again, arguing that his statement could not have been voluntary in light of the results of psychiatric tests administered six weeks after the attempted shooting showing that he suffered from paranoid schizophrenia and medical testimony that defendant was probably not lucid enough to knowingly waive his rights and make a voluntary statement.

Held, affirmed. Considering the totality of the circumstances, the trial court's decision that the statement was

voluntary was not clearly erroneous. The psychiatric testimony in defendant's favor was contradicted by police officers' testimony that defendant calmly acknowledged his rights, signed a waiver, and answered questions coherently. There was no evidence that the police used any force, and defendant's statement was routinely transcribed and was completed within thirty-five minutes after defendant waived his rights. Furthermore, it was possible that defendant, diagnosed as paranoid schizopherenic, could have made a voluntary statement six weeks earlier. Harris v. State, 648 S.W.2d 47 (1983).

§ 43.30 Delay in arraignment

Arkansas Defendant was convicted of capital felony murder in the shooting death of a police officer. On appeal, defendant argued that his confession should have been suppressed because there had been a three-and-a-half-day delay in bringing him before a magistrate.

Held, reversed and remanded. The Supreme Court of Arkansas applied the three-part test used in Commonwealth v. Davenport, 870 A.2d 301 (1977), which governs the exclusion of evidence obtained during a delay in bringing the accused before a magistrate. According to this test, exclusion of evidence depends upon whether the delay was unnecessary and evidence obtained prejudicial and reasonably related to the delay. In the present case, it was evident that the delay was unnecessary. Arkansas Criminal Procedure Rule 8.1 required that an arrested person who is not released by a lawful manner be taken before a judicial officer without delay. The prosecutor in this case, however, made a deliberate decision to hold defendant in detention in violation of Rule 8.1. The incriminating statements made by defendant while in custody were unquestionably prejudicial. Finally, the delay contributed to obtaining defendant's confession since it was only after three-and-a-half-days' detention that he incriminated himself. Because his statements were reasonably related to the delay which was in violation of the prompt-appearance rule, the court concluded that defendant's confession should have been excluded. Duncan v. State, 726 S.W.2d 653 (1987).

§ 43.35 Absence of counsel

Court of Appeals, 2d Cir. After his conviction in state court, a state prisoner brought a habeas corpus petition alleging that his Sixth Amendment rights were violated by the admission at trial of his oral confession to the police, who knew of his recent arrest for rape and sodomy, where the police should have surmised that he was already represented by counsel. The district court denied the petition.

Held, affirmed. The admission of the oral confession did not violate defendant's Sixth Amendment rights since there was no proof that the police had actual knowledge that he was in fact so represented. Garofolo v. Coomb, 804 F.2d 201 (1986), 23 CLB 291.

California Defendant was convicted of numerous felonies, including assault with a deadly weapon, burglary, and rape. When arrested he was informed of his *Miranda* rights, and he stated that he wanted a lawyer during questioning. Without providing an attorney, the police proceeded to question him and elicited statements tying defendant to the crimes. Defendant claimed that all statements were inad-

missible, citing People v. Disbrow, 545 P.2d 272 (Cal. 1976). The motion to bar the prosecution from using the statements in its case was granted only in part. The court allowed the statements for impeachment testimony by the prosecution because of Proposition 8 contained in Section 28(d) of the California constitution, which states that no relevant evidence shall be excluded in any criminal proceeding. At issue before the California Supreme Court was whether the judicially created *Disbrow* exclusionary rule survived the 1982 amendment of the California constitution by Proposition 8.

Held, affirmed. The court stated that Proposition 8 was crafted for the very purpose, among others, of abrogating cases such as *Disbrow,* which had elevated the procedural rights of the criminal defendant above the level required by the Federal Constitution, as interpreted by the U.S. Supreme Court. The Court went on the explain that in adopting Section 28(d) and its exception for "statutory rules of evidence," the voters probably intended to preserve *legislatively* created evidentiary rules, while abrogating *judicial* decisions that had required the exclusion of evidence solely on state constitutional grounds. People v. May, 748 P.2d 307 (1988).

Indiana Defendant was convicted of two counts of rape. He was arrested on the rape charges one day after being released on a drug-related charge. When defendant was arrested on the basis of a warrant for delivery of a controlled substance, he was read his *Miranda* rights. He was thereupon interrogated but denied any knowledge of the substance of the drug charge. Defendant was again advised of his rights, and waived them. He was then questioned about the rape, having been named by an informant as a suspect before his arrest on the rape charge. Defendant denied any involvement in the rape at that interrogation and subsequently stated that he did not wish to talk any more until he consulted with an attorney. The investigating officer thereupon ceased questioning defendant, who was returned to the jail cell where he was being held on the drug charge. A juvenile investigator who had been looking into a case of two runaway girls then attempted to interrogate defendant, who lived near the girls, about that case. Defendant waived his *Miranda* rights and agreed to talk with the investigator. After he denied providing any assistance to the runaway girls, defendant was questioned by the investigator about the rape case; again, he denied any involvement. Defendant was released from jail on bond shortly thereafter. The next day he was arrested and charged with the rapes. He was again advised of his *Miranda* rights, and waived them. Defendant was once again interrogated about the rapes, and ultimately confessed to them. This confession was admitted into evidence at trial, and used to help convict him. On appeal, defendant argued that his invocation of his right to counsel after his first arrest, on the drug charge, should have precluded the admission into testimony of his confession to the rapes after his second arrest on those charges.

Held, conviction affirmed and remanded for correction of sentence. The Indiana Supreme Court determined that defendant's invocation of his right to counsel after his drug arrest did not preclude interrogation after his rape arrest the next day,

when he had been released following his drug arrest and rearrested on the rape charges. The court stated that whether there has been a valid waiver of a defendant's right to remain silent and to consult with an attorney depends on the particular facts and circumstances of each case. In this case, the evidence was sufficient to support a conclusion that defendant's confession was the product of free will, and his incriminating statements were properly admitted as evidence. Lindsey v. State, 485 N.E.2d 102 (1985).

§ 43.40 Post-indictment and post-arrest statements

Court of Appeals, 2d Cir. Defendant was convicted on a guilty plea on two counts of preparing and conspiring to prepare false documents for submission to a governmental agency. On appeal, he argued that a post-indictment statement made by him to a government informant had been improperly admitted at trial.

Held, conviction affirmed. The Second Circuit found that while ordinarily the use of an informer to elicit incriminating statements from the defendant after indictment is improper, the post-indictment investigation here focused on criminal activity distinct from the indicted crimes, and that the government's continued investigation of other crimes and obstruction of justice was proper. United States v. Pineda, 692 F.2d 284 (1982), 19 CLB 264.

§ 43.50 Fruit of an illegal arrest

U.S. Supreme Court Defendant was found guilty in South Carolina state court of armed robbery. The intermediate appellate courts and the South Carolina Supreme Court affirmed, rejecting his argument that his confession should have been suppressed.

Held, judgment vacated and case remanded. The Supreme Court found that the fact that the confession may have been "voluntary," in the sense that *Miranda* warnings were given and understood, was not by itself sufficient to purge the taint of the illegal arrest. The Court explained that a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. Lanier v. South Carolina, 106 S. Ct. 297 (1985), 22 CLB 275.

U.S. Supreme Court After the petitioner was arrested on a robbery charge without a warrant or probable cause, based on an uncorroborated informant's tip, and was taken to the police station, he confessed after being given his *Miranda* warnings. The confession was admitted at trail and he was convicted and the Alabama Court of Criminal Appeals reversed, but the Alabama Supreme Court in turn reversed and reinstated the conviction. Certiorari was granted.

Held, reversed and remanded. The Supreme Court held that petitioner's confession should have been suppressed as the fruit of an illegal arrest. The Court reasoned that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. The Court observed that, here, there was no meaningful intervening event and the illegality of the arrest was not cured by the six hours' elapsed time between the arrest and the confession. Taylor v. Alabama, 457 U.S. 637, 102 S. Ct. 2664 (1982), 19 CLB 71.

Court of Appeals, 8th Cir. Defendant was found sleeping in an illegally parked truck by police officers. They woke defendant, and asked for his driver's license, which he could not produce. After running a check, they learned that the driver's license had been suspended. Because of this, they impounded the vehicle. During an inventory search of the vehicle, they discovered a large amount of currency that defendant denied any knowledge of. Continuing the search, the officers found additional currency and a large garbage bag partially open, containing what appeared to be marijuana. The officers then advised defendant that he was under arrest, and read him his *Miranda* rights. Defendant replied that he understood his rights. He also stated, "It is my dope. I am in trouble and I know it." He then requested a lawyer, and all questioning stopped. The police then obtained a search warrant and seized 190 pounds of marijuana in the truck. Defendant was indicted and convicted of possession with intent to distribute marijuana. On appeal, defendant contended that he was seized without probable cause based on the currency found in the truck, and that all subsequent evidence, including statements made after the illegal arrest, must be suppressed.

Held, conviction affirmed. The court stated that where statements were obtained not by improper exploitation of an illegal arrest, but only after intervening events had given the police probable cause to arrest defendant, and where the illegal detention lasted only a few minutes, any connection between the illegal detention and defendant's admission was so attenuated that the admissions were not infected by the prior illegality. United States v. Maier, 720 F.2d 978 (1983), cert. denied, 466 U.S. 970, 104 S. Ct. 2342 (1984).

VIOLATIONS OF *MIRANDA* STANDARDS AS GROUNDS FOR EXCLUSION

§ 43.55 General construction and operation of *Miranda*

U.S. Supreme Court After defendant was arrested at the scene of the burglary and advised of his *Miranda* rights, he replied that he "wanted a lawyer before answering any questions." During a second interrogation concerning an unrelated burglary, defendant made an incriminating statement concerning the charge of burglary. The Arizona trial court suppressed the statement under the rule of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981).

Held, affirmed. The Supreme Court granted certiorari and found that the *Edwards* rule applies to bar police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation. Arizona v. Robeson, 108 S. Ct. 2093 (1988).

Court of Appeals, 1st Cir. Defendant was charged with willful failure to file federal income tax returns. He sought suppression of certain statements he had made to an Internal Revenue Service (IRS) agent who interviewed him. Although defendant testified that the IRS agent read him his *Miranda* rights from a printed card, the district court found that the government did not prove that the agent read the word "criminal" from the card and that the agent had violated an IRS regulation which requires that the card be read verbatim. It therefore suppressed the statements, and the government appealed.

Held, judgment reversed. The court first noted that IRS investigations differ from those of the police in that they are usually, if not wholly civil, a hybrid civil-criminal investigation. Although several courts have suggested that evidence be suppressed as a remedy for misrepresentations, the court pointed out that in this case there were no affirmative misrepresentations and saw no basis for such a holding where, as here, any reasonable person would have known from what the agent did explicitly say that a criminal prosecution might be in the offing. The court cited Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 612 (1976), where it was held that IRS criminal investigators need not give *Miranda* warnings prior to non-custodial interviews, and pointed out that no statute required the enactment of IRS regulation in issue. It further held that, in the absence of the regulation, defendant had no constitutional claim. United States v. Irvine, 699 F.2d 43 (1983).

Court of Appeals, 5th Cir. After defendant was convicted of possession of marijuana with intent to distribute, he appealed on the ground that an incriminating statement made by him had been improperly admitted at trial.

Held, affirmed. While interrogation of defendant after arraignment violated his *Miranda* rights, such error was harmless because the government introduced similar statements made by defendant in response to questions from the border patrol. The court noted that while a post-arraignment statement is a custodial one subject to *Miranda* restrictions, routine questioning at the border does not constitute custodial interrogation. United States v. Ledezma-Hernandez, 729 F.2d 310 (1984), 20 CLB 468.

Arizona Defendant appealed his convictions for numerous felonies, including felony murder. Defendant contended that the jail counselor's and psychiatrist's testimony at the pretrial hearing to suppress evidence, as well as the psychiatrist's testimony during trial, was in error. During the pre-trial hearing both testified defendant understood his rights because he became agitated after he was read his rights. During the trial, however, the psychiatrist never mentioned the defendant's desire to invoke his *Miranda* rights. Defendant claimed that his rights were violated because the prosecution is forbidden to use defendant's invocation of *Miranda* against him.

Held, conviction affirmed. The Supreme Court of Arizona affirmed on these grounds, but reversed and remanded on other grounds. First, the court determined that if there had been a jury, the testimony during the pretrial hearing would have been prejudicial and consequently in error, but since there was no jury, the testimony was allowed. Second, the court determined that although the psychiatrist's testimony at trial may have been based upon the fact that defendant invoked his right to silence, this was not mentioned to the jury; therefore, the testimony was not in error. State v. Bravo, 762 P.2d 1318 (1988).

Illinois Defendant was convicted of taking indecent liberties with a child, an offense committed, inter alia, when a person seventeen years old or older engages in deviate sexual contact with a person under the age of sixteen. The only proof of defendant's age offered at trial was the testimony of a police officer who questioned defendant three days after his arrest. After receiving *Miranda* warnings from the officer,

defendant stated that he would not discuss the charges without first consulting an attorney; however, he offered to speak about anything else. The officer proceeded to get general identifying data from defendant, including his date of birth. On appeal, defendant contended that his rights under *Miranda* were violated by introducing his statements of his age.

Held, affirmed. The Supreme Court of Illinois held that the principles of *Miranda* did not prohibit inquiry into basic identifying data concerning a defendant, even where the response may establish an element of the crime with which he is charged. People v. Dalton, 434 N.E.2d 1127 (1982), 19 CLB 82.

§ 43.56 Public safety exception (New)

U.S. Supreme Court Defendant was charged in a New York State court with criminal possession of a weapon. The trial court suppressed the gun in question, and a statement made by defendant, because the statement was obtained by police before they read defendant his *Miranda* rights. That ruling was affirmed on appeal through the New York Court of Appeals and certiorari was granted. The record showed that a woman approached two police officers who were on road patrol, told them that she had just been raped, described her assailant, and told them that the man had just entered a nearby supermarket and was carrying a gun. While the first officer radioed for assistance, the second officer entered the store and spotted defendant, who matched the description given by the woman. Defendant ran toward the rear of the store, and the second officer followed and ordered him to stop and put his hands over his head. The officer frisked him and discovered that he was wearing an empty shoulder holster. After handcuffing him, the officer asked him where the gun was. Defendant nodded toward some empty cartons and responded, "The gun is over there." The officer then retrieved the gun from one of the cartons, formally arrested defendant, and read him his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). Defendant indicated that he would answer questions without an attorney being present and admitted that he owned the gun and had purchased it. The trial court excluded defendant's initial statement and the gun because defendant had not yet been given the *Miranda* warnings, and also excluded defendant's other statements as evidence tainted by the *Miranda* violation.

Held, reversed and remanded. The Court of Appeals erred in affirming the exclusion of defendant's initial statement and the gun because of the officer's failure to read defendant his *Miranda* rights before attempting to locate the weapon. Thus, it also erred in affirming the exclusion of defendant's subsequent statements as illegal fruits of the *Miranda* violation. The court said this case presented a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*. Procedural safeguards that deter a suspect from responding, and increase the possibility of fewer convictions, were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege against compulsory self-incrimination. However, if *Miranda* warnings had deterred responses to the police officer's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting defendant. An answer was needed to insure that future danger to

the public did not result from the concealment of the gun in a public area. New York v. Quarles, 104 S. Ct. 2626 (1984), 21 CLB 76.

§ 43.60 Prerequisite of custodial interrogation

"[The] High Court vs. High Drivers: A Short Course in Logic," by Barry Latzer, 21 CLB 37 (1985).

U.S. Supreme Court After defendant was stopped by the police for traffic violations, he admitted upon questioning that he had been drinking and was returning home. Defendant failed a sobriety test and was convicted in the Delaware Criminal Court of driving under the influence of alcohol and related offenses. The Pennsylvania Superior Court reversed and remanded, and certiorari was granted.

Held, reversed. The Supreme Court declared that investigative stops do not involve "custody" for purposes of the *Miranda* rule, and that statements made by drivers who are stopped in the absence of *Miranda* warnings are admissible. The Court noted that although such stops are unquestionably a seizure under the Fourth Amendment, they are typically brief and are different from prolonged station house interrogations. Pennsylvania v. Bruder, 109 S. Ct. 205 (1988).

U.S. Supreme Court After respondent-driver was stopped by the police and was unable to perform a field sobriety test without failing, he responded to questioning by saying that he had consumed two beers and smoked marijuana a short time before. Respondent was then arrested and questioned further, whereupon he stated that he was "barely" under the influence of alcohol. At no time was he given any *Miranda* warnings. Respondent was then charged with misdemeanor offenses and convicted. The district court dismissed his habeas corpus petition, but the court of appeals reversed.

Held, affirmed. A person subjected to custodial interrogation is entitled to the benefit of *Miranda* safeguards, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested. Thus, respondent's statements made at the station house were inadmissible since he was "in custody" at least as of the moment he was formally arrested and instructed to get into the police car. Berkemer v. McCarty, 468 U.S. 120, 104 S. Ct. 3138 (1984), 21 CLB 66.

Court of Appeals, D.C. Cir. During an internal FBI investigation arising from allegations that the president of the International Brotherhood of Teamsters had been authorized by the FBI to maintain "no show" employees on the union payroll, an FBI agent was questioned on numerous occasions after having signed administrative forms notifying him that he was required to answer certain questions as a condition of continued employment with the FBI. After the agent was indicted, the district court suppressed statements made by him during the course of interviews conducted by FBI and Justice Department lawyers regarding false statements made by him in prior interviews. The government appealed.

Held, affirmed. The District of Columbia Circuit found that the statements made by the agent were obtained under compulsion and were therefore inadmissible at trial. The court reasoned that the agent was under a rea-

sonable belief that the administrative inquiry was continuing, rather than a formal criminal investigation, and that failure to respond could result in the loss of employment. The court thus found that the agent was entitled to "use" immunity, especially where Justice Department lawyers had told him in one breath that he could remain silent but in the next had said that they remained interested in putting him in front of a grand jury, where he would be compelled to testify with immunity. United States v. Friedrick, 842 F.2d 382 (1988).

Court of Appeals, 1st Cir. A defendant in a drug prosecution moved to suppress evidence on the grounds that police officers had failed to give him a *Miranda* warning after stopping his automobile. The district court granted the motion in part, but the Court of Appeals vacated and remanded. On remand, the district court again granted the suppression motion, and an appeal was taken.

Held, reversed. The blocking of the car and the continuance of the inquiry for twenty to twenty-five minutes after arrival of additional police officers did not transform the initial *Terry* stop of defendant into de facto arrest requiring the giving of *Miranda* warnings. United States v. Quinn, 815 F.2d 153 (1987), 23 CLB 491.

Court of Appeals, 2d Cir. After defendant was indicted for making false statements to the Small Business Administration and for related charges, the district court granted his motion to suppress statements made in the presence of federal agents who did not identify themselves as such. The statements in question were made during a noncustodial interview in which no *Miranda* warnings were given and a GSA special agent was introduced merely as member of the GSA Inspector General's Office.

Held, motion reversed. The Second Circuit found that the statements were voluntary, since there was no evidence of promises, threats, or physical coercion, and there was no obligation to inform defendant that the agent was conducting a criminal investigation. The court noted that silence may only be equated with affirmative misrepresentation when there is a moral duty to speak or when silence would be intentionally misleading. United States v. Okwumabua, 828 F.2d 950 (1987), 24 CLB 175.

Court of Appeals, 7th Cir. After defendants were convicted in the district court of conspiracy to commit mail and wire fraud and to travel interstate to commit arson, they appealed on the ground, among others, that the statement of one defendant to a co-defendant who was cooperating with the authorities was improperly admitted.

Held, convictions affirmed. The Seventh Circuit stated that the fact that a defendant did not know that a co-defendant was cooperating with the authorities did not transform a voluntary conversation into a custodial interrogation of the defendant for Fifth Amendment purposes. The court thus found that the government did not violate defendant's constitutional right to remain silent by having a cooperating co-defendant tape record incriminating statements made by defendant after he had invoked his Fifth Amendment privilege. United States v. Burton, 724 F.2d 1283 (1984).

Hawaii Three police officers approached defendant's house to investigate a claim that he had threatened a

neighbor with a gun. They informed defendant of the neighbor's complaint and obtained confirmation of his identity. Then one of the officers, who had noticed marijuana plants growing along the walkway, asked defendant if he was aware that growing marijuana plants was illegal, and began uprooting the plants. Defendant responded by exclaiming, "Don't take my plants! . . . I was growing them for my brother . . . I need the money . . ." as the officer quietly continued uprooting the plants. Defendant was charged with promotion of a detrimental drug and terroristic threatening. At trial, defendant moved to have his statements suppressed, on the grounds that he should have received a *Miranda* warning. The motion was granted, and the state appealed.

Held, reversed. The Supreme Court of Hawaii reversed the trial court holding as to the incriminatory statements. The officer's question and actions were not made in a custodial context, since they were not of a nature that would "subjugate the individual to the will of the examiner." Miranda v. Arizona, 384 U.S. 457, 86 S. Ct. 1619 (1966). The questions that preceded defendant's self-incrimination fell within the category of general on-the-scene questioning. Defendant's statements were not responsive to the question asked and were unforeseeable. State v. Paahana, 666 P.2d 592 (1983).

Indiana Defendant was convicted of murder and felony murder. He appealed, claiming that the trial court erred in denying his motion to suppress statements he made to his probation officer on the ground that he did not receive *Miranda* warnings. After his arrest, defendant asked the probation officer to join him in the interrogation room. He then voluntarily made certain admissions. On that occasion and others on which defendant volunteered incriminating admissions, the officer warned him not to talk to her and that she was duty bound to report whatever he said. Defendant contended that the officer, as an agent of the state, should have given him *Miranda* warnings before he talked to her.

Held, affirmed. The procedural safeguards of Miranda v. Arizona, 384 U.S. 436, 88 S. Ct. 1602 (1966), only apply to a "custodial interrogation," which is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way. The safeguards did not apply in this instance, where defendant initiated the conversations in which he made voluntary statements after being warned against doing so by the probation officer. Rose v. State, 446 N.E.2d 598 (1983).

§ 43.65 —Interpretations by state courts

Connecticut Defendant was convicted of murder. After being arrested and read his *Miranda* rights, he asked to telephone his attorney. He was allowed to telephone from a room in which two police officers were present and able to hear the conversation. Another attorney called him back while he was in the same room and a police officer listened to that consultation also. In both conversations, defendant confessed to the killing. The police officers were allowed to testify regarding these consultations, although tape recordings of the consultations were not allowed in evidence. On appeal, defendant argued that the police testimony regarding his conversations with his attorneys should not have been admitted.

Held, judgment set aside and new trial ordered. The court reasoned that the right to consult counsel includes the right to do so without being overheard. For the police or their agents to eavesdrop on a defendant exercising his *Miranda* rights makes a mockery of those rights. State v. Ferrell, 463 A.2d 573 (1983).

Iowa Defendant was convicted of murder. After an investigating officer discovered a bill of sale at the scene which had been signed by defendant, he was contacted and told that the police wished to speak with him in regard to the death. Police officers picked him up at his home and drove him to the station; defendant was not arrested, handcuffed, or otherwise physically restrained. When he arrived at the station, one officer noticed a stain on defendant's shoe which appeared to be blood. Defendant was asked if he would remove his shoes. When he consented, he was told that the police would like to have the stain analyzed by a laboratory. Defendant consented and then said "I've got something I want to tell you." When the officer asked "what is that?", defendant stated that he had been to the victim's home and found the victim's body. At that point he was advised of his *Miranda* rights, and he made an inculpatory statement in which he admitted killing the victim. At trial he moved to suppress the statements, arguing that they were inadmissible because they were the products of a custodial interrogation.

Held, conviction affirmed. The court found no indication that the questioning took place in a context where defendant's freedom to depart was in any way restricted. It pointed out that any interview of one suspected of a crime by a police officer will have coercive aspects to it, but held that *Miranda* is applicable only to the sort of coercive environment that involves restrictions on a person's freedom. After pointing out that *Miranda* does not require warnings in connection with the taking of physical evidence such as blood samples, the court held that the officers' request for defendant's shoes did not itself require warnings because the request involved physical evidence and not a communication from defendant's mind. Finally, the court deemed admissible the exchange in which defendant volunteered his statement, since it was defendant who initiated the exchange and the officers could not have reasonably known that their prior questions were likely to precipitate defendant's statements. State v. Cook, 330 N.W.2d 306 (1983).

Maine Defendant was convicted of two counts of possession of a firearm by a felon. The first count, illegal possession of a shotgun, led to the second count, illegal possession of a revolver. Defendant was arrested after a search of his apartment, pursuant to a warrant, during which a .357 magnum revolver was uncovered. At the time of the arrest, a deputy sheriff handed defendant a search warrant and an arrest warrant. After defendant read the search warrant, he told the officer that the shotgun belonged to another person. Before trial, defendant moved to suppress this incriminating statement from evidence. At the suppression hearing, contradictory testimony regarding the questioning of defendant was presented. Defendant testified that the deputy sheriff had not simply handed defendant the warrrants and arrested him before defendant made his statement, but that the arresting

officer had also questioned defendant concerning the shotgun, to which the defendant replied that it was no longer at his home because its owner had picked it up. The trial court denied defendant's motion to suppress his statement. On appeal, defendant argued that the trial court erred in denying his motion to suppress his statement, because the conduct of the deputy sheriff constituted the functional equivalent of a custodial interrogation, conducted without giving defendant his *Miranda* warnings.

Held, affirmed. The Maine Supreme Court ruled that defendant's statement after his arrest regarding the shotgun was not elicited by custodial questioning and was, therefore, properly admitted at trial. The court stated that the deputy sheriff who arrested defendant did not interrogate defendant or, by his conduct, engage in the functional equivalent of custodial questioning. On the evidence, the trial court did not err in denying defendant's motion to suppress his statement. State v. Friel, 508 A.2d 123 (1986), cert. denied, 107 S. Ct. 156.

Utah Defendant's car was pulled over after he crossed the center line several times in a short distance. Police noticed an odor of alcohol and slurring of speech and asked him to perform some field sobriety tests. He attempted to perform the tests, but in each case proved incapable. He was then advised about the implied consent law and asked to take a breathalyzer test. He consented, and here again failed to meet the standards for sobriety. At the trial, defendant's attorney did not object to the admission of the breathalyzer test results, but challenged the admission of the field test results on the grounds that the defendant should have been given a *Miranda* warning before being asked to give evidence against himself. The trial judge not only granted the motion to suppress, but dismissed all charges against the defendant. The district court reversed the dismissal, and defendant appealed.

Held, judgment affirmed. The majority of the Utah Supreme Court held that at the time field sobriety tests were given, the police had not taken defendant into custody, but were merely pursuing an investigation, and therefore no *Miranda* rights applied. In determining whether defendant was in custody, the court looked at four factors: the site of interrogation; whether there were any physical signs of arrest, such as handcuffs; the length of the interrogation; and whether investigation centered on defendant. Although the investigation did center on defendant, the fact that it was not yet established that a crime had been committed was a mitigation factor. Salt Lake City v. Carner, 664 P.2d 1168 (1983).

§ 43.70 —Lack of "interrogation" motive

U.S. Supreme Court After defendant was taken into custody for killing his son and was advised of his *Miranda* rights, he declined to answer questions until a lawyer was present. The police then permitted defendant and his wife to meet in the presence of an officer, who taped the conversation with a recorder placed in plain sight. The prosecutor used the tape to rebut defendant's insanity defense. Defendant was convicted, but the Supreme Court of Arizona reversed, holding that the defendant's *Miranda* rights had been violated.

Held, reversed and remanded. The U.S. Supreme Court held that the police's actions following defendant's re-

fusal to be questioned without a lawyer did not constitute interrogation or its functional equivalent. The Court found that the defendant was not subject to compelling influences, psychological ploys, or direct questioning, and there was no evidence that the police alowed the wife to meet with the defendant in order to obtain incriminating statements. Arizona v. Mauro, 107 S. Ct. 1931 (1987).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of possession of heroin, he appealed on the ground that a nurse, who was a municipal employee, improperly questioned him after he suffered a narcotics overdose.

Held, affirmed. The nurse was not required to give the defendant *Miranda* warnings prior to asking him about the cause of his condition. The court found that the nurse's sole purpose in questioning the defendant was to confirm her preliminary diagnosis that the defendant was suffering from a heroin overdose so that appropriate treatment could be made. United States v. Borchardt, 809 F.2d 1115 (1987), 23 CLB 392.

Hawaii Defendant was convicted of murder. Initially, he was questioned only as a witness to the murder. Defendant voluntarily went to a police station to be interviewed. He denied involvement in the crime and voluntarily agreed to take a polygraph test. Defendant also signed a form stating that the administration of the polygraph was uncoerced, and that he understood that he had the right to remain silent. Defendant then took the test, and "failed." He was then held for further questioning by the police. Defendant was again advised of his *Miranda* rights by the police, and he requested that an attorney be present during the interrogation. All questioning then ceased, and defendant was taken to a processing area to be booked, without counsel present. In the processing room was a police officer who was acquainted with defendant. This police officer did not know why defendant was in the station. When defendant entered the room, the police officer-acquaintance asked him what he was doing there, as a gesture of friendship and greeting. Defendant then told the police officer that he was being questioned as a witness to a murder. Without further word from the police officer, defendant then confessed to the officer that he had shot the murder victim. Defendant then told the police officer that he did not want an attorney and that he would tell the whole story to the police. The police officer then informed other officers of defendant's confession. Another officer advised defendant of his right to counsel, but he said that he did not want an attorney, and wanted to make a statement. Before and during the course of an oral confession, defendant was twice more advised of his *Miranda* rights, but waived them. He then signed his statement, saying that he had voluntarily waived his right to have an attorney present. Defendant's confession was subsequently used as evidence against him at trial. On appeal, defendant claimed that he should have been allowed to suppress his confession, on the ground that it was elicited by interrogation after he invoked his right to counsel, in violation of his constitutional rights as articulated in *Miranda.*

Held, conviction affirmed. The Hawaii Supreme Court stated that the relevant test as to whether a defendant was subject to interrogation is whether

a police officer should have foreseen that his words and actions were reasonably likely to elicit an incriminating response from a defendant. The court held in this case that the police officer's question to defendant about what had happened to him did not constitute interrogation, because the officer could not reasonably have known that this "greeting" would elicit an incriminating response from defendant. Defendant's confession was therefore voluntary and uncoerced, and could be admitted as evidence. State v. Ikaika, 698 P.2d 281 (1985).

New York Defendant, a suspect in the investigation of a burglary and sexual assault of a woman, agreed to accompany two officers to the complainant's home. Defendant had told the police that he had no knowledge of the crime. One officer visited the complainant, who identified defendant from a photo array as the perpetrator. The officer returned to the car and said to defendant, "You're a liar." Defendant, who had not been advised of his *Miranda* rights, responded, "You're right. I did it." Prior to trial, defendant moved to suppress the statement. The motion was denied; defendant was convicted and appealed.

Held, affirmed. The admissibility of the statement defendant made in the squad car turns on whether it was "the product of 'express questioning or its functional equivalent.' " Rhode Island v. Innis, 446 U.S. 291, 300–301, 100 S. Ct. 1682, 1689 (1980). The police officer's statement, "You're a liar," was declarative and not an express question. The officer did not know that his statement was "reasonably likely to evoke an incriminating response from the suspect" (Rhode Island v. Innis, supra, at 301, 100 S. Ct. 1690). As the suppression court correctly determined, no response was called for under the circumstances. Therefore, there was no violation of defendant's right against self-incrimination. People v. Huffman, 61 N.Y.2d 795, 462 N.E.2d 122, 473 N.Y.S.2d 945 (1984).

§ 43.75 Necessity and sufficiency of warnings

U.S. Supreme Court Petitioner was convicted of murder in the Cook County circuit court, and petitioner appealed. The Illinois appellate court affirmed, and petition for leave to appeal was allowed. The Supreme Court of Illinois affirmed and petition was filed for writ of certiorari. Petitioner contended that his Sixth Amendment rights were violated because he did not "knowingly and intelligently" waive his right to have counsel present during his postindictment questioning.

Held, conviction affirmed. The Supreme Court found that (1) although petitioner's Sixth Amendment right to counsel arose with his indictment, this did not bar police from questioning petitioner if petitioner waived his right to counsel, and (2) *Miranda* warnings were sufficient to make petitioner aware of his Sixth Amendment right to counsel during postindictment questioning. Patterson v. Illinois, 108 S. Ct. 2389 (1988).

U.S. Supreme Court Defendant made an incriminating statement to police officers after having been questioned in his home as to a burglary without having been given any *Miranda* warnings. He was then taken to the station house, and after having been given his *Miranda* warnings, defendant executed a written confession. The written confession was admitted at trial, and after

his conviction, the Oregon Court of Appeals reversed.

Held, conviction reversed and case remanded. The Supreme Court decided that the Fifth Amendment does not require the suppression of a confession made after proper *Miranda* warnings and a valid waiver, solely because the police had obtained an earlier voluntary but unwarned admission from the suspect. The Court observed that it is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective. Oregon v. Elstad, 105 S. Ct. 1285 (1985), 21 CLB 466.

Court of Appeals, 5th Cir. A Texas state prisoner convicted of capital murder in the course of a robbery sought federal habeas corpus relief on the ground that the *Miranda* warnings given him at the time of arrest were inadequate. The district court denied the application, and the prisoner appealed.

Held, affirmed denial of habeas corpus relief. The Fifth Circuit found that the fact that a police officer stated that it would take "some time" before a lawyer would be appointed did not render the *Miranda* warnings inadequate. The court rejected the defense reasoning that the officer's comment linked the right to appointment of counsel to some future point after police interrogation, noting that the prisoner had also been informed that if he was too poor to hire a lawyer the court would appoint a lawyer for him free of charge "now or any other time." De La Rosa v. Texas, 743 F.2d 299 (1984), 21 CLB 181.

Missouri Defendant was convicted of capital murder. On appeal, defendant contended that the trial court erred in admitting into evidence his confession to the murder as the state failed to show compliance with the guidelines set forth in Miranda. Specifically, defendant argued that one of the officers giving the *Miranda* warnings omitted the element advising him that anything he said could and would be used against him. Before then, defendant had not questioned the sufficiency of the warnings.

Held, affirmed. The state was under no obligation to prove its compliance with *Miranda* because defendant never challenged the sufficiency of the warnings and never requested an evidentiary hearing on the issue. Defendant's own failure to raise the issue implied that the warnings were sufficient, that defendant was fully apprised of his rights, and that he freely chose to speak with the police about the murder. State v. Groves, 646 S.W.2d 82 (1983).

§ 43.80 —Interpretations by state courts

Arkansas Defendant was convicted of driving while intoxicated, and his driver's license was suspended because he refused to take a breathalyzer test. After his arrest, defendant was taken to a police station, where he was advised of his *Miranda* rights and of his rights under the implied consent law. The warnings did not make clear that the rights to counsel and against self-incrimination did not apply to the implied consent law. Defendant was given a form to fill out, one of whose questions asked if he was going to take a breathalyzer test. Defendant left blank the line for that question, but he wrote "refused" on the signature

line of the form. A police officer asked defendant if he would take the breathalyzer test, and defendant replied that he wanted to consult an attorney. He tried to telephone counsel but was unable to reach his attorney. Defendant was thereupon issued tickets and placed in jail. On appeal, defendant argued that it was not explained to him that his *Miranda* rights were not applicable under the implied consent law.

Held, conviction reversed. The Arkansas Supreme Court stated that when *Miranda* warnings are given a suspect in connection with an explanation of the implied consent law, the suspect must be explicitly informed that such rights do not apply to the decision about whether to take a breathalyzer test. It was clear from defendant's actions that he mistook his rights under *Miranda,* specifically his rights to counsel and against self-incrimination, which he invoked, with his implied consent rights, specifically his refusal to take the test, which may result in the revocation of driving privileges for a period of six months to one year. If a suspect is not so informed, he should not be held accountable for a refusal to take a breathalyzer test because of the confusion inherent in the reading of *Miranda* rights and implied consent rights together. Therefore, the court reversed the judgment suspending defendant's license for refusing to take the breathalyzer test. Wright v. State, 703 S.W.2d 850 (1986).

Nebraska Defendent was convicted of operating or having actual physical control of a motor vehicle while under the influence of alcohol. He appealed, claiming that the court erred in admitting into evidence his statement to a police officer that he had been celebrating getting off of probation for driving while intoxicated. The police officer, observing that defendant was driving in an erratic manner, approached him and asked him to perform four sobriety tests. After failing all four tests, defendant was taken to the police cruiser for a preliminary breath test. When the officer asked defendant if he had been drinking, defendant made the statement at issue. Both defendant and the state agreed that the officer had not issued a *Miranda* warning before the inquiry was made. When defendant failed the breath test, he was arrested.

Held, affirmed. Although a *Miranda* violation occurred, it was harmless error. Once defendant was taken to the cruiser for the breath test, and was not free to leave, defendant was "in custody" for purposes of *Miranda* warnings. The officer's interrogation without advice to defendant of his *Miranda* rights was clearly a violation of defendant's privilege against self-incrimination. Error was harmless, however, because the state adduced testimony, absent defendant's statement, which established guilt beyond a reasonable doubt. State v. Andersen, 331 N.W.2d 507 (1983).

New York Defendant was convicted of petit larceny and third-degree possession of stolen property. He was apprehended by a private detective in a department store with $175 worth of unpurchased shirts in a shopping bag. Defendant was taken by the security guard for questioning, without being given *Miranda* rights, and he signed an inculpatory statement. Defendant subsequently was turned over to a special police officer, licensed by the Police Commissioner of the City of New York and employed by the store, who administered *Miranda* warnings, took defendant to the police

station, and pressed charges against him. He was subsequently convicted of the charges. On appeal, defendant argued that his incriminating statement made to the private store detective should have been suppressed, because of the involvement of the special detective in the proceedings.

Held, conviction remanded to trial court for consideration. The court of appeals held that the private store detective was not required to administer *Miranda* warnings to defendant before a special police officer arrested defendant and advised him of his rights. The court ruled that the employment of a special police officer by a store does not constitute state action, and, thus, the store does not have to follow legal guidelines pertaining to the issuance of *Miranda* warnings. The investigation conducted by the security guard who apprehended defendant was private in character, and, as such, was not subject to the same rules as state action in regard to the interrogation of suspects. For state action to take place, official participation in an investigation must occur prior or simultaneous to the giving or signing of an inculpatory statement. In the present case, the special police officer did not enter the case until after defendant signed and gave a "criminal trespass sheet" and a "circumstances sheet" to a private store detective. Thus, defendant could not suppress his inculpatory statement. People v. Ray, 480 N.E.2d 1065 (1985).

Rhode Island Defendant was convicted of entering a dwelling house with intent to commit a felony. On appeal, defendant contended that the trial justice erred in denying defendant's motion to suppress his confession because of the manner in which he was informed of his rights under the guidelines set forth in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), was inadequate and that his waiver was therefore invalid.

Held, conviction affirmed. His confession was admissable. Defendant was given a waiver-of-rights form that contained all the Miranda admonitions. He read the form aloud without any difficulty, and acknowledged that he understood his rights. He initialed the eight rights enumerated on the form, and had intelligently and knowingly waived his privilege against self-incrimination and his right to counsel. State v. Appleton, 459 A.2d 94 (1983), 20 CLB 69.

Virginia Defendant was convicted of five counts of capital murder. He was sentenced to death for each offense. After his arrest for one of the murders, defendant was read his *Miranda* rights, and asked if he understood them. He replied that he did. A detective then summarized the evidence against defendant and asked if he had anything to say. Defendant replied by asking if he had been told that he had the right to an attorney, and the detective responded in the affirmative. At that point, the detective and another detective present stood up, as if to cease questioning. Defendant then spontaneously referred to an automobile that the police claimed linked defendant to the murder. The other detective then asked defendant if he killed the victim, and he answered "yes." Defendant thereupon confessed to the five murders of which he was subsequently convicted. On appeal, defendant argued, among other things, that his *Miranda* warning was insufficient, and that he should have had counsel appointed immediately after having been read his rights, and before he made a voluntary confession. Defendant contended that the oral *Miranda* warning was inadequate, be-

cause the logical conclusion a defendant would draw was that he had to wait until the court appointed counsel for him, and that this would take some time. In essence, defendant argued that, effectively, he had not been told that he had the right to have an attorney appointed immediately, that is, before questioning.

Held, convictions and the death sentence affirmed. The Virginia Supreme Court ruled that the *Miranda* warning given defendant was not defective. *Miranda* requires that a defendant be told that he has the right to have an attorney present before any questioning, and if he cannot afford an attorney the court is empowered to appoint one for him. To add "prior to any questioning" to the latter part, as suggested by defendant, is redundant. Taken as a whole, the meaning of the *Miranda* warning is clear, that is, that a defendant has the right to have counsel appointed prior to any questioning. The court ruled that "*Miranda* nowhere requires that a suspect be told he has the right to the immediate appointment of counsel. . . . The import of *Miranda* is that once a suspect asks for counsel, the police cannot interrogate him until counsel has been appointed." In this case, the interrogating detectives made motions to cease questioning defendant, whereupon he voluntarily made a statement about the crime and subsequently confessed to the murders. Poyner v. Commonwealth, 329 S.E.2d 815 (1985).

§ 43.85 Time of warning

Idaho Defendant was convicted of the first-degree murder of her husband. She appealed the trial court's denial of her motion to suppress evidence of her interview with a police detective, contending that the *Miranda* warnings were given too early. About a week after the murder was committed, the detective followed her into a motel and advised her that he wanted to talk. The detective then handed defendant a printed form containing the *Miranda* rights and asked her to read and sign it. After she did so, the detective began his tape-recorded interview. The detective did not inform defendant that he possessed a warrant for her arrest when she was given the *Miranda* rights, nor did he readvise her of them when he specifically informed her that she was under arrest. Defendant contended that the interrogation did not become custodial until she was specifically informed of her arrest, and that she should have received *Miranda* warnings at that point.

Held, affirmed. The *Miranda* warnings given to defendant effectively informed her of her rights. Those rights did not have to be repeated at the moment in time asserted by defendant to be the point at which the interrogation became custodial, especially since they had been given just five to ten minutes earlier. State v. Mitchell, 660 P.2d 1336, cert. denied, 461 U.S. 934, 103 S. Ct. 2101 (1983).

Michigan Defendant appealed his conviction of second-degree murder, claiming his Fifth Amendment right prohibiting self-incrimination was violated. After his trial, the court requested defendant to undergo a presentencing psychiatric evaluation. Defendant was evaluated and found to be a danger to society and was sentenced from 40 to 70 years' imprisonment. Defendant claimed he should have been informed of his *Miranda* rights before undergoing psychiatric evaluation.

Held, conviction affirmed. The Supreme Court of Michigan declared that the *Miranda* protection is afforded to let a defendant know his rights at a

time when he does not have the advice of counsel or even know the severity of the charges leveled against him. In this case, defendant's attorney was present when the trial court ordered the evaluation. He made no objection and would have informed defendant in the course of the trial about the Fifth Amendment provision against self-incrimination. The court also noted that the examiner's explanation of the purpose of the examination, and the inquiry whether defendant wanted to proceed with the evaluation, adequately protected his rights. People v. Wright, 430 N.W.2d 133 (1988).

New York Defendant was convicted of murder in the second degree and he appealed on the ground that his *Miranda* rights were violated. Defendant had invoked his right under *Miranda* to remain silent following arrest for a murder, which occurred during the course of a robbery. He later abandoned an attempt to speak to a district attorney when he was told that he first had to reveal to a detective what he wanted to talk about with the district attorney. The detective, instead of acceding to defendant's request, left and within a short time, returned with furs stolen from the murder victim's apartment, and placed them directly in front of defendant's jail cell without giving further *Miranda* warnings. Thereupon, defendant made a further request to another detective to speak to a district attorney, followed, in one continuous conversation, by incriminating statements.

Held, conviction reversed. The court of appeals found that the detectives improperly engaged in "interrogation" of a suspect, following the invocation of his right to silence, by placing some of the stolen items outside his jail cell without rereading him his *Miranda* rights. Therefore, defendant's right to cut off questioning was not scrupulously honored, and defendant's motion to suppress his statements made subsequent to his viewing of the furs was granted and a new trial ordered. People v. Ferro, 472 N.E.2d 13 (1984).

§ 43.90 Waiver of *Miranda* rights

U.S. Supreme Court After defendant was convicted in Colorado state court of first degree murder, the Colorado Court of Appeals reversed and the Colorado Supreme Court affirmed, holding that his waiver of *Miranda* rights before making a statement was invalid because he was not informed that he would be questioned about a murder.

Held, reversed and remanded. A suspect's awareness of all the crimes about which he may be questioned is not relevant to determining the validity of his decision to waive the Fifth Amendment privilege. The Court thus found that mere silence by law enforcement agents as to the subject matter of an interrogation is not "trickery" sufficient to invalidate a suspect's waiver of *Miranda* rights. Colorado v. Spring, 107 S. Ct. 851 (1987), 23 CLB 387.

Georgia Defendant was convicted of murder, rape, burglary, forgery in the first degree, and financial transaction card fraud. He was sentenced to death for murder. Soon after his arrest, defendant was taken to police headquarters where an officer gave defendant the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). Defendant thereupon signed a written waiver form re-

citing that he understood his *Miranda* rights, waived them, and was willing to make a statement. He gave an incriminating statement to police on this occasion, and 15 minutes later a second incriminating statement. Two days later, on September 4th, defendant was brought before a county magistrate for a "first appearance" where he asked the magistrate to delay his committal hearing so that he would have time to retain an attorney, explaining that he did not wish to proceed with the public defender representing him. That afternoon defendant gave a third incriminating statement that was tape recorded. Defendant later challenged admission of the third statement as violative of his Fifth and Sixth Amendment rights to counsel that should therefore have been suppressed.

Held, conviction affirmed. The Supreme Court of Georgia upheld the conviction based on a close scrutiny of the facts. The court pointed out that at no time during police interrogation did he express any desire to deal with police only through counsel or request that interrogation cease for any reason. Instead, he announced only his intention to retain the services of an attorney to represent him at his committal hearing. Accordingly, the court decided that he waived any right to counsel that he had under the Fifth Amendment, and, therefore, the court ruled that the admission into evidence of the resulting taped confession was not Fifth Amendment error. Turning to the Sixth Amendment, the court stated that the "first appearance" was not the type of adversarial judicial proceeding that triggers a defendant's Sixth Amendment right to an attorney. The purpose of the first appearance was simply to set a hearing date; it was not a "trial-type confrontation." Ross v. State, 326 S.E.2d 194 (1985), 21 CLB 472.

§ 43.91 —Interpretations by state courts (New)

Illinois Defendant was convicted of murder of a seventy-one-year-old man and was sentenced to death. There was conflicting testimony as to whether defendant signed a written waiver of his *Miranda* rights before or after police questioned him about the murder, but the trial court ruled that the waiver was signed prior to questioning. On appeal, defendant contended that the oral, written, and taped confessions that he gave at the police station were obtained in violation of his *Miranda* rights provided under the Fifth Amendment. He argued that *Miranda* warnings alone were not sufficient to fully advise him of his constitutional rights.

Held, affirmed. The Illinois Supreme Court affirmed his conviction and stated that defendant signed a typewritten form waiving all of his *Miranda* rights, and the trial court determined that he did this prior to making any of his three confessions. Defendant admitted that he was familiar enough with *Miranda* warnings to realize a waiver meant that whatever he told the police could be used in court. Therefore, his waiver of Fifth Amendment rights was voluntarily, knowingly, and intentionally made. People v. Owens, 464 N.E.2d 261 (1984), reh'g denied, 467 U.S. 1143, 105 S. Ct. 826 (1985).

Massachusetts Defendants were convicted by a jury of murder in the second degree in the beating death of a sailor. After a gang fight where the sailor was beaten with a baseball bat by the youths, he later died in the hos-

pital. After a police investigation, defendants were called to the police station where they both made statements, and were later arraigned after the death of the sailor. After being indicted, one defendant moved to suppress statements he made to the police on the grounds they they were obtained in violation of his *Miranda* rights and that any waiver of his rights which he had made was not voluntary.

Held, conviction affirmed. The Supreme Judicial Court of Massachusetts concluded that defendant had voluntarily approached the police officer to make a statement. Both before and after defendant was taken into custody, the police and an assistant district attorney acted assiduously to safeguard defendant's rights by giving *Miranda* warnings and asking defendant if he preferred to wait for his lawyer. Commonwealth v. Curtis, 448 N.E.2d 345 (1983).

New Hampshire Defendant was indicted for second-degree murder for causing the death of a nineteen-month-old child. He moved to suppress certain statements made in response to police questioning. After a hearing, the trial judge denied the motion as to some statements, but granted it as to others. The question of the correctness of the rulings was transferred in advance of trial to the Supreme Court of New Hampshire. The specific question transferred was whether defendant had, halfway through the questioning, effectively asserted his right to counsel after having been given the warnings required by *Miranda* at the start of the questioning. The child was found by defendant in a partially filled bathtub at about 2:00 A.M. in the mobile home where defendant was living with the child's mother, Cindi, who was at work. Although defendant made attempts to revive the child and called on a neighbor for help, the child was in fact dead. Defendant was interrogated that night in the local police station without being taken into custody. Two nights later three law enforcement officers picked up defendant at his home and took him to another town for further questioning, where he was taken to a room in the second police station and given the *Miranda* warnings, which he said he understood. Defendant, however, was not asked whether he waived his rights, nor did he expressly waive them. The questioning began at 8:36 P.M. and ended at 11:14 P.M., during which defendant was under intensive and skillful questioning by the three police officers. It was not until halfway through the questioning that defendant made incriminating statements after the following exchange:

> [Defendant]: Should I have my lawyer . . .
>
> [Corporal]: Tap, let me tell you something . . .
>
> [Sheriff]: I know you didn't do it on purpose.
>
> [Corporal]: We're not out here to hang you Tap, we have to get the truth.
>
> [Defendant]: Cindi is going to kill me.
>
> [Corporal]: No, she's not going to kill you.
>
> [Sheriff]: It was an accident wasn't it?
>
> [Defendant]: It was an accident. I sat him in the tub . . .
>
> Later on in the questioning, defendant asked the following:
>
> [Defendant]: Do I need a lawyer for this before I. . ."

[Sheriff]: That's entirely up to you, you've already confessed to us as to what happened. We just want to get this thing straightened out . . .

[Defendant]: In other words, I've already screwed myself. . . ." After further prodding to get it off his chest, defendant made further incriminating statements regarding the "accident."

Held, defendant had asserted his right to counsel. The Supreme Court of New Hampshire ruled that on both occasions defendant indicated his lack of understanding of the seriousness of his situation and sufficiently indicated that he was seeking the advice of a lawyer, and that law enforcement officials have a duty to see to it that an opportunity to consult with counsel is provided pursuant to *Miranda* before further questioning. State v. Tapply, Jr., 470 A.2d 900 (1983).

§ 43.95 —Voluntary and intelligent requirement

U.S. Supreme Court Defendant approached a Denver police officer and stated that he had murdered someone and wanted to talk about it. The officer advised him of his *Miranda* rights and defendant said that he understood them and still wanted to talk. Based on subsequent psychiatric evaluation, the trial court suppressed defendant's initial statements because they were "involuntary." The Supreme Court of Colorado affirmed.

Held, reversed and remanded. Coercive police activity is a necessary predicate to finding that a confession is not voluntary within the meaning of the due process clause. The Court thus found that a defendant's mental condition, while a significant factor in determining "voluntariness," does not by itself, and absent official coercion, ever dispose of the inquiry into the admissibility of a confession. The Court also found that the state need only prove a *Miranda* waiver by a preponderance of the evidence. Colorado v. Connelly, 107 S. Ct. 515 (1986), 23 CLB 287.

U.S. Supreme Court After having been taken into custody on suspicion of sexual assault and advised of his rights, defendant indicated to the police that he would not make a written statement, but that he was willing to talk about the incident that led to his arrest. Defendant orally admitted his involvement in the sexual assault, and the confession was introduced into evidence at trial. This conviction was reversed by the Connecticut Supreme Court.

Held, reversed and remanded. Since defendant's statements to the police made clear his willingness to talk about the sexual assault, the Constitution did not require suppression of his incriminating statements. The Court reasoned that although *Miranda* was designed to protect defendants from being compelled by the government to make statements, defendants also had the right to choose between speech and silence. Connecticut v. Barrett, 107 S. Ct. 828 (1987), 23 CLB 386.

U.S. Supreme Court After his arrest in connection with breaking and entering, defendant was questioned by police officers regarding a murder. The same evening, unknown to defendant, defendant's sister contacted the Public Defender's Office, and an attorney from that office was told that defendant would not be questioned until the following day. Less than an hour later, the police gave defendant his *Miranda*

warnings and he signed a waiver. The Rhode Island state court denied his pretrial motion to suppress his statements, and he was convicted of first-degree murder. The district court denied habeas corpus relief, but the court of appeals reversed.

Held, reversed and habeas corpus denied. The Court declared that the police's failure to inform the defendant of the attorney's telephone call did not deprive him of information essential to his ability to knowingly waive his *Miranda* rights. The court reasoned that events occurring that are unknown to defendant have no bearing on his capacity to knowingly waive his rights. Moran v. Burbine, 106 S. Ct. 1135 (1986).

U.S. Supreme Court Defendant, a soldier, was charged with rape in Missouri. He retained private defense counsel. After discussing the matter with his counsel and a military attorney, defendant requested a polygraph examination. His request was granted and before being examined, defendant signed a written consent document as required by *Miranda,* and also was advised of his rights under the Uniform Code of Military Justice and the Eighth Amendment. He was further advised that he could stop answering questions at any time or speak to a lawyer before answering further. He refused such assistance. After the examination, he admitted having intercourse with the victim and was convicted of rape. The district court denied his petition for habeas corpus relief. On appeal the Eighth Circuit reversed, and the Supreme Court granted certiorari.

Held, reversed. The Supreme Court concluded that once defendant made voluntary, knowing, and intelligent waiver of his right to have counsel present at a polygraph examination, there was no requirement that the police again advise him of his rights before questioning him about the results of the polygraph. The court particularly noted that defendant had consulted with an attorney, and it was clear that he understood his rights and was aware of his power to stop the questioning at any time. Wyrick v. Fields, 459 U.S. 42, 103 S. Ct. 394 (1982), 19 CLB 373.

Court of Appeals, 2d Cir. After defendant was convicted in the federal district court on a conditional plea of guilty of bank robbery, he appealed, challenging the denial of his motion to suppress evidence on the grounds that *Miranda* warnings had been improperly given.

Held, conviction affirmed. The Second Circuit concluded that *Miranda* does not require the interrogator to ask the suspect whether he understands each of his rights, although it is good practice to do so. The court thus found that the fact that defendant was talking most of the time when he was being advised of his rights did not necessarily render the warnings ineffective, especially since defendant "was not a newcomer to the jurisprudence of *Miranda.*" United States v. Hall, 724 F.2d 1055 (1983).

Arizona The police suspected defendant of having committed a murder but evidently did not think that they had sufficient evidence to make an arrest. In order to question him about the crime, they persuaded him to come to the police station on the pretext of talking about a misdemeanor traffic warrant. At the station, they fingerprinted him and put him in an interrogation room but told him he was not under arrest. The questioning began

with the traffic warrant but soon moved to defendant's extensive criminal history and then to the murder under investigation. The detective established several links between defendant and the victim, whereupon defendant admitted the killing. Only at that point did the detective administer, in simplified form, *Miranda* warnings. The mentally retarded defendant waived his *Miranda* rights and confessed to two police officials, but balked when a third began to question him. The jury convicted defendant of second-degree murder and theft. Defendant appealed on the ground that his confessions were not voluntary.

Held, affirmed. The Supreme Court of Arizona, en banc, ruled that even though the police used a ruse to persuade defendant to go to the police station, this did not amount to a sufficient degree of overreaching to hold the confession involuntary under Colorado v. Connelly, 107 S. Ct. 515 (1986). The Connelly decision indicated that a waiver cannot be held involuntary if there is no "police overreaching." Thus, the proper inquiry focuses on what the police did, and not on "a metaphysical inquiry into defendant's 'free will' or subjective perceptions of reality." However, what the police may do depends in part on what they know about defendant's abilities, the court reasoned, thus a permissible tactic against a suspect of normal intelligence and sophistication may amount to "overreaching" when the suspect has mental shortcomings. In this case, the court found no overreaching that would taint either defendant's waiver of rights or his confessions. State v. Carrillo, 750 P.2d 883 (1988).

Delaware Defendant was convicted of second-degree murder and possession of a deadly weapon during the commission of a felony. On appeal, he argued that his statement to the police that he committed the act out of self-defense should have been suppressed from evidence. The statement was substantially identical to his testimony, but if his claim of self-defense was rejected, it would underscore the state's contention that defendant was guilty of second-degree murder or manslaughter. After defendant was arrested and taken into custody, his father and his attorney asked to speak to him. The police refused their request, and told the attorney that he would not be permitted to speak with defendant unless defendant asked to see an attorney. In addition, the police never communicated the attorney's message to defendant that he was at the station if defendant wished to see him. After being advised of his *Miranda* rights and saying that he neither had nor wanted an attorney, defendant made the statement at issue. Although defendant moved to suppress the statement after his indictment, his trial counsel, who did not represent defendant on the appeal, never renewed the motion or mentioned it during the trial. Defendant argued that the refusal by the police to inform him that his attorney was waiting to see him violated his *Miranda* right to counsel. The state argued that defendant waived the issue by not raising it below.

Held, reversed and remanded. The Supreme Court of Delaware decided to address the issue even though it was not raised below because it raised a serious claim, and because defendant had filed a motion to suppress after his indictment. It then held that the statement was inadmissible because the conduct of the police vitiated defendant's waiver of his right to counsel.

Defendant, who was not informed of the presence of his attorney, did not voluntarily and intelligently waive that right. The state's assertion that the statement was exculpatory, and that its admission was harmless, was inapposite for two reasons: (1) a *Miranda* violation can occur even if a statement is exculpatory, and (2) the statement was inculpatory since the jury could conclude from it that defendant had committed second-degree murder or involuntary manslaughter. Therefore, the statement could not be used as part of the state's case-in-chief. It could, however, be used to impeach defendant if he testified. Weber v. State, 457 A.2d 674 (1983).

Florida Defendant was convicted of burglary and first-degree murder. Trial court reversed this conviction because the police had failed to inform defendant that an attorney, retained in his behalf, was at the station house requesting to speak with him. The conduct of the police was held a violation of due process that deprived defendant of information essential to a knowing and intelligent waiver of his right to counsel. The case was vacated and remanded by the U.S. Supreme Court following its decision in Moran v. Burbine, 106 S. Ct. 1452 (1986).

Held, reversed and remanded. In *Burbine,* an attorney contacted by Burbine's sister on his behalf but without his knowledge, called the police station and was told that Burbine would not be questioned until the next day; however, questioning began soon afterward and resulted in three signed confessions. The U.S. Supreme Court held that the police conduct was irrelevant because knowledge of the attorney's telephone call was not essential to a knowing and intelligent waiver of Burbine's *Miranda* rights. It was noted, however, that on facts more egregious than those in *Burbine,* police conduct might rise to the level of a due process violation depending on individual state laws. In the present case, the attorney telephoned the police station to inquire as to his client's status, arrived at the station and requested access. Defendant was not told of the attorney's presence or request and police refused access even in the face of a circuit court judge's telephonic order that the attorney be allowed to see his client. In addressing these facts, the court determined that the police conduct in this case was more egregious than in *Burbine* and violated the due process provision of the Florida Constitution. Thus, the initial reversal was reaffirmed. Haliburton v. State, 514 So. 2d 1088 (1987).

Rhode Island Defendant was convicted of first-degree murder. The trial judge denied his motion to suppress three incriminating statements he made to the arresting officers at police headquarters. Defendant appealed the conviction and denial of the suppression motion on the ground that they were obtained in violation of defendants' right to counsel and his privilege against self-incrimination. The officers obtained oral and written waivers by defendant of those rights without first telling him of a phone call they received from a public defender regarding defendant's legal representation. As a result, asserted defendant, his confessions did not follow intelligent waiver of his right to counsel and right to remain silent.

Held, conviction affirmed. Defendant argued for application of the New York rule which provides that once a police officer is notified that accused is represented by counsel, the accused's

right to counsel may not be waived in the absence of counsel. The Supreme Court of Rhode Island rejected the New York rule on its face and as applied to this case. Defendant had been warned of his *Miranda* rights and had been represented by the public defender's office in the past. Therefore, he was able to make an informal decision to waive those rights in the absence of information about the telephone call from an attorney whom he did not know. While defendant was harmed very little, if at all, by the nondisclosure of the public defender's phone call, society would be harmed significantly if confessions such as the ones made by defendant were suppressed from criminal trials. State v. Burbine, 451 A.2d 22 (1982).

§ 43.100 —Effect of refusal to sign written waiver

Court of Appeals, 9th Cir. After his conviction for conspiracy to distribute cocaine, defendant appealed, arguing that his due process rights had been violated at trial when an F.B.I. agent was permitted to testify as to his refusal to sign a *Miranda* waiver form.

Held, conviction affirmed. The Ninth Circuit found that while the trial court erred in permitting testimony regarding defendant's refusal to sign a *Miranda* waiver form, the error was harmless in light of the extremely strong case against defendant. The court reasoned that declining to sign a waiver form is equivalent to an assertion of the right to silence, and that evidence of defendant's assertion of the right to silence must not be brought before the jury since it would create a "strong negative inference" that the defendant is guilty. United States v. Valencia, 773 F.2d 1037 (1985), 22 CLB 167.

§ 43.105 —Effect of request for counsel

"Enforcement Workshop: What Is 'Representation'? When Does It Matter?" by James J. Fyfe, 19 CLB 367 (1983).

U.S. Supreme Court After having been arraigned in Michigan state court on unrelated murder charges, defendants requested the appointment of counsel. Before having had an opportunity to consult with counsel, defendants were questioned by police officers after having been advised of their *Miranda* rights. Defendants were both convicted at trial over objections to the admission of their confessions in evidence. The Michigan Court of Appeals reversed and remanded in one case, but affirmed in the other, and the Michigan Supreme Courrt affirmed.

Held, conviction affirmed. The Court found that once a suspect has invoked his right to counsel, either at an arraignment or similar proceeding, any waiver of defendant's right to counsel for a police-initiated interrogation is invalid. The Court reasoned that the assertion of the right to counsel at an arraignment is no less significant than when it is made during a custodial interrogation. Thus, after a formal accusation has been made, the police may no longer employ techniques for eliciting information from uncounseled defendants that might have been entirely proper at an earlier stage of the investigation. Michigan v. Jackson, 106 S. Ct. 1404 (1986).

U.S. Supreme Court After defendant was arrested on armed robbery charges in Louisiana and read his *Miranda* rights, he said that he did not wish to make any statement until he saw a lawyer, and the interview was terminated. The next day, however, a

detective again asked if he was willing to talk about the case, and after his *Miranda* rights were again read to him, he orally confessed to the robberies. The confession was admitted at trial, and defendant was convicted. While on appeal to the state supreme court, the U.S. Supreme Court ruled in Edwards v. Arizona, 451 U.S. 477 (1981), that a defendant's rights were violated by the use of a confession obtained without counsel present and after a request for an attorney. The Louisiana Supreme Court affirmed the conviction, and certiorari was granted.

Held, conviction reversed. The Supreme Court stated that the *Edwards* ruling applied to all cases pending on direct appeal at the time *Edwards* was decided. Shea v. Louisiana, 105 S. Ct. 1065 (1985), 21 CLB 464.

U.S. Supreme Court An Ohio state prisoner sought habeas corpus, which was granted by the district court, and the Court of Appeals for the Sixth Circuit affirmed.

Held, habeas corpus petition granted. Justice O'Connor ruled that the grant of the writ would be stayed in view of the doubtfulness of the underlying decision that the use at the prisoner's trial of statements that he made, after he had invoked his rights to silence and to the presence of an attorney, would require the grant of a new trial. The court reasoned that Edwards v. Arizona, 451 U.S. 477 (1981), should not retroactively render inadmissible a statement such as that presented here, which was obtained by the police years before *Edwards* was decided. Tate v. Rose, 104 S. Ct. 2186 (1984).

U.S. Supreme Court A prisoner filed a petition for a writ of habeas corpus, arguing that his conviction should be reversed because statements made by him to the police about a homicide had been improperly used against him. The district court denied his petition, but the court of appeals reversed.

Held, reversed and remanded. The decision in Edwards v. Arizona, 451 U.S. 477 (1981), should not be applied retroactively. The U.S. Supreme Court explained that while the prisoner's appeal was pending, *Edwards* was decided, which held that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him. The Court reasoned that the constitutional principle established in *Edwards* had little to do with the truth-finding function of a criminal trial, nor could it be said that the decision had been clearly foreshadowed. Thus law enforcement authorities could not reasonably have been expected to conduct themselves in accordance with the decision prior to its announcement. Solem v. Stumes, 465 U.S. 638, 104 S. Ct. 1338 (1984), 21 CLB 462, cert. denied, 105 S. Ct. 2145 (1985).

Court of Appeals, 1st Cir. After defendant was convicted in district court on narcotics charges, the Court of Appeals for the First Circuit affirmed in part, vacated in part, and remanded.

Held, petition for rehearing denied. The First Circuit ruled that where the words and actions of the accused are ambiguous as to whether he wishes a lawyer, the questioning officers must find out more specifically whether he wants a lawyer before they can proceed with other questioning. The court further commented that, based on the record in this case, the questioning was impermissible even under a standard that restricts questioning to clarify the ambiguous request for counsel. United

States v. Porter, 776 F.2d 370 (1985), 22 CLB 282, cert. denied, 107 S. Ct. 2178 (1987).

Alaska Defendants were convicted of violating state and municipal drunken driving prohibitions. On appeal, defendants argued that the police wrongfully refused their requests to consult an attorney before deciding whether to submit to a breathalyzer test. A second issue was whether one's refusals to submit to such a test could be considered by a judge in sentencing procedures.

Held, reversed. Defendant's statutory right to access of counsel was violated by the arresting officers' denial of their requests to speak with their attorneys. The state argued that the phrase "immediately after an arrest" in the statute meant after any sobriety tests are administered. They argued that since the evidence which these tests are designed to detect dissipates quickly, it would be impracticable to allow prior consultation. The court disagreed, holding that "immediately" means just that, and that the possibility of evidence being destroyed does not automatically change this. Since a wait of at least fifteen minutes is necessary before administering the breathalyzer test, no additional delay is incurred by acceding to a request to contact an attorney during that time. Only if an attorney cannot arrive within a reasonable period of time may a breathalyzer test be conducted before a suspect obtains legal advice. However, the suspect must first be given an opportunity to contact counsel. If he is not, evidence derived from the test is inadmissible at a subsequent criminal trial under the exclusionary rule. Copelin v. State, 659 P.2d 1206 (1983), cert. denied, 469 U.S. 1017, 105 S. Ct. 430 (1984).

Maine Defendant was charged with operating a motor vehicle while under the influence of alcohol. The state appealed the trial court's grant of defendant's motion to suppress the results of his blood-alcohol test. The motion and its grant were based on the arresting officer's refusal of defendant's request to consult with an attorney before submitting to the blood-alcohol test.

Held, reversed. The provision of an opportunity for consultation with an attorney prior to submission to a blood-alcohol test is not required by Maine's implied consent law or by the state or federal constitution. Under Maine's implied consent law, an individual who refuses to take a blood-alcohol test after being arrested for driving under the influence can have his license suspended for up to three months. In its examination of the statute's legislative history, the Supreme Judicial Court of Maine concluded that the primary purpose of the statute is to promote highway safety and not to protect the individual driver from otherwise reasonable searches and seizures. It held that the statute, which gives drivers only the power, not the right, to revoke implied consent to a test, does not provide drivers with a right of prior consultation. In its examination of *Miranda,* it held that a constitutional right to counsel arises only to protect the Fifth Amendment privilege against compulsory self-incrimination and to protect the Sixth Amendment right to counsel at critical stages of prosecution. It then cited case law holding that a blood-alcohol test does not violate the Fifth Amendment and does not constitute a critical stage of prosecution. State v. Jones, 457 A.2d 1116 (1983).

Oregon Defendant's conviction of capital murder was automatically reviewed. Defendant claimed the trial court erred when it allowed statements he made to police to be used as impeachment testimony after he had invoked his *Miranda* rights to have an attorney during questioning. The police, however, continued to question him before providing him with an attorney.

Held, conviction reversed and remanded. First, the court stated that the prosecution erred when it pitted the testimony of the questioning officer against that of defendant. The prosecutor implied that one of them must be lying, and the court stated that this is not allowable procedure. Second, the court determined the officer's testimony concerning statements made by defendant while in custody as inadmissible. Although defendant gave up the right to be silent, he nonetheless repeatedly requested that an attorney be present during questioning. The police did not provide him with an attorney and continued to question defendant for several hours. The court stated that this clearly violated defendant's rights and all statements taken during this interrogation must be considered inadmissible. State v. Isom, 761 P.2d 524 (1988).

Pennsylvania An automatic appeal resulted from defendant's conviction of first-degree murder and his death sentence. After his arrest, an officer read defendant his *Miranda* rights, and he requested an attorney. Defendant asked the officer what good it would do talking to the officer. He responded that he would tell the district attorney that defendant cooperated with the police. Defendant then waived his rights and made a confession. The question before the court was whether the officer's statement to defendant concerning the district attorney misled defendant into giving a confession.

Held, new trial granted. The court said that the statement by the officer to defendant was an impermissible inducement and thereby tainted his admissions. The court believed that misleading statements and promises by the police choke off the legal process at the very moment which *Miranda* was designed to protect. Commonwealth v. Gibbs, 553 A.2d 409 (1989).

§ 43.120 Statements to persons other than police

U.S. Supreme Court After defendant was convicted in state court of first-degree murder, his conviction was reversed by the Minnesota Supreme Court on the grounds that incriminating statements made by him had been improperly admitted.

Held, reversed. While a state may not impose substantial penalties because a witness elects to exercise his Fifth Amendment rights not to give incriminating testimony against himself, a state may require a probationer to appear and discuss matters that affect his probationer's status. In reviewing the record, the Court found that the probationer was not deterred from claiming the self-incrimination privilege by any reasonably perceived threat of revocation of probation. Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136 (1984), 21 CLB 462.

§ 43.125 Use of statement obtained in violation of *Miranda*—impeachment exception

Court of Appeals, 2d Cir. Defendant was convicted of bank robbery. He denied having any involvement in the robbery; on cross-examination he was

questioned about a statement he gave to an FBI agent following his indictment. At the time the statement was given, the FBI agent was aware that defendant would be arraigned within an hour, at which time counsel would be said to represent him. On appeal, defendant argued that use of the statement violated his Sixth Amendment right to counsel. The government contended that the statement was properly admitted for impeachment purposes to show that defendant had perjured himself on direct examination.

Held, conviction reversed. Although a statement taken in violation of a defendant's *Miranda* rights can be used for impeachment, a statement taken in violation of constitutional rights cannot be so used. In this case, defendant's Sixth Amendment right to counsel was involved; in such a case, even if defendant had been given *Miranda* warnings and was found to have waived *Miranda* rights, his waiver would not affect his Sixth Amendment right to counsel, the waiver of which must be measured by a higher standard than are waivers of Fifth Amendment rights. Since the court could not say that the error was harmless beyond a reasonable doubt, the standard that applies to violations of constitutional rights required that defendant's conviction could not stand. United States v. Brown, 699 F.2d 585 (1983).

South Dakota Defendant was arrested one morning for drunken driving, advised of the implied consent law, and asked to take a blood test. At trial, he stated that, when refusing to take the test, he had told the police officer that he had slept from 11:30 P.M. to 8 A.M. the night before. The police officer testified that defendant had stated that he had had only four or five hours of sleep the night before. Defendant was convicted; on appeal he contended that his statements made in connection with his refusal to take the blood test were inadmissible because they were involuntary and he had not been advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Held, conviction affirmed. Statements in custody before advisement of constitutional rights cannot be introduced into evidence in chief. However, they can be introduced to impeach a defendant who later gives conflicting testimony in his own behalf. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643 (1971). Thus, appellant's prior inconsistent statements, which he made without having been advised of his *Miranda* rights, were admissible to impeach his trial testimony. State v. Williamson, 349 N.W.2d 645 (1984).

44. CONFRONTATION OF WITNESSES

§ 44.00 In general

U.S. Supreme Court At his trial for sexual assault, defendant objected to the placement of a screen between him and the sexual assault victims. After

his conviction, the Iowa Supreme Court affirmed.

Held, conviction reversed and remanded. The Supreme Court declared that the confrontation clause provides a criminal defendant with the right to confront face-to-face the witnesses giving evidence against him at trial. The clause helps to ensure the integrity of the fact-finding process by making it more difficult for a witness to lie. Coy v. Iowa, 108 S. Ct. 2798 (1988).

U.S. Supreme Court After defendant was convicted in the district court of transporting an illegal alien, the Court of Appeals for the Ninth Circuit reversed on the ground that an alien witness had been deported before trial.

Held, reversed. The Supreme Court held that a defendant seeking to show denial of due process or denial of the Sixth Amendment right of confrontation because of the deportation of an alien witness must make some plausible explanation of the assistance that he would have received from the testimony of the deported witness. The Court further observed that the deportation of an illegal alien witness is justified upon a good faith determination that the witness possesses no evidence favorable to the defendant. The Court thus concluded that sanctions will be warranted for deportation of an alien witness only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of facts. United States v. Valenzuela-Bernal, 453 U.S. 858, 102 S. Ct. 3440 (1982), 19 CLB 73.

Court of Appeals, 2d Cir. Defendant was convicted of various federal drug offenses. Defendant asserted as error the admission of the grand jury testimony of a witness who was murdered during the course of his first trial, because such testimony was inadmissible hearsay, the use of which violated the confrontation clause of the Sixth Amendment.

Held, remanded. The Second Circuit ruled that an evidentiary hearing was required to determine if defendant was involved in the murder of a prosecution witness. The court further held that if defendant was found to have been involved in the murder, then the witness's grand jury testimony was admissible, reasoning that if defendant was involved in the murder, he thereby waived his rights under the confrontation clause. United States v. Mastrangelo, 693 F.2d 269 (1982), 19 CLB 263, cert. denied, 467 U.S. 1204, 104 S. Ct. 2385 (1984).

§ 44.05 —Interpretations by state courts

Florida Defendant was convicted of first-degree murder. The judge sentenced him to death, despite jury's recommendation of life imprisonment. He appealed both the conviction and the sentence, the sentence on the twin grounds that the jury recommendation was not followed and that the judge, in passing sentence, had taken into account a confession made by a co-defendant found guilty at a separate trial. The co-defendant's confession was not introduced during the guilt-determination phase of the trial.

Held, conviction affirmed, but sentence vacated. The court found that the judge was not required to follow the jury recommendation. However, he should not have taken the co-defendant's statements into account in imposing sentence. A defendant is entitled under the Sixth Amendment to confront and cross-examine the witnesses against him. This right has been

applied to the sentencing process. Here the consideration of the confession of a co-defendant was quite different from consideration of a pre-sentence report where defendant has the right and the opportunity to cross-examine. Defendant cannot require a co-defendant to waive his constitutional right to remain silent and force him to testify during the sentencing procedure. Engle v. State, 438 So. 2d 803 (1983).

Illinois Defendant was convicted of murder and armed robbery. At trial, a juvenile witness testified that he saw defendant commit the crimes with which he was charged. The witness, eleven years old at the time of the crimes, was questioned by police a day after the murder, when he went to the crime scene and was asked by the police if he knew anything about it. The police told him that he would go to jail if he did not tell them what he knew about the crime. He thereupon said that the crime was committed by "Eddie" (not defendant's name), and he was taken to police headquarters where he identified defendant from photographs shown to him by the police. At the time of defendant's retrial, the subject of the present appeal, the juvenile witness was in the custody of the Department of Corrections. His custodial status was the result of an adjudication of delinquency arising from a burglary charge filed against him. In addition, ten other petitions were filed against him, two of which resulted in adjudication of delinquency. At defendant's retrial, when the juvenile witness testified, he was subject to reinstatement of the unadjudicated petitions. At the retrial, defendant's counsel attempted to cross-examine the juvenile witness as to these juvenile delinquency petitions in order to establish a possible bias or motive for the witness' testimony, but counsel was prevented from doing so by the trial court. On appeal, defendant argued that he was denied his Sixth Amendment right to confront a witness against him when the trial court refused to allow defense counsel to cross-examine the juvenile witness as to any possible interest or bias in his testimony and as to the fact that the witness was in the custody of the Department of Corrections.

Held, conviction reversed and case remanded. The Illinois Supreme Court found that the trial court's refusal to allow defendant's counsel to cross-examine the juvenile witness as to the petitions filed against him and the fact that he was under custodial status was a denial of defendant's right to confront his accuser, and was as such a constitutional error of first magnitude and no amount of showing of want of prejudice could cure it. A defendant's right to confront a witness includes the right to cross-examine the accuser as to any possible ulterior motives, even if the witness is a juvenile, when defendant's liberty is at stake and the credibility of the witness is in question. People v. Triplett, 485 N.E.2d 9 (1985).

Kansas Defendant was convicted of aggravated criminal sodomy of his stepson. At trial, the state presented the videotaped testimony of defendant's daughter, R.J., who testified that she saw defendant sodomize her brother, J.W. During the first part of the videotaped testimony, R.J. and a social worker were the only persons present in the room. During the second part, they were joined by R.J.'s foster mother, the state's attorney, the defense attorney, and the court reporter. The state also presented the

testimony of J.W., defendant's stepson, who was not videotaped. J.W. testified that defendant had sodomized him several times over a two-to-three-year period, and that he did not know R.J. had witnessed any of these acts. On appeal, defendant argued that admission of the videotaped testimony of R.J. under provisions of state statute violated his constitutional right of confrontation.

Held, conviction affirmed. The Kansas Supreme Court held that statutes providing for admission of prior videotaped recordings of extrajudicial statements of child victims are constitutional. In the case at bar, the admission of videotaped testimony of defendant's daughter, who was not compelled to testify at trial, did not violate defendant's right to confrontation, since defendant was allowed to observe and hear testimony of the child in person and attorneys for the defendant, the state, and the child were present and the only parties allowed to question the child. The attorneys were given the opportunity to cross-examine the child, so that factors determining the reliability of the child and her statements, as provided by one of the statutes, could be brought out during the questioning of the child and need not be reconsidered by the trial court. State v. Johnson, 729 P.2d 1169 (1986), 23 CLB 401, cert. denied, 107 S. Ct. 2466 (1987).

Louisiana Defendant, convicted of murder, argued that his constitutional right of confrontation was violated by the trial court's refusal to allow him to cross-examine a prosecution witness on the witness' juvenile record. Both defendant and the witness had been charged initially with the murder of a cab driver. Johnson gave police a statement exculpating himself and incriminating defendant; he was permitted to plead guilty to a reduced charge in exchange for his trial testimony against defendant. At trial, defendant sought to cross-examine Johnson about the latter's juvenile delinquency adjudications, which included charges of larceny, burglary, battery and aggravated assault; the trial court refused to permit the inquiry on the ground that such juvenile records are confidential. Defendant himself testified at trial and asserted that Johnson was the sole killer.

Held, reversed and remanded. The Supreme Court of Louisiana said that the opportunity to cross-examine Johnson fully was of particular importance under the circumstances present in this case, since he was arguably a participant in the crime. It noted that, moreover, while some witnesses saw defendant carrying the murder weapon before the crime was committed, others saw it in Johnson's possession afterwards; only Johnson refuted defendant's testimony that it was Johnson, not he, who committed the crime. Noting Johnson's obvious motive to lie, other inconsistencies in his testimony, and the fact that his juvenile delinquency adjudications were probative both on the issues of his past violent behavior and veracity, the court found that defendant's right to confrontation outweighed the state's interest in preserving the confidentiality of Johnson's juvenile records. State v. Hillard, 421 So. 2d 220 (1982), 19 CLB 388.

North Carolina Defendant, convicted of murder in the second degree, armed robbery, and related crimes, argued on appeal for reversal because two co-defendants testified that they pleaded guilty to charges growing out of the

same events for which defendant was being tried.

Held, affirmed. Evidence of a nontestifying co-defendant's guilty plea cannot be introduced as evidence of the guilt of the defendant on trial, stated the court, because to do so would violate the defendant's right of confrontation as well as "the rationale that a defendant's guilt must be determined solely on the basis of the evidence presented against him." However, it continued, no right of a defendant on trial is prejudiced where a witness discloses his own participation in the crimes and that he has pled guilty to the charges. State v. Rothwell, 303 S.E.2d 798 (1983), 20 CLB 65.

Pennsylvania Defendant was convicted of rape, involuntary sexual intercourse, incest, corruption of minors, and endangering the welfare of a minor child. On appeal, he contended that the right to confront his accuser, as guaranteed by the United States and Pennsylvania Constitutions, was violated when the accuser, his six-year-old daughter, was permitted to testify at trial via closed circuit television.

Held, conviction affirmed. The court determined that the use of closed circuit television in child abuse cases, where a child is unable or reluctant to testify against an adult member of the family, is a minimally intrusive infringement on the right of confrontation. Thus, as long as the right of cross-examination is preserved and all interested persons can observe the alleged victim as he or she testifies, the use of closed circuit television is not prohibited by the confrontation clause of either the federal or state constitutions. Stating that the right to confront did not confer upon the accused the right to intimidate, the court rejected defendant's argument that "eyeball-to-eyeball contact" was necessary to ensure the trustworthiness of the child witness' testimony. Commonwealth v. Ludwig, 531 A.2d 459 (1987).

Washington Defendant was convicted of indecent liberties involving four- and five-year-old victims in a trial where hearsay statements of the two alleged victims were admitted under a state statute that conditionally admits hearsay statements of child victims of sexual abuse. At trial the parties stipulated that the children were incompetent to testify. The judge allowed their mothers to testify under the statute as to claims the boys had made regarding their sexual contact with defendant. On appeal, the following question was certified: whether the statute violates the confrontation clause of the state and federal constitutions.

Held, remanded for re-sentencing. The majority of the Washington Supreme Court, en banc, decided that inasmuch as age alone does not render a witness incompetent, the children could not properly be declared "unavailable" absent a hearing to determine whether they were incapable of perceiving or relating the facts of the incidents at issue. The trial court also erred when it based its finding that the statements were reliable on the fact that defendant subsequently confessed: "Adequate indicia of reliability must be found in the reference to circumstances surrounding the making of the statement, and not from subsequent corroboration of the criminal act." The court held, therefore, that defendant was denied his Sixth Amendment confrontation rights when the trial judge admitted the hearsay statements of the two boys without determining whether the children were actually incompetent or whether their claims

possessed sufficient indicia of reliability. State v. Ryan, 691 P.2d 197 (1984).

§ 44.15 Co-defendant's out-of-court statements

U.S. Supreme Court After defendant was convicted in New York state court of second degree murder, which was affirmed by the New York State Court of Appeals, he appealed on the ground that co-defendant's confession incriminating him should not have been admitted at trial.

Held, reversed and remanded. The Supreme Court stated that the confrontation clause bars admission of a non-testifying co-defendant's confession incriminating defendant, even though the jury was instructed not to consider the confession against the defendant. The Court thus accepted the view that introduction of the defendant's own interlocking confession cannot cure the confrontation clause violation, even though it may, in some cases, render it harmless. Cruz v. New York, 107 S. Ct. 1714 (1987), 23 CLB 486.

U.S. Supreme Court At the joint trial of the respondent and a co-defendant, the co-defendant's confession was admitted over the respondent's objection. The confession had been redacted to omit all reference to the respondent, and the jury was cautioned not to use it in any way against him. The respondent was convicted of felony murder and assault to commit murder, and the Michigan Court of Appeals affirmed. The district court denied respondent's habeas corpus petition, but the Court of Appeals reversed.

Held, reversed and remanded. The confrontation clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate any reference to a defendant's existence. Richardson v. Marsh, 107 S. Ct. 1702 (1987), 23 CLB 486.

U.S. Supreme Court The Supreme Court of New Mexico held that the admission against defendant of an out-of-court statement of a co-defendant violated defendant's rights under the confrontation clause of the Sixth Amendment. The court reasoned that there was no opportunity for defendant to cross-examine co-defendant, either at the time the statement was made or at trial.

Held, judgment vacated and remanded for further proceedings. The Court stated that a lack of cross-examination is not necessarily fatal to the admissibility of evidence under the confrontation clause. The Court noted that the prosecution can overcome the presumption against it by demonstrating that the particular statement bears sufficient "indicia of reliability" to satisfy the confrontation clause. New Mexico v. Earnest, 106 S. Ct. 2734 (1986), reh'g denied, 107 S. Ct. 22, cert. denied, 106 S. Ct. 3332.

U.S. Supreme Court Petitioner and a co-defendant were charged with committing a double murder and tried jointly in an Illinois court in a bench trial. In finding petitioner guilty of both murders, the judge expressly relied on portions of the co-defendant's confession. The Illinois Appellate Court affirmed petitioner's convictions, rejecting her contention that her rights under the confrontation clause were violated.

Held, conviction reversed and remanded. The Court declared that the

admission of the co-defendant's confession required reversal. The Court explained that the truth-finding function of the confrontation clause is uniquely threatened when an accomplice's confession is sought to be introduced against a defendant without the benefit of cross-examination, since such a confession is hearsay, and since the accomplice may have a strong motivation to implicate a defendant and to exonerate himself. Lee v. Illinois, 106 S. Ct. 2056 (1986).

U.S. Supreme Court At defendant's trial for conspiring to manufacture and distribute illegal drugs, a taped conversation was introduced between various participants in the conspiracy. Defendant objected on the grounds that the voices of unindicted co-conspirators on the tape were inadmissible pursuant to Federal Rule of Evidence 801(d)(2)(E) absent a showing that the declarants were unavailable. The court of appeals reversed his conviction.

Held, reversed. The Court found that the confrontation clause of the Sixth Amendment does not require a showing of unavailability as a condition to the admission of the out-of-court statements of a nontestifying co-conspirator. The Court observed that the principles whereby prior testimony may be admitted as a substitute for live testimony only if the declarant is unavailable do not apply to co-conspirator statements. United States v. Inadi, 106 S. Ct. 1121 (1986).

Court of Appeals, 2d Cir. Defendant was convicted of bank robbery. The prosecution impeached his co-defendant by cross-examining him about a statement he made which implicated both defendants. The co-defendant had denied any involvement in the crime.

Held, conviction reversed. The court found that it was unnecessary to bring defendant's name into the questioning for the limited purpose of impeaching the co-defendant's credibility. By using the co-defendant's statement, defendant, who did not take the witness stand, was implicated in violation of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 120 (1968). The court also found that it was immaterial that in this case the co-defendant was available for cross-examination by defendant; since the co-defendant claimed total innocence, and in the resulting absence of a defense common to both defendants, any cross-examination of the co-defendant would have been ineffective and fruitless with respect to the issue of defendant's participation. The court parenthetically noted that in any event the statement was inadmissible hearsay because it was not authenticated due to the fact that its author, the co-defendant, denied making it. United States v. Brown, 699 F.2d 585 (1983).

North Carolina Defendant was charged with armed robbery, larceny of a firearm, and carrying a concealed weapon. Defendant's case was consolidated for trial with the cases of co-defendants, Gonzalez and Crawford, who also were charged with the armed robbery of the same store that defendant had been charged with robbing. A jury found defendant guilty of armed robbery and carrying a concealed weapon. Co-defendant Gonzalez was convicted as charged. Co-defendant Crawford was acquitted. Defendant was convicted and sentenced. The Court of Appeals affirmed defendant's convictions, and defendant petitioned for discretionary review, which was granted. Defendant contended that he was deprived of his right to a fair trial

by the consolidation of his trial with the trial of co-defendants, and the resulting admission of the expurgated extrajudicial statements of co-defendants, without a limiting instruction. Thus, defendant was denied his Sixth Amendment right to confront the witnesses against him by the trial court's erroneous admission of the aforementioned extrajudicial statements.

Held, reversed and remanded. The Supreme Court of North Carolina found that the following statement by co-defendant Crawford incriminated defendant: "I told him I was with some guys, but that I didn't rob anyone, they did." The court concluded that the introduction of this extrajudicial statement constituted error, and violated the decision reached in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968). *Bruton* holds that even with a cautionary instruction, a confession by a nontestifying defendant cannot be placed before a jury if it implicates a jointly tried defendant. In brief, defendant was denied his right of cross-examination secured by the confrontation clause of the Sixth Amendment. The court held that the above statement of co-defendant Crawford clearly implicated defendant, even though it was sanitized, and its admission into evidence was not harmless error. Therefore, defendant was entitled to a new trial. State v. Gonzalez, 316 S.E.2d 229 (1984), 21 CLB 83.

Oregon Defendant was found guilty of murder. He owed money to a drug dealer, and his co-conspirator encouraged him to believe that he would have to kill the dealer if he could not pay his debt. Evidence at the trial that defendant offered to pay the co-conspirator for killing the dealer consisted primarily, but not exclusively, of hearsay testimony as to statements the co-conspirator had made about the conspiracy. Testimony was offered by both a third conspirator and a friend of the co-conspirator that the co-conspirator stated that the defendant had offered him $14,000 to kill the dealer. The co-conspirator was not available to testify because he planned to assert his privilege against self-incrimination. Defendant appealed on the grounds that the admission of hearsay testimony as to his co-conspirator's statements deprived him of his right to confront the witnesses against him. He also questioned the accuracy of the co-conspirator's statements because the co-conspirator used cocaine heavily during the period of the alleged conspiracy.

Held, conviction affirmed. The U.S. Supreme Court does allow for a co-conspirator exception to the confrontation clause, but federal courts are split on how broadly the exception applies. Federal rulings mention four reliability factors that must be considered before such testimony is admitted. They are: (1) whether the declaration contained assertions of past fact that might be given undue weight by a jury; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether the declarant might be relying on faulty recollection; and (4) whether the circumstances under which the statements were made suggested that the declarant might have misrepresented the defendant's role in the crime. The Oregon court also considered two other factors: (1) whether the evidence was "crucial" to the state's case and (2) whether the statements were made during the course of and in furtherance of the conspiracy. The third conspirator's testimony as to the co-conspirator's statements was appropriately admitted, and it concerned

plans rather than past facts. The ruling left open the possibility that the testimony by the co-conspirator's friend was harmless error. State v. Farber, 666 P.2d 821, appeal dismissed, 464 U.S. 987, 104 S. Ct. 475 (1983).

§ 44.20 —Admission subject to limiting instructions

U.S. Supreme Court At a Tennessee state court murder trial, the state introduced a confession made by defendant. Defendant then testified that his confession was coercively derived from an accomplice's written confession, claiming that the police officer read the accomplice's confession and directed defendant to say the same thing. In rebuttal, the police officer denied that defendant was read the accomplice's confession, which was read to the jury after the trial judge instructed them that it was admitted solely for rebuttal purposes. After defendant was convicted and sentenced to life imprisonment, the Tennessee Court of Criminal Appeals reversed.

Held, reversed. The Supreme Court found that defendant's confrontation rights under the Sixth Amendment were not violated by the introduction of the accomplice's confession for rebuttal purposes. The Court explained that since the accomplice's testimony was not introduced to prove what happened at the murder when defendant confessed, no confrontation clause concerns were raised. Tennessee v. Street, 105 S. Ct. 2078 (1985).

§ 44.25 —Limitations on right to cross-examine

"[The] Inevitable Discovery Exception to the Exclusionary Rule," by Brent R. Appel, 21 CLB 101 (1985).

"Enforcement Workshop: *Oregon v. Bradshaw*—What's Happening Here?" by James J. Fyfe, 20 CLB 154 (1984).

"[The] Benefits of Legal Representation in Misdemeanor Court," by Gerald R. Wheeler, 19 CLB 221 (1983).

U.S. Supreme Court After defendant's conviction of sodomy in state court was affirmed, he filed a petition for certiorari on the grounds that the trial court's refusal to permit his counsel to cross-examine the complainant, in regard to her cohabitation with her boyfriend, violated petitioner's Sixth Amendment rights.

Held, petition granted, judgment reversed and case remanded. The Supreme Court found that the restrictions placed on the cross-examination of the complainant violated the Sixth Amendment right to confront witnesses. The Court noted that such evidence was relevant to defendant's claim that he and the complainant had engaged in consensual sexual acts and that she lied about it for fear of jeopardizing her relationship with her boyfriend. Olden v. Kentucky, 109 S. Ct. 480 (1988).

U.S. Supreme Court During defendant's murder trial, the Delaware trial court refused to allow the defense counsel to cross-examine a prosecution witness about an agreement that he had made to speak to the prosecutor about the murder in question in exchange for the dismissal of pending public drunkenness charges against him. After defendant was convicted, the Delaware Supreme Court reversed, holding that the court improperly restricted cross-examination and that the harmless

error doctrine did not apply to such a ruling.

Held, conviction vacated and case remanded. The Court stated that while the trial court's denial of the right to impeach the prosecution witness for bias violated defendant's rights under the confrontation clause, such a ruling was subject to harmless error analysis. The Court reasoned that the correct inquiry should have been whether, assuming the damaging potential of the cross-examination were fully realized, whether a reviewing court would nevertheless say that the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 106 S. Ct. 1431 (1986).

U.S. Supreme Court After defendant was convicted of murder in Delaware state court, his conviction was reversed in the Delaware Supreme Court on the ground that the admission of an expert witness' opinion violated defendant's Sixth Amendment right to confrontation because the witness could not recall the basis for his opinion. At trial, the prosecution sought to prove that defendant killed the victim with a cat leash. To establish this, the prosecution sought to establish that a hair found on the leash was that of the victim, and an FBI agent testified that the hair had been forcibly removed, but he failed to recall how he arrived at that opinion.

Held, reversed and remanded. The Supreme Court concluded that defendant's confrontation rights had not been denied, since, through its own witness, the defense was able to suggest to the jury that the witness had relied on a theory that the defense expert considered baseless. Delaware v. Fensterer, 106 S. Ct. 292 (1985), 22 CLB 275.

Court of Appeals, 1st Cir. After defendant was convicted in the district court of bank robbery, he appealed on the ground that his Sixth Amendment rights were infringed by the trial court's restriction of his cross-examination of an accomplice-witness.

Held, conviction affirmed. The First Circuit ruled that the district court's refusal to permit cross-examination of an accomplice-witness as to unprosecuted crimes and a pending murder charge was not improper. The court explained that defense counsel had already established, through extensive cross-examination, the potential bias of the accomplice, stemming both from his plea agreement and his expectation and hope for leniency. The court thus concluded that little, if anything, would have been added by admitting testimony as to unprosecuted crimes. United States v. Barrett, 766 F.2d 609 (1985).

Court of Appeals, 4th Cir. After defendant was convicted of multiple murders, which was affirmed by the North Carolina Supreme Court, his habeas corpus petition was granted by the district court.

Held, reversed and remanded. The admission of hypnotically enhanced testimony did not violate defendant's Sixth Amendment confrontation right since the witness' general testimony indicated that she testified independently of possible suggestion from the hypnotist. The court also noted that independent evidence that was uncontroverted corroborated the witness' version of the shooting. McQueen v. Garrison, 814 F.2d 951 (1987), 23 CLB 490.

Court of Appeals, 5th Cir. State prisoner, who was incarcerated after a conviction of felony theft, petitioned for a writ of habeas corpus on the ground

that his cross-examination of a witness had been improperly restricted. The district court denied the petition and an appeal was taken.

Held, affirmed. The Fifth Circuit stated that while precluding a defendant from impeaching a witness through cross-examination concerning unadjudicated criminal offenses violated the defendant's confrontation right, such error was harmless. The court noted that the evidence of the mailing of defendant's campaign literature with unreimbursed postage from the school district was uncontroverted and defendant's testimony attempting to document the purchase of sufficient postage to mail his campaign literature failed to establish even a plausible case of payment. Carriello v. Perkins, 723 F.2d 1165 (1984).

§ 44.30 Opportunity to cross-examine

U.S. Supreme Court After defendant was convicted in Kentucky state court of sodomy in the first degree, the Supreme Court of Kentucky reversed, holding that his rights were violated by his exclusion from a competency hearing.

Held, reversed. The U.S. Supreme Court held that the defendant's rights under the confrontation clause were not violated by his exclusion from competency hearings of two child witnesses. The exclusion did not impair defendant's opportunity to cross-examine, because the two girls were cross-examined at trial in defendant's presence. Kentucky v. Stincer, 107 S. Ct. 2658 (1987).

South Carolina Defendant was convicted of criminal sexual conduct in the first degree with a 3-year-old child and sentenced to thirty years of imprisonment. The trial judge granted a pretrial motion by the state to allow the testimony of the victim to be videotaped. At the taping session, the trial judge, court reporter, solicitor, defense counsel, victim, and her mother were present, and a video camera operator was located behind a one-way mirror. Defendant viewed the proceeding over closed-circuit television from a nearby room and was granted constant contact with his defense counsel through a set of headphones. He was also provided with a second attorney, who remained in the room with him. Defendant's objection to the admission of the videotape at trial was overruled, and it was played as the state's first evidence before the jury. On appeal, defendant argued that the procedure employed in videotaping the victim's testimony outside his presence denied him eye contact with the witness and violated his constitutional right of confrontation under the Sixth Amendment.

Held, affirmed. The Supreme Court of South Carolina held that the videotaped testimony of the three-year-old victim did not violate defendant's right to confrontation because defendant's counsel was permitted to cross-examine without limitation and defendant was able to view the proceedings over closed-circuit television and to assist his counsel in the cross-examination. The presence of a trial judge created a courtroom atmosphere during the videotape, and the jury was able to observe the victim's appearance and demeanor in her taped testimony. In crimes against children, such as sexual abuse, the need to protect young victims from the trauma of an in-court testimony is legislated in a section of the Victim's and Witness's Bill of Rights Act No. 418, 1984 S.C. Acts § 1842. State v. Cooper, 353 S.E.2d 451 (1987).

§ 44.35 Use of witness' prior testimony

Court of Appeals, 11th Cir. After defendants were convicted in the district court of conspiring to import marijuana, they appealed on the grounds that they were not able to cross-examine a prosecution witness at a second trial since the transcript of the witness' testimony at the first trial was admitted.

Held, convictions affirmed. The Eleventh Circuit stated that the prosecution witness's first trial testimony was properly admitted at the second trial when the witness refused to testify notwithstanding that there was no cross-examination at the first trial concerning violations of a sequestration order. The court found that the admission of the prior testimony did not violate the confrontation clause where the violation of the sequestration order did not relate to the substance of the witness' testimony against the defendant and the only effect of cross-examination would have been to impeach the witness' credibility, which was adequately attacked at the first trial. United States v. Monaco, 702 F.2d 860 (1983), 19 CLB 479.

Iowa Defendant, convicted of robbery, argued on appeal that the State's use at trial of a witness' discovery deposition violated his Sixth Amendment right of confrontation. The deposition had been taken by co-defendant's counsel. Defendant's attorney, who was notified but did not attend, was given a copy prior to trial; he also received a second opportunity to depose the witness, Allard, which he did not utilize. A subpoena was issued for Allard one week prior to the trial; however, the subpoena was returned unserved by a deputy sheriff, with a "diligent search" form endorsed, "Our information indicates subject may be located out of state fishing." At trial, the court took notice of the unserved subpoena and endorsed form, finding that reasonable efforts had been made to locate Allard and that defendant had sufficient prior opportunity to cross-examine him, the court declared Allard unavailable and granted the prosecutor's application to use his deposition. Defense counsel objected, but refused the court's offer of a continuance to enable defendant to locate Allard.

Held, conviction reversed and remanded for new trial. While there is an exception to constitutional confrontation requirements where a witness is unavailable, it held, a witness is not deemed "unavailable" unless the State has established its good-faith efforts to secure his presence at trial. Here, the court found that the return of the subpoena and the endorsement on the form were not sufficient to meet the State's burden of proving the witness' unavailability; no one, it stated, "took the stand to provide evidence of constitutionally sufficient efforts to locate him for trial." The State's contention that defendant waived his right to confront Allard by refusing a continuance was also rejected by the court, which noted that the State, not defendant, was responsible for producing the witness. State v. Dean, 332 N.W.2d 336 (1983), 20 CLB 72.

§ 44.38 Videotaped testimony (New)

Court of Appeals, 5th Cir. After defendant was convicted of illegal transportation of aliens, he appealed on the ground that a videotaped deposition of two government witnesses was improperly used against him at trial.

Held, reversed. The Fifth Circuit court held that the admission of the videotaped testimony violated the defendant's right to confront adverse witnesses. The witnesses had been released across the border pursuant to a standing order of the court stating that alien material witnesses must be deposed and released within sixty days of detention. They were unavailable as witnesses at the time of trial. United States v. Guardian-Salazar, 824 F.2d 344 (1987).

§ 44.40 Harmless error

Court of Appeals, 3d Cir. After defendant was convicted for making false statements to the Immigration and Naturalization Service, defendant appealed on the ground that the prosecutor had improperly cross-examined a witness.

Held, affirmed. The Third Circuit stated that while the trial court erred in allowing the government to cross-examine a defense witness about the invocation of her Fifth Amendment privilege against self-incrimination, such error was harmless where the witness' testimony was of minimal probative value as to the charges on which defendant was convicted and there was no likelihood that the jury would have associated the witness' claim of privilege with defendant's guilt. The court particularly noted that the witness' only testimony which was exculpatory was fully credited by the jury and resulted in an acquittal on the relevant charges. Nezowy v. United States, 723 F.2d 1120 (1983), cert. denied, 104 S. Ct. 3533 (1984).

Wisconsin Defendant, convicted of sexual assault, argued on appeal that there should be a reversal because statements obtained from him in violation of his constitutional rights were admitted into evidence at trial. On appeal, the state conceded that police violated his rights by continuing a post-arrest interrogation after defendant had requested counsel; however, it contended that any error committed by receiving the statements into evidence was harmless beyond a reasonable doubt because the statements were merely duplications of other evidence. The statements in dispute consisted of defendant's admission that he forced the victim into the basement of her home and demanded that she remove her clothing, but did not recall attempting to have sexual intercourse with her because he was in an intoxicated state at the time of the incident. Other witnesses and evidence placed defendant at the scene and the victim's testimony that defendant attempted to have sex was uncontradicted.

Held, reversed and remanded for new trial. The Supreme Court of Wisconsin found defendant's statements did more than duplicate other evidence because defendant's "selective memory" concerning the incident was not credible; the jury it continued, would have been influenced by admission of his statements. Accordingly, the court concluded that the error was not harmless. State v. Billings, 329 N.W.2d 192 (1983), 19 CLB 487.

§ 44.45 Waiver

Nebraska Defendant was convicted of felony murder vehicle homicide. On appeal, he argued that the trial court erred by trying the case on stipulated facts without first determining whether defendant entered into the stipulation intelligently and voluntarily.

Held, affirmed. Although the right of confrontation and cross-examination is a fundamental constitutional requirement for a fair trial, its waiver

may be accomplished by an accused's counsel as a matter of trial tactics or strategy. Waiver can be in the form of stipulation to the admission of evidence if the accused does not object. There was no evidence that defendant raised any objections to the stipulation. Nor was it the court's duty to determine whether the stipulation was defendant's personal decision. Carried to its logical conclusion, defendant's argument would require the trial court to instruct an accused every time counsel makes a decision not to cross-examine an adverse witness. State v. Bromwich, 331 N.W.2d 537 (1983).

45. RIGHT TO COUNSEL

SCOPE AND EXTENT OF RIGHT GENERALLY

TYPE OR STAGE OF PROCEEDING

NATURE OF OFFENSE CHARGED

ADEQUACY AND EFFECTIVENESS OF COUNSEL

CONFLICT OF INTEREST

RIGHT TO CONFER WITH COUNSEL

SCOPE AND EXTENT OF RIGHT GENERALLY

§ 45.05 Right of indigent defendant

Alaska A private attorney was appointed by the state court to represent an indigent defendant charged with committing nine offenses. Since both the public defender and a law firm retained to handle indigent cases experienced conflicts of interest, the matter was assigned to the attorney. The attorney's name was taken from a list compiled pursuant to a 1979 court order and based on the Anchorage phone book. The same court order also directed that if an attorney could not accept a court appointment, he or she was responsible for arranging "for another attorney to provide such representation." The attorney objected to the order, arguing that it required pri-

vate attorneys to provide services to persons they would rather not represent. In addition, he claimed that the order required attorneys, like himself, not competent in criminal matters to represent criminal defendants.

Held, affirmed in part, reversed in part and remanded. The majority of the Alaska Supreme Court, after reviewing this attorney's credentials, found that he was competent in criminal law and should have accepted the court assignment. However, the court reversed a contempt judgment entered against him on the ground that he was denied a jury trial. However, the provision of the 1979 court order forcing attorneys who cannot ethically accept an appointment to hire and pay for a replacement was held unconstitutional as taking an attorney's property without just compensation. Wood v. Superior Court, 690 P.2d 1225 (1984).

California Defendant was convicted of second-degree murder for the shooting death of a man outside a tavern. He was sentenced to seventeen years to life in prison. While incarcerated for the crime, defendant was sued by the son of the murdered man for wrongful death. Defendant claimed that he was indigent, and requested that the court appoint counsel to represent him. The court declined his request, on the ground that defendant was not entitled to court-appointed counsel in a civil suit. In addition, the Superior Court (Napa County) claimed that the state legislature had not appropriated money for the compensation of court-appointed counsel in civil actions. Defendant thereupon sought a writ of mandate to compel the court to appoint counsel to defend him, and to provide reasonable compensation to such counsel.

Held, peremptory writ of mandate granted. The California Supreme Court found that defendant had a right to access to the courts. As a last resort, in an appropriate case, court appointment of counsel may be the only way to provide an incarcerated, indigent defendant in a civil suit with access to the courts for the protection of his personal and property rights. Access to counsel, not the right to counsel, is the important point; the power to appoint counsel is independent of the power to compensate such counsel. The court declined to rule, however, on whether such counsel should be appointed by the trial court, and how such counsel should be compensated. The court decided that the trial court should conduct further proceedings on those matters. Yarbrough v. Superior Court (County of Napa), 702 P.2d 583 (1985).

Florida The state attorney general brought a petition for a writ of quo warranto to divest respondent, the Public Defender for the Eleventh Judicial Circuit in and for Dade County, Florida, and two assistant public defenders, of authority to accept an appointment by a federal judge to represent indigents in federal court. The indigent defendant had been represented by respondents in state court and had been convicted of various crimes including attempted first-degree murder. Defendant, pro se, filed a petition for writ of habeas corpus in the U.S. District Court for the Southern District of Florida. Defendant did not request appointed counsel. The federal judge, after consulting the state public defender's office, appointed respondent to represent defendant in the federal court. The attorney general's motion attacked the appointment as beyond the powers granted by the federal statute since counsel is provided to in-

digent clients in federal courts pursuant to 18 U.S.C. § 3006A (1976). That statute specifies that attorneys appointed be drawn from the federal public defender's office or from a panel of private attorneys, which may include members of nonprofit legal aid organizations.

Held, writ of quo warranto not issued. The Supreme Court of Florida addressed only the issue of the state public defender's authority to accept such an appointment. The court found that respondents had exceeded their statutory authority in accepting the appointment, but noted that the appointment had been made and accepted. The court declined to issue the writ of quo warranto because it would place the respondents in an untenable position. Instead, the court commended its construction of applicable state law to the consideration of the respondents and the federal judge with the confidence that the appointment would be vacated. State ex rel. Smith v. Brummer, 443 So. 2d 957 (1984).

Wisconsin County appealed a court order compelling it to pay standby attorney's fees for court-ordered legal services of an attorney assisting a *pro se* defendant on various criminal charges. Prior to the appointment of a fourth attorney to the defendant, who was indigent, the office of the state public defender warned defendant that it would be the last appointment, but, issuing the warning again, the office appointed a fifth lawyer, who withdrew after a disagreement with defendant. On granting defendant's request to appear *pro se,* the court ordered the public defender to appoint standby counsel, which it refused to do, arguing that it had already appointed five attorneys and was not required to furnish further counsel to the defendant under its administrative regulation. The trial court subsequently found standby counsel to assist defendant and, following trial, ordered the county to pay for the services, which it refused to do and was therefore held in contempt. On appeal, the county argued that the trial judge lacked the authority to appoint standby counsel, because the defendant had waived his right to counsel by electing to proceed *pro se,* and that the legislature delegated the duty of providing and compensating counsel for indigent defendants to the public defender.

Held, affirmed as modified. The Supreme Court of Wisconsin held that the trial court had the inherent power to appoint counsel to assist indigent defendants when the public defender declined to do so under its administrative rules. Applying McKaskler v. Wiggins, 465 U.S. 168 (1984), which held that the appointment of standby counsel did not impinge on the rights of a defendant who chose to appear *pro se* and who objected to the appointment, the court found that the interests of the trial court, not defendant, were best served by the appointment. The trial judge acted properly and reasonably, motivated in ordering the standby counsel, as the record revealed, by a concern that the trial should proceed in an orderly fashion. Moreover, the power to order the county to pay the attorney's fees was part of the court's incidental power, characterized as an operating cost, and thus did not require commencement of a separate action. State v. Lehman, 403 N.W.2d 438 (1987).

§ 45.10 Right to counsel of one's own choosing

Court of Appeals, 7th Cir. Petitioner, incarcerated in a Wisconsin state pris-

on on a conviction of first-degree murder and armed robbery, appealed the denial by the federal district court of his petition for habeas corpus. Of petitioner's claims, the most substantial was that he was denied counsel. Rosen, an attorney from the public defender's office, was appointed to represent petitioner, who was indigent. But then petitioner's parents retained a Chicago lawyer, Grant, for him. Grant had not been admitted to the Wisconsin bar, however, and under Wisconsin law local counsel must appear in every case tried in a Wisconsin court, though nonresident counsel may appear in association with the local counsel. Rosen offered to serve as local counsel, but the trial court ruled that petitioner would have to pay for a local lawyer if he wanted Grant to defend him. Petitioner's parents, not willing to spend additional funds for local counsel, asked Grant to withdraw from the case. Petitioner, to his dissatisfaction, was represented by Rosen alone. He argued that the Wisconsin rule deprived him of the counsel of his choice.

Held, affirmed. In support of its decision, the Seventh Circuit cited U.S. Courts of Appeals cases holding that the Sixth Amendment does not guarantee an indigent criminal defendant the appointment of the lawyer of his choice, and that a criminal defendant has no right to the appointment of out-of-state counsel. Although the Wisconsin rule may appear protectionist, it did not deprive petitioner of his Sixth Amendment rights. He had the choice of retaining Rosen or choosing an attorney of the Wisconsin bar who was as affordable and competent as Grant, the latter of which could be done without undue difficulty. The Seventh Circuit noted that the Wisconsin law could circumvent a tactic of many unsuccessful criminal defendants, that is, to complain of lack of effective assistance of counsel from an out-of-state attorney. Ford v. Israel, 701 F.2d 689, cert. denied, 464 U.S. 832, 104 S. Ct. 114 (1983).

Court of Appeals, 11th Cir. Two attorneys representing criminal defendants were held to be in contempt by the district court for failing to proceed to trial because of scheduling conflicts created by another criminal case.

Held, reversed. The contempt order imposed after failure to comply with an order to obtain substitute counsel violated the clients' Sixth Amendment right to counsel of their choice and created an inherent conflict of interest between the attorneys and their clients. The court reasoned that while the right to counsel of choice is not absolute, the trial court's order here directing the attorneys to obtain substitute counsel overstepped proper limits where the clients had expressed a specific desire to retain their present counsel. United States v. Koblitz, 803 F.2d 1523 (1986), 23 CLB 288.

Massachusetts Defendant was convicted of murder in the first degree and assault and battery by means of a dangerous weapon. After argument in the Supreme Judicial Court, the case was remanded for an evidentiary hearing to determine reasons why defendant wanted to discharge his counsel and to make an evaluation of the validity of those reasons. The trial judge conducted the hearing that had been ordered, but declined to grant a new trial. On appeal, defendant contended that he had the right to consult ad libitum with his trial counsel and complained that his confinement impinged on this alleged right.

Held, affirmed. The Supreme Judicial Court reaffirmed its holdings in prior cases that the decision to honor a defendant's request for change of appointed counsel is a matter left to the discretion of the trial judge, but after he has given the defendant the opportunity to articulate his reasons. The court added that a defendant has no constitutional right to any particular court-appointed counsel. Commonwealth v. Moran, 448 N.E.2d 362 (1983).

§ 45.15 Absence of counsel during portion of proceedings

Maine Defendant was convicted of two degrees of theft as well as burglary. A co-defendant and other witnesses had received telephone threats, and defendant had revealed to the co-defendant a plan to kill one of the witnesses. The co-defendant turned informer and, wearing a body wire transmitter, met with defendant after being instructed to avoid drawing information out of him. Defendant's incriminating statements concerning the pending indictment were offered against him at trial.

Held, conviction reversed and case remanded. The Supreme Judicial Court of Maine stated that the situation was controlled by United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980), which instructs that the rule of Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964), applies wherever the state intentionally creates a situation likely to induce a defendant to make incriminating statements. The court held that the instruction to avoid actively questioning defendant was not a sufficient protection for defendant's Sixth Amendment right to counsel. The authorities should have known that the close relationship between informer and defendant significantly increased the chance that defendant would confide incriminating information to the informer. The state's valid purpose in investigating other criminal activity cannot remove from constitutional scrutiny evidence thereby uncovered that relates to alleged criminal acts for which the right to counsel has already attached. States v. Moulton, 481 A.2d 155 (1984), 21 CLB 268.

Massachusetts Defendant was convicted of assault and battery by means of a dangerous weapon. The appellate court affirmed, and defendant appealed solely on whether his Sixth Amendment right to counsel was violated by the admission in evidence of a pretrial corporeal identification made by a witness in the presence of and at the request of a police officer and without notice to counsel.

A witness to the crime identified defendant at trial and also testified that he had previously identified defendant. On May 2, 1980, the day of defendant's probable cause hearing, defendant was seated in a courtroom waiting for the session to begin. The witness had been summoned to the probable cause hearing, and was also in the courtroom. Without advising defendant's counsel, the investigating police officer asked the witness to step outside. After the witness stepped outside, the officer asked him if he had seen the assailant in the courtroom. The witness said that he had, and, at the officer's request, reentered the courtroom and pointed out defendant among the spectators.

Held, reversed. The Supreme Judicial Court of Massachusetts reversed because of failure to exclude the identification. The court distinguished this

case from cases involving evidence of identifications made at the time of probable cause hearings. Such cases require attention to the circumstances of any identification, the fairness or unfairness of the procedures followed, and the extent to which counsel undertook or could have undertaken to eliminate the suggestiveness of any identification. In this case, however, the adequacy of defendant's right to counsel under the Sixth Amendment was the issue. The court was concerned with a rule that requires the per se exclusion of evidence of a pretrial, corporeal identification made at the request of and in the presence of a police officer without notice to counsel. Even if the identification procedures are fair and without prejudice to the accused, and even if counsel has been appointed, evidence of such an identification must be excluded. These principles were extended to government-requested identifications made in the course of pretrial court proceedings in the absence of counsel or without notice to counsel. The exclusion is a per se exclusion, rather than one made on the basis of unfairness, because the lack of notice to counsel leaves the defendant with no opportunity to prevent or control such a "showup" or to arrange alternatively for a lineup before the hearing. Commonwealth v. Donovan, 467 N.E.2d 198, 21 CLB 185, cert. denied, 467 U.S. 1308, 105 S. Ct. 516 (1984).

§ 45.20 Right to continuance of trial to obtain new counsel

U.S. Supreme Court Respondent was charged in California Superior Court with various crimes, rape, robbery, and burglary, all relating to the same female victim. The court assigned the Deputy Public Defender to represent respondent. The Deputy Public Defender represented respondent at the preliminary hearing and supervised an extensive investigation. Shortly before the trial, the Deputy Public Defender was hospitalized for surgery, and six days before the scheduled trial date a senior trial attorney in the Public Defender's Office was assigned to represent respondent. After the trial was under way, respondent moved for a continuance, claiming that his newly assigned attorney did not have time to prepare the case. The attorney, however, told the court that he was fully prepared and "ready" for trial, and the court denied a continuance. Respondent was convicted on some counts but there was a mistrial on other counts on which the jury could not agree. A second trial, during which respondent refused to cooperate with his lawyer, also resulted in convictions. The California Court of Appeal affirmed the convictions on all counts, and the California Supreme Court denied review. Thereafter, respondent filed a habeas corpus petition in Federal District Court, alleging that the California Superior Court abused its discretion in denying a continuance. The District Court denied the writ. The Court of Appeals reversed, holding that the Sixth Amendment guarantees a right to counsel with whom the accused has a "meaningful attorney-client relationship," and that the state trial judge abused his discretion and violated this right by arbitrarily denying a continuance that would have permitted the Deputy Public Defender to try the case.

Held, reversed and remanded. The state trial court did not deny the right to counsel by denying a continuance, since the Sixth Amendment does not require a "meaningful attorney-client

relationship." The court took note of the fact that the substitute attorney was "ready" for trial, and that the court could properly take into account the interest of the victim in not undergoing the ordeal of yet a third trial. Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 1610 (1983), 20 CLB 57.

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of conspiracy to defraud the government, he appealed on the grounds that the trial had improperly denied his application to obtain new counsel.

Held, conviction affirmed. The District of Columbia Circuit ruled that denial of defendant's plea to obtain new counsel was proper. Since the case had already been delayed twice, a new attorney would have taken months to review relevant documents, and there had already been scheduling problems with witnesses. United States v. Rettaliata, 833 F.2d 361 (1987), 24 CLB 265.

Court of Appeals, 4th Cir. After defendant was convicted in the district court of bank larceny, he appealed on the grounds that the court had denied his request for appointment of different counsel.

Held, conviction affirmed. The Fourth Circuit found that an indigent defendant has no absolute right to have a particular lawyer represent him and can demand a change of appointed counsel only with good cause. The court noted that defendant's request had been made only five days prior to trial; defendant had already been granted a similar motion, which resulted in the trial being postponed for three months; and there was a lack of assurance from defendant that further delay would not result from substitution. United States v. Gallop, 838 F.2d 105 (1988).

Court of Appeals, 5th Cir. Defendant murdered a uniformed police officer who, having caught defendant with loot from a bar robbery that he had just committed, was attempting to apprehend him. His state conviction and death sentence were confirmed on direct appeal. Defendant exhausted his state habeas corpus remedies, and his application for the writ was denied in the federal district court, therefore he appealed.

Held, affirmed; remanded on another point of law. The Fifth Circuit ruled that the trial court did not deny the state prisoner effective assistance of counsel by refusing his request to dismiss his court-appointed counsel and for a continuance to permit his representation by new counsel. The court observed that the request was made two days before trial and the new counsel knew nothing about the case and was just commencing a lengthy trial in another state. The court further noted that the right to counsel of one's own choosing is not an absolute right and may not be used for purposes of delay, especially where, as here, petitioner asserted nothing more than a sudden loss of confidence in his appointed counsel and a desire for a new one specializing in "death cases." Bass v. Estelle, 696 F.2d 1154 (1983), 19 CLB 375.

Illinois Defendant, convicted of delivering cocaine, argued on appeal that his Sixth Amendment and state constitutional rights were violated by denial of his motion for a continuance to obtain trial counsel. Over eighteen months elapsed between the filing of the complaint and commencement of

time, during which period defendant was free on bail. At least one year of the period was attributable to defendant and most of the numerous continuances he requested related to his retention of counsel. On January 7, a date scheduled for trial some weeks earlier, defendant appeared before the court and claimed to have retained new counsel, who was then engaged in another trial. The court granted defendant's request for a one-week adjournment, despite the prosecutor's objection that he was ready to proceed, but cautioned defendant that the case would go to trial on January 16 with or without defendant's attorney. On January 16, defendant stated that his attorney, who had never filed a notice of appearance, had "withdrawn" from the case. The court ordered the case to go forward and defendant participated pro se in jury selection. After the jury was empaneled, defendant requested a further continuance to obtain counsel. The court refused and the trial proceeded, with the court assisting defendant in the examination of witnesses and as to general procedural matters. Following his conviction, defendant retained appellate counsel and, on appeal, the intermediate appellate court reversed and held that defendant had not knowingly and intelligently waived his right to counsel.

Held, reversed; conviction reinstated. The Illinois Supreme Court stated that where a defendant who is financially able to engage counsel has been instructed to do so within a certain reasonable time, but he fails to do so and does not show reasonable cause why he was unable to secure representation, the court may treat such a failure as a waiver of the right to counsel and require him to proceed. Here, the court found, the trial judge reasonably concluded that defendant, who made no claim of indigency, was deliberately seeking to postpone the trial indefinitely and frustrate the administration of justice. "Judicial patience need not be infinite," the court said, in deciding that the trial court had not abused its discretion in ordering defendant to trial without counsel. People v. Williams, 440 N.E. 843 (1982), 19 CLB 276.

§ 45.25 Waiver

U.S. Supreme Court After defendant was convicted of armed robbery in Illinois state court and the Illinois Supreme Court affirmed, defendant petitioned for a writ of certiorari on the ground that the trial court had improperly admitted statements made by him after he expressed a desire to deal with the police only through counsel.

Held, judgment reversed and case remanded. The Supreme Court declared that once an accused in custody has expressed a desire to be represented by counsel, he should not be subjected to further questioning until counsel has been made available to him or unless he validly waives his earlier request to be represented by counsel. The Court commented that a valid waiver cannot be established by showing only that the accused responded to further police-initiated custodial interrogation, and that a subsequent statement by him may not be used to cast retrospective doubt in his initial request. Smith v. Illinois, 105 S. Ct. 490 (1984), 21 CLB 256.

U.S. Supreme Court Following the disappearance of a ten-year-old girl in Des Moines, Iowa, defendant was arrested and arraigned in Davenport, Iowa. The police informed defendant's counsel that they would drive defen-

dant back to Des Moines without questioning him, but during the trip, one of the officers began a conversation by asking defendant to direct the police to the child's body so that she could have a Christian burial. This conversation ultimately resulted in defendant making incriminating statements and directing the officers to the child's body. A systematic search of the area that was being conducted with the aid of 200 volunteers and that had been initiated before defendant made the incriminating statements was terminated when defendant guided police to the body. Before trial in an Iowa state court for first-degree murder, the court denied defendant's motion to suppress evidence of the body and all related evidence, including the body's condition as shown by an autopsy, defendant having contended that such evidence was the fruit of his illegally obtained statements made during the automobile ride. Defendant was convicted, and the Iowa Supreme Court affirmed, but later federal habeas corpus proceedings ultimately resulted in the U.S. Supreme Court holding that the police had obtained defendant's incriminating statements through interrogation in violation of his Sixth Amendment right to counsel (Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232 (1977)). At defendant's second state court trial, his incriminating statements were not offered in evidence, nor did the prosecution seek to show that defendant had directed the police to the child's body. However, evidence concerning the body's location and condition was admitted, the court having concluded that the state had proved that if the search had continued, the body would have been discovered within a short time in essentially the same condition as it was actually found. Defendant was again convicted of first-degree murder, and the Iowa Supreme Court affirmed. In subsequent habeas corpus proceedings, the district court affirmed; however the Eighth Circuit reversed.

Held, reversed and remanded. The court adopted the inevitable discovery exception to the exclusionary rule. Thus, if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence to unlawful police conduct has so little basis that the evidence should be received. Nix v. Williams, 104 S. Ct. 2501 (1984), cert. denied, 105 S. Ct. 2681 (1985), 21 CLB 71.

U.S. Supreme Court Respondent was questioned at the police station during the investigation of the death of a person whose body had been found in his wrecked pickup truck. He was advised of his *Miranda* rights, and later arrested for furnishing liquor to the victim, a minor, and again advised of his *Miranda* rights. Respondent denied his involvement and asked for an attorney. Subsequently, while being transferred from the police station to a jail, respondent inquired of a police officer, "Well, what is going to happen to me now?" The officer answered that respondent did not have to talk to him and respondent said he understood. There followed a discussion between respondent and the officer as to where respondent was being taken and the offense with which he would be charged. The officer suggested that respondent take a polygraph examination, which he did, after another reading of his *Miranda* rights. When the examiner told respondent that he did not believe respondent was telling the

truth, respondent recanted his earlier story and admitted that he had been driving the truck in question and that he had consumed a considerable amount of alcohol and had passed out at the wheel of the truck before it left the highway. Respondent was charged with first-degree manslaughter, driving while under the influence of intoxicants, and driving while his license was revoked. His motion to suppress his statements admitting his involvement was denied, and he was found guilty after a bench trial. The Oregon Court of Appeals reversed, holding that the inquiry respondent made of the police officer while being transferred to jail did not "initiate" a conversation with the officer and that therefore the statements growing out of this conversation should have been excluded from evidence under Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981).

Held, reversed and remanded. While *Edwards v. Arizona* did not hold that the mere initiation of a conversation by an accused after invoking his right to counsel amounts to a waiver, the defendant here did in fact make a knowing and intelligent waiver. The Court observed that the totality of circumstances must be analyzed in determining whether there has been a bona fide waiver, and that in asking, "Well, what is going to happen to me now?" the accused had initiated further conversation for purposes of *Edwards*. His statement showed a willingness and a desire for a generalized discussion about the investigation and was not merely a necessary inquiry arising out of the incidents of the custodial relationship. Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830 (1983), 20 CLB 61.

Delaware Defendant was convicted of first-degree felony murder and possession of a deadly weapon during commission of a felony. The murder, the shooting of a clerk, took place during the burglary of a liquor store. A co-defendant was also convicted of the same offenses. It was a statement of co-defendant's that initially led to defendant's arrest. After his arrest in Maryland, defendant was extradited to Delaware, where the crimes occurred. Upon his arrival in Delaware, defendant was advised of the charges against him and of his *Miranda* rights, and he invoked his right to counsel. All questioning thereupon ceased, but before defendant was taken to a processing room, a detective told him that he was being charged as a result of the statement made by co-defendant implicating defendant in the incident and naming defendant as the triggerman. After processing, defendant was given something to eat and placed in a cell. Shortly thereafter, he was taken from his cell to Magistrate Court. As defendant and the detective arrived at the court, defendant made a spontaneous statement denying that he shot the victim but in effect implicating himself in the crimes. The detective informed defendant that since he had invoked his right to counsel, the detective could not discuss the case with him. Defendant then asked the detective if he could retract his request for counsel, and the detective told defendant that he would call the district attorney and a defense attorney so that defendant could tell his story. The detective was unsuccessful in attempting to reach a deputy attorney general, and he did not attempt to contact a defense attorney. The detective thereupon asked defendant if he wanted to tell the detec-

tive what happened. Defendant then made a second statement that placed him at the scene of the crimes but denied participation in the criminal acts themselves. At a suppression hearing, defendant did not contest the admissibility of the first, spontaneous statement, but challenged the admissibility of his second statement, charging a violation of his Fifth Amendment rights. The state, citing Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830 (1983), argued that defendant's first statement, made as he arrived at Magistrate Court, constituted initiation of further communication with the police and a valid waiver of his right to counsel, and was, therefore, admissible. The trial court admitted the statements, and these statements were used to convict defendant.

Held, conviction reversed and case remanded for new trial. The court found that the detective's recitation of the evidence against defendant after he invoked his rights to silence and counsel was reasonably calculated to elicit an incriminating statement from defendant, and thus tainted defendant's subsequent waiver of these same rights. The court cited Edwards v. Arizona, 451 U.S. 477 101 S. Ct. 1880 (1981), which established that statements made after invocation of the Fifth Amendment are only admissible if the prosecution proves the accused initiated further contact with the police and thus validly waived his previously invoked right to counsel. The court stated that "for present purposes the controlling principle is clear: If the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver." In this case, there was no doubt that defendant requested counsel, so the issue hinged on who initiated further communication. The court ruled that the fact that defendant's second incriminating statement occurred approximately forty-five minutes after the detective ceased questioning defendant was irrelevant. The detective should not have repeated to defendant that a co-defendant had named him as the prime culprit, and these statements to defendant by the detective established further contact on the part of the police. The court stated that "In going beyond the formalities of the booking process to describe State's evidence, particularly the highly incriminating accusations of . . . [co-defendant], the Detective . . . engaged in a gratuitous and totally unnecessary tactic which was reasonably calculated to elicit a reaction from the defendant." Since defendant's statement was elicited after he invoked his right to counsel, it should not have been admitted into evidence. Wainwright v. State, 504 A.2d 1096 (1986), cert. denied, 107 S. Ct. 236.

Maryland Defendant was charged with drug paraphernalia possession. After a postponement of trial, he appeared for trial, represented by a public defender. Prior to jury selection, defendant told the court that he wanted new counsel, and he persisted despite the court's assurances that his attorney was competent. Another public defender was brought in, but defendant rejected his assistance as well and asserted that he wanted to hire private counsel himself. The court declared that the trial had to begin that day and asked if he wanted to discharge his attorney and represent himself. Defendant stated that he did not want to represent himself and argued for a

postponement so that he could hire another counsel. The court informed defendant that the trial would proceed with him unrepresented by counsel if he discharged counsel and allowed the prosecutor to examine defendant to ensure that his waiver was knowing and voluntary. It then allowed defendant to discharge his attorney and ordered that the trial proceed. Defendant was convicted. On appeal, defendant argued that a judge was required to order current defense counsel to continue providing legal representation over the client's objections.

Held, conviction affirmed. The court ruled that a defendant may waive right to counsel if, shortly before trial and without justification, he insists on discharging counsel, demands appointment of different counsel, and refuses to represent himself. The court found this constituted a waiver of the Sixth Amendment right to counsel as long as the accused was properly warned of the consequences of his act. Fowlkes v. State, 536 A.2d 1149 (1988).

New York Defendant was convicted upon his plea of guilty of falsely reporting an incident in the third degree. Defendant, a seventeen-year-old male who had briefly left home on foot after a family argument, telephoned the state police and misrepresented that he had been involved in an automobile collision with a deer. The state troopers arrived and discovered defendant's ploy, whereupon he was arrested and charged. Defendant appeared in justice court for arraignment and pleaded not guilty to both charges. A few weeks later, defendant reappeared with his mother, elected to proceed without counsel, and entered guilty pleas. He was sentenced, and defendant appealed to the county court. This court affirmed defendant's conviction and rejected each of defendant's challenges, including the claim that waiver of counsel was ineffective; he then appealed to the court of appeals.

Held, reversed. The court of appeals reversed and held that the record did not support a finding that defendant's waiver of counsel was effective, since it revealed no colloquy between the town justice and defendant that was sufficient to ensure that defendant knowingly and intelligently waived his constitutional right to counsel before pleading guilty to the charges against him. The court found no evidence in the record that the town justice made any precautionary inquiry to ensure that defendant, in waiving counsel, appreciated the value of being represented by counsel and the difficulties of proceeding without one. People v. Mitchell, 463 N.E.2d 1207 (1984).

North Carolina Defendant was convicted of two counts of first-degree murder in North Carolina. He was indicted for the crimes after questioning in Georgia by North Carolina authorities. Defendant was in Georgia under sentence for a different murder committed in that state. During custodial interrogation in Georgia for the murder committed in that state, defendant invoked his Fifth and Sixth Amendment rights. The North Carolina law-enforcement officials subsequently went to Georgia to question defendant about the murders in North Carolina. They advised defendant of his constitutional rights, but he waived them, and made an inculpatory statement about the crimes. The confession was later entered into evidence at trial and used to convict defendant. On appeal, defendant argued that his statements made to the North Carolina authorities should have been suppressed, even though he waived his rights, because

he had earlier invoked them in regard to the Georgia crime.

Held, conviction affirmed. The North Carolina Supreme Court said that it was constitutionally permissible for the North Carolina officers to question defendant about the murders committed in that state, because he had waived his rights in that regard, even though defendant had previously invoked his rights to remain silent and to have counsel present during custodial interrogation by the Georgia officials about unrelated crimes committed in that state. State v. Dampier, 333 S.E.2d 230 (1985).

§ 45.30 —Right to defend pro se

U.S. Supreme Court At his state robbery trial, defendant proceeded pro se, but the trial court appointed standby counsel to assist him over defendant's objection. Following his conviction, defendant unsuccessfully appealed on the ground that his standby counsel interfered with his presentation of the defense. His habeas corpus petition was then denied in the district court, but the court of appeals reversed, holding that his Sixth Amendment rights were violated.

Held, reversed. The court found that defendant's Sixth Amendment right to conduct his own defense was not violated, since it appears that he was allowed to make his own appearances as he saw fit and his standby counsel's unsolicited involvement was held within reasonable limits. The Court observed that defendant was accorded the rights of a pro se defendant to control the organization and conduct of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and jury at appropriate points in the trial. McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944 (1984), reh'g denied, 104 S. Ct. 1620 (1984).

Illinois Before entering a plea of guilty to charges of murder, armed robbery, rape, and aggravated kidnapping, defendant presented a motion that he be allowed to serve as his own co-counsel. Defense attorney explained that his client wished to conduct some parts of his trial himself. The court denied the motion, and required defendant to choose between self-representation and representation by counsel, whereupon defendant chose to be represented by counsel. The denial of this pretrial motion was one of the grounds on which defendant later appealed to have his guilty plea vacated.

Held, judgment affirmed. The court stated that a defendant has no right to both self-representation and the assistance of counsel. He must choose one or the other at the proper time and in the proper manner. People v. Williams, 454 N.E.2d 220, reh'g denied, 467 U.S. 1268, 104 S. Ct. 3563 (1983).

New York Defendant, convicted of larceny and related crimes, argued on appeal that the trial court erroneously denied his request for "standby counsel" to assist him in representing himself at trial. Defendant had moved to proceed pro se, but requested that the court appoint an attorney to act in an advisory capacity; after a lengthy hearing into defendant's ability to represent himself, the court permitted pro se representation but refused to assign standby counsel.

Held, affirmed. The Court of Appeals found that there was no constitutional right to the "hybrid" form of representation requested by defen-

dant; an accused's Sixth Amendment rights provide for either representation by counsel or pro se representation but not both, it noted. While the appointment of standby counsel to assist a pro se defendant has received judicial approval, such an appointment is within the trial court's discretion and not as a matter of right. Here, the trial court conducted an extensive inquiry, during which: "Defendant repeatedly asserted his desire to appear on his own behalf and manifested his appreciation of the attendant risks as well as his familiarity with legal principles and courtroom procedures. The record demonstrates that defendant's decision to proceed pro se without standby counsel was made knowingly and intelligently." People v. Mirenda, 442 N.E.2d 49 (1982).

TYPE OR STAGE OF PROCEEDING

§ 45.40 Lineups

Court of Appeals, 7th Cir. While in jail awaiting trial on one case, defendant was required to appear in a lineup as a suspect in a second case. After his conviction in the second case, he brought a habeas corpus petition on the grounds that the trial court should have suppressed the identification made at the lineup because the prison authorities refused to allow him to have his attorney present. The district court denied his petition for a writ of habeas corpus.

Held, affirmed. Defendant had no Sixth Amendment right to counsel at the lineup since the government had not yet begun the "prosecution" of him in the second case at the time of the lineup. United States v. Lane, 804 F.2d 79 (1986), 23 CLB 290, cert. denied, 107 S. Ct. 1382 (1987).

§ 45.45 Arraignment and preliminary hearing

U.S. Supreme Court A defendant charged with a 1970 robbery and murder in New York was confined in a cell with a prisoner who had agreed to act as a police informant. Incriminating statements made by defendant to the informant were admitted at trial, and the defendant was convicted. The defendant's petition for habeas corpus was denied, but the court of appeals reversed.

Held, reversed and remanded. The Court declared that the Sixth Amendment does not forbid admission in evidence of an accused's statements to a jailhouse informant who was placed in proximity to the accused but made no effort to stimulate conversations about the crime charged. The Court noted that, to show a Sixth Amendment violation, defendant must demonstrate that the police took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986).

Court of Appeals, 2d Cir. After three individuals committed an armed robbery at a garage, during which an employee was shot and killed, defendant voluntarily surrendered. After receiving *Miranda* warnings, he stated that he had been at the garage at the time of the robbery but was not personally involved. He was then sent to the Bronx House of Detention following his arraignment, and was moved to a cell where an informant had been instructed to find out the identity of the defendant's accomplices. Defendant told the informant that he and two cohorts had executed the robbery according to plan, and the informant

passed the information on to the police. Defendant was convicted, and his petition for habeas corpus relief was denied in the district court.

Held, conviction affirmed. The Second Circuit concluded that the state's use of a jailhouse informant placed in the defendant's cell by prearrangement to elicit inculpatory information violated petitioner's right to counsel. The court reasoned that since the government intentionally staged the scene that induced defendant to make the inculpatory statements, it could be deemed to have deliberately elicited them in violation of defendant's Sixth Amendment right to counsel. Wilson v. Henderson, 742 F.2d 741 (1984), 21 CLB 178.

Court of Appeals, 5th Cir. After defendant was convicted in the district court of first-degree murder, he appealed on the grounds, among other things, that he was denied his right to counsel before he confessed to the murder.

Held, conviction affirmed. The Fifth Circuit stated that defendant did not have any Sixth Amendment right to counsel at the time of his confession because no adversary judicial proceedings had commenced against him in regard to the murder. The court commented that adversary judicial proceedings may be initiated by way of "formal charge, preliminary hearing, indictment, information or arraignment." United States v. McClure, 786 F.2d 1286 (1986).

Court of Appeals, 6th Cir. A petition for a writ of habeas corpus was filed in the district court, alleging that defendant's counsel provided inadequate representation in Virginia state court in connection with a guilty plea to a charge of raping an eleven-year-old girl.

Held, granting of habeas corpus reversed. The Fourth Circuit stated that a defendant is not denied his Sixth Amendment right to counsel merely because his lawyer did not pursue every avenue of investigation open to him. The court noted that defense counsel was fully aware of defendant's history and mental limitations because of his prior representation of him, and that counsel knew defendant had no alibi for the time period of the alleged rape and that defendant had, in fact, admitted being with the victim at the time in question. Moreover, defense counsel had reason to believe that a guilty plea, combined with a favorable psychiatric evaluation, raised the likelihood of a sentence of probation. Ballou v. Booker, 777 F.2d 910 (1985), 22 CLB 279.

Rhode Island Defendant was convicted of homicide and he appealed. Carney had complained of receiving threatening phone calls from defendant and in anticipation that he might receive more calls, had asked the police to listen on an extension whenever the telephone rang. Three calls were received by Carney from defendant. During one conversation, Carney raised the matter of victim's death and elicited information that no one other than defendant was in the house with victim on the night of his death and that victim had not committed suicide. Prior to these telephone calls, defendant had been arraigned on the charge of homicide and counsel had appeared to represent him. The police officers who listened in on the conversations

were aware of the pending charges against defendant. The case was remanded by the Supreme Court of the United States in light of the decision of Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986), on the question of whether defendant's Sixth Amendment right to counsel was violated by the police listening to telephone conversations between defendant and Carney.

Held, conviction vacated and remanded for new trial. The court distinguished this case from that of Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986). In *Kuhlmann,* the police officer had instructed his informant to assume a purely passive role and listen only to spontaneous and unsolicited statements made by the accused. Here, the informant was more than a passive listener; the informant raised the issue of the victim's death and pressed for further information. Instead, the court held as controlling the case of Maine v. Moulton, 106 S. Ct. 477 (1985). The court rejected arguments that the Sixth Amendment right to counsel is violated only when the police set up a confrontation between the accused and a police agent. The court further held immaterial the fact that law enforcement officials were investigating the accused for the commission of crimes separate and distinct from the crime for which he was charged. Therefore, the fact that the police were present in the Carney home because of possible threats from defendant was noncontrolling. Accordingly, the court determined that defendant's right to counsel had been violated by the admission of the incriminating statements made to Carney. State v. Mattatall, 525 A.2d 49 (1987), 24 CLB 180.

§ 45.60 Sentencing

Oregon Defendant had entered a plea of "no contest" to a charge of sexual abuse. A pre-sentence investigation was ordered and defendant was directed to appear before the probation department for various interviews. Defendant's attorney was not allowed at the interviews; defendant then moved for an order permitting his attorney to be present. The sentencing court denied his motion and defendant brought a mandamus proceeding against the court.

Held, peremptory writ of mandamus issued. The Oregon Supreme Court ruled that pursuant to the Sixth Amendment guaranty of the right to counsel, defendant's attorney could not be barred from attending the pre-sentence interviews. Sentencing, it noted, is a critical stage of a criminal prosecution at which a defendant is entitled to counsel. Functionally, the pre-sentence investigation is part of the sentencing proceeding and, accordingly, the assistance of counsel cannot be denied. State ex rel. Russell v. Jones, 647 P.2d 904 (1982), 19 CLB 176.

Wisconsin After defendant pled guilty guilty to charges of burglary and resisting an officer, the trial court ordered a pre-sentence report. Defendant was subsequently interviewed by a state probation agent. On appeal, he argued that he had a Sixth Amendment right to have an attorney present at that interview, and that *Miranda* safeguards are also applicable to such meetings. The trial court denied his motion to vacate sentence.

Held, judgment affirmed and motion denied. The court first acknowledged that sentencing is a critical stage of a criminal prosecution such that a

defendant's Sixth Amendment right to counsel has attached. It then determined that, contrary to defendant's claim, Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981) does not require the presence of counsel at a presentence interview. At most *Estelle* requires that, as was done here, counsel be given notice prior to any presentence interview. As to the issue of whether defendant might have a constitutional right, independent of *Estelle,* to have counsel present, the court pointed out that the purpose of a pre-sentence report is to assist the judge in selecting the appropriate sentence for the individual defendant. Since the presence of counsel at the interview might seriously impede the trial court's ability to obtain the fullest information possible about defendant, the court held that counsel need not be present. It pointed out that there are numerous safeguards for defendant at the sentencing stage, including his right to receive counsel's advice prior to the pre-sentence investigation and to have counsel give argument at the pre-sentencing hearing. As to defendant's *Miranda* argument, the court held that, although *Estelle* required the giving of *Miranda* warnings at a psychiatric examination, the Supreme Court expressly declined to decide whether this rule would extend to "all types of interviews or examinations . . ." related to sentencing. Because of the trial court's need for full information, the court held that *Miranda* warnings should not be required at a pre-sentence interview. State v. Knapp, 330 N.W.2d 242, cert. denied, 464 U.S. 834, 104 S. Ct. 117 (1983).

§ 45.80 Habeas corpus and other post-conviction collateral proceedings

U.S. Supreme Court Defendant was convicted of second-degree murder and sentenced to life imprisonment in Pennsylvania state court. The Supreme Court of Pennsylvania affirmed. The defendant then sought post-conviction relief, which was denied in Pennsylvania state court. The Supreme Court of Pennsylvania reversed, holding that the prisoner was entitled under state law to appointed counsel in post-conviction proceedings. On remand, the lower court appointed counsel but permitted counsel to withdraw on the ground that there were no arguably meritorious issues. Defendant acquired new appointed counsel, who convinced the Pennsylvania Superior Court that the prior counsel's conduct violated the defendant's constitutional rights.

Held, reversed and remanded. The U.S. Supreme Court held that defendant had no equal protection or due process right to appointed counsel in post-conviction proceedings. The right to appointed counsel extended to only the first appeal of right. No defendant had a constitutional right to counsel when attacking a conviction that had become final upon exhaustion of the appellate process. Pennsylvania v. Finley, 107 S. Ct. 1990 (1987).

Court of Appeals, 11th Cir. Petitioner, a Florida state prisoner convicted of grand theft, appealed the denial of his petition for a writ of habeas corpus, claiming ineffective assistance of counsel. His claim was based on his attorney's untimely, procedurally defective, and oral motion for disqualification of the state trial judge instead of a written motion accompanied by two supporting affidavits as required under Florida law. Petitioner argued that the judge had been biased because prior to the trial, petitioner had filed two lawsuits against the judge, who had given peti-

tioner what he considered an excessive sentence in a previous criminal case.

Held, affirmed. The attorney's errors in the disqualification motion did not prejudice petitioner because a proper motion would not have succeeded. Under Florida law, a judge cannot be disqualified just because he convicted petitioner in a previous criminal trial. Petitioner failed to present any evidence that the presence of the judge adversely affected his trial, or that the judge acted improperly during the trial. Because it was clear from the record that the habeas corpus petition lacked merit, petitioner was not entitled to an evidentiary hearing or appointment of counsel. Schultz v. Wainwright, 701 F.2d 900 (1983).

Indiana Defendant, Kenneth "Robin" Koehler, was found guilty of battery. In the trial, two public defenders had been appointed to represent Koehler but he was dissatisfied with both; after his second motion to substitute counsel was denied, defendant moved to dismiss his attorney and represent himself. The court appointed a third public defender as standby counsel, but Koehler chose to conduct all examinations of witnesses throughout the proceedings. Proceeding pro se, Koehler exhibited only a rudimentary knowledge of the law, and his method of questioning was so ineffective, repetitive, and ambiguous that the trial judge admonished him for dilatory tactics. After the jury returned a verdict of guilty, Koehler informed the judge that he could not adequately conduct his own defense in the habitual criminal proceeding, and he requested that his standby counsel represent him. The state objected, contending that Koehler had waived his right to counsel by proceeding pro se; the court refused Koehler's reequest, forcing him to continue representing himself. Koehler was found to be a habitual criminal and was sentenced to thirty-eight years in prison. On appeal, he argued that the trial court violated his Sixth Amendment right to counsel by refusing to appoint counsel for his habitual offender hearing.

Held, affirmed in part, reversed in part and remanded for resentencing. The Supreme Court of Indiana held that defendant was denied his constitutional right to counsel in the habitual offender proceeding, and remanded for a new sentencing hearing. Even though Koehler had fired two attorneys, he made the decision to proceed pro se before trial and did not change his mind until trial on the battery charge had concluded. Koehler's stated reasons for requesting counsel at a later stage were legitimate; he acknowledged that he was unfamiliar with the legal intricacies of an habitual offender hearing and thus could not adequately defend himself. His poor performance during the battery trial supported this admission. Moreover, because Koehler's request came at the opportune time between trial on the battery charge and the habitual offender proceeding, appointment of counsel would have created no delay. No continuance would have been necessary since standby counsel was familiar with the case. Finally, Koehler had failed as defense counsel during the battery trial in such a manner that there was no reason to believe he would have fared any better during the habitual offender proceeding. Koehler v. State, 488 N.E.2d 196 (1986), 23 CLB 297.

§ 45.85 Appeals

U.S. Supreme Court A public defender believed that his client's state

court appeal from felony convictions was frivolous, but was unwilling to include in his withdrawal brief the discussion required by the Wisconsin Supreme Court rule. The public defender filed an original action in the state supreme court challenging the discussion requirement on the basis that it was inconsistent with Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967) and that it forced counsel to violate his client's Sixth Amendment rights. The state supreme court upheld the constitutionality of the rule and noted probable jurisdiction.

Held, affirmed. The Supreme Court found that requiring an attorney to assert the basis for the conclusion that an appeal is frivolous does not violate client's Sixth and Fourteenth Amendment rights. McCoy v. Court of Appeals of Wisconsin, 108 S. Ct. 1895 (1988).

U.S. Supreme Court After defendant was convicted of a drug offense in Kentucky state court, his retained counsel filed a notice of appeal, but the appeal was dismissed because counsel failed to file a statement of appeal. When the Kentucky Supreme Court affirmed, defendant was granted habeas corpus relief in the district court, and the court of appeals affirmed.

Held, affirmed. The Supreme Court found that the due process clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. The Court reasoned that a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. Evitts v. Lucey, 105 S. Ct. 830 (1985).

NATURE OF OFFENSE CHARGED

§ 45.95 Traffic and ordinance violations

Kansas In a prosecution for driving while under the influence of alcohol (DUI) the trial court suppressed the results from the breath test given driver-defendant. Defendant was stopped and arrested for DUI by a highway patrol trooper. Defendant was informed of his *Miranda* rights while at the arrest site. After defendant arrived at the local police station, the officer requested defendant to take a breath test. Defendant asked to be allowed to telephone his attorney before deciding whether to take the test. The officer refused and defendant consented to the test. After providing the breath sample, he was allowed to call his lawyer. Defendant filed a pretrial motion to suppress the test results. After conducting a hearing, the trial court ordered the results of the test suppressed on the ground that defendant's consent to the test was obtained in violation of his Sixth Amendment right to counsel. The state appealed.

Held, reversed and remanded. A majority of the Kansas Supreme Court stated that the Sixth Amendment right to counsel applies only to criminal cases. Therefore, adversarial judicial criminal proceedings must have been initiated before the constitutional right to counsel attaches. An arrest for DUI does not, in itself, initiate the criminal proceedings. It is the filing of a complaint that triggers the initiation of the criminal proceedings, and under Kansas law a traffic ticket does not become a complaint until it is filed with the court. Therefore, defendant had no constitutional right to consult

with counsel in order to determine whether to submit to a breath test. The court recognized that when a DUI arrestee receives *Miranda* warnings, he may become confused regarding the scope of the right to counsel set forth in the warnings. In order to avoid confusion, therefore, an arrestee should be informed that he has no right to counsel before deciding whether to take the test. State v. Bristor, 691 P.2d 1 (1984).

Maryland Defendant was convicted of driving while intoxicated. Defendant was stopped by police for drunk driving. The arresting officer read defendant a standardized statement of his rights and the penalties for refusal to submit to a chemical test under the state's implied consent statute. Defendant agreed to take a chemical sobriety test and signed the required waiver form. According to defendant, he requested permission to telephone his attorney three times both before and after the test was administered, but the officer said he had no right to counsel. Defendant moved to suppress the test results on the ground that he was denied his right to counsel under the Sixth Amendment prior to administration of the breathalyzer test. The trial court denied his motion, and he appealed.

Held, conviction affirmed. The court of appeals found that the due process clause of the Fourteenth Amendment, as well as Article 24 of the Maryland Declaration of Rights, requires that a person under detention for drunk driving must, on request, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test, as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the testing process. On the way to this result, the court rejected the argument that the pretest period is a "critical stage" of a drunken driving prosecution, so as to trigger an arrestee's Sixth Amendment right to counsel. The court indicated, however, that the due process clause of the Fourteenth Amendment "has long been recognized as a source of a right to counsel independent of the Sixth Amendment where critically important to the fairness of the proceeding." With respect to the question of what happens when an arrestee submits to a test after being denied his due process right to contact an attorney, the court concluded that the only effective sanction is to suppress the test results. Sites v. State, 481 A.2d 192 (1984).

ADEQUACY AND EFFECTIVENESS OF COUNSEL

§ 45.105 Delay in assigning counsel

U.S. Supreme Court Four inmates of a federal prison were placed in administrative segregation during an investigation of the murder of a fellow inmate. They remained in individual cells for nineteen months before they were indicted and arraigned in the district court, at which time counsel was appointed for them. The district court denied their motion to dismiss the indictment, and they were convicted of murder, but the court of appeals reversed.

Held, reversed and remanded. Federal inmates are not entitled to the appointment of counsel while they are in administrative segregation and before any adversary judicial proceedings are initiated against them. The Court noted that the Sixth Amendment right

to counsel attaches only where there is a criminal prosecution so that the accused may be aided at all critical pretrial proceedings and where the accused is confronted with the intricacies of the criminal law at trial. United States v. Gouveia, 467 U.S. 180, 104 S. Ct. 2292 (1984), 21 CLB 72, cert. denied, 105 S. Ct. 1771 (1985).

§ 45.110 Ineffectiveness

"The Aftermath of *Nix v. Whiteside:* Slamming the Lid on Pandora's Box," by Monroe H. Freedman, 23 CLB 25 (1987).

"*Nix v. Whiteside:* The Role of Apples, Oranges, and the Great Houdini in Constitutional Adjudication," by Brent Appel, 23 CLB 5 (1987).

U.S. Supreme Court After respondent pleaded guilty in Florida state court to three capital murder charges, he told the judge that he had no significant prior criminal record and that he was under "extreme stress." Prior to sentencing, counsel decided not to ask for a presentence or psychiatric report, instead relying on the statements made at the time of plea. After the Florida Supreme Court affirmed, the respondent sought habeas corpus relief in the district court, which was denied, but the court of appeals reversed and remanded.

Held, reversed. A finding of ineffective assistance of counsel cannot be made unless counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied upon to produce a just result. The Court further observed that, for a showing of prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), 21 CLB 70, reh'g denied, 104 S. Ct. 3562 (1984).

U.S. Supreme Court After defendant was convicted in the district court of mail fraud involving a "check kiting" scheme, he appealed on the ground that his counsel had not provided effective assistance, and the Court of Appeals for the Tenth Circuit reversed. Trial counsel, who was young and inexperienced in criminal matters, was given only twenty-five days to prepare for trial, and some of the witnesses were not readily accessible.

Held, reversed and remanded. The court of appeals had improperly applied a standard of reasonable competence without finding that there had been an actual breakdown of the adversarial process during the trial. The Court thus found that the criteria identified by the court of appeals as the circumstances surrounding the defendant's representation, while relevant to an evaluation of a lawyer's effectiveness in a particular case, did not provide an adequate basis for concluding that competent counsel was unable to protect the defendant's constitutional rights. The Court further noted that if there is no bona fide defense to a charge, counsel cannot create one and may render a disservice to the interests of his client by attempting a useless charade. United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984), 21 CLB 67.

Court of Appeals, 3d Cir. After defendant was convicted in state court on murder and kidnapping charges, he sought a writ of habeas corpus in federal court on the grounds that he

had been prejudiced by trial counsel's failure to object to the imposition of consecutive sentences for first-degree murder and kidnapping.

Held, conviction affirmed. The Third Circuit ruled that trial counsel's nonobjection was not an error, since murder and kidnapping are separate and distinct offenses for double-jeopardy purposes. The court also found that it was not improper for trial counsel to have decided not to call defendant's wife as an alibi witness when her testimony would have appeared self-serving and might have caused the jury to focus on a contrived defense. Diggs v. Owens, 833 F.2d 439 (1987), 24 CLB 266.

Court of Appeals, 4th Cir. After defendant was convicted in South Carolina state court for rape, his petition for habeas corpus was denied in the district court. Defendant claimed that he had been denied effective assistance of counsel, since his court-appointed counsel had been given only three days to prepare for trial.

Held, denial of habeas corpus affirmed. The Fourth Circuit found that the facts and circumstances surrounding defendant's representation by appointed counsel did not amount to ineffective assistance. The court noted that while counsel had only three days to prepare between indictment and trial, the appointed counsel had previously represented defendant for more than two months prior to a preliminary hearing and had conducted necessary interviews and reviewed the prosecutor's file. Moreover, counsel participated in all critical stages of the trial and defense counsel had complete access to evidence and witnesses. Griffen v. Aiken, 775 F.2d 1226 (1985), 22 CLB 278, cert. denied, 106 S. Ct. 330 (1986).

Court of Appeals, 7th Cir. After his conviction of murder, armed robbery, and related charges in connection with a bank robbery, defendant brought a federal habeas corpus petition claiming that he had been denied effective assistance of counsel. The district court granted the petition with regard to the sentencing phase of the trial and vacated the death sentence.

Held, district court affirmed. The Seventh Circuit ruled that defense counsel's stipulation to the existence of convictions that were ultimately proven to be nonexistent, constituted ineffective assistance of counsel. The court noted that defense counsel had so stipulated without asking the State's attorney whether he had actual proof of those convictions in the form of certified copies during a critical phase of sentencing hearing. Lewis v. Lane, 832 F.2d 1446 (1987), 24 CLB 260.

Court of Appeals, 7th Cir. After his state conviction for murder, petitioner sought habeas corpus relief in federal court, claiming that the use in a search warrant affidavit of confidential information obtained from a defense attorney's investigator infringed on his right to effective assistance of counsel. The district court granted the petition.

Held, reversed. The Seventh Circuit court held that even if disclosure of confidential information by defense counsel's investigator facilitated execution of the search warrant, admission of evidence seized during the search did not violate defendant's right to counsel. United States ex rel. Shiflet v. Lane, 815 F.2d 457 (1987), 23 CLB 492.

Court of Appeals, 8th Cir. After defendants were convicted of various charges arising out of their depositing

forged treasury checks, the defendants appealed, on the grounds, among other things, that the convictions should be set aside because of ineffective assistance of counsel.

Held, convictions affirmed, but without prejudice to the claim of one of defendants that his rights to effective counsel had been infringed. The Eighth Circuit ruled that an evidentiary hearing would be required to determine whether defendant's counsel had a firm factual basis for his belief that defendant would perjure himself prior to notifying the court to that effect. The court noted that before an attorney can reveal a client's confidences, a clear expression of intent to commit perjury by the defendant is required, and a defendant's statement of intention to lie on the stand does not necessarily mean that the client will lie once there. The court further noted that once the possibility of a client's perjury is disclosed to the trial court, the court should attempt to minimize any prejudice by informing the attorney of his other duties to the client and informing the client of his rights and obligations. United States v. Long, 857 F.2d 436 (1988).

Court of Appeals, 9th Cir. After defendant was convicted in the district court of conspiracy to defraud the United States and income tax offenses, he appealed on the ground that his retained counsel was ineffective.

Held, conviction reversed and case remanded. The Ninth Circuit found that the ineffectiveness of defendant's counsel required reversal even though it was likely that the defendant would have been convicted anyway. The court observed that the representation of the accused must be within the range of competence generally demanded of attorneys in criminal cases, and that counsel's failure to conduct a pretrial investigation and consult with his client on key points in this complex case rendered his representation ineffective. United States v. Tucker, 716 F.2d 576 (1983), 20 CLB 167.

Connecticut Defendant, convicted of attempted assault, contended on appeal that his Sixth Amendment right to the effective assistance of counsel had been violated because his attorney had not pursued an insanity defense.

Held, conviction affirmed. The Supreme Court of Connecticut suggested that a claim of ineffective assistance of counsel is more properly presented on a petition for a new trial or for a writ of habeas corpus, rather than on direct appeal, because the evidentiary hearing available in the collateral proceeding:

> provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency. "The defendant, his attorney, and the prosecutor have an opportunity to testify at such a hearing as to matters which do not appear of record at the trial, such as . . . whether, for tactical reasons, objection was not made to certain adverse testimony, just how much information the defense attorney received from his client about statements made to others, and other such relevant matters." [Citation omitted.]

Because of the inadequacy of the record, defendant had not met his burden of showing that counsel's performance fell below the "range of competence displayed by lawyers with

ordinary training and skill in the criminal law." The court in affirming defendant's conviction, however, noted its decision did not preclude defendant from pursuing his claim in a collateral proceeding. State v. Chairamonte, 454 A.2d 272 (1983), 19 CLB 491.

§ 45.115 —Interpretations by state courts

Arizona Defendant was convicted of aggravated robbery and sentenced to twenty years' imprisonment. He appealed his conviction. The primary question on appeal was whether trial counsel's acquiescence to defendant's demand that he call witnesses whose veracity and credibility counsel strongly doubted, and the concomitant waiving of closing argument constituted ineffective assistance of counsel under the Sixth Amendment.

Held, case remanded to trial court for further proceedings. The Arizona Supreme Court, en banc, found that in acceding to defendant's demand that he call the witnesses and in failing to present a closing argument, trial counsel provided less than minimally competent representation. The counsel's decision not to present a closing argument was not ineffective assistance per se; however, counsel's choice, whether based on ethics or tactics, was unreasonable. No ethical principle would have barred counsel from making an argument based on evidence and testimony other than that of the perjurious witnesses and, as a tactical matter, such an argument was possible in this case. State v. Lee, 689 P.2d 153 (1984).

Arkansas Defendant was found guilty of rape and was sentenced to prison. He petitioned for post-conviction relief on the ground that he was not afforded effective assistance of counsel at trial because his counsel failed to challenge a juror, to make timely objection to the testimony of a police officer, and to have defendant testify on his own behalf.

Held, conviction affirmed. The Arkansas Supreme Court found that defendant had not proven that he was prejudiced by counsel's representation. To prevail on an allegation of ineffective assistance of counsel, the court stated, defendant must establish that the conduct of counsel prejudiced him so as to undermine the adversarial process, citing Strickland v. Washington, 104 S. Ct. 2052 (1984). The court observed that the object of a review of a claim of ineffective assistance of counsel is not to grade counsel's performance but to find actual prejudice. Neither mere error on the part of counsel nor bad advice is tantamount to denial of effective assistance of counsel under the Sixth Amendment. Isom v. State, 682 S.W.2d 755 (1985).

California The public defender was assigned to represent a defendant who had confessed to crimes that included robbery, rape, and assault with a deadly weapon. The appointment was made after a preliminary hearing had taken place, at which the defendant had chosen to represent himself, although he did not take an active part in the hearing. The defendant, who sought to be committed to a mental hospital, made no affirmative request for counsel, but refused to answer when asked if he could afford counsel, and refused to communicate with counsel once appointed. The public defender moved to terminate his appointment, on the grounds that the defendant's actions indicated he rejected the assistance of counsel; the motion was denied. Next, arguing that he was unable to prepare effectively for trial,

defense counsel sought a new preliminary hearing or, failing that, a continuance, and was again unsuccessful. At the trial, defense counsel sat silently, without asking any questions of potential jurors or of witnesses, without making any arguments, and without presenting any evidence. Defendant was not even present during the trial, since his behavior had led to his expulsion from the courtroom during jury selection. After defendant's conviction, the case was appealed on the grounds that defendant was denied effective assistance of counsel.

Held, conviction reversed. The Supreme Court of California stated that "by allowing this defendant to proceed to trial without the assistance of counsel when he had not affirmatively waived his right to such assistance, the court abrogated both its duty to protect the rights of the accused and its duty to ensure a fair determination of the issues on their merits." It was the duty of counsel to proceed with the case, despite adverse rulings of the court and an obstreperous client, and to preserve his points for appeal. Counsel's tactics were not the result of attorney-client collusion, since defendant gave no instructions to counsel. Further, defense counsel's nonparticipation resulted in the inclusion of some arguably prejudicial material during the trial. People v. McKenzie, 668 P.2d 769 (1983).

Idaho Defendant was convicted of voluntary manslaughter for the shooting death of a man who also wielded a firearm. After his arrest, defendant was interrogated by a prosecutor and a deputy sheriff. Defendant asked the prosecutor if he was an attorney, and if the prosecutor could represent him, not understanding the prosecutor's position. At trial, defendant pled self-defense, claiming that he shot the deceased when the other man lifted his gun as if to shoot defendant. The deputy sheriff, though, testified that defendant told him during the interrogation that the deceased had dropped his gun, and, thus, was unarmed when defendant fired the final, deadly shots. Defendant's counsel failed to object to the deputy sheriff's testimony during the trial. On appeal, defendant argued that the failure of his attorney to object to the deputy sheriff's testimony amounted to ineffective counsel. In addition, defendant argued that his statements made during interrogation should have been suppressed, since he had requested counsel before he made the inculpatory remarks, and had been denied same.

Held, conviction reversed and case remanded. The Idaho Supreme Court ruled that defendant was denied his Fifth and Sixth Amendment rights. The court stated that counsel's failure to move for a suppression of the deputy sheriff's testimony constituted an objectively verifiable attorney error, in that it precluded defendant from arguing that the use of deadly force was justified self-defense. In addition, although defendant never specifically said that he wished to receive counsel, his question to the prosecutor about whether the prosecutor could represent defendant was at least equivocally a request for counsel. Thus, the conviction should be vacated, and the case remanded. Carter v. State, 702 P.2d 826 (1985).

Illinois Defendant appealed his conviction for murder, contending he had ineffective assistance of counsel at both his trial and his direct appeal. In both rases, he brought multiple allegations of error.

Held, conviction affirmed. Citing

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), the court held that in order to prove ineffective assistance of counsel, defendant must show that counsel's actions varied from the prevailing professional norms and that those actions prejudiced the jury's decision. The court believed that the alleged errors during the trial were most likely legal tactics, not errors. The court further stated that even if these tactics were errors, they did not prejudice the jury's decision. The court also believed that any errors in the direct appeal were also non-prejudicial. People v. Caballero, 533 N.E.2d 1089 (1989).

Maine Defendant was indicted for raping his three sisters and was convicted for the rape of two of them. On appeal, he argued that his attorney's failure to seek trial severance of the three counts charging him with the rape of his three sisters and his failure to call witnesses constituted ineffective assistance of counsel. At the trial, defense counsel presented three alibi witnesses. He acknowledged that he had made no further effort to contact potential witnesses, but contended that he had contacted all potential witnesses made known to him by defendant. At the post-conviction hearing, ten other witnesses were presented, including one of his sisters, who testified as to the whereabouts of defendant and the victims at the times of the alleged offenses. The habeas judge, finding evidence that one of the sisters defendant was convicted of raping might have been in Canada at the time of the alleged offense, held that defendant had established his entitlement to relief from that conviction. With regard to the remaining conviction, the judge ruled that defense counsel's performance did not fall measurably below that which might be expected from an ordinary fallible attorney and denied relief. Defendant appealed from the latter decision.

Held, affirmed. There was no serious incompetency on the defense counsel's part. Defense counsel's decision not to seek a severance was firmly premised upon considerations of trial strategy. Believing that the testimony of only one sister (for whose rape defendant was convicted) was valid, defense counsel had hoped that it could slip by with the testimony of the other sisters. Courts cannot interfere with an attorney-client relationship unless the attorney commits an egregious error. Nor was defense counsel's decision not to call additional witness grounds for reversal. It was based on the reluctance of those witnesses to testify and on counsel's reasonable fear that their reluctant, half-hearted testimony could damage the defense. Thus, it was a reasoned, informed defense, not the product of incompetency. True v. State, 457 A.2d 793 (1983).

Massachusetts Defendant was convicted of first-degree murder and assault with intent to murder. On appeal, defendant contended that he was deprived of effective assistance of counsel as a result of his counsel's abandonment, in his closing argument, of an insanity defense. Defense counsel presented the insanity defense in his opening statement, cross-examined prosecution witnesses for the purpose of raising doubts as to defendant's sanity, and produced a psychiatrist who had known defendant on a professional basis for many years and who testified in detail on defendant's schizophrenia, paranoia, sociopathic personality, and severe character disorder. The psychiatrist testified that,

as a result of these diseases, defendant was unable either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of of the law. However, in his closing argument, defense counsel stated that defendant acted with a plan and with intelligence and that, though he was insane, his insanity was not sufficient to support a verdict of not guilty by reason of insanity. He then argued for a conviction of second-degree murder.

Held, reversed and remanded for a new trial. Under the standard of Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974), defendant was deprived of effective assistance of counsel because his attorney's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer—and . . . it has likely deprived the defendant of an otherwise available, substantial ground of defense." The evidence elicited by defense counsel both during the cross-examination of prosecution witnesses and during defendant's case raised a substantial question as to defendant's criminal responsibility. The jury could have reasonably concluded that defendant was insane at the time he committed the killing. Defense counsel's closing argument eliminated this possibility, and left defendant with a weak defense of mental impairment which, at best, would result in a conviction for second-degree murder. Defendant, who established that a better closing argument might have accomplished something material for the defense, was entitled to a new trial. Commonwealth v. Street, 446 N.E.2d 670 (1983).

Massachusetts Defendant was convicted of first-degree murder. On appeal, defendant argued that he was entitled to a new trial because he was denied effective assistance of counsel. Defendant's trial counsel proceeded with three principal defenses: insanity, mental impairment, and provocation. Despite expert testimony raising the defenses of insanity and mental impairment, the defense counsel in his closing argument dismissed these defenses and argued for a verdict of guilty of voluntary manslaughter, although there was no evidence of provocation.

Held, motion for new trial granted. A defendant is denied effective assistance of counsel when his attorney is guilty of serious incompetence, inefficiency, or inattention which deprives defendant of an otherwise available, substantial ground of defense. There was sufficient evidence that, if believed, could have resulted in a verdict that defendant was not criminally responsible. There was testimony raising the issues of defendant's ability to premeditate murder and whether he posssessed the state of mind to commit as cruel and atrocious a murder as he committed. Despite this, the defense counsel did not ask the jury to consider defendant's mental state but, instead, surrendered defendant to a poorly conceived manslaughter theory. Counsel's behavior fell measurably below that which might be expected from an ordinary fallible lawyer. Commonwealth v. Westmoreland, 446 N.E.2d 663 (1983).

Pennsylvania Defendant's sentence for murder was vacated on appeal. The state appealed that decision. Defendant filed numerous, repetitive petitions under the Post Conviction Hearing Act (P.C.H.A.) 42 Pa.C.S. § 9541 et seq., contending he had an ineffec-

tive counsel during his trial and his appeal.

Held, reversed. The court found that the Post Conviction Hearing Act was abused by defendant. The court noted a defendant could continue petitioning the court forever asserting ineffective assistance of counsel. This would suspend the finality of the litigation indefinitely. The court concluded that ineffective assistance of counsel may only be used when there has been a serious miscarriage of justice. Commonwealth v. Lawson, 549 A.2d 107 (1988).

Wyoming Defendant was convicted of aggravated robbery and unauthorized use of an automobile. On appeal, he contended that his right to effective assistance of counsel had been jeopardized by lack of notice that one of the state's witnesses had been hypnotized prior to testifying. Before hypnosis, the witness in question testified that a masked gunman appeared in the store where she was employed, that his mask slipped off once during the robbery, that she had seen him in the store without a mask earlier that day, and that she could positively identify defendant as the gunman. She added nothing as a result of her hypnotic session to her description of the events, but said that the hypnosis made her more confident of her identification of defendant. During the trial, defendant did not move for a continuance for the purpose of securing expert testimony relating to hypnosis. However, he moved for a mistrial at the close of all the evidence on the ground that his right to effective assistance of counsel had been jeopardized by lack of notice of the hypnosis. The motion was denied.

Held, affirmed. Defendant was adequately advised of the pretrial hypnosis of the witness. Material furnished by the state to defendant included a supplemental report of the hypnosis. Defense counsel apparently did not review that report and did not learn of the hypnosis until it was revealed during the witness's testimony. However, defense counsel listened to the tape recording of the hypnotic session and then examined the witness concerning the hypnosis. Furthermore, the witness's testimony during hypnosis did little more than reinforce her pre-hypnotic testimony. Gee v. State, 662 P.2d 103 (1983).

§ 45.120 —Failure to assert available defense

Court of Appeals, 1st Cir. After defendant was convicted of second-degree murder, he appealed, claiming that he had been denied effective assistance of counsel when his attorney failed to investigate the possibility that others had a motive to kill the victim.

Held, conviction affirmed. The First Circuit found that counsel's performance was reasonable in light of the fact that there were no other persons anywhere in the vicinity. The court also found that counsel's decision not to ask for a manslaughter charge was not improper, since such a request would have undercut the defense theory of defendant's nonparticipation in the crime. Casale v. Fair, 833 F.2d 386 (1987), 24 CLB 266.

Court of Appeals, 1st Cir. After the district court granted a petition for habeas corpus on the ground of incompetency of counsel, an appeal was taken by the State of Rhode Island.

Held, reversed and petition dismissed. The First Circuit held that although petitioner's defense counsel

had failed to recognize or appreciate that intoxication may be a defense to first-degree murder, and had also failed to interview witnesses, visit the scene of the crime, or make an independent examination of ballistic evidence, petitioner was not entitled to habeas corpus relief. The court explained that petitioner failed to establish that his decision to accept a guilty plea agreement to a charge of second-degree murder was actually and materially influenced by counsel's errors. The court thus found that counsel's errors in this case were not so pervasive that no actual connection need be shown. Dufresne v. Moran, 729 F.2d 18 (1984), 20 CLB 464.

Court of Appeals, 2d Cir. After defendant pleaded guilty in New York State court to first-degree robbery and other offenses, he appealed on the ground that he was denied effective assistance of counsel. After having exhausted his state remedies, he filed a habeas corpus petition, which was denied by the district court.

Held, denial of petition affirmed. The Second Circuit stating that the trial counsel's failure to advise defendant of the affirmative "play pistol" defense to the first-degree robbery charge did not deny him effective assistance of counsel. The court reasoned that there was little likelihood that the defense would succeed because defendant would have been forced to take the witness stand in order to try to establish it, and he could have had to concede the burglary and the robbery in order to present the "play pistol" claim to the jury. Mitchell v. Scully, 746 F.2d 951 (1984), 21 CLB 258.

Court of Appeals, 3d Cir. On appeal from the denial of a petition for habeas corpus, defendant, who had been convicted of narcotics violations in state court, argued that he had been denied effective assistance of counsel where his attorney had failed to compare his voice exemplar to the government's intercepted recording.

Held, reversed and remanded. The Third Circuit concluded that defendant had been denied effective assistance of counsel by defense's failure to make the comparison of the two tape recordings where the tape recording of the intercepted telephone conversation was the only evidence introduced against defendant. The court reached this conclusion even though trial counsel may have decided as a matter of strategy not to use the exemplar at trial despite the testimony of an expert that spectrographic analysis indicated defendant was a speaker in the incriminating telephone conversation. United States v. Baynes, 687 F.2d 659 (1982), 19 CLB 172.

Court of Appeals, 5th Cir. A Louisiana state prisoner brought a habeas corpus petition, claiming that his attorney's advice as to parole eligibility denied him effective assistance of counsel. The district court denied relief.

Held, denial of petition affirmed. The Fifth Circuit stated that the prisoner was not prejudiced by his attorney's incorrect advice as to parole eligibility. The court explained that the defendant claiming ineffective assistance of counsel has the burden of establishing that, but for the misadvice, he would not have pleaded guilty and would have insisted on going to trial. Czere v. Butler, 833 F.2d 59 (1987), 24 CLB 262.

Court of Appeals, 5th Cir. After having been convicted in a Mississippi state court of murder, defendant peti-

tioned for federal habeas corpus relief on the ground that he had been denied effective assistance of counsel due to his lawyer's failure to properly investigate his defense. His petition was denied by the district court.

Held, affirmed. The Fifth Circuit held that a defendant seeking to establish a Sixth Amendment denial of effective assistance of counsel must show both failure to investigate adequately as well as actual prejudice arising from the failure. The court explained that it was not enough for defendant to show that the investigation of a possible character witness would have turned up admissible evidence; he must also establish that knowledge of the uninvestigated evidence would have altered his counsel's tactical decisions at trial. The court further found that defense counsel's tactical decision that good character testimony would be inconsistent with the defense of mental disturbance did not constitute ineffective assistance. Gray v. Lucas, 677 F.2d 1086 (1982), 19 CLB 76, reh'g denied, 402 U.S. 1124, 103 S. Ct. 3099 (1983).

§ 45.125 —Incorrect legal advice

U.S. Supreme Court After defendant entered a guilty plea to first-degree murder and theft charges in Arkansas state court, he was sentenced to concurrent terms of thirty-five years for the murder and ten years for the theft. Defendant then filed a habeas corpus petition, alleging that his plea was involuntary by reason of ineffective assistance of counsel because his court-appointed attorney had misinformed him that he would be eligible for parole after serving one third of his prison sentence. The district court denied relief and the court of appeals affirmed.

Held, denial of habeas corpus affirmed. The Supreme Court stated that where a defendant enters a guilty plea on counsel's advice, a claim of ineffective assistance of counsel requires the defendant show that counsel's representation fell below an objective standard of reasonableness and that there was "prejudice," that is, a reasonable probability that the outcome would have been different but for counsel's errors. The Court concluded that there was no claim of "prejudice" here because there was nothing to support the conclusion that parole eligibility played a role in the defendant's decision to plead guilty. Hill v. Lockhart, 106 S. Ct. 366 (1985), 22 CLB 277.

§ 45.130 —Failure to introduce evidence or make objections

Court of Appeals, 4th Cir. Defendant appealed from an order of the federal district court denying his petition for a writ of habeas corpus based on a claim of incompetency of counsel. He argued that his trial counsel's failure to object to prosecution evidence that he "stood on his constitutional rights" to remain silent denied him the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments, to a degree that prejudiced the outcome of his trial.

Held, judgment reversed with direction to issue a writ of habeas corpus conditional on the results of a new trial. The Fourth Circuit found that habeas corpus relief was warranted since the trial counsel's failure to object to prosecution evidence that defendant had stood on his constitutional rights to remain silent during interrogation

denied defendant effective assistance of counsel. The court noted that the failure to raise the issue on direct appeal was not a waiver since the trial counsel also represented the defendant on the unsuccessful appeal to the North Carolina Supreme Court and could not be expected to assert his own incompetence. Alston v. Garrison, 720 F.2d 812 (1983), cert. denied, 104 S. Ct. 3589 (1984).

Court of Appeals, 5th Cir. A Texas state prisoner sentenced to death brought a petition for a writ of habeas corpus, which was denied in the district court.

Held, denial of writ affirmed. The Fifth Circuit stated that the defense attorney at trial was not ineffective for failing to present evidence of petitioner's mental retardation as a mitigating factor. The court noted that the defense attorney's decision not to introduce such evidence was a matter of trial strategy to avoid possible introduction of unfavorable rebuttal testimony. Bell v. Lynaugh, 828 F.2d 1085 (1987), 24 CLB 176.

Court of Appeals, 5th Cir. After defendant was convicted of aggravated robbery in Texas state court, he petitioned for federal habeas corpus relief on the grounds that he had been denied effective assistance of counsel because his attorney had failed to make argument to the jury at the sentencing phase of trial. The district court denied the petition.

Held, affirmed. The Fifth Circuit decided that even if counsel's performance were deficient for failing to present evidence or make an argument at the sentencing phase of trial, the defendant failed to show reasonable probability that, but for the alleged error, the resulting sentence would have been different. Martin v. McCotter, 796 F.2d 813 (1986), cert. denied, 107 S. Ct. 935, (1984).

Court of Appeals, 6th Cir. After having been convicted in Michigan state court for armed robbery, defendant brought a habeas corpus petition, alleging that he had been denied effective assistance of counsel.

Held, conviction reversed. The Sixth Circuit found that defense counsel's failure to move to contest the admissibility of defendant's three prior convictions denied defendant effective assistance of counsel. The court observed that counsel's clearly erroneous understanding and recitation of the law concerning the admissibility of prior convictions resulted in defendant being misinformed. Blackburn v. Foltz, 828 F.2d 1177 (1987), 24 CLB 176.

Florida Defendant, who received four death sentences for murder convictions, filed a motion for post-conviction relief and requested a stay of execution, alleging that his trial counsel had rendered ineffective assistance by failing to present evidence to mitigate his sentences. At trial, defendant's counsel presented no mitigating evidence but argued that defendant should be treated no more harshly than his co-perpetrators, one of whom was found incompetent to stand trial while the other received a sentence of life imprisonment. Counsel's argument was effective to some degree in that the jury recommended that defendant also be sentenced to life imprisonment, but the trial judge overrode the jury and imposed the death sentence. Defendant argued that trial counsel rendered ineffective assistance by failing to call defendant's mother and sister to testify that he was a nice person who had

helped support them ten to twelve years prior to his commission of the murders. Trial counsel testified at an evidentiary hearing that he knew the mother and sister were willing to testify but, in view of the trial judge's reputation, had concluded that such nonstatutory mitigating evidence would have little effect on the judge and that a proportionality argument would be the better strategy. The circuit judge, granting defendant's motion, vacated the sentences, and the state appealed.

Held, reversed with directions to reinstate the death sentence. The Supreme Court of Florida held that defendant presented no legitimate claim for post-conviction relief and that the circuit judge erred in declaring trial counsel ineffective and vacating the death sentences. Citing Strickland v. Washington, 466 U.S. 668, 687 (1984), the court ruled that the circuit judge did not apply the proper standard for deciding a claim of ineffective assistance of counsel, which standard would have had to show counsel's performance was deficient and thereby prejudiced the defense. Taking into account all the circumstances—the likelihood of the testimony of the defendant's mother and sister impressing the trial judge, the state's ability to undermine such testimony through cross-examination, and the disparate punishment given to the co-perpetrators—the trial counsel made a reasonable choice, well within the wide range of professionally competent assistance. The counsel's strategic decisions did not constitute ineffective assistance, because alternative courses of action had been considered and rejected. State v. Bolender, 503 So. 2d 1247 (1987).

Washington Defendant was convicted of two counts of aggravated murder in the first degree and was sentenced to death. During the penalty phase of the trial, several potential defense witnesses were available, but defendant did not want them to testify. After sentencing, defendant claimed he had been denied effective assistance of counsel because defense counsel had failed to present any mitigating evidence, even though to do so had been defendant's own expressed desire. Defendant cited the American Bar Association's Standards for Criminal Justice, which says that decisions about which witnesses to call are the exclusive province of the lawyer. At issue was whether the trial defense counsel failed to provide effective assistance of counsel by acceding to defendant's request not to present mitigating evidence at the penalty phase of the case.

Held, affirmed. The court said that to prove ineffective assistance of counsel, it must be shown first that counsel's performance was deficient, and second, that the deficiency prejudiced the defense. The court determined that defense counsel was not deficient, since it had located four witnesses who were willing to testify on behalf of defendant. The court maintained that the ABA guideline was not a constitutional provision and declined to adopt a rule that would invalidate trials in which a lawyer acquiesced in his client's wishes. Such a rule, the court said, would fly in the face of the constitutional right of criminal defendants to control, at least broadly, their own defenses. Counsel's actions are usually based, quite properly, on informed strategic choices made by defendant and on information supplied by defendant. In this case, defense counsel appeared to be following two strategies. First, it was clear to the court

that if the witnesses had testified, defendant's past criminal convictions, which had been excluded from the trial, might well have been put before the jury in rebuttal. Almost certainly this real possibility had entered into defense counsel's decision. As it was, defense counsel was successful in keeping defendant's extensive criminal record out of evidence. Second, he chose to pursue a strategy emphasizing innocence by refusing mitigating evidence, and by doing so hoped to introduce some doubts into the jurors' minds as they considered the life or death alternatives. In view of the foregoing, it certainly could not reasonably be said that defense counsel did not exercise reasonable professional judgment. The court concluded that not only did defendant fail to show that defense counsel's performance was deficient, but he also failed to address prejudice of the trial. Petition of Jeffries, 752 P.2d 1338 (1988).

§ 45.140 —Duty of appellate counsel

U.S. Supreme Court Respondent was convicted of robbery and assault in a jury trial in a New York state court. Counsel was then appointed to represent him on appeal. Respondent informed counsel of several claims that he felt should be raised, but counsel rejected most of the suggested claims, stating that they would not aid respondent in obtaining a new trial and that they could not be raised on appeal because they were not based on evidence in the record. Counsel then listed seven potential claims of error that he was considering including in his brief, and invited respondent's "reflections and suggestions" with regard to those claims. Counsel's brief to the Appellate Division of the New York Supreme Court concentrated on three of the claims, two of which had been originally suggested by respondent. In addition, respondent's own *pro se* briefs were filed. At oral argument, counsel argued the points presented in his own brief, but not the arguments raised in the *pro se* briefs. The Appellate Division affirmed the conviction. After respondent was unsuccessful in earlier collateral proceedings attacking his conviction, he filed this action in Federal District Court, seeking habeas corpus relief on the basis that his appellate counsel had provided ineffective assistance. The District Court denied relief, but the Court of Appeals reversed, concluding that under Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493—which held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a nonfrivolous appeal—appointed counsel must present on appeal all nonfrivolous arguments requested by his client. The Court of Appeals held that respondent's counsel had not met this standard in that he failed to present certain nonfrivolous claims.

Held, reversed and habeas corpus denied. The Supreme Court stated that counsel assigned to prosecute an appeal from a criminal conviction does not have the constitutional duty to raise every nonfrivolous issue requested by the defendant. The Court observed that while the accused has ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty or to take an appeal, he does not have the right to overrule the professional judgment of appellate counsel as to the issues to be raised. Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983), 20 CLB 161.

CONFLICT OF INTEREST

§ 45.145 In general

Court of Appeals, 1st Cir. After defendant pleaded guilty to federal narcotics charges, he sought to set aside the plea on the ground of ineffective assistance of counsel. The district court denied the motion.

Held, vacated and remanded. The First Circuit stated that evidence that the defense attorney lied to his client on a material matter was conduct that amounted to ineffective assistance of counsel, since it fell below an objective standard of unreasonableness. The attorney apparently falsely told defendant that he had spoken to the prosecutor, who had said that the drug dealer in question had incriminated defendant, and that the attorney had confirmed this representation by speaking directly to the drug dealer. United States v. Giardino, 797 F.2d 30 (1986).

Court of Appeals, 4th Cir. After defendants were convicted in the district court on Racketeer Influence and Corrupt Organization Act (RICO), conspiracy, and Travel Act violations, they appealed on the ground that an assistant district attorney's participation in the case was improper, since he had formerly represented them in connection with the same matter.

Held, affirmed in part and reversed in part. The Fourth Circuit ruled that the prosecutor's participation in the case was per se illegal, and that the defendants' right to a fair trial was fatally compromised, especially since he had represented them as to a matter identical to the one on trial. United States v. Schell, 775 F.2d 559 (1985), 22 CLB 282, cert. denied, 106 S. Ct. 1498 (1986).

Court of Appeals, 5th Cir. After defendants were convicted in the district court of conspiracy to import cocaine, one defendant appealed on the ground that the trial judge had improperly denied his request for a subpoena to obtain testimony from a government informant who allegedly had been his attorney.

Held, conviction affirmed and remanded for further proceedings. The Fifth Circuit found that if a defendant's prior counsel discloses confidential information to the government, there may be a sufficient basis to dismiss the indictment or to suppress evidence if prejudice can be established. United States v. Fortna, 796 F.2d 724 (1986), cert. denied, 107 S. Ct. 437 (1986).

Louisiana Defendant and McNabb were charged jointly with theft; they were convicted of the charge after a trial at which both were represented by the same attorney. After the exhaustion of defendant's appeals, he filed for post-conviction relief, alleging that his right to effective assistance of counsel was violated because of a conflict of interest between himself and McNabb. A hearing ensued, with the court ruling that a conflict of interest existed because of the disparity in the evidence against defendants: "[T]he case against McNabb was strong and direct, whereas the evidence against [defendant] was weak and circumstantial."

Held, reversed. Citing Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980), the court stated that where a defendant raises a conflict of interest issue after trial "in order to establish a violation of the Sixth Amendment . . . [he] must demonstrate that an actual conflict of interest adversely affected

his lawyer's performance." Noting that counsel had conducted a vigorous defense for each co-defendant and that no antagonistic defenses existed, the court found that the disparity of the evidence, alone, was insufficient to establish a conflict. The court also rejected defendant's only other complaint, that he was not permitted by counsel to testify in his own behalf because of the prejudicial effect it would have on McNabb, finding that defendant had not shown how his testimony would have benefited his case. Although it did not appear from the trial record that the judge had inquired into a possible conflict, the Louisiana high court found that under the circumstances, he had no duty to do so. Finally, it ruled, the evidence adduced at the post-trial hearing established that even if a conflict existed, defendant had knowingly and intelligently waived it. State v. Edwards, 430 So. 2d 60 (1983), 20 CLB 73.

Nebraska Defendant, convicted of murder, argued on appeal that there should be a reversal because of a conflict of interest on the part of his trial counsel. At trial, the state called two witnesses who were also represented by defense counsel. Defendant was informed of the multiple representations but made no objection. Both witnesses testified and were cross-examined by defense counsel; neither gave testimony that was harmful to defendant.

Held, affirmed. The Supreme Court of Nebraska stated that the mere possibility of a conflict of interest by an accused's attorney does not constitute a violation of the accused's Sixth Amendment right to the effective assistance of counsel. To establish such a violation, the court continued, a defendant who raised no objection at trial must demonstrate both that (1) his attorney also represented other clients whose interests actually conflicted with his own; and (2) the multiple representation had an adverse effect on his attorney's performance. Here, found the court, the record disclosed no actual conflict of interest. State v. Pope, 318 N.W.2d 883 (1982), 19 CLB 87.

§ 45.150 Representation of co-defendants

U.S. Supreme Court A Georgia trial court found petitioner guilty of murder and sentenced him to death. After exhausting his direct appeal, petitioner sought habeas corpus relief on the grounds of ineffective assistance of counsel, claiming that lawyers from the same law firm represented both indictees. The district court rejected the claim, and the court of appeals affirmed.

Held, affirmed. The U.S. Supreme Court held that the defense attorney's partnership with a lawyer representing a co-indictee in the same prosecution did not so infect the attorney's representation as to constitute a conflict of interest. Burger v. Kemp, 107 S. Ct. 3114 (1987).

Court of Appeals, 4th Cir. After their conviction for conspiracy to possess and distribute heroin, defendants appealed on the ground that their joint representation by the same counsel deprived them of their Sixth Amendment rights.

Held, affirmed. The Fourth Circuit ruled that defendants' pretrial waiver of their right to conflict-free representation was valid, where both the U.S. magistrate and the district judge informed them about the dangers of joint representation and pos-

sible conflicts. The court noted, however, that the better practice would have been for the trial court to conduct further inquiry as to defendants' knowledge of the dangers of joint representation. United States v. Akinseve, 802 F.2d 740 (1986), cert. denied, 107 S. Ct. 3190 (1987).

Court of Appeals, 4th Cir. Defendants were convicted of conspiracy to import and possess narcotics. On appeal they claimed their rights were violated because they were represented at trial by the same attorney. They contended that Federal Rule of Criminal Procedure 44(c) requires the court to "inquire with respect to such joint representation and . . . personally advise each defendant of his right to effective assistance of counsel, including separate representation. . . ."

Held, affirmed. The Fourth Circuit held that the mere failure of the district court to inquire or advise as to the defendant's joint representation by the same attorney did not, per se, require reversal of the convictions. The court explained that the claimed "guilt by association" arising from the joint representation did not establish prejudice warranting reversal. The court further found that it was unnecessary to decide whether the substance of a conversation one of the defendant's had with a government agent and introduced into evidence created prejudice as a result of the joint representation since the conversation was admitted without objection and no motion was made to strike it. United States v. Arias, 678 F.2d 1202, 19 CLB 77, cert. denied, 459 U.S. 910, 103 S. Ct. 218 (1982).

Court of Appeals, 8th Cir. Defendant and her husband pled guilty in federal district court to the crime of kidnapping under 18 U.S.C. § 1201 (a) (1976), and were given fifty-year sentences. Defendant appealed the court's denial of her motion to vacate her sentence, arguing that she was denied effective legal representation because of a conflict of interest arising from the joint representation of defendant and her husband by one attorney. She also claimed that she did not knowingly waive her right to separate counsel.

Held, case remanded for a new hearing and new sentence. The record showed that a conflict of interest existed, and that it adversely affected counsel's performance. It showed that the only aggravating factor in the kidnapping charge was an injury to the kidnapped infant's scrotum, and that defendant was not present when the injury occurred. It was clear that counsel, if he had not also represented the husband, would have argued that defendant's lack of involvement with the injury should result in a lighter sentence for her than for her husband, and that counsel's failure to do so adversely affected defendant's representation. However, there was no showing that any conflict of interest adversely affected defendant's representation when she pled guilty. In fact, during the plea hearing, defendant spoke on her own behalf and counsel said little. Despite this, the court remanded for a new hearing because defendant did not knowingly waive her right to conflict-free representation. She acquiesced to joint representation without warning from counsel or the court of any conflict. United States v. Unger, 700 F.2d 445, cert. denied, 464 U.S. 934, 104 S. Ct. 339 (1983).

Court of Appeals, 11th Cir. Four defendants were convicted of conspiracy

to possess with intent to distribute marijuana and aiding and abetting its distribution. Defendants appealed, claiming that their joint representation by a single criminal defense attorney from their arrest until the end of their trial created a conflict of interest which violated their right to effective assistance of counsel. Moreover, they claimed that the federal district court erred in failing to conduct an adequate hearing on the conflict of interest issue.

Held, conviction affirmed. Although the district court erred in failing to conduct an adequate hearing on the conflict of interest issue, the error was harmless because no actual conflict of interest existed. Rule 44 (c) of the Federal Rules of Criminal Procedure requires the court to advise each defendant individually of the potential dangers of joint representation and of his right to effective representation. It then requires the court to obtain a response from each defendant indicating that he has been advised of his right to effective representation, that he is aware of a possible conflict of interest, and that he voluntarily waives his Sixth Amendment protections. The court's failure to comply with Rule 44(c) did not require a reversal because defendants failed to demonstrate that defense counsel made choices beneficial to one client but harmful to another, or that defendants' respective defenses were inconsistent. In fact, co-defendants' statements were largely corroborative, and their various defenses were coordinated. United States v. Mers, 701 F.2d 1321, cert. denied, 464 U.S. 991, 104 S. Ct. 481 (1983).

RIGHT TO CONFER WITH COUNSEL

§ 45.165 In general

Court of Appeals, 6th Cir. Petitioner, a state prisoner convicted of second-degree murder, was granted habeas corpus relief by the federal district court on the ground that the state of Tennessee had violated petitioner's Sixth Amendment right to effective counsel by interfering with his relafrom that of Kuhlmann v. Wilson. In prison awaiting his trial, petitioner, at his attorney's request, drafted a handwritten statement detailing his whereabouts and activities during the week of the murder. The attorney had requested the statement to help in preparation of petitioner's trial. During a legal search of defendant's cell, prison employees discovered the statement and gave a copy to the prosecuting attorney. The trial court permitted the prosecuting attorney to use the statement to impeach petitioner's credibility, and on the strength of it and some circumstantial evidence convicted petitioner. The trial court denied a motion for a new trial and the Tennessee Court of Criminal Appeals affirmed the conviction. The federal district court, however, ordered an evidentiary hearing to determine whether petitioner was prejudiced by prosecution's use of the statement. The court found that the statement was a confidential attorney/client communication whose use prejudiced petitioner. It also noted that the statement was not a final draft, and that petitioner's recollection of events was different after reflection and questioning. The state appealed on the following grounds: (1) deference should have been given to the state courts' findings of lack of prejudice; and (2) any error in use of the confidential statement was harmless beyond a reasonable doubt.

Held, grant of habeas corpus relief in the form of a new trial affirmed. A presumption of correctness did not attach to the state courts' findings. Al-

though the state court determined that use of the statement did not prejudice petitioner, it made factual findings on whether seizure, and not use, of the statement violated his right to counsel. The state courts made no findings on whether such use constituted an unlawful interference with an attorney-client relationship. Nor was the error of the state courts harmless. In light of the fact that all other evidence against petitioner was circumstantial, it would be impossible to find beyond a reasonable doubt that use of the statement did not contribute to petitioner's conviction. Bishop v. Rose, 701 F.2d 1150 (1983).

Georgia Defendant, convicted of murder, argued on appeal that there should be a reversal because the arresting officer testified at trial that, while being booked, defendant had requested to speak with his attorney and was given use of a telephone for that purpose.

Held, conviction affirmed. The Supreme Court of Georgia stated that

> [T]his testimony did not focus on the defendant's silence or suggest that the defendant had asserted his right to remain silent. The testimony simply related, in the course of a lengthy narrative, that the defendant requested an attorney; it did not purport to be evidence of the defendant's guilt or to be directed toward undermining any of his defenses.

Accordingly, the court concluded, defendant's rights were not prejudiced by the officer's testimony. Duck v. State, 300 S.E.2d 121 (1983), 19 CLB 487.

South Carolina Defendant, convicted of murder, argued on appeal that his right to counsel was violated when the trial judge prohibited him from consulting with his attorney during a fifteen minute recess between his direct testimony and cross-examination.

Held, conviction affirmed. The Supreme Court of South Carolina found that the trial judge's denial of the brief consultation did not amount to a denial of the defendant's rights. It reasoned that

> Normally, counsel is not permitted to confer with his defendant client between direct examination and cross-examination. Should counsel for a defendant, after direct examination, request the judge to declare a recess so that he might talk with his client before cross-examination begins, the judge would and should unhesitatingly deny the request.

Moreover, even if the trial judge's ruling could be considered a violation of defendant's right to counsel, defendant had not demonstrated that he was prejudiced as a result; thus, implied the court, any possible error was harmless and not grounds for reversal. State v. Perry, 299 S.E.2d 324, 19 CLB 486, cert. denied, 461 U.S. 908, 103 S. Ct. 188 (1983).

Texas Defendants, convicted for aggravated promotion of prostitution, contended on appeal that they were denied effective assistance of counsel because of the trial court's refusal to allow defense counsel to withdraw, and that the state violated defendant's Sixth Amendment right to counsel and the state constitution by using an informant to disclose pretrial conversations between defendants and their counsel. At the direction of prose-

cutors, the informant, a putative defense witness, had attended and surreptitiously recorded a meeting between defendants and counsel at which trial strategy was discussed. During the meeting, counsel made several highly derogatory remarks about police officers and the criminal justice system, as well as advising defendants on how to avoid future arrest and prosecution by falsifying business records.

When the recording was played for the jury, counsel moved for a mistrial and to withdraw, on the ground that he had become a witness and could not serve as defendant's attorney. The motion was denied; on summation, the prosecutor made several references to the taped conversation as evidence of a conspiracy to cover up the operation of a prostitution ring.

Held, reversed and remanded. The Texas Court of Criminal Appeals, en banc, found first that the defense attorney's taped statements were so damaging to his credibility and character that his clients were denied the effective assistance of counsel. Further, stated the court, the State violated defendant's Sixth Amendment right to counsel by directing its agent to record the pretrial consultation and using the tape at trial. Brewer v. State, 649 S.W.2d 628 (Tex. Crim. App. 1983), 20 CLB 74.

§ 45.166 —Interpretations by state courts (New)

Connecticut Defendant was convicted of selling a controlled substance. At trial, while defendant was being cross-examined, the court called a recess. The state requested a sequestration order and asked the court not to permit defendant to confer with his counsel, since the state was in the middle of cross-examination. The court granted the order over the defense's objection. Defendant appealed, stating that the trial court's sequestration order violated his rights under the state and federal constitutions. The court of appeals held that the trial court's error was harmless.

Held, conviction reversed and new trial ordered. The court ruled that the trial court's grant of the sequestration order was an error of constitutional magnitude that mandated reversal per se and was not subject to harmless error analysis. The Supreme Court in Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330 (1976), held that a trial court order preventing defendant from consulting with his counsel for a seventeen-hour recess impinged on his right to assistance of counsel, but the Court left open the question of whether an order denying the right of consultation between a criminal defendant and his counsel for a brief recess resulted in a Sixth Amendment violation of rights. The Connecticut court held that a per se rule of automatic reversal is warranted by a violation of defendant's fundamental right to assistance of counsel, thereby following the majority of circuits that have considered the issue. The harmless error analysis is unworkable in cases in which defendant is completely denied assistance of counsel, since the analysis requires a showing of prejudice which would intrude on the attorney-client relationship and since the harm caused by the error cannot adequately be assessed from the record. State v. Mebane, 529 A.2d 680 (1987), 24 CLB 269.

Minnesota Defendant was convicted and sentenced to life imprisonment for first-degree murder. He appealed the decision based on the trial court's failure to suppress his custodial state-

ment taken by the police after he had invoked, but had been denied, his constitutional right to counsel. After his arrest, defendant was questioned twice concerning the murder. Although on both occasions defendant asked to see an attorney, one was not provided, nor was defendant allowed a phone call. After being isolated in an intake facility for two days, police again tried to question him, and again defendant asked for counsel and was refused. He concluded that giving a statement would be in his best interests after being denied contact with persons outside the jail for approximately two days.

Held, affirmed on other grounds. Pivotal to resolution of defendant's claim that his statement was inadmissible is whether, prior to giving the statement, he had effectively invoked his right to assistance of counsel. The court said that custodial interrogation initiated by police after an accused has invoked that right violates the Fifth Amendment right of an accused not to be compelled to be a witness against oneself. The court held that when a suspect indicates by an equivocal or ambiguous statement, which is subject to a construction that the accused is requesting counsel, all further questioning must stop, except for narrow questions designed to "clarify" the accused's true desires respecting counsel. In the court's view, considering all the circumstances surrounding defendant's detention and questioning in the jail, defendant was clearly denied his right to counsel. Additionally, he had been retained in prolonged police custody without being afforded counsel, or being permitted to contact relatives or friends outside the jail, thereby creating a presumption of coercion. Therefore, the trial court should have suppressed the statement. State v. Robinson, 427 N.W.2d 217 (1988).

New York Defendant was convicted of second-degree murder and burglary. Police went to the home of defendant when the victim's husband recognized defendant's voice during a telephone call demanding ransom. After being advised of his *Miranda* rights, defendant refused the services of a lawyer and indicated he might know "something" or someone who knew where the victim was. When he attempted to drive away, however, he was taken to the police station where he asked for a lawyer. But when he told the lawyer that he could not pay the lawyer unless he was able to get ransom money from the victim's father, the lawyer departed, recommending that defendant call Legal Aid. Defendant, however, did not make the call, insisting that he would act as his own attorney. Faced with defendant's refusal to provide any indication as to the whereabouts of the victim until he was paid ransom money, the police continued to question him. Later, defendant led police to the victim, who had suffocated in a coffinlike box. On appeal from his conviction, defendant claimed that his incriminating statements, including his continued demands for ransom money in exchange for information, should be suppressed as violative of his right to counsel under the New York state constitution.

Held, conviction affirmed. The Court of Appeals found that it would not be reasonable or realistic to expect the police to refrain from pursuing the most obvious, and perhaps the only, source of information by questioning the kidnapper simply because the kidnapper asserted the right to counsel after being taken into cus-

tody. For the court to hold that the special restrictions of the state right-to-counsel rule extend into this area of police activity would either dangerously limit the power of the police to find and possibly rescue the victim or would, perversely, permit the kidnapper to continue his ransom demands and negotiations from the sanctuary of the police station. Therefore, the court held that the police did not violate defendant's right to counsel under the state constitution by questioning him concerning the victim's whereabouts. People v. Krom, 461 N.E.2d 276 (1984), 21 CLB 79.

Ohio Defendant appealed his indictment for complicity to commit vandalism, intimidation, tampering with evidence, and perjury. While he was telephoning his attorney from the jail, an officer tape recorded, without defendant's knowledge, defendant's remarks. Defendant moved to dismiss the indictment on the basis that the state deliberately violated his constitutional right to counsel. The motion was granted, but later overturned.

Held, reversed and remanded. The court held that the recording was in error and should not be used. The court determined that the trial court should decide in camera whether or not the unauthorized interception of a private conversation between a criminal defendant and his attorney results in substantial prejudice to the defendant in the preparation of his defense. If there is prejudice to the defendant, the trial court may take appropriate action, including dismissal of the indictment. The court ordered that this case be remanded to the trial court to decide whether or not there was prejudice. State v. Milligan, 533 N.E.2d 724 (1988).

46. CRUEL AND UNUSUAL PUNISHMENT

§ 46.00 In general

U.S. Supreme Court During the course of a riot at Oregon State Penitentiary, an officer shot respondent in the knee. Respondent then brought a civil rights action (42 U.S.C. § 1983) alleging that he had been deprived of his rights under the Eighth and Fourteenth Amendments. The district court directed a verdict for petitioners, but the court of appeals reversed and remanded.

Held, reversed. The Court ruled that the shooting of an inmate during a security action does not violate his Eighth Amendment right to be free from cruel and unusual punishment as long as the inflicting of pain was not done wantonly or unreasonably. The Court added that the test as to whether the force was reasonable or not was whether force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically for the purpose of causing harm. Whitley v. Albers, 106 S. Ct. 1078 (1986).

U.S. Supreme Court Respondent was convicted of uttering a "no account" check for $100 in a South Dakota state court. The maximum punishment for that felony would have been five years' imprisonment and a $5,000 fine. Respondent, however, was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute because of his six prior

felony convictions—three convictions for third-degree burglary and convictions for obtaining money under false pretenses, grand larcency, and third-offense driving while intoxicated. The South Dakota Supreme Court affirmed the sentence. After respondent's request for commutation was denied, he sought habeas relief in Federal District Court, contending that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. The District Court denied relief, but the Court of Appeals reversed.

Held, affirmed. The sentence of life imprisonment without possibility of parole for a defendant convicted of uttering a "no account" check for $100 and who had three prior convictions was so significantly disproportionate to his crime that it violated the Eighth Amendment. The Court reasoned that since the uttering of a "no account" check was of a nonviolent nature, and the defendant's prior felonies were relatively minor, the sentence was improper in view of the fact that it was the most severe that the state could impose on any criminal. Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001 (1983), 20 CLB 62.

Court of Appeals, 1st Cir. After defendants were convicted in the district court of aiding and abetting arson that resulted in death, they were sentenced to seventy-five years' and ninety-nine years' imprisonment, respectively. Prior to sentencing, the government had requested sentences of twenty-four and thirty-five years, respectively.

Held, convictions affirmed. The First Circuit found that the imposition of sentences three and four times the government's recommendation did not breach the court's duty to individualize each defendant's sentence where defendant's attorney has brought all mitigating circumstances to the judge's attention prior to sentencing. The court also noted that the sentences were less than the maximum allowed by law, and there was no indication that the district judge imposed uniform sentences for a given type of crime. The court, however, remanded for further sentencing proceedings, requiring from the district court a written indication as to whether the court actually relied on certain challenged statements in a pre-sentence investigation report. United States v. Jimenez-Rivera, 842 F.2d 545 (1988).

Court of Appeals, 5th Cir. A prison inmate brought a civil rights action against prison guards, the prison warden, and others for damages for injuries sustained in beating and stabbing incidents. The prisoner claimed that he was deprived of his civil rights by being jailed with an inmate with known animosity toward him. The district court granted damages, and the defendants appealed.

Held, affirmed in part and reversed in part. The Fifth Circuit found that the conduct of the prison officials did not violate the Eighth Amendment prohibition against cruel and unusual punishment, since it did not manifest a conscious or callous indifference to the prisoner's needs. Johnston v. Lucas, 786 F.2d 1254 (1986).

Court of Appeals, 8th Cir. After defendants were convicted in district court of kidnapping, they appealed on the grounds, among other things, that the sentence of 200 years without possibility of parole for 66 years was cruel and unusual punishment.

Held, conviction affirmed. The

Eighth Circuit determined that the sentence for kidnapping was not an abuse of discretion, especially where the crime was brutal, defendants took an active role in it, and they had a long criminal record. The court also found that defendant had knowingly and freely made incriminating statements disclosing the location of the victim's body, even though FBI agents had made misrepresentations that the co-defendant was talking and would probably blame the defendant. United States v. Petary, 857 F.2d 458 (1988).

Delaware After defendant's third conviction for second-degree burglary, the state moved to declare him a habitual offender, pursuant to the requirements of the Delaware recidivist statute. Defendant was so declared and sentenced to life in prison without parole. At issue was whether or not the recidivist statute violated the Eighth Amendment ban on "cruel and unusual punishments" as interpreted by Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001 (1983).

Held, affirmed. The *Solem* court established three criteria for claims of disproportionate sentences: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." The recidivist statute treats breaking into a dwelling, during the daytime, unaccompanied by actual violence, as seriously as breaking into another type of structure with a deadly weapon or when violence to a person results. The court concurred to the extent that it declared that the unauthorized entry into a residence for the purpose of committing a crime was a grave matter. *Solem* states that prior convictions are relevant to sentencing. Under the recidivist statute, when the third separate crime involving death or danger to human life is committed, the habitual offender sentencing provision is triggered. While there may be "more serious offenses" that would bring a less severe sentence upon a first offense, this fact alone does not in any way lessen the legislature's justification in providing for a sentence of life imprisonment without parole to a person that is convicted on three separate occasions of certain specified felonies involving death or danger to human life. Lastly, the court maintained that although Delaware is the only state where a mandatory life term of imprisonment could result for a third daytime residential burglary, the Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how to best administer its criminal laws. Williams v. State, 539 A.2d 164 (1988).

§ 46.01 —Interpretations by state courts (New)

California Defendant, a seventeen-year-old with no prior criminal record, was tried as an adult and found guilty of felony murder. Defendant got together with seven schoolmates to raid a marijuana farm from which he had been chased at gunpoint twice before. They carried what weapons they could obtain—shotguns and baseball bats—and had discussed the possibility of overpowering whoever was on guard in order to remove some of the ripened marijuana crop. They were discovered and defendant, who was hiding with three other boys, saw one of the farmers approaching them from behind, carrying a shotgun. In what he

later convincingly testified was a panic reaction grounded in fear for his life, defendant fired nine shots from his .22 caliber semi-automatic rifle into the farmer, killing him. The jury, expressing discomfort with the felony-murder statute, felt compelled to bring in a verdict of first-degree murder, since the California statute mandates a first-degree verdict where an offender commits a murder in the course of the felony of attempted robbery. The judge, alluding to defendant's immaturity and lack of prior record, committed defendant to the Youth Authority, as the jury had recommended. On appeal, the Youth Authority was found not to have jurisdiction, and defendant's sentence was changed to a life prison term, of which he would have to serve a minimum of sixteen to twenty years. Defendant appealed the sentence on the ground that it was "cruel and unusual punishment" within the meaning of the California constitution.

Held, judgment modified. The Supreme Court of California reduced the first-degree murder conviction to second-degree murder. The court upheld the constitutionality of the felony-murder statute, but expressed dissatisfaction with a rule that provides only one punishment scheme for all homicides occurring during the commission of or attempt to commit certain offenses. In the defendant's case, however, the law resulted in the imposition of a punishment that was disproportionate to the crime committed, and was therefore cruel and unusual within the meaning of California's constitution. Factors in the finding were defendant's age, his immaturity for his age, his lack of a criminal record, his ability to convince the judge and jury that he feared for his life and had panicked, and the very light sentences imposed on the other boys. People v. Dillon, 668 P.2d 697 (1983).

Delaware Defendant was convicted of first-degree murder, first-degree rape, and first-degree burglary. He was sentenced to death. The murder victim was a 92-year old woman weighing 75 pounds. Defendant murdered the victim, after breaking into her home, by choking her in the course of raping her. On appeal, defendant argued, among other things, that the death penalty was cruel and unusual punishment, and thus unconstitutional, for someone who had no proven intent to cause a victim's death.

Held, case remanded. The Delaware Supreme Court vacated the death sentence and remanded the case for a new penalty hearing, but on other grounds than the appeal issue raised here. On the above question, the court held that imposition of the death penalty for felony murder is not per se unconstitutional. The court stated that "the death penalty is not a grossly disproportionate and excessive punishment for a defendant found guilty of felony murder, who actually killed his victim under the circumstances present here." Defendant strangled a frail old woman while raping her, which defendant should have known could cause her death. His conduct therefore fulfilled a statutory requirement of recklessness and met a constitutional standard of culpability. According to the court, "An individual's culpability is determined by reference to his intentions, expectations and actions." The court ruled that in this case, defendant in a sense acted intentionally, in that his actions could reasonably have been expected to result in the death of his victim. In any case, the felony murder statute does not require any showing that a defen-

dant intended to kill his victim, but only that his actions recklessly caused the victim's death. Under a Delaware statute, a presumption exists that a person intends the natural and probable consequences of his actions. In this case, the natural and probable consequence of defendant's actions was his victim's death. Whalen v. State, 492 A.2d 552 (1985).

Utah Defendant was convicted of first-degree murder, aggravated burglary, and conspiracy to commit murder. On appeal, he contended that the trial court erred in the penalty phase of the case by admitting evidence of other crimes that defendant had allegedly committed but of which he had not been convicted. The State was allowed to introduce evidence that defendant had assaulted several people in jail while he awaited his trial. The appellate court assumed that defendant based his claim on the Eighth and Fourteenth Amendments to the U.S. Constitution since defendant did not specify them specifically, but cited a State of Washington case that relied on them.

Held, admission of evidence affirmed. The court ruled that evidence for which no convictions had been obtained was not per se inadmissible at the penalty phase of the trial, but only if the State is able to prove beyond a reasonable doubt that defendant did in fact commit those offenses. The majority of the court found that "[a] rule prohibiting evidence of violent crimes which have not yet resulted in convictions would preclude the sentencing authority from considering important information about the accused's violent proponsities and future dangerousness, factors essential to an evenhanded consideration of death penalty issues." The majority concluded that a more reasonable approach is to admit all evidence crucial to a proper sentencing determination while adequately protecting the accused from unfair prejudice. State v. Lafferty, 749 P.2d 1239 (1988).

§ 46.05 Death penalty

"[The] Constitutionality of Executing Juvenile Offenders: *Thompson v. Oklahoma*," by Steven N. Gersten, 24 CLB 91 (1988).

"Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence," by Bruce S. Ledewitz, 24 CLB 379 (1988).

"Social Sciences and the Criminal Law: Capital Punishment by the Numbers—An Analysis of *McCleskey v.* Kemp," by James R. Acker, 23 CLB 454 (1987).

"Payment of Costs in Death Penalty Cases," by Marshall Dayan, 22 CLB 18 (1986).

"Can the Death Penalty be Imposed on Juveniles: The Unanswered Question in *Eddings v. Oklahoma*," by Christopher M. Hill, 20 CLB 5 (1984).

U.S. Supreme Court Fifteen-year-old defendant was convicted of first-degree murder in Oklahoma state court, after he actively participated in a brutal murder. The district attorney's statutory petition to try the defendant as an adult was granted by the trial court and the defendant was sentenced to death. Defendant appealed. The Oklahoma Court of Criminal Appeals affirmed.

Held, judgment vacated and case remanded. The Supreme Court ruled

that "the cruel and unusual punishment" prohibition of the Eighth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the execution of a person under age 16 at the time of his or her offense. The Court reasoned that it must be guided by the "evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles, 356 U.S. 86 (1958)), in determining why a civilized society may reject or enforce the death penalty for a person less than age 16 at the time of the crime. Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

U.S. Supreme Court While serving a life sentence without possibility of parole on a first-degree murder conviction, defendant was sentenced to death for the murder of a fellow inmate. He was sentenced to death under a Nevada law mandating a death sentence in these circumstances. The state supreme court affirmed, but the federal district court vacated the sentence in a habeas corpus proceeding. The court of appeals affirmed.

Held, affirmed. The Supreme Court held that a statute requiring the death penalty for a prison inmate convicted of murder while serving a life sentence without possibility of parole violates the Eighth and Fourteenth Amendments. The Court declined to depart from a constitutional mandate that required individual sentencing in capital cases. Sumner v. Shuman, 107 S. Ct. 2716 (1987).

U.S. Supreme Court After petitioner was convicted of first degree murder and sentenced to death, he sought habeas corpus relief on the ground that the sentencing judge refused to consider mitigating circumstances not specifically enumerated in the Florida death penalty statute. The district court denied relief and the Eleventh Circuit Court of Appeals affirmed.

Held, reversed and remanded. The Supreme Court ruled that absent a showing that the non-statutory mitigating circumstances, when imposing sentence, were harmless, the exclusion of mitigating evidence renders the death sentence invalid. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), 23 CLB 487.

U.S. Supreme Court After the defendant's conviction and death sentence for murder and other charges was affirmed by the Georgia Supreme Court, his habeas corpus petition was granted in the district court, but reversed by the Court of Appeals for the Eleventh Circuit.

Held, affirmed. The Supreme Court stated that a statistical study, indicating that the death penalty in Georgia was imposed more frequently on black defendants killing white victims than on white defendants killing black victims, was insufficient to support an inference that decision makers in a particular case acted with discriminatory purpose. McCleskey v. Kemp, 107 S. Ct. 1756 (1987), 23 CLB 487.

U.S. Supreme Court The petitioner was convicted of felony murder arising from the abduction and murder of a family by petitioner's coconspirators. The Arizona Supreme Court upheld the death sentence, holding that "intent to kill" may be established where life would or might be taken in accomplishing the underlying felony.

Held, vacated and remanded. The Supreme Court stated that although petitioner neither intended to kill the victims nor inflicted the fatal wounds,

specific intent to kill is not necessary to sustain a murder conviction where there is reckless disregard for human life. The Court thus found that this "reckless disregard" is a sufficiently culpable mental state to support a capital sentence. The case was, however, remanded since the Arizona Supreme Court premised its decision on a finding of intent. Tison v. Arizona, 107 S. Ct. 1676 (1987), 23 CLB 486.

U.S. Supreme Court After a California trial jury found defendant guilty of forcible rape and first degree murder, the trial judge instructed the jury to consider and weigh the aggravating and mitigating circumstances, but cautioned the jury, during the penalty phase, that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The California Supreme Court reversed defendant's death sentence.

Held, reversed and remanded. The instruction in question did not violate the Eighth and Fourteenth Amendments when given during the penalty phase of a capital murder trial. The Court reasoned that a reasonable juror would most likely interpret the admonition to avoid basing a decision on "mere sympathy" as a directive to ignore only the sort of sympathy that was not rooted in the aggravating and mitigating evidence introduced during the penalty phase. California v. Brown, 107 S. Ct. 837 (1987), 23 CLB 387.

U.S. Supreme Court When defendant was convicted of murder in a Florida state court in 1974, there was no suggestion that he was incompetent at the time of the offense, at trial, or at sentencing. Subsequent behavior led to further psychiatric examinations, and one doctor concluded that he was not competent to suffer execution. Nevertheless, the governor signed a death warrant, and defendant filed a habeas corpus petition in district court, which was denied. The court of appeals affirmed.

Held, reversed and remanded. The Court stated that the Eighth Amendment prohibits the state from inflicting the death penalty on a prisoner who is insane. The Court reasoned that its conclusion was necessary to protect the condemned from fear and pain without comfort of understanding, and to protect the dignity of society itself from the barbarity of exacting mindless vengeance. Ford v. Wainwright, 106 S. Ct. 2595 (1986).

U.S. Supreme Court After defendant was convicted of a capital crime in California state court and was sentenced to death, the California Supreme Court affirmed, rejecting the claim that the state capital punishment statute was invalid because it failed to require a comparison of defendant's sentence with sentences imposed in similar capital cases to determine whether they were proportionate. Habeas corpus relief was denied in the district court, but the court of appeals held that comparative proportionality review was constitutionally required.

Held, reversed and remanded. The court decided that the Eighth Amendment does not require proportionality review by appellate courts in every case in which it is requested by the defendant, and the California death penalty scheme is not rendered unconstitutional by the absence of a provision for such a review. Decisions of the court do not require comparative proportionality review by an appellate court in every capital case. That some

schemes providing proportionality review are constitutional does not mean that such review is indispensable. Pulley v. Harris, 465 U.S. 37, 104 S. Ct. 871 (1984).

U.S. Supreme Court Several defendants convicted in Missouri state court of capital murder and sentenced to death sought stays of execution. Their respective convictions and sentences were affirmed by the Missouri Supreme Court on direct appeal, but there was no prior federal review.

Held, stays granted. Justice Blackmun, as Circuit Justice, stated that every defendant who has a right of direct review from a sentence of death is entitled to have that review before paying the ultimate penalty. The Court commented that the right to review otherwise is rendered meaningless since it makes no sense to have the execution set on a date within the time specified for that review or before the review is completed. United States v. McDonald, 104 S. Ct. 567 (1984).

U.S. Supreme Court Applicant was sentenced to death in November 1973 for the murder of the manager of a restaurant he had robbed. His conviction and sentence were affirmed by the Florida Supreme Court, and the U.S. Supreme Court denied certiorari in 1976. Applicant filed his first habeas petition in 1979, which was denied, and his second petition in 1983. Applicant's case had been considered by at least ten state and federal courts other than the U.S. Supreme Court, and twice by that Court.

Held, application denied. The Court reviewed a record that showed that the Florida Supreme Court and both the federal district court and the Eleventh Circuit had considered voluminous statistics which allegedly supported the claim of discriminatory application of the death sentence. These courts determined in written opinions that such evidence was insufficient to show unconstitutional discrimination; therefore the court was not warranted in disagreeing with their decisions. Sullivan v. Wainwright, 464 U.S. 109, 104 S. Ct. 450 (1983).

U.S. Supreme Court After a Louisiana state prisoner was sentenced to death, he sought habeas corpus in the district court, which denied relief. The Court of Appeals for the Fifth Circuit affirmed the denial of relief but granted a stay of execution.

Held, stay vacated. The Court stated that a stay granted pending resolution of a certiorari petition will be vacated unless there is reasonable probability that four members of the Supreme Court would consider the underlying issue sufficiently meritorious. In this case, the Court found that a challenge to a districtwide, rather than a statewide, proportionality review of the death penalty with other cases was not an issue warranting a grant of certiorari. Maggio v. Williams, 464 U.S. 46, 104 S. Ct. 311 (1983).

U.S. Supreme Court Petitioner and three other men, all of whom claimed to be urban guerillas and members of the Black Liberation Army, killed a white hitchhiker in Florida. Petitioner was convicted of first-degree murder by a jury in a Florida state court, and as required by the Florida death penalty statute a separate sentencing hearing was held before the same jury, which rendered an advisory sentence recommending life imprisonment. However, the trial judge, after receiving a presentence report, sentenced petitioner to death. As required by the Florida statute, the judge made written

findings of fact, including findings of the statutory aggravating circumstances that petitioner had knowingly created a great risk of death to many persons, had committed the murder while engaged in a kidnapping, had endeavored to disrupt governmental functions and law enforcement, and had been especially heinous, atrocious, and cruel. The judge also found that in addition to the statutory aggravating circumstances the petitioner's record constituted an aggravating circumstance, and ultimately concluded that there were sufficient aggravating circumstances to justify the death sentence. The judge did not find any mitigating circumstances, noting particularly that petitioner had an extensive criminal record and thus did not qualify for the statutory mitigating circumstance of having no significant history of prior criminal activity. On automatic appeal, the Florida Supreme Court affirmed, approving the trial judge's findings and concluding that the trial judge properly rejected the jury's recommendation of life imprisonment. However, the Florida Supreme Court later vacated its judgment and remanded to the trial court to give petitioner a full opportunity to rebut the information in the presentence report. After a resentencing hearing, the trial court reaffirmed the death sentence on the basis of findings that were essentially identical to its original findings, and the Florida Supreme Court again affirmed.

Held, judgment affirmed. Although the trial court's consideration of the defendant's criminal record as an aggravating circumstance was improper under state law, the imposition of the death penalty following the defendant's conviction was not unconstitutional since the finding of aggravating circumstances was not arbitrary or irrational. Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 20 CLB 162, reh'g denied, 464 U.S. 874, 104 S. Ct. 209 (1983).

U.S. Supreme Court Respondent was found guilty of murder by a jury which imposed the death penalty. The judge instructed the jury during the sentencing phase of the trial that it was authorized to consider all of the evidence received during the guilt phase of the trial as well as all facts and circumstances presented in mitigation or aggravation during the sentencing proceeding, and that it must find and designate in writing the existence of one or more specified statutory aggravating circumstances in order to impose the death penalty. The jury stated in writing that it found the statutory aggravating circumstances that respondent had a prior conviction of a capital felony, that he had "a substantial history of serious assaultive criminal convictions," and that the murder was committed by an escapee. While respondent's appeal was pending, the Georgia Supreme Court held in another case that one of the aggravating circumstances—"substantial history of serious assaultive criminal convictions" —was unconstitutionally vague. In respondent's case, the Georgia Supreme Court held that the two other aggravating circumstances adequately supported the sentence. After the federal district court denied respondent's petition for habeas corpus, the court of appeals held that respondent's death penalty was invalid. The Georgia Supreme Court explained the state-law premises for its view that the failure of one aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported by

other aggravating circumstances. Under Georgia law the finding of a statutory aggravating circumstance serves a limited purpose—it identifies those members of the class of persons convicted of murder who are eligible for the death penalty, without furnishing any further guidance to the jury in the exercise of its discretion in determining whether the death penalty should be imposed.

Held, reversed. Although the Georgia Supreme Court invalidated one of the statutory criteria for aggravating circumstances under which the prisoner was convicted, namely a history of serious assaults, the death penalty need not be vacated, since the jury expressly found the existence of two other statutory aggravating circumstances. The Court further found that the limited function served by the jury in the finding of statutory aggravating circumstances did not render the scheme invalid. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733 (1983), 20 CLB 61.

U.S. Supreme Court An application for an order vacating a stay of execution of an Alabama state prisoner was filed with the court through Justice Powell.

Held, application to dissolve and vacate stay granted. In imposing the death sentence, aggravating factors were considered in a nonarbitrary manner where the defendant had been involved in 280 armed robberies and nine kidnappings. Alabama v. Evans, 103 S. Ct. 1736 (1983), 20 CLB 58.

U.S. Supreme Court A habeas corpus proceeding was brought to challenge the death sentence imposed in South Carolina state court for murder and armed robbery. The Fourth Circuit ruled that the trial court's instructions were erroneous, since the jury could have reasonably concluded that it could recommend a death sentence even if it found that defendant was not personally responsible for the murder but was only responsible as an aider and abetter. Therefore, the court vacated judgment and remanded the case with instructions to grant the writ of habeas corpus. Both parties appealed.

Held, judgment vacated and case remanded. The Supreme Court granted certiorari and remanded the case to the Fourth Circuit for consideration in light of Rose v. Clark, 106 S. Ct. 3101 (1986) and Cabana v. Bullock, 106 S. Ct. 689 (1986). Hyman v. Aiken, 777 F.2d 938 (1985), 22 CLB 279, vacated 106 S. Ct. 3327 (1986).

California Defendant appealed his sentence of death for murder. He claimed the prosecutor erred in his closing argument when he informed the jurors that the law, not they, had the power of life and death. The jury was only to weigh mitigating and aggravating factors. Once the jury decided which was greater the law would grant death if appropriate.

Held, reversed. The court agreed with defendant, stating the prosecution misled the jurors when it told them the law, not they, decided defendant's fate. According to the court, this summation took power from the jury and is incompatible with the Eighth Amendment's heightened need for reliability in the determination that death is the appropriate punishment in a specific case. The prosecutor's instruction misled the jurors because it implied the decision to invoke the death penalty rested not with them but elsewhere. People v. Farmer, 765 P.2d 940 (1989).

Florida Defendant appealed his conviction of capital murder. He contended that because he was only seventeen at the time of the crime, death would be cruel and unusual punishment and would violate the Eighth Amendment. He claimed that minors usually have less control of their actions and therefore juries rarely impose capital punishment on minors. Defendant also claimed that minors are usually treated more leniently under the law.

Held, conviction affirmed. The court reviewed the legislative history of juveniles, who are charged with serious offenses, being treated as adult defendants. The court found that over a thirty-year period the legislature consistently enacted laws providing that minors be remanded to the criminal courts rather than the juvenile courts when they are indicted for capital crimes. However, the court noted in this case the aggravating circumstances outweighed the mitigating factors, and the jury felt the death penalty was warranted. The court also cited Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) which established no age requirement for the imposition of capital punishment. In that case, the U.S. Supreme Court determined that each case must be decided individually. The court in this case found there was no constitutional bar to the imposition of the death penalty on defendants who are seventeen years of age when the offense was committed. LeCroy v. State, 533 So.2d 750 (1988).

Florida Defendant was convicted of first-degree murder for having shot a man in the back twice during the course of a robbery. In spite of the jury's recommendation of life imprisonment, the trial judge imposed the death penalty, based on his finding of four aggravating circumstances: (1) the crime was committed while defendant was under sentence of imprisonment; (2) it took place during the commission of a felony; (3) it was especially heinous, atrocious, and cruel; and (4) it was cold, calculated, and premeditated.

Held, affirmed. On appeal, the Supreme Court of Florida upheld the death sentence. It found that the killing of a victim who apparently offered no resistance to the robbery was not especially heinous, atrocious, and cruel, since there was nothing about it to "set the crime apart from the norm of capital felonies." It also rejected the trial judge's finding that the killing was cold, calculated, and premeditated, since that aggravating factor "applies only to crimes which exhibit a heightened premeditation, greater than that required to establish premeditated murder." It noted that the trial judge erred in citing defendant's lack of remorse in support of the latter finding; consideration of lack of remorse is improper in making findings in support of aggravating factors. Faced, however, with the two remaining aggravating factors and no mitigating factors, the Florida Supreme Court concluded that the facts clearly and convincingly suggested a sentence of death, making the jury override appropriate. Gorham v. State, 454 So. 2d 556 (1984), 21 CLB 183.

Louisiana Defendant was convicted of first-degree murder. After the verdict, the trial court immediately conducted the penalty hearing before the same jurors. The initial verdict form stated that the "aggravating element" required under first-degree murder was defendant's attempt to commit

armed robbery at the time of the killing. The jury returned a recommendation of death. Defendant appealed, contending the Louisiana death penalty scheme to be unconstitutional for three reasons.

Held, affirmed. The first claim was that the statute's requirement that the aggravating circumstance be proved at the guilt stage unconstitutionally predisposed the jury to return the death penalty in the sentencing stage on the basis of the same aggravating circumstance. This offered no constitutional principle; in fact, it narrowed the first-degree murder category earlier in the trial, and there was a greater protection against arbitrariness. Defendant also objected to the failure to select a separate jury in the sentencing phase and to the jury having been selected by eliminating those who would not impose the death penalty under any circumstances. This argument had been rejected in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770 (1968). Defendant offered no factual support for his contentions. Finally, defendant contended that the jurors had been misled by the fact that their verdict was termed a "recommendation," even though it bound the judge. In fact, the jurors had been clearly instructed that the judge had to sentence according to their unanimous recommendation. State v. Summit, 454 So. 2d 1100 (1984), cert. denied, 490 U.S. 1038, 105 S. Ct. 1411 (1985).

New Jersey Defendant was convicted of murder and sentenced to death. On appeal, he challenged the constitutionality of the New Jersey Death Penalty Act (the Act), N.J.S.A. 2C:11-3.

Held, affirmed in part and reversed in part. The Supreme Court of New Jersey held that capital punishment is not a per se violation of the state constitutional ban against cruel and unusual punishment. Additionally, under the state and federal Constitutions, the Act sufficiently guided juries' discretion to achieve a capital-punishment system that narrowed the class of those potentially subject to the death penalty. The Act also defined and selected those who would be subject to the sentencing proceeding and ultimately the death penalty with consistency and reliability. Capital punishment was a matter of particular state interest or local concern; thus, it did not require a uniform national policy. In determining whether the sentence of death was cruel and unusual under the state constitution, the court stated that constitutional provisions drafted in different times and intended to embody general principles need not be limited to the specifics in the minds of the framers. Thus, it was not dispositive that the same constitution containing the cruel and unusual punishment clause also contained the death penalty as a permissible punishment. As evidenced by the legislature's passing of the Act, the court stated that the community's contemporary-standard-of-decency requirement had been met. The death penalty, although severe and irrevocable, was not grossly disproportionate in relation to the crime. The ban on cruel and unusual punishment was not a vehicle for enforcing judicial notions of penological reasonableness; it was not appropriate for the judiciary to invalidate a particular statutory punishment on the ground that another punishment might accomplish the same goal. The court agreed with State v. Forcella, 245 A.2d 181 (1968), that stated "[a]s to the question whether the death penalty serves a useful end, and its morality and fairness, these are

matters which rest solely with the legislative branch of government." The Act contained sufficient safeguards to prevent arbitrary infliction of the death penalty. The Act not only conformed with the Constitutional requirements set forth by the Supreme Court but also provided several other procedural protections for the defendant, including the guarantee of mandatory appellate review, the finding of aggravating factors to exist beyond a reasonable doubt, the requirement that aggravating factors outweigh mitigating factors beyond a reasonable doubt, and the provision that in the event of a deadlock at the penalty proceeding the court must impose a sentence of imprisonment. Juries in capital cases must be informed of and free to exercise their statutory option to return final, nonunanimous verdicts resulting in imprisonment if after a reasonable period of deliberations they were unable to agree. Under the Act, a nonunanimous verdict constituted a final resolution of the case, and implications that the jury should have rendered a unanimous verdict to avoid additional expense and prevent waste of time and resources were prejudicially coercive and untrue. The trial court committed prejudicial error by instructing jurors to engage in further deliberations in terms that strongly impelled them to reach a unanimous verdict. Therefore, the court reversed, holding that defendant would not be subject to the death penalty on remand and that the trial court should proceed as if the jury had reached a final non-unanimous verdict. State v. Ramseur, 524 A.2d 188 (1987).

North Carolina Defendant appealed his death sentence for two counts of first-degree murder. He contended that the punishment was disproportionate to the crimes committed. During the commission of two separate robberies, defendant killed a victim in each crime. The autopsy of the first murder victim showed she had been physically abused before she was killed.

Held, sentence affirmed. The court noted that the aggravating circumstances were not disproportionate to the imposition of the death sentence because: (1) defendant committed the murders so that he could rob the victims; (2) he continued to live next door to scene of the first murder, even as the body lay awaiting discovery; and (3) he was convicted of a previous felony using violence: the voluntary manslaughter of his wife. For these reasons, the court found that the death penalty was not excessive. State v. McNeil, 375 S.E.2d 909 (1989).

§ 46.10 —Statutory requirements

U.S. Supreme Court After being convicted of capital murder and sentenced to death in the Pike County circuit court, defendant filed petition for postconviction collateral relief. The Supreme Court of Mississippi denied defendant's petition, arguing that he had waived his right to challenge a previous New York conviction. The court reasoned that its capital sentencing procedures could be rendered standardless if a postsentencing decision of another state could invalidate a Mississippi death sentence, and that the New York conviction provided adequate support for the death penalty.

Held, reversed and remanded. The Supreme Court found that denial of defendant's petition, based in part on a felony conviction that was vacated, violated his Eighth Amendment right prohibiting cruel and unusual punish-

ment. Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

U.S. Supreme Court A Maryland prisoner was convicted by jury of first-degree murder of his cell mate. On appeal, the Maryland Court of Appeals affirmed and certiorari was granted.

Held, conviction vacated and remanded. The Supreme Court ruled that there was a substantial probability that, in attempting to complete the verdict form as instructed, jurors thought they were precluded from considering any mitigating evidence unless they unanimously agreed on the existence of a particular mitigating circumstance. Mills v. Maryland, 108 S. Ct. 1860 (1988).

U.S. Supreme Court After his conviction in Oklahoma state court for a particularly brutal double murder, the jury imposed the death penalty upon a finding of aggravating circumstances that were "especially heinous, atrocious, or cruel." The federal district court denied habeas corpus relief, but the court of appeals reversed, holding that the aggravating circumstance statute did not offer sufficient guidance to the jury.

Held, conviction affirmed. The Supreme Court found that the Oklahoma aggravating circumstance statute was unconstitutionally vague in that it did not offer sufficient guidance to the jury in deciding whether to impose the death penalty. Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

U.S. Supreme Court After his conviction in Texas state court of capital murder, defendant was sentenced to death. During the sentencing hearing, a psychiatrist testified that defendant presented a continuing threat to society through acts of criminal violence. The Texas Court of Criminal Appeals affirmed.

Held, conviction reversed and remanded. The Supreme Court found that the use of a psychiatrist's testimony at a capital sentencing proceeding on the issue of future dangerousness violated defendant's Sixth Amendment right to consult with counsel before submitting to psychiatric examination designed to determine future dangerousness. Satterwhite v. Texas, 108 S. Ct. 1792 (1988).

U.S. Supreme Court Defendant and a co-defendant, at a jury trial in a Florida court, were convicted of first-degree murder and robbery, and were sentenced to death. The Florida Supreme Court affirmed. The court found that under Florida law, if the accused was present, aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty with the actual perpetrator of the underlying felony, of first-degree murder. Certiorari was granted to determine whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life.

Held, reversed and remanded. The Supreme Court held that the Eighth Amendment does not permit the imposition of the death penalty on a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that force will be employed. The Court thus ruled that the identical treatment of a robber and his accomplice, and the attribution to the

accomplice of the culpability of those who killed victims was impermissible under the Eighth Amendment. The Court reasoned that in determining the validity of capital punishment of an accomplice's conduct, focus must be made on his individual culpability and not that of those who committed the robbery and shot the victims. Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368 (1982), 19 CLB 72.

U.S. Supreme Court Habeas corpus relief was denied to an Alabama state prisoner in a capital case by the district court, but the Court of Appeals for the Fifth Circuit reversed on the ground that failure of the trial court to give a lesser-included-offense instruction required reversal of the death sentence.

Held, reversed. The Supreme Court held that where defendant testified in the murder trial that, if necessary, he was always prepared to kill, and defendant admitted to shooting his victim in the back in the course of the armed robbery, defendant was not prejudiced in any way by the fact that, under an Alabama statute thereafter found to be unconstitutional, the jury was required to convict defendant of the capital offense charged or return a verdict of not guilty and was not allowed to consider any lesser included offenses. The Court reasoned that due process requires only that the lesser-included-offense instruction be given when the evidence warrants such instruction. The Alabama rule that the lesser-included-offense instruction should be given, if there is any reasonable theory from the evidence which would support the position, did not offend federal constitutional standards. Hopper v. Evans, 102 S. Ct. 2049 (1982), 19 CLB 69.

U.S. Supreme Court A Georgia prisoner was denied federal habeas corpus relief by the district court, but the Court of Appeals for the Fifth Circuit reversed and remanded to the extent that the district court left standing his death sentence since one of the aggravating circumstances found by the jury —that the murder was committed by a person who had a substantial history of serious assaultive criminal convictions—was found invalid.

Held, question certified to the Georgia Supreme Court. The Supreme Court noted that the Georgia Supreme Court had never explained the rationale for its position that the death sentence is not impaired by the invalidity of statutory aggravating circumstances found by the jury. The Supreme Court then certified to the Georgia Supreme Court a question seeking an explanation of the state law premises supporting the conclusion that if two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not taint the proceeding. Zant v. Stephens, 102 S. Ct. 1856 (1982), 19 CLB 69.

Court of Appeals, 9th Cir. Defendant, a California state prisoner, who was sentenced to death for murder, appealed from the federal district court's denial of his habeas corpus petition.

Held, vacated and remanded to allow the California Supreme Court to undertake a proportionality review of the application of the death penalty in this case. The Ninth Circuit declared that the California death penalty statute is constitutional since it establishes factors to guide the jury's discretion and allows for consideration of aggravating and mitigating circumstances. The court explained that while irregular or selective application of the death

penalty is to be avoided, consideration of nonstatutory mitigating or aggravating circumstances is not objectionable as long as at least one statutory circumstance is found before the death penalty is imposed. The court thus concluded that the California statute did not violate the Eighth and Fourteenth Amendments on the theory that it placed no limit on the prosecutor's introduction of evidence of aggravating factors. Harris v. Pulley, 692 F.2d 1189 (1982), 19 CLB 264, rev'd, 465 U.S. 37, 104 S. Ct. 871 (1983).

Arizona Defendant and his brothers, sons of an inmate, helped their father and another inmate escape from state prison. The weapons used in the escape and during the subsequent 12-day flight were provided by the three brothers. They assisted in planning a break-out, procured a car, and held guns on guards during the escape. They were also aware that their father had killed a guard during an earlier escape attempt. Thus they could anticipate the use of lethal force during this attempt to flee confinement. The four killings for which defendant and his brothers were convicted occurred later when the escapees and their helpers were stranded because of car trouble. When four people in a passing car stopped to render aid, the gang killed the four and took their car. The gang was apprehended later by police. On appeal, defendant argues imposition of the death penalty in this case is unconstitutional under Edmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368 (1982), where the Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty absent a showing that the defendant killed, attempted to kill, or intended to kill.

Held, death penalty statute excluding jury involvement in sentencing decision is not unconstitutional. The Supreme Court of Arizona concluded from the facts that defendant intended to kill. Defendant's participation up to the moment of the firing of the fatal shots was substantially the same as the others. Defendant actively participated in the events leading to death by, among other things, providing the murder weapons and helping abduct the victims. Moreover, defendant was present at the murder site, did nothing to interfere with the murders, and after the murders even continued on the joint venture. State v. Tison, 690 P.2d 755 (1984), 21 CLB 264.

Florida Defendant was convicted of kidnapping and first-degree murder, and sentenced to death. The death penalty was imposed because it was found that the crime involved aggravating circumstances, in that (1) the murder was especially heinous, atrocious, or cruel; and (2) the crime was committed while defendant was under sentence of imprisonment imposed for a previous conviction on another capital felony. On appeal, defendant argued that there was insufficient evidence that these aggravating circumstances existed.

Held, affirmed. The Florida Supreme Court ruled that it was not adequately established that the crime was especially heinous, atrocious, or cruel. According to the court, "heinous" is defined as "extremely wicked or shockingly evil," "atrocious" as "outrageously wicked and vile," and "cruel" as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." In this case, there was no proof that the murder fell into any of these cate-

gories. No specific cause of death could be ascertained from the autopsy, there was no clear evidence that the victim struggled with defendant before her death, and it could not be determined whether the victim was sexually assaulted before her murder, due to the deteriorated state of the body when it was discovered. Thus, it could not be determined that the crime was especially heinous, atrocious, or cruel. The court ruled, though, that the second aggravating circumstance, that is, that the crime was committed while defendant was under sentence of imprisonment for another capital felony, existed. It was proved that defendant had escaped from jail in Colorado, and committed the murder in question while under sentence in that state for aggravated kidnapping, a crime involving the use of, or threat of, violence. Thus, the imposition of the death penalty on defendant in this case was justified. Bundy v. State, 471 So. 2d 9 (1985).

Florida Defendant was convicted of first-degree murder for having shot a man in the back twice during the course of a robbery. In spite of the jury's recommendation of life imprisonment, the trial judge imposed the death penalty, based on his finding of four aggravating circumstances: The crime was committed while defendant was under sentence of imprisonment; it took place during the commission of a felony; it was especially heinous, atrocious, and cruel; and it was cold, calculated, and premeditated.

Held, conviction and sentence affirmed. The Florida Supreme Court upheld the death sentence. It found that the killing of a victim who apparently offered no resistance to the robbery was not especially heinous, atrocious, and cruel, since there was nothing about it to "set the crime apart from the norm of capital felonies." It also rejected the trial judge's finding that the killing was cold, calculated, and premeditated, since that aggravating factor "applies only to crimes which exhibit a heightened premeditation, greater than that required to establish premeditated murder." It noted that the trial judge erred in citing the defendant's lack of remorse in support of the latter finding; consideration of lack of remorse is improper in making findings in support of aggravating factors. Faced, however, with the two remaining aggravating factors and no mitigating factors, the Florida Supreme Court concluded that the facts clearly and convincingly suggested a sentence of death, making the jury override appropriate. Gorham v. State, 454 So. 2d 556 (1984).

§ 46.11 —State constitutional requirements (New)

Massachusetts A state trooper was found injured by multiple gunshot wounds and was taken to a nearby hospital where he died as a result of the wounds. Defendants were indicted for the trooper's murder, and after a series of hearings on pretrial motions in the Superior Court, the Commonwealth moved to report two questions of law because the judge found that each defendant, if convicted, might be sentenced to death. Therefore, the question of the constitutionality of the death penalty statute was so important as to require the decision of the Supreme Judicial Court on direct appellate review. In 1980, the high court had declared the capital punishment statute then in force to be impermissibly cruel under the state constitution.

In response, voters amended the constitution declaring that no state constitutional provision "shall be construed as prohibiting the imposition of the punishment of death," and the legislature enacted a new statute. The Commonwealth contended that the legislature intended for the trial judge to empanel a jury to decide the sentencing question after the court had accepted defendant's guilty plea.

Held, provisions of death penalty statute impermissibly burden state constitutional rights against self-incrimination and right to jury trial. The majority of the Supreme Judicial Court interpreted the statute to require a jury verdict as a condition precedent to the imposition of the death penalty. The court found that the statutory sections referred to in the certified questions violate the state constitution by impermissibly burdening a defendant's right against self-incrimination and right to trial by jury. The majority asserted that the constitutional amendment passed by the voters takes away only the court's power to prohibit the death penalty entirely; however the court may continue to review particular statutes providing for death sentences. Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (1984), 21 CLB 262.

47. DOUBLE JEOPARDY

§ 47.00 In general

U.S. Supreme Court Defendant petitioned for a writ of habeas corpus. He sought to prevent the state of Arkansas from resentencing him as a habitual offender. His previous conviction as a habital offender had been set aside for improper reliance on a conviction for which he had been pardoned. The district court granted the writ and set aside the enhanced sentence. The court of appeals affirmed, and certiorari was granted.

Held, reversed. The Supreme Court declared that the double jeopardy clause does not prevent the government from retrying a defendant, who succeeds in getting his first conviction set aside, as long as the evidence admitted in the sentencing hearing is sufficient to sustain a guilty verdict. Lockhart v. Nelson, 109 S. Ct. 285 (1988).

U.S. Supreme Court After defendant was convicted at trial for first-degree murder in an Arizona court, he entered into an agreement with the prosecutor to plea to second-degree murder and testify against the other parties involved in the murder. When the convictions of the other participants were reversed and remanded, defendant refused to testify against them again. The prosecutor refiled first-degree murder charges against him, and the Supreme Court of Arizona vacated his second-degree murder conviction. Defendant was convicted at trial and sentenced to death. Habeas corpus relief

was denied in the district court, but the court of appeals reversed.

Held, reversed. The U.S. Supreme Court held that respondent's prosecution for first-degree murder did not violate the double jeopardy clause, because his breach of the plea agreement removed the double jeopardy bar that otherwise would prevail. The court noted that the terms of the plea agreement clearly stated that if respondent refused to testify, the charges would be reinstated, which in effect was an agreement to waive the double jeopardy defense. Ricketts v. Adamson, 107 S. Ct. 2680 (1987).

U.S. Supreme Court After defendant was convicted in state court of incest, the Montana Supreme Court reversed with instructions to dismiss on double jeopardy grounds arising from his prior indictment for sexual assault.

Held, reversed. The prior reversal of the defendant's incest conviction did not offend the Double Jeopardy Clause since it was reversed on grounds unrelated to guilt or innocence because Montana's ex post facto law prevents Montana from convicting defendant of incest. Montana v. Hall, 107 S. Ct. 1825 (1987).

U.S. Supreme Court After defendant was convicted of first-degree murder and armed robbery, he appealed, and the Supreme Court remanded for resentencing. On remand, the Arizona Superior Court imposed the death penalty, and the Arizona Supreme Court reversed.

Held, affirmed. The double jeopardy clause prohibited Arizona from resentencing respondent to death after a life sentence was set aside on appeal, notwithstanding that failure to initially impose the death penalty was based on misconstruction of the capital sentencing law defining the aggravating circumstance of "pecuniary gain." The Court reasoned that reliance on an error of law does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits of the issue in the sentencing hearing, namely, whether death was the appropriate punishment for respondent's offense. Arizona v. Rumsey, 104 S. Ct. 2305 (1984), 21 CLB 72.

U.S. Supreme Court Under Massachusetts's two-tier system, if a defendant charged with certain minor crimes elects to have a bench trial and is dissatisfied with the results, he has an absolute right to trial de novo before a jury and need not allege error at the bench trial. However, he has no right to appellate review of a bench trial conviction.

After conviction at a bench trial, defendant moved to dismiss the charge on the ground that, since no evidence of intent had been presented at the trial, retrial was barred. The motion to dismiss was denied and the dismissal was affirmed by the Massachusetts Supreme Judicial Court. The district court, however, granted habeas corpus relief and the court of appeals affirmed.

Held, reversed. Defendant's retrial de novo without any judicial determination of the sufficiency of the evidence at his prior bench trial did not violate the double jeopardy clause. The Court reasoned that the state was not intending to impose multiple punishments for a single offense by the two-tier system, since defendant had not been acquitted. Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294 (1984), 21 CLB 73.

Court of Appeals, 2d Cir. After petitioner's first trial ended in a conviction for armed robbery and a hung jury on a felony murder charge, a second felony murder prosecution resulted in his conviction. Prior to his retrial, petitioner had made no attempt to obtain the trial court's dismissal of the second indictment on double jeopardy or other grounds. His subsequent habeas corpus writ was granted, and his conviction set aside, on double jeopardy grounds.

Held, judgment reversed and petition denied. Assuming arguendo that petitioner's claim—that attempted robbery was the "same offense" as felony murder under the facts of this case—the court found that the claim was interposed too late. By failing to raise the double jeopardy claim at the trial court level prior to the second prosecution, petitioner waived the right not to be subjected to a second trial for the same offense. The court noted that it is well-established that the constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by a defendant at the time of trial, will be regarded as waived. This disposed of petitioner's claim that he was subjected to multiple trials; as to his alternative claim that he was subjected to multiple punishments, also in violation of the double jeopardy clause, the court held that, although this case theoretically raised the possibility of multiple punishment, the fact that petitioner successfully obtained reversal of his attempted robbery conviction resulted in only one punishment. Paul v. Henderson, 698 F.2d 589, cert. denied, 464 U.S. 835, 104 S. Ct. 120 (1983).

Court of Appeals, 5th Cir. After being acquitted for misapplication of bank funds and conspiracy charges, defendant moved to dismiss a second indictment on double jeopardy grounds. The district court dismissed the charges and defendant appealed.

Held, affirmed in part and reversed in part. The Fifth Circuit stated that the conspiracy charged in the second indictment was part of the same conspiracy in the first indictment, and thus was barred by double jeopardy. The court noted that the time period, personnel, statutory offenses, and overt acts were essentially the same. However, the court found that the substantive counts charged in the second indictment were not barred since the evidence to prove these charges would not be the same as that which the government attempted to use to establish the prior charges. United States v. Levy, 803 F.2d 1390 (1986), 23 CLB 287.

§ 47.05 —Interpretations by state courts

Georgia Defendant was convicted of burglary and murder. Although the state sought the death penalty, claiming the burglary as an aggravating circumstance, defendant nonetheless received a life sentence. In his direct appeal to the court, defendant's enumerations of error presented issues concerning whether, under the substantive double jeopardy law of Georgia, either murder or burglary was a lesser included offense within the other.

Held, affirmed. In a capital crime, burglary committed during the murder can be held as an aggravating offense. The court said that the statutory aggravating circumstances are not offenses for double jeopardy purposes, but rather are procedural standards designed to control a jury's discretion in capital cases in order to ensure

against capricious and arbitrary enforcement of the death penalty. Imposition of the death penalty for a murder occurring during the commission of a burglary is not rendered constitutionally infirm by reason of the fact that the murder is the burglary conviction's predicate offense. The court concluded for substantive double jeopardy purposes, neither a burglary conviction nor a murder conviction is a lesser included offense within the other, since proof of additional elements must necessarily be shown to establish each crime. Cash v. State, 368 S.E.2d 756 (1988).

Hawaii Defendant pleaded guilty to three counts of promoting a dangerous drug in the second degree. He was sentenced on October 27, 1983 to ten years imprisonment and was also ordered to make restitution. At the time of sentencing, a motion to sentence defendant as a repeat offender filed by the state was pending before the trial court, but the motion was continued to November 2, 1983 to comply with certain notice requirements. On November 2, the trial court granted the state's motion upon finding that defendant was a repeat offender under the state statute. The 10-year sentence defendant received on October 27 was amended to include a five-year mandatory minimum term of imprisonment. On appeal, defendant argued that the court, by granting the motion, increased the severity of punishment after the October 27 sentencing thereby violating the double jeopardy clause of the Fifth Amendment.

Held, sentence affirmed. The Supreme Court of Hawaii approved the sentencing by holding that where subsequent to sentencing it became evident that defendant was a repeat offender, the trial court was bound to correct an illegal sentence and impose the five-year minimum term of imprisonment mandated by state statute. The court recognized that the power to correct even a statutorily illegal sentence must be subject to some temporal limit, but only five days elapsed when the illegal sentence was corrected by the trial court. State v. Delmondo, 696 P.2d 344 (1985).

Kentucky Defendant was convicted of trafficking in drugs and of being a persistent felony offender (PFO) in the second degree. On appeal, he argued that he was subject to double jeopardy when he was tried for second-degree PFO after an earlier conviction for first-degree PFO had been set aside. The trial judge's order to set aside was based upon a finding of insufficient evidence to sustain the jury's guilty verdict.

Held, affirmed. The double jeopardy clause precluded retrial for first-degree PFO, but not a trial for second-degree PFO. The order setting aside the conviction for first-degree PFO did not address the issue of whether the evidence was sufficient to convict on second-degree PFO. Nor could one infer from the jury's verdict in the first proceeding that defendant was acquitted of it. Furthermore, it was not the purpose of the second proceeding to give the state another opportunity to produce evidence that it simply failed to muster initially. Gill v. Commonwealth, 648 S.W.2d 846 (1983).

Maryland Defendant was convicted of premeditated first-degree murder. The state sought imposition of the death penalty under the state capital punishment statute. At his third capital sen-

tencing hearing, defendant again elected to be sentenced by a jury. The jury imposed the death penalty and this appeal followed. Defendant maintained that his third sentencing proceeding was barred by the double jeopardy clause of the Fifth Amendment. He contended that the trial court's conduct in the second capital sentencing proceeding constituted "judicial overreaching," which barred further resentencing because the trial judge "intentionally and deliberately directed and required the reading of prior recorded trial testimony to the jury."

Held, conviction affirmed. The Court of Appeals of Maryland held that the trial court's conduct did not amount to judicial overreaching even though the sentence imposed was later vacated in Tichnell II, 427 A.2d 991 (1981). Rather, the trial judge was mistaken in his belief that it was essential that the transcript of testimony in defendant's original trial be introduced in evidence so as to permit the sentencing jury to have before it the identical testimony that was produced before the fact finder at the guilt or innocence stage of the proceeding. The court's action was not intended to provoke defendant to move for a mistrial. Only where the trial court engages in misconduct with intent to provoke defendant's motion for a mistrial would retrial be barred by the double jeopardy clause (Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083 (1982)). Therefore nothing in the bar of double jeopardy prevented a third capital sentencing proceeding in defendant's case. Tichnell v. State, 468 A.2d 1 (1983).

Michigan Defendant was convicted by a jury of two counts of armed robbery and one count of possession of a firearm during the commission of a felony for his participation in a holdup of a grocery market. The trial testimony indicated that a young male carrying a sawed-off shotgun entered the market and went to a cash register, pushed the cashier aside, and removed money and checks from the register. He then proceeded to the manager's office about twenty feet away, where he demanded and received money from a second cashier. The robber ran from the store and was driven away, but was later apprehended. On appeal, the issue presented was whether defendant's conviction on two counts of armed robbery violates the double jeopardy provisions of the U.S. and Michigan Constitutions.

Held, convictions affirmed; sentences vacated and case remanded. The Supreme Court of Michigan held that robbing two cashiers in one grocery store was not a single offense under the armed robbery statute, but two separate and distinct offenses for purposes of the federal and state double jeopardy clauses. The appropriate "unit of prosecution" under the state armed robbery statute is the person assaulted and robbed. The court did not ascribe to the state legislature the intent to inform a criminal that as long as he is robbing one store clerk, or bank teller, or bus passenger, he is free to take money from the rest of the persons present without facing the prospect of additional robbery convictions. If two crimes are not the "same offense" under Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932), that is a sufficiently clear expression of legislative intent to permit the imposition of multiple punishment. People v. Wakeford, 341 N.W.2d 68 (1983).

Montana After mistrial for forgery by accountability and witness tampering, the retrial of defendant was dismissed on the grounds of double jeopardy. A jury was impaneled and sworn in for the initial trial, and the prosecutor presented six witnesses. On the second day of the trial, the judge, on his own motion, declared a mistrial because he believed that defendant was being denied effective assistance of counsel and that manifest necessity required him to declare a mistrial. A retrial was scheduled, and after reviewing the briefs, a substitute judge dismissed the case on defendant's motion based on double jeopardy.

Held, reversed and remanded. The court accorded the greater deference upon review to the original trial judge who observed the performance of the defense counsel and could judge his competence. The court stated that although defendant's Fifth Amendment right not to be placed twice in jeopardy (attached when the jury is impaneled and sworn) must be considered, the trial judge's action was motivated by his concern for defendant's constitutional right to effective assistance of counsel. The constitutional protection against double jeopardy bars a second criminal trial unless there is a "manifest necessity" to terminate the trial, or defendant acquiesed in the termination. The court determined that the trial judge acted responsibly and exercised sound discretion when he found manifest necessity for a mistrial. The court said that there was substantial evidence from which to conclude that counsel's performance had been ineffective, noting that highly prejudicial evidence would have been admitted for the lack of proper objection if the trial judge had not stepped in. Under this circumstance, no reasonable alternative to mistrial could be suggested. State v. Moran, 753 P.2d 333 (1988).

North Carolina Defendant was convicted of second-degree murder, armed robbery, conspiracy to commit armed robbery, and felonious larceny. He was sentenced to life imprisonment for the murder conviction. Defendant appealed the sentence, and the North Carolina Supreme Court eventually remanded the case for resentencing because the trial judge failed to find a mitigating factor and improperly found an aggravating factor. At the second sentencing hearing, the judge found a different, valid aggravating factor, namely a prior conviction, and defendant was resentenced in that light. Upon a motion for relief, the North Carolina Supreme Court ordered a third sentencing hearing, because the second sentence imposed was harsher than the first. At the third sentencing hearing, defendant was again sentenced to life imprisonment on the second-degree murder conviction, and he appealed again on the ground that the last sentence imposed was invalid. Defendant argued that the third sentence constituted double jeopardy in violation of the Federal and North Carolina Constitutions, because under the principles of double jeopardy an aggravating factor may not be found at second and third sentencing hearings if it was not found at the first.

Held, conviction affirmed. The North Carolina Supreme Court ruled that under the Fair Sentencing Act, the principles of double jeopardy did not bar the finding of aggravating factors or, for that matter, mitigating factors, different from those found at

the earlier sentencing hearing. A trial court may or may not find such factors without regard to findings in prior sentencing hearings, and in this regard the trial judge exercises "relatively unbridled sentencing discretion." In this case, the third and last sentencing hearing was free from error, and defendant's sentence was therefore affirmed. State v. Jones, 336 S.E.2d 385 (1985).

Oregon Defendant was enjoined from trespassing on his neighbor's property, following civil litigation between them. Subsequently, he violated the injunction and was indicted for criminal trespass. While that charge was pending, he was adjudicated in contempt of the injunction, after the neighbor initiated a contempt proceeding.

Defendant moved for dismissal of the indictment; the contempt proceeding, he argued, was a criminal prosecution for double jeopardy purposes and, accordingly, the trespass indictment constituted an impermissible second prosecution for the same offense. The trial court agreed and dismissed; the intermediate appellate court, however, found that the contempt proceeding was civil, not criminal, in nature and reversed. Defendant appealed.

Held, reversed and trial court's dismissal reinstated. While noting that the contempt adjudication was sought by a private litigant and arose from defendant's violation of a civil injunction, the court did not find these factors dispositive. Rather, it distinguished between civil and criminal contempts as follows:

> [W]e have described a penalty for contempt as "civil" when it is imposed in order to compel compliance with an order and will end as soon as the respondent complies, and as "criminal" when it is imposed as punishment for a completed contempt that can no longer be avoided by belated compliance.

Here, continued the court, defendant was found in contempt and punished for entering on his neighbor's land in defiance of a court order; the penalty for contempt was not imposed as a sanction to compel future compliance. Therefore, the contempt proceeding constituted a prosecution for a criminal offense. The prosecution of defendant for trespass following his contempt adjudication, concluded the court, violated Oregon statutes forbidding consecutive prosecutions for offenses based on the same criminal episode, suggesting also that the same reasoning applied under constitutional double jeopardy principles as well. State v. Thompson, 659 P.2d 383 (1983), 20 CLB 67.

Rhode Island Defendant was convicted of second-degree murder and assault. During trial, the judge granted defense's motion to acquit in regard to first- or second-degree murder charges but determined that the case would continue in respect to lesser charges of manslaughter and assault. The trial justice did not inform the jury of the motion or ruling, and defendant's case was presented without any indication that the charges had been modified or reduced. However, the murder charges were reinstated the next morning after the trial justice determined that because the homicide had been committed in the course of an inherently dangerous felony as outlined in In re Leon, 410 A.2d 121 (1980), sufficient evidence had been presented to establish the charges of second-degree murder and assault with intent to murder.

On appeal, defendant argued that trial justice had violated the ban on double jeopardy by reconsidering his previous decision of acquittal.

Held, affirmed. The Supreme Court of Rhode Island stated that in the closest precedent to the case, People v. District Court, 663 P.2d 616 (1983), it was determined that the midtrial correction of the Colorado district court's erroneous ruling on a motion for judgment of acquittal did not violate the prohibition against double jeopardy. The corrective ruling did not result in any additional governmental attempt to convict the defendant before a different jury, and there was no indication that the court's erroneous ruling detrimentally affected defendant's defense to the charges. In the present case, the purported granting of the motion for acquittal did not terminate the prosecution's case and take the matter from the jury entirely but rather reduced certain charges and this reduction of charges was never communicated to the jury. The reconsideration by the trial justice had no effect on the continuance of the trial, and defendant was not faced with any threat of re-prosecution. The entry of the abortive order reducing defendant's charges did not affect the presentation of his defense; the witnesses he presented after the trial court's ruling tended to show that he was guilty of no crime as opposed to addressing the issue of his guilt on the greater charges thought to have been reduced. Defendant was presented with the opportunity to present any additional testimony or evidence that he might desire in opposition to the restored offense. Thus, the court held that double jeopardy principles did not bar the trial justice from submitting the case to the jury on the greater charges. State v. Iovino, 524 A.2d 556 (1987).

South Carolina Defendant was convicted of assault and battery of a high and aggravated nature, kidnapping, and four counts of first-degree criminal sexual conduct. On appeal, defendant argued that his convictions for kidnapping and assault and battery of a high and aggravated nature constituted double jeopardy under the test stated in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932), as these crimes are circumstances which may be proven to establish criminal sexual conduct in the first degree.

Held, conviction affirmed. The Supreme Court of South Carolina stated that the convictions for kidnapping and assault and battery, as well as for criminal sexual conduct, did not violate the double jeopardy clause of the Fifth Amendment. The South Carolina legislature has authorized cumulative punishments for kidnapping, assault and battery of a high and aggravated nature, and first-degree criminal sexual conduct. The court stated that the double jeopardy clause does not limit the legislature's power to impose sentences for a given crime, and the legislature could have created a single offense, which provided one sentence for kidnapping, and a still greater sentence if the kidnapping resulted in rape. The legislature chose to accomplish this result by two statutes instead of one citing Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673 (1983). State v. Hall, 310 S.E.2d 429 (1983).

Wisconsin Defendant was convicted of false swearing and theft by fraud, and received two suspended sentences based on concurrent probation terms of

four and six years. One condition of her probation, which required her to live and work at a hospital in India for three years, was held invalid on appeal because it exceeded the power conferred by the legislature. On remand, the trial court re-sentenced defendant to two concurrent two-year prison sentences. Defendant filed a post-sentencing motion arguing that the second sentence violated her double jeopardy rights. Her motion was denied and she appealed.

Held, judgment reversed. The court held that, because prejudice is a form of punishment and a person may not be placed twice in jeopardy of punishment, the reimposition of a sentence after a defendant has been placed on probation, absent a violation of a condition of probation, is a violation of both the U.S. and Wisconsin Constitutions' double jeopardy clauses. The court noted that, once granted, the conditional liberty of probation can be forfeited only by breaching the conditions of probation. State v. Dean, 330 N.W.2d 630 (App. 1983).

Wisconsin Defendant was convicted of kidnapping and second-degree felony murder. The trial court found that the kidnapping constituted the underlying felony for the second-degree murder conviction. On appeal, defendant argued that she was exposed to double jeopardy by being convicted both of second-degree felony murder and kidnapping based on the same incident.

Held, conviction reversed as to kidnapping and affirmed as to second-degree murder. The court noted that the constitutionality of a multiple punishment depends on whether the state legislature intended that the violations constitute a single offense or two offenses, i.e., whether one punishment or multiple punishments are intended. Where there is no clear expression of legislative intent, the trial court must assume that the legislature ordinarily does not intend to punish the same offense under two different statutes. Where two statutory provisions proscribe the same offense, they are construed not to authorize cumulative punishments in the absence of a clear indication of a contrary legislative intent. The felony murder statute in issue required proof of all the elements of kidnapping, while the kidnapping statute did not require proof of any element not necessary to prove felony murder. The court pointed out that there was no clearly expressed legislative intent to impose multiple punishment in such a situation, and, after a lengthy discussion of the statutory history, determined that defendant's double jeopardy rights were violated inasmuch as the legislature did not clearly express its intent to authorize multiple punishment, and inasmuch as it did not specifically exempt felony murder and kidnapping from the purview of a statute which provided that a defendant may not be convicted of both the crime charged and an included crime when the included crime does not require proof of any fact in addition to those which must be proved for the crime charged. State v. Gordon, 330 N.W.2d 564 (1983).

§ 47.10 When jeopardy attaches

U.S. Supreme Court After defendants were convicted in the Arizona state court of first-degree murder, they were sentenced to death on the grounds that the statutory aggravating circumstance was present; that is, the offense was committed in "an especially heinous, cruel or depraved manner." The Ari-

zona Supreme Court reversed, holding that the evidence was insufficient to support a finding of "especially heinous" circumstances, but that the trial judge erred in finding that the "pecuniary gain" circumstance was limited to contract killings. On remand, defendants were again convicted of first-degree murder and were again sentenced to death when the judge found that both of the above aggravating circumstances were present. The Arizona Supreme Court affirmed.

Held, conviction affirmed. The Court ruled that reimposition of the death penalty on defendants did not violate the double jeopardy clause. The Court reasoned that the trial judge's rejection of the "pecuniary gain" aggravating circumstance was not an "acquittal" of that circumstance for double jeopardy purposes, and that since the reviewing court did not find the evidence legally insufficient, there was no death penalty "acquittal" by that court. Poland v. Arizona, 106 S. Ct. 1749 (1986).

U.S. Supreme Court Defendants were charged with various crimes in Pennsylvania state court arising from their alleged arson of a building. At the close of the prosecution's case, the trial judge ruled that the evidence was insufficient to convict. The appellate court prohibited the commonwealth from appealing on the ground that it was barred by the double jeopardy clause, but the Pennsylvania Supreme Court reversed.

Held, judgment reversed. The Court found that the trial court's ruling on sufficiency was the equivalent of an acquittal under the double jeopardy clause. The Court reasoned that the commonwealth's appeal was barred because reversal would have led to further trial proceedings. Smalis v. Pennsylvania, 106 S. Ct. 1745 (1986).

§ 47.15 —Interpretations by state courts

California The state appealed an order of dismissal on defendant's post-mistrial plea of former jeopardy. Defendant was tried on a charge of murder in the second degree. After deliberation, the jury found defendant not guilty of murder but could not reach a verdict on voluntary manslaughter. The judge declared a mistrial and set a date for a pretrial hearing on a new trial. At the hearing, defendant moved for a dismissal of the manslaughter charge on the ground that a new trial would place him in double jeopardy.

Held, reversed. The dismissal was appealable because it was legally erroneous. Jeopardy never attaches when a mistrial has been declared because the parties are placed back in the status quo as if no trial had ever occurred. The partial verdict of acquittal on the charged greater offense of second-degree murder was not a bar to a new trial for the uncharged lesser offense of manslaughter as defendant had claimed. People v. Smith, 659 P.2d 1152 (1983).

Maine Defendant and his brother were tried jointly for murder. In addition, defendant was tried for the charge of hindering the apprehension or prosecution of another. Both had made statements to the police during the investigation. Defendant's statement contained several admissions by his brother that he had killed the victim. On the third day of trial, after ten prosecution witnesses had testified, the prosecutor raised the issue of the admissibility against defendant's brother of a redacted version of de-

fendant's statement. The prosecutor's concern was the effect of Bruton v. United States, 391 U.S. 123 (1968). This case held that, in joint trial cases, the admission in evidence of a nontestifying defendant's confession implicating his co-defendant violates the co-defendant's Sixth Amendment right to cross-examine his accusers. Defendant's attorney objected to admission of the redacted version, insisting that the statement, if admitted, should be complete. The court advised counsel that *Bruton* prohibited the admission in evidence of defendant's complete statement. After listening to argument on the admissibility of the redacted statement outside the presence of the jury, the court concluded that the statement, even in its redacted form, still tended to establish a critical element of the state's case, namely, the brother's intent to kill the victim. Thus, the statement was inadmissible under *Bruton.* Without consulting counsel on either side, the court ordered the cases severed. At the state's request, the court proceeded with the trial of the brother. Later, after defendant's counsel unsuccessfully argued that any further prosecution would violate his client's right to be free from double jeopardy, defendant was retried on the same indictment. He was acquitted of murder but convicted of hindering apprehension or prosecution. Defendant appealed, claiming he was put in jeopardy twice for the same offense in violation of his constitutional rights under Article I, Section 8, of the Maine constitution.

Held, reversed. The Supreme Judicial Court of Maine reversed the conviction for the reason given by defendant. In a jury trial in a criminal case, jeopardy attaches as soon as the jury is impaneled and sworn. Once jeopardy attaches, a defendant does not lose his opportunity to obtain a favorable verdict from a particular jury, and will not be required to stand trial a second time unless he consents to a mistrial or unless, under all the circumstances, the mistrial was mandated by manifest necessity. The court viewed the severance order as the functional equivalent of a declaration of a mistrial as to defendant. Accordingly, because jeopardy attached to defendant at the time the jury was impaneled and sworn at the joint trial with his brother, defendant's retrial violated his right to be free from double jeopardy unless severance was mandated by manifest necessity. The court looked for that "high degree" of necessity that is required before a trial court can properly conclude that termination of the proceedings is appropriate. The decision to sever in the instant case was not a sound exercise of judicial discretion because the state had failed to show *any* necessity for the severance. The trial justice could have sustained defendant's objection to the admission of the redacted statement, thereby protecting the brother's *Bruton* rights and preserving intact the joint prosecution format selected by the state. State v. Rowe, 480 A.2d 778 (1984).

New Jersey The state appealed after defendant, convicted of second-degree robbery, was sentenced to two years' probation. Defendant argued that the state's appeal and any increase in his sentence were barred by the double jeopardy provisions of the federal and state constitutions. On July 8, 1981, two days after his conviction, defendant's sentence had been stayed. The state's appeal was filed while the stay was in effect, but had not been per-

fected before the stay was set aside on September 1 on defendant's ex parte motion. Defendant served part of his probationary sentence until September 30, when the stay of sentence was restored, on application by the state.

Held, affirmed. The state's appeal did not in itself offend double jeopardy principles just because its success might deprive defendant of the benefit of a more lenient sentence. Nor did jeopardy attach on September 1, 1981, when defendant's stay was set aside and he began to serve his sentence. The order to set aside the stay was procured ex parte by defendant, and the state did not know of the existence of that order until September 30, when it applied to reinstate the stay. Under those circumstances, defendant's probationary term would not have commenced for jeopardy purposes. By electing to stay the sentence, defendant waived his right to challenge an increased sentence on double jeopardy grounds. State v. Jones, 457 A.2d 37 (Super. App. Div. 1983).

Oregon The state appealed the dismissal on grounds of former jeopardy of murder and felony murder charges against defendant. Several months after he was arrested on the murder and felony murder charges, defendant entered an unconditional guilty plea to a reduced charge of hindering prosecution. In exchange for the reduced charge, defendant promised to testify against a co-defendant. At the sentencing hearing, the prosecution stated that it would not be willing to proceed unless defendant agreed to waive jeopardy. The issue had not been previously discussed with defendant or his attorney. Defendant, who wanted to be sentenced that day, waived double jeopardy. When defendant later refused to testify against the co-defendant, the state attempted to prosecute defendant for murder and felony murder. The trial court dismissed the charges, holding that jeopardy had attached when defendant's guilty plea to the reduced charge was entered, and that the purported waiver that took place at the sentencing hearing was not timely and was of no consequence. The state argued that jeopardy did not attach until judgment was entered, and that defendant's waiver therefore was effective. Alternatively, it argued that defendant repudiated his double jeopardy defense by breaching his plea bargain.

Held, affirmed. Once defendant's guilty plea had been accepted by the court, he was placed in jeopardy. Defendant had no right to withdraw the plea, and a judgment of conviction had to be entered unless the court determined that there was an insufficient factual basis for the plea or that it was not voluntarily or intelligently made. Notwithstanding that defendant violated terms of the agreement by which he pled guilty to a reduced charge, he could not be prosecuted for greater charges based on the same criminal episode and known to the prosecutor at the time of the first prosecution. State v. Taylor, 660 P.2d 690 (App. 1983).

Tennessee Defendant was indicted for vehicular homicide after he pled guilty to and was sentenced in municipal court for driving while under the influence of an intoxicant, disregarding a stop sign, and unlawfully possessing a controlled substance. Defendant moved to dismiss the indictment on the ground that the second prosecution violated the double jeopardy provisions of the federal and state constitutions. The motion was denied.

On appeal, the issue before the court was whether the double jeopardy clauses of the state and federal constitutions bar a prosecution for vehicular homicide when defendant, prior to the victim's death, had pled guilty to and been sentenced in municipal court for the three specified charges.

Held, dismissal of defendant's plea of double jeopardy affirmed and case remanded. The Tennessee Supreme Court stated that the double jeopardy provisions of the Fifth Amendment and the state constitution prohibit the federal government or a state from trying a defendant for a greater offense after it has convicted him of a lesser included offense. The court added that an offense is necessarily included in another if the elements of the greater offense, as they are set forth in the indictment, include, but are not congruent with, all of the elements of the lesser. An exception to the prohibition occurs, and prosecution is allowed for the greater offense, when an element of the greater offense has not occurred at the time of the prosecution for the lesser offense. In this case, the court found that defendant could not have been charged with vehicular homicide at the time of his trial in municipal court because a necessary element to prosecution for vehicular homicide (i.e., the death of the victim) had not yet occurred. Thus, defendant's indictment falls within the exception to the proscription against double jeopardy, and defendant may be prosecuted for vehicular homicide. State v. Mitchell, 682 S.W.2d 918 (1984).

§ 47.20 Mistrials

U.S. Supreme Court Jury tried petitioner and acquitted him of one of several counts, but was unable to agree on the other counts. The District Court declared a mistrial as to these counts of the indictment, and set them down for retrial. Petitioner moved to bar his retrial, claiming that a second trial would violate the double jeopardy clause of the Fifth Amendment because evidence sufficient to convict on the remaining counts had not been presented by the government at the first trial. His motion was denied and he appealed.

Held, denial of motion to bar retrial affirmed. The protection of the double jeopardy clause by its terms applies only if there has been some event, such as an acquittal, that terminates the original jeopardy. Petitioner mistakenly assumed that the judicial declaration of a mistrial was an event that terminated jeopardy in his case and allowed him to assert a valid claim of double jeopardy. However, a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The government, like a defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he had no valid double jeopardy claim to prevent his retrial. Richardson v. United States, 468 U.S. 317, 104 S. Ct. 3081 (1984), 21 CLB 67.

U.S. Supreme Court Defendant was convicted of rape and murder at a jury trial based on the weight of the evidence. Pursuant to the jury's recommendation, the judge sentenced defendant to death. On appeal, the Florida Supreme Court reversed. On remand the trial court dismissed the indictment on double jeopardy princi-

ples. The Florida Court of Appeal reversed and the state supreme court affirmed. Certiorari was granted to decide whether the double jeopardy clause bars retrial after a state appellate court sets aside a conviction on the ground that the verdict was against "the weight of the evidence."

Held, affirmed. The Supreme Court held that reversal because of the weight of the evidence, rather than on the sufficiency of the evidence, does not preclude retrial on double jeopardy grounds. The Court observed that reversal based on the weight of the evidence does not mean that acquittal was the only proper verdict; rather, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. The Court compared a reversal based on the evidence's weight to a mistrial due to a deadlocked jury, where retrial is permitted as a matter of course. Tibbs v. Florida, 457 U.S. 31, 102 S. Ct. 2211 (1982), 19 CLB 70.

U.S. Supreme Court Defendant was tried for theft in Oregon state court. The state's expert witness testified as to the value and identity of the stolen property. On cross-examination, the witness acknowledged that he had once filed an unrelated criminal complaint against defendant, but explained no action had been taken on his complaint. On redirect examination, the trial judge sustained objections to the prosecutor's questions about why the witness had filed a complaint against defendant. After eliciting from the witness that he had never done business with defendant, the prosecutor asked: "Is that because he is a crook?" The trial judge then granted defendant's motion for a mistrial. On retrial the court rejected defendant's contention that the double jeopardy clause constitutionally barred further prosecution finding that "it was not the intention of the prosecutor in this case to cause a mistrial." Defendant was convicted, but the Oregon Court of Appeals reversed, sustaining the double jeopardy claim because the prosecutor's misconduct amounted to "overreaching." Certiorari was granted.

Held, reversed and remanded. The Supreme Court held that retrial was not barred by the double jeopardy clause since the prosecutor's remarks were not intended to provoke a mistrial. The Court explained that when a defendant asks for a mistrial, retrial is barred only when there is "manifest necessity" triggered by misconduct by the prosecutor that is so clearly harassment or overreaching so as to demonstrate intent to subvert the protection afforded by the double jeopardy clause and "goad" the defendant into seeking a mistrial. Oregon v. Kennedy, 102 S. Ct. 2083 (1982), 19 CLB 70.

Court of Appeals, 2d Cir. Defendants were indicted on narcotics and weapons charges and, at their request, the trial judge declared a mistrial. On appeal, defendants argued that a new trial should be barred on double jeopardy grounds.

Held, affirmed. The Second Circuit ruled that double jeopardy may not be invoked to bar a second trial when a defendant makes a mistrial motion, unless the mistrial is compelled by governmental misconduct so egregious that defendant must abandon his right to take his case to the first trier of the facts. In this case, the court observed that although the judge and prosecutor held an ex parte conference that excluded certain defense lawyers, neither the judge nor the prosecutor did any-

thing to provoke a mistrial intentionally. United States v. Rivera, 802 F.2d 593 (1986).

Court of Appeals, 5th Cir. After defendant was convicted in the district court on two counts of a three-count indictment charging him with conspiracy to receive and utter counterfeit money, he appealed on double jeopardy grounds.

Held, conviction affirmed. The Fifth Circuit stated that defendant's failure to object to trying a case before a second jury, and requesting that it be tried before the first jury, constituted waiver of the claim that he was placed in double jeopardy by failure to proceed before the original jury on the original indictment. The defendant who was arrested on a one-count indictment, which was subsequently superseded by a three-count indictment, stated that he was opposed to being prosecuted on the new counts before the previously selected jury. The court thus concluded that after he was convicted under two counts of the superseding indictment by the newly impanelled jury, he was not placed in double jeopardy by failure to proceed before the original jury on the original indictment. United States v. Milhim, 702 F.2d 522 (1983), 19 CLB 479.

Court of Appeals, 9th Cir. After defendant was arrested for driving under the influence of alcohol, a federal magistrate entered a judgment of acquittal, but the district court reversed the judgment and remanded the case for a new trial.

Held, district court reversed. The Ninth Circuit found that the magistrate's sua sponte termination of the trial in defendant's favor, after the defense rested, barred a retrial. The court reasoned that defendant had not sought termination of the case, so retrial would permit the government a second attempt to convict the defendant, which the double jeopardy clause prohibits. United States v. Govro, 833 F.2d 135 (1987), 24 CLB 263.

Idaho Defendant, convicted of aiding and abetting in the delivery of a controlled substance, argued on appeal that double jeopardy principles barred his conviction at a second trial after a mistrial had been declared at the first. At the earlier trial, defense counsel moved to dismiss the action based on the State's failure to comply with a discovery order, after the jury had been selected and sworn. The motion was denied and a witness called. After the witness had been sworn and direct examination commenced, defense counsel renewed his motion. The trial court again refused to grant the dismissal motion, but offerred to continue the case to afford an opportunity for discovery. Defense counsel agreed and the court then dismissed the jury. On the adjourned date, three and one-half weeks later, defendant moved for dismissal on the ground that retrial was barred by constitutional double jeopardy protections. The trial court ruled that the earlier proceeding would be deemed a mistrial and denied the motion. Defendant appealed from the ensuing conviction.

Held, affirmed. The Supreme Court of Idaho found that defendant had waived his double jeopardy rights and that there were no constitutional barriers to the continued prosecution. Where a defendant requests or acquiesces to a mistrial, said the Court, double jeopardy will bar a retrial only if prosecutorial or judicial misconduct induced the mistrial; further, it stated, such misconduct must be intended to

provoke the defendant into requesting or consenting to a mistrial. Here, the Court found, there was no indication that the prosecutor's failure to comply with the discovery order was "intended for the sole purpose of forcing the defendant to request a mistrial"; rather, it appeared to be a negligent error. Accordingly, ruled the Court, defendant's agreement to the mistrial operated as a waiver of his double jeopardy rights. State v. Sharp, 662 P.2d 1135 (1983), 20 CLB 175.

New York Defendant in the first case was convicted of criminal sale and possession of a controlled substance. In an unrelated second case, defendant was convicted of manslaughter and criminal possession of a weapon. Defendants argued on appeal that a retrial, following the declaration of a mistrial over defense objection, violated the ban on double jeopardy, even though it was defendants who originally requested a mistrial.

Held, affirmed in the first case but reversed in the second. In the first case, defendant moved for mistrial; however, immediately after the application was granted, counsel sought to withdraw it. The New York Court of Appeals determined that the denial of defendant's request to withdraw his application was not an abuse of discretion as a matter of law; therefore, retrial was not barred. In the second case, defendant's original mistrial application was denied, and he had no choice but to continue with the trial. Mistrial was granted only after the state's witness gave testimony that weakened state's case, and the prosecutor joined the earlier mistrial motion. A mistrial motion is no longer pending after it is denied and additional proceedings take place; thus, defendant's original motion did not have to be explicitly withdrawn. Defendant should have been given the opportunity to withdraw the motion because circumstances had changed between the time the mistrial motion was denied and the time it was granted. The mistrial declared in the second case was declared without defendant's consent and absent a manifest necessity; thus, his right not to be placed in jeopardy was violated by the retrial. People v. Catten, 508 N.E.2d 920 (1987).

Pennsylvania Defendant was convicted of second-degree murder and robbery. Two fellow conspirators testified for the prosecution. Defendant argued, on appeal, that a new trial should be granted because the prosecution concealed the terms of the plea agreement between one of the informing conspirators and the Commonwealth. After hearing evidence on this issue, the superior court granted a new trial. Defendant then filed a motion to dismiss the charges against him, asserting that a retrial would violate his right not to be placed twice in jeopardy, which was denied. He appealed.

Held, affirmed. The Supreme Court of Pennsylvania held that double jeopardy attaches to preclude retrial after mistrial only with respect to mistrials that have been intentionally caused by prosecutorial misconduct. In determining whether there was prosecutorial overreaching that triggered double jeopardy, the court applied Oregon v. Kennedy, 456 U.S. 667 (1982), in which a retrial was barred only when prosecutorial acts were shown intentionally to provoke a mistrial. In this case, although the plea agreement, which was the usual commitment to reduce a sentence in return for a testimony, had not been fully disclosed at

trial, the deal was described in general on cross-examination and the Commonwealth did not go to any lengths to disguise or lie about the fact that a bargain existed. The Commonwealth should have been more forthcoming in correcting any doubt created by witness's imprecise testimony but no manifest evidence suggested that the prosecutor intended to provoke a mistrial; thus, the threshold requirement of *Oregon* was not breached. Commonwealth v. Simons, 522 A.2d 537 (1987), 23 CLB 499.

South Carolina Defendant was charged in an indictment with distribution of marijuana. After a mistrial was declared over the objection of defense counsel, the case was tried again and defendant was convicted. Defendant appealed, contending that the second trial violated his double jeopardy constitutional rights. The first trial began on July 2, and the jury began deliberations at 4:30 P.M. on the next day. At about 10 P.M. that evening, the jury requested that testimony of two witnesses be read. The trial judge, on being told by the reporter that the testimony would take approximately two hours and ten minutes, decided to declare a mistrial. Defense counsel objected, requesting that the judge proceed immediately with the reading of the testimony or, alternatively, bring the jury back the following morning.

Held, conviction reversed. The mistrial was not dictated by manifest necessity or the ends of public justice, and so defendant's plea of double jeopardy under the state and federal constitutions should have been sustained. Presumably, a portion of the time period from 4:30 P.M. until 10 P.M. had been consumed by an evening meal. Thus, the jury had not deliberated for an unusually long time before it requested the testimony it needed to reach a verdict. The declaration of mistrial was unjustified on these facts. State v. Prince, 301 S.E.2d 471 (1983).

§ 47.25 —Reason for grant

Court of Appeals, 8th Cir. After his tax evasion trial ended in a declaration of mistrial because of the conclusion that the government's statistically based projections of income received by defendant's business should not have been admitted into evidence, he appealed from an order denying his motion to dismiss the indictment.

Held, affirmed. The Eighth Circuit held that the double jeopardy clause did not bar a new trial since the government's introduction of statistical income projections at the original trial was not intentional prosecutorial misconduct or gross negligence. The court observed that a retrial may only be barred after a mistrial is declared upon the defendant's motion when the government conduct giving rise to the motion was intended to provoke the defendant into moving for a mistrial. United States v. Civella, 688 F.2d 575 (1982), 19 CLB 168.

Georgia Defendant was convicted of felony murder. A mistrial was granted over defense objection when it was discovered, after the jury was impaneled and sworn and prosecution witnesses had testified, that the individual who had been brought into court and placed on trial was not in fact the defendant. A conviction was obtained at the subsequent trial. On appeal, defendant argued that the trial court had erred in overruling his plea of double jeopardy.

Held, conviction affirmed. The court determined that defendant had not

been placed in legal jeopardy at his first trial because it was another individual and not defendant who had been placed on trial at the earlier proceeding. Tieu v. State, 358 S.E.2d 247 (1987), 24 CLB 276.

Kentucky Defendant was convicted of first-degree robbery and two counts of sexual abuse. On appeal, he argued that the trial court erred in denying his motion to dismiss on double jeopardy grounds. At a previous trial, defense counsel had introduced a police officer as defendant's witness for the purpose of showing that defendant had voluntarily surrendered himself. On cross-examination, the prosecution asked if defendant had made any statement at the time of his surrender. Defendant's objection to the question was sustained, and his motion for a mistrial was granted. Defendant argued that jeopardy had attached at that point and precluded a retrial.

Held, affirmed. The court applied the general rule in federal and state cases that defendant's motion for mistrial removes any double jeopardy bar to retrial. It acknowledged a narrowly carved exception for misconduct by the prosecution intended to provoke defendant into moving for a mistrial, and found that no intentional provocation occurred in the case at bar. Stamps v. Commonwealth, 648 S.W.2d 869 (1983).

§ 47.35 —Dual sovereignty doctrine

U.S. Supreme Court Defendant hired two men to murder his wife, and the men kidnapped the wife from her home in Alabama. Her body was later found at the side of a road in Georgia. Defendant pleaded guilty to "malice" murder in Georgia state court in exchange for a life sentence. Subsequently, he was tried and convicted of murder in Alabama state court and was sentenced to death. The Alabama appellate court and Alabama Supreme Court affirmed the conviction.

Held, conviction affirmed. The Supreme Court ruled that under the dual sovereignty doctrine, successive prosecutions by two states for the same conduct are not barred by the double jeopardy clause. The Court thus held that the Alabama prosecution was not barred because each state's power to prosecute derives from its inherent sovereignty, and not from the federal government. Heath v. Alabama, 106 S. Ct. 433 (1985), 22 CLB 277.

§ 47.40 Implied acquittal

U.S. Supreme Court After defendant was indicted for murder, involuntary manslaughter, aggravated robbery, and grand theft, he pleaded guilty at arraignment to involuntary manslaughter and grand theft. Over the state's objection, the court dismissed the remaining charges to which he had pleaded not guilty. The Ohio Court of Appeals and the Ohio Supreme Court affirmed.

Held, reversed and remanded. The double jeopardy clause does not prohibit the state from continuing its prosecution of respondent on murder and aggravated robbery charges after a guilty plea on another count. The Court explained that acceptance of a guilty plea on a lesser-included offense while charges on the greater offenses remain pending is not the same as an implied acquittal that results from a guilty verdict on lesser-included offenses rendered by a jury. Ohio v. Johnson, 104 S. Ct. 2536, 21 CLB 70, reh'g denied, 105 S. Ct. 20 (1984).

Court of Appeals, 6th Cir. Defendant was indicted in the district court for illegal activities relating to explosives after the government had unsuccessfully attempted to have his probation revoked for such activities. His motion to dismiss on double jeopardy grounds was denied by the district court.

Held, affirmed and remanded for trial. The Sixth Circuit ruled that an unsuccessful revocation proceeding does not bar the government from prosecuting on the same factual basis. The court reasoned that the court's decision on the probation revocation matter was not a "valid and final judgment" on defendant's involvement in alleged criminal activities. United States v. Miller, 797 F.2d 336 (1986).

§ 47.45 Separate and distinct offenses

U.S. Supreme Court After defendant was convicted in the district court of continuing criminal enterprise (CCE), conspiracy to possess marijuana, and other related offenses, he appealed on double jeopardy grounds. The court of appeals for the Eleventh Circuit affirmed in part.

Held, conviction affirmed. The Supreme Court ruled that prosecution for CCE and marijuana importation did not violate the double jeopardy clause; nor did it bar cumulative punishment for those two offenses. The Court pointed out that the language, structure, and legislative history of the Comprehensive Drug Act of 1970 indicate that the CCE offense is a separate offense that is punishable in addition to the predicate offenses. Garrett v. United States, 105 S. Ct. 2407 (1985).

U.S. Supreme Court After defendant was convicted in the district court for currency reporting and false statement offenses, he received a sentence of six months in prison on the false statement count and a consecutive three-year term of probation on the currency reporting count. The answer "no" to the question on a Customs form of whether he was carrying more than $5,000 into the country formed the basis for each count. The court of appeals for the Ninth Circuit reversed the false statement conviction (18 U.S.C. § 1001), finding that defendant's conduct could not be punished under the false statement and currency reporting (31 U.S.C. §§ 1058, 1101) statutes.

Held, reversed. The Supreme Court found that since proof of currency reporting violation does not necessarily include proof of a false statement offense, a defendant could properly be convicted of, and receive consecutive punishments for, the two offenses without constituting double jeopardy. United States v. Woodward, 105 S. Ct. 611 (1985).

U.S. Supreme Court Defendant, as the result of a robbery in which he used a revolver, was convicted in a Missouri state court of both first-degree robbery and armed criminal action, and was sentenced to concurrent prison terms of ten years for robbery and fifteen years for armed criminal action. The Missouri Court of Appeals reversed the conviction and sentence on the ground that defendant's sentence for both robbery and armed criminal action violated the protection against multiple punishments for the same offense provided by the double jeopardy clause of the Fifth Amendment which was made applicable here by the Fourteenth Amendment. The court construed the robbery and armed criminal action statutes as defining the "same

offense" under the test announced in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932), i.e., where the same act or transaction constitutes a violation of two distinct statutes, the test for determining whether there are two offenses or only one, is whether each statute requires proof of a fact which the other does not.

Held, vacated and remanded. The Supreme Court found that defendant's conviction and sentence for both armed criminal action and first-degree robbery in a single trial did not violate the double jeopardy clause. The Court concluded that where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under the *Blockburger* test, a court's task of statutory construction is at an end and the trial court may impose cumulative punishment under such statutes in a single trial, Missouri v. Hunter, 459 U.S. 359 103 S. Ct. 673 (1983), 19 CLB 374.

Court of Appeals, 2d Cir. After defendants were convicted in the district court of possession of various narcotics and related offenses, they appealed on the ground that their prosecution for narcotics conspiracy should have been barred by their prior substantive drug conviction.

Held, affirmed. The Court of Appeals for the Second Circuit held that the double jeopardy clause did not bar the conspiracy prosecution when the acts that gave rise to the prior conviction only played a minor part in the present conspiracy. An indictment that charges a wide-ranging conspiracy involving many drug transactions was substantially different from an indictment on a single, isolated transaction. United States v. Nersesian, 824 F.2d 1294 (1987).

Court of Appeals, 2d Cir. Defendant, who had been convicted of supervising a continuing criminal enterprise and engaging in narcotics distribution, moved to have his consecutive sentences vacated. The district court denied the motion, and he appealed.

Held, affirmed. The Second Circuit held that conviction and imposition of cumulative punishments for supervising a continuing criminal enterprise engaged in narcotics distribution and for conspiring to engage in an illegal racketeering enterprise in violation of RICO did not violate double jeopardy. The predicate acts used in charging a continuing criminal enterprise were not factually identical with those used to charge defendant under the RICO statute. Because only narcotics felony offenses may be used as predicate offenses under the continuing-criminal-enterprise statute, and the RICO conspiracy count alleged many non-narcotic predicate acts, the offenses were separate and distinct. United States v. Muhammad, 824 F.2d 214 (1987).

Court of Appeals, 2d Cir. After having been convicted of one RICO count alleging a pattern of racketeering involving a conspiracy to extort money from certain construction businesses, defendant moved to dismiss a second RICO indictment charging extortion in relation to concrete-pouring jobs valued at more than $2 million. The district court denied the motion.

Held, affirmed. The second RICO prosecution was not barred by double jeopardy since the allegations of the two indictments sufficiently demonstrated the existence of two separate and independent criminal enterprises

and separate allegations of extortion and labor bribery. United States v. Langella, 804 F.2d 185 (1986), 23 CLB 291.

Court of Appeals, 2d Cir. An interlocutory appeal was taken from an order of the district court denying a motion to dismiss pending criminal Racketeer Influenced and Corrupt Organizations Act (RICO) charges on the grounds that prosecution was barred by the double jeopardy clause and prior plea agreements. Defendants were facing RICO charges arising out of their alleged membership in the Colombo organized crime family. One of the predicate offenses for the RICO charges related to the bribery of an IRS Special Agent, who pretended to be amenable to corrupt overtures. Each of the defendants had previously pled guilty to these bribery charges.

Held, denial of motion to dismiss affirmed. The Second Circuit concluded that the double jeopardy clause and the prior guilty pleas were not a bar to a trial on the pending RICO charges. The court noted that the RICO conspiracy continued for four years beyond the date of the last indictment in the bribery case, and the plea agreement made by one U.S. attorney did not bind another U.S. attorney in a different district. United States v. Persico, 774 F.2d 30 (1985), 22 CLB 160.

Court of Appeals, 4th Cir. After defendant was convicted in successive trials of vandalism and breaking and entering, he petitioned for a writ of habeas corpus in the district court, which was denied.

Held, conviction affirmed. The Fourth Circuit ruled that successive convictions did not unconstitutionally subject defendant to double jeopardy, because the evidence necessary to sustain a conviction for breaking and entering was not the same as that necessary to convict on the second offense, namely, vandalism. The court explained that vandalism requires only evidence of entering, without regard to whether the defendant committed a break-in. The court further found that the mere fact that the state had introduced greater proof at the first trial than was necessary did not support his claim of double jeopardy. Martin v. Taylor, 857 F.2d 958 (1988).

Arkansas Defendant was convicted of rape by deviate sexual activity and incest, for engaging, on numerous occasions, in sexual intercourse by forcible compulsion with his fourteen-year-old daughter. He appealed his conviction on separate counts, arguing that the charges of rape and incest should have been merged because they grew out of the same factual situation.

Held, affirmed. The Supreme Court of Arkansas found it unnecessary to determine whether rape by deviate sexual activity and incest required different elements of proof. There was ample testimony by which the jury could have found that defendant committed rape by deviate sexual activity on one occasion and, on other occasions, was guilty of incest by having sexual intercourse with his daughter. Each act constituted a separate offense, and so defendant was properly convicted on separate counts. Massey v. State, 648 S.W.2d 52 (1983).

Illinois The passenger of the vehicle driven by defendant was killed when the car struck a tree. Defendant was issued uniform traffic complaint citations for driving under the influence

(DUI) and illegal transportation of alcohol. Defendant appeared before a circuit court judge and pled guilty to the charges; the pleas were accepted and a sentencing date set. However, in the defendant's absence and without notice to him, the State moved to enter a *nolle prosequi* to both charges and that motion was granted. Defendant was subsequently indicted on reckless homicide charges. Trial court granted his motion to dismiss the charges on double jeopardy grounds and the state appealed.

Held, reversed and remanded. Focusing on the statutory elements of reckless homicide and DUI, the court noted that the two offenses are not the same. Under state statute, reckless homicide requires the killing of an individual without lawful justification by the reckless use of a motor vehicle; performance of such acts while under the influence of alcohol is not a statutory element of the crime. Proof of driving under the influence is prima facie evidence of recklessness; however, it neither automatically establishes reckless conduct nor is conclusive evidence. Moreover, DUI is not an offense consisting solely of one or more of the elements of reckless homicide. Because DUI is not a lesser included offense of reckless homicide, the court held that defendant's reckless homicide prosecution was not barred under double jeopardy principles by the earlier DUI prosecution. People v. Jackson, 514 N.E.2d 983 (1987).

Illinois Defendant was convicted of burglary for breaking into a day care center located in a building owned by the county housing authority; the day care center itself was leased to and operated by a community group. At trial, an official of the housing authority testified that defendant's entry into the premises was unauthorized; defendant's conviction was reversed on appeal on the ground that the housing authority had no possessory interest in the burglarized portion of the premises. Following the reversal, defendant was reindicted for the burglary of the same premises, with the second indictment alleging that the premises were under the control of the day care center. Defendant moved to dismiss the second indictment, asserting inter alia that retrial was barred by double jeopardy principles. The motion was granted and the dismissal affirmed by the intermediate court.

Held, reversed and remanded for trial. The Supreme Court of Illinois stated that constitutional prohibitions against double jeopardy would prevent a retrial for the same offense where reversal of the initial conviction was based on insufficiency of the evidence: "[t]he prosecutor is not afforded a second opportunity to supply evidence that he . . . failed to produce at the first trial on the same charge," it continued. Here, both prosecutions of defendant were based on the same conduct but did not involve the same offense, the court found, reasoning that burglary of premises controlled by the housing authority was a separate and distinct offense from burglary of premises under the control of the day care center. People v. Holloway, 442 N.E.2d 191 (1982), 19 CLB 387.

North Carolina Defendant was convicted of felonious breaking or entering and felonious larceny. He was sentenced for both the breaking or entering conviction and the larceny conviction based on the breaking or entering. On appeal, defendant argued that the double jeopardy principles of the United States Constitution and the

North Carolina constitution prohibited his conviction and punishment for both offenses.

Held, conviction affirmed. The North Carolina Supreme Court found that defendant's convictions and sentences in a single trial for both felonious breaking or entering and felonious larceny pursuant to that breaking or entering were not prohibited by the double jeopardy provisions of either the United States or North Carolina constitutions. The act of breaking into or entering the property of another, and the act of larceny, or the stealing and carrying away of another's property, violates two separate statutes enacted to protect two separate and distinct social norms. Defendant was, therefore, not subjected to multiple punishments for the same offense, but was sentenced for two separate offenses. The court cited Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673 (1983), as to the nature of the double jeopardy clause's protection against multiple punishments: it does nothing more than prevent a sentencing court from imposing punishment greater than that intended by a legislature. Double jeopardy does not prohibit multiple punishments for offenses when one is included within the other if both are tried together and if the legislature intended for both offenses to be separately punished. Even if the elements of two statutory crimes are the same, defendant may be convicted and sentenced for both in a single trial if it is found that the legislature so intended. Thus, the issue in the present case was whether the North Carolina state legislature intended that the offenses of felonious breaking or entering and felonious larceny based upon that breaking or entering be separate and distinct offenses. To that effect, the court stated that it was clear that the conduct of defendant was violative of two separate and distinct social norms, namely the breaking into or entering of the property of another and the stealing and carrying away of another's property. The legislature did not intend the crime of felonious breaking or entering to be subsumed under the equal crime of felonious larceny. Likewise, the legislature intended that the crimes of breaking or entering and felonious larceny be punished separately. Thus, defendant was properly tried for, convicted of, and punished separately in a single trial for the crimes of breaking or entering and felonious larceny following that breaking or entering. State v. Gardner, 340 S.E.2d 701 (1986).

South Carolina Defendant was convicted of driving under the influence (DUI) and in a separate trial was also convicted of reckless homicide. On appeal, defendant argued that the double jeopardy clause of the Fifth Amendment prohibited his subsequent prosecution on the charge of reckless homicide.

Held, reversed. The Supreme Court of South Carolina held that defendant's substantial claim of double jeopardy prohibited his subsequent prosecution for reckless homicide, because the state relied on and proved the same facts as in the adjudicated DUI offense and, in effect, staged a retrial of the DUI offense. The principal test for determining whether two offenses are the same for purposes of barring successive prosecution, set forth in Brown v. Ohio, 432 U.S. 166 (1977), was whether "each provision requires proof of an additional fact which the other does not." It was undisputed that DUI and reckless homicide were separate and distinct offenses

that required proof of an element not found within the other; thus, neither was a lesser included offense of the other. This court adopted the rationale of a more expanded *Brown* test, as contended by defendant, under Illinois v. Vitale, 447 U.S. 421 (1980), which held that "if in the pending manslaughter prosecution *Illinois* relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, *Vitale* would have a 'substantial claim of double jeopardy' under the Fifth and Fourteenth Amendment of the U.S. Constitution. State v. Carter, 353 S.E.2d 875 (1987).

§ 47.50 —Same transaction

U.S. Supreme Court After defendant was arrested when the police found him in possession of another person's revolver, he was indicted and convicted under two different statutes on charges of receiving a firearm and for possessing it. He was then sentenced to consecutive terms of imprisonment on the respective counts. The district court denied his motion for a change of sentence, and the Court of Appeals reversed.

Held, judgment vacated and case remanded with instructions. The Supreme Court stated that while the government may seek a multiple-count indictment where a single act establishes both the receipt and possession of the firearm, defendant may not suffer two convictions or sentences on such an indictment. Ball v. United States, 105 S. Ct. 1668 (1985), 21 CLB 462.

Court of Appeals, 5th Cir. After defendant was convicted on four drug counts, he appealed on the ground that his conviction of conspiracy to possess with intent to distribute over one kilogram of cocaine, and of conspiracy to possess with intent to distribute over 50 kilograms of marijuana, violated double jeopardy.

Held, reversed in part. The Fifth Circuit ruled that the prosecution for the two conspiracy charges violated double jeopardy. The court explained that the government proved only a single conspiracy to distribute where the marijuana and cocaine conspiracies occurred at the same time, the same persons were involved in both conspiracies, and the location of both conspiracies was identical. United States v. Bazar, 807 F.2d 1200 (1986), 23 CLB 390, cert. denied, 107 S. Ct. 1976 (1987).

Court of Appeals, 6th Cir. Petitioner was convicted of robbery and assault with intent to commit first-degree murder, both arising out of the same beating incident. The trial judge ordered that petitioner serve his two sentences consecutively, and the district court subsequently granted his habeas corpus petition on double jeopardy grounds.

Held, judgment affirmed and petition granted. The court found that petitioner was subjected to multiple punishments for the same offense in violation of his double jeopardy guarantees. It cited the test adopted in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932), which states that where the same act constitutes a violation of two statutory provisions the test to be applied is whether each provision requires proof of a fact which the other does not. Under the applicable Tennessee first-degree murder statute, petitioner could arguably have been convicted either for attempting a willful, deliberate, malicious, and premeditated murder or on a felony murder basis. Although the trial court gave a

lengthy and accurate charge on premeditation, there was no way that the state could conclusively show that the jury did not rely on the predicate felony of robbery in finding the intent required to convict. Since the underlying robbery could have been used by the jury to supply premeditation, petitioner's rights were violated. The court pointed out that the state could continue to convict for both a felony and for assault with intent to murder, as long as the felony murder instruction was not given and the state succeeded in proving intent and premeditation. Pryor v. Rose, 699 F.2d 287 (1983).

Court of Appeals, 6th Cir. Defendant pled guilty to two counts under the Federal Bank Robbery Act, 18 U.S.C. §§ 2113(d) and 2113(e). Defendant was sentenced to fifteen years under Section 2113(d) for putting lives in jeopardy during the bank robbery, and to twenty-five years under Section 2113(e) for kidnapping in the commission of the bank robbery. The sentences ran consecutively. Defendant contended that the sentences for the two offenses merge; however, the government claimed that the continuation of the kidnapping after the completion of the bank robbery was a separate offense under Section 2113(e).

Held, vacated and remanded. The Sixth Circuit held that continuation of a kidnapping after completion of a federal bank robbery was not an offense separate from putting lives in jeopardy during a kidnapping. The court reasoned that the kidnapping of the bank officer and his family was part of the robbery scheme from the beginning and continued through the completion of the robbery and defendant's temporary escape thereafter. The court thus rejected the pyramiding of penalties under the Bank Robbery Statute where the offenses arose from the same transaction. United States v. Moore, 688 F.2d 433 (1982), 19 CLB 168, cert. denied, 464 U.S. 997, 104 S. Ct. 497 (1983).

Court of Appeals, 9th Cir. Defendant was initially convicted of the unlawful sale of heroin, and was sentenced to a fifteen-year term of imprisonment as a felon. At the time he committed that offense he had been released on his own recognizance, after having been charged with an earlier crime. Following his sentencing on the heroin charge, he was again indicted, this time under a statute proscribing commission of a felony while released on recognizance. He was awaiting trial on that indictment when he sought habeas corpus relief based on double jeopardy. This was denied by the district court, consequently defendant appealed.

Held, reversed. The Ninth Circuit found that the state statute violated the prohibition against double jeopardy since an element of the conviction required proof of the underlying felony. The court observed that while legislatures are free to define such offenses in multiple statutes, where the same transaction constitutes a violation of two distinct statutory provisions requiring the same proof, double jeopardy prevents prosecutors from seeking to secure punishment under both statutes. Dixon v. Dupnik, 688 F.2d 682 (1982), 19 CLB 171.

Colorado Defendant was convicted of two counts of first-degree murder for killing an eleven-year-old girl after forcing her to engage in sexual activity. The two counts were murder after deliberation and felony-murder. Defendant argued on appeal that his convic-

tion on two counts of first-degree murder for one killing violated the principles of double jeopardy. The state contended that the offenses were separate and distinct crimes, and that dual convictions and concurrent sentences imposed for the killing of one victim did not violate the double jeopardy clause.

Held, convictions vacated and case remanded. The court adopted the rule of lenity in construing the Colorado statute on first-degree murder—that is, it would not recognize an act to be a crime unless penal law clearly and unmistakably so provided. It construed the statute to prohibit the act of first-degree murder, and to treat murder after deliberation and felony murder not as separate crimes but as different ways to commit first-degree murder. It concluded that the rule of lenity required that the statute be read to allow only one conviction for one killing. People v. Lowe, 660 P.2d 1261 (1983) (en banc).

Pennsylvania Defendants were sentenced to consecutive prison terms upon their conviction for aggravated robbery and for committing a crime of violence while in possession of a firearm. On appeal, they asserted a violation of their rights under the double jeopardy clauses of the federal and state constitutions to be protected against multiple punishments for one offense. They argued that the two offenses for which they were convicted constituted the "same offense" under the test enunciated by the U.S. Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932). Under the *Blockburger* test, two offenses are the "same offense" for double jeopardy purposes if the statutory provision for each does not require proof of a fact which the statutory provision for the other does not.

Held, affirmed. The purpose of the double jeopardy clause is to restrain courts from imposing multiple punishments for a single offense, not to restrain the legislature in its role in defining crimes and fixing penalties. Since it decided *Blockburger,* the U.S. Supreme Court has made it clear that the *Blockburger* test can be used as a tool of statutory construction only in the absence of legislative expression to the contrary. The two offenses for which defendants were convicted are set forth in separate Pennsylvania statutes providing for separate and cumulative penalties. Thus, their rights under the double jeopardy clause were not violated even though their offenses might have constituted the "same offense" under the *Blockburger* test. Commonwealth v. Bostic, 456 A.2d 1320 (1983).

§ 47.55 Administrative proceedings

U.S. Supreme Court Certain prison inmates, who were convicted of capital offenses and sentenced to death by lethal injection of drugs, petitioned the Food and Drug Administration (FDA), alleging that the use of the drugs for such a purpose violated the Federal Food, Drug, and Cosmetic Act (FDCA). When the FDA refused their petition, they brought action in the district court, which was denied, but the Court of Appeals reversed, holding that the FDA's refusal to take enforcement action was reviewable and that such refusal was an abuse of discretion.

Held, the FDA's decision not to take the enforcement actions requested by defendants was not subject to review under the Administrative Procedure Act. The Court reasoned that the

presumption that an agency decision not to institute enforcement proceedings is unreviewable was not rebutted here, especially since the relevant provisions give complete discretion to the FDA and the Secretary of Health and Human Services to decide how and when they should be exercised. Heckler v. Chaney, 105 S. Ct. 1649 (1985), 21 CLB 463.

Court of Appeals, 4th Cir. A state administrative hearing resulted in the determination that defendants fraudulently obtained food stamps, and they were disqualified from the food stamp program. Later, a federal grand jury indicted defendants for the unauthorized use of food stamps. Defendants then moved in the district court to dismiss the federal charges, claiming that the administrative action barred the criminal action, which was denied.

Held, conviction affirmed. The Fourth Circuit stated that a state administrative food stamp action does not bar a subsequent federal criminal prosecution of the same defendant. The court found nothing in the legislative history of the relevant statutory sections indicating that Congress wished to bar federal criminal prosecutions instigated after the imposition of state administrative sanctions. United States v. Ramsey, 774 F.2d 95 (1985), 22 CLB 161.

§ 47.60 Waiver of objection (New)

Court of Appeals, 5th Cir. On June 12, 1981, a federal grand jury indicted defendant for possession of counterfeit money under 18 U.S.C. § 472. On September 21, 1981, the jury was selected in his case but was not sworn, and the trial was scheduled for October 5, 1981, which was later reset as October 25. On October 20, a superseding three-count indictment was filed charging defendant of violating 18 U.S.C. §§ 371, 472, and 1503. On October 26, the government announced it was ready to proceed to trial. Defendant replied that he was ready to proceed on the old indictment, but requested thirty days to prepare on the two new counts in the superseding indictment. The government then indicated it had no objection to retaining the previously selected jury. Defendant stated that he was opposed to being prosecuted on the new counts before the same jury, or even another jury selected from the same venire. The court, therefore, discharged the jury and stated that a new jury would be selected from a new panel. Defendant then filed a motion to dismiss two counts of the superseding indictment on the grounds that further prosecution violated the due process of law and the double jeopardy clauses of the Fifth Amendment. This motion was denied. A new jury was impaneled. After trial, the new jury convicted defendant on two counts of the three-count indictment charging him with conspiracy to receive and utter counterfeit money and with possession of counterfeit money. He appealed on double jeopardy grounds.

Held, affirmed. Defendant's failure to object to trying the case before a second jury, and requesting that it not be tried before the first jury, constituted waiver of the claim that he was placed in double jeopardy by failure to proceed before the original jury on the original indictment. Defendant, who was arrested on a one-count indictment, which was subsequently superseded by a three-count indictment, stated that he was opposed to being prosecuted on the new counts before the previously selected jury.

The court thus concluded that after he was convicted under two counts of the superseding indictment by the newly impaneled jury, he was not placed in double jeopardy by failure to proceed before the original jury on the original indictment. United States v. Milhim, 702 F.2d 522 (1983), 19 CLB 479.

48. DUE PROCESS

§ 48.00 In general

"Enforcement Workshop: Civil Liability for Fourth Amendment Violations—Rhetoric and Reality," by Candace McCoy, 22 CLB 461 (1986).

U.S. Supreme Court After defendant was convicted in district court of child molestation, sexual assault, and kidnapping, he appealed, and the Arizona Court of Appeals reversed.

Held, conviction reversed. The Supreme Court ruled that the failure on the part of the police to preserve potentially useful evidence is not a denial of due process of law unless the defendant can show bad faith on the part of the police. The court thus found that the due process clause of the Fourteenth Amendment does not require a state to preserve semen samples, even though the samples might prove to be useful to the defendant. Arizona v. Youngblood, 109 S. Ct. 333 (1988).

U.S. Supreme Court Respondents, Mexican nationals, were arrested and deported after a group hearing, and they were subsequently arrested and charged under 8 U.S.C. § 1326, providing that any alien who has been deported and thereafter reenters the United States is guilty of a felony. The district court dismissed the indictments, and the Court of Appeals for the Eighth Circuit affirmed.

Held, affirmed. The U.S. Supreme Court held that an alien deprived of the right to have the disposition of a deportation hearing reviewed in a judicial forum requires that a review be made available in any subsequent proceeding in which the result of the original deportation proceeding is used to establish an element of a criminal offense. The Court noted that case law established that some meaningful review of an administrative proceeding is required where the decision made by the administrative body is a critical factor in the subsequent imposition of criminal sanctions. United States v. Mendoza-Lopez, 107 S. Ct. 2148 (1987).

U.S. Supreme Court After petitioner was indicted on federal fraud charges, he moved for dismissal of the indictment on the ground that there was discrimination in the grand jury selection process. The district court denied the motion, and the petitioner was convicted after a jury trial. The court of appeals affirmed.

Held, affirmed. Even assuming that there was discrimination in the selection of a grand jury foreman, such discrimination does not warrant reversal of petitioner's conviction. The Court reasoned that discrimination in the selection of a grand jury foreman, as distinguished from discrimination in the selection of the grand jury itself, does not in any sense threaten the interests of a defendant protected by the due process clause. Hobby v. United

States, 468 U.S. 339, 104 S. Ct. 3093 (1984), 21 CLB 67.

U.S. Supreme Court Defendant driver was convicted of four misdemeanors in connection with an automobile accident in which a passenger in the truck he collided with was killed. He appealed, and the case was transferred to the circuit court for a trial de novo. Meanwhile, a grand jury indicted him for manslaughter. The state prosecuted only the manslaughter charge, and, after conviction and unsuccessful state appeals, he brought a federal habeas corpus action. The magistrate in his report recommended that the writ be issued.

Held, affirmed. The case was controlled by Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098 (1974). The facts in *Blackledge* were similar in that the defendant in that case also exercised his statutory right to a trial de novo, and the prosecutor then obtained a felony indictment charging him with a higher count. This sequence suggested a "likelihood of vindictiveness." Therefore, a presumption of unconstitutional vindictiveness in such circumstances was established by the Court. Thus the prosecution of defendant for manslaughter in the instant case, following his invocation of his statutory right to appeal his misdemeanor convictions, was an unconstitutional denial of due process. Thigpen v. Roberts, 468 U.S. 27, 104 S. Ct. 2916 (1984), 21 CLB 69.

U.S. Supreme Court After the State of Illinois appealed from an order of the state court dismissing an implied consent hearing to determine whether a defendant's driver's license should be suspended for refusing to submit to a breathalizer test, the Illinois Appellate Court affirmed.

Held, reversed and remanded. The Supreme Court found that a driver's right to a hearing before he can be deprived of his license for failing to submit to a breath analysis test accorded a driver all of the due process that the Constitution requires. Illinois v. Batchelder, 463 U.S. 1112, 103 S. Ct. 3513 (1983), 20 CLB 163.

U.S. Supreme Court Defendant pled not guilty to misdemeanor charges arising from an incident involving assault on a federal officer, and requested a jury trial after initially expressing an interest in plea bargaining. While the misdemeanor charge was still pending, defendant was indicted and convicted in federal district court on a felony charge arising out of the same incident as the misdemeanor charges. Defendant moved to set aside the verdict based on prosecutorial vindictiveness, contending that the felony indictment gave rise to an impermissible appearance of retaliation. The district court denied the motion, and on appeal the Fourth Circuit reversed.

Held, reversed and remanded. A presumption of prosecutorial vindictiveness was not warranted in this case, and absent such a presumption no due process violation was established. A prosecutor should remain free before trial to exercise his discretion to determine the societal interest in the prosecution. The initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution. United States v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485 (1982), 19 CLB 68.

Court of Appeals, 2d Cir. After a corporation and its vice-president were convicted of making false representations and statements to the Department of Agriculture in violation of 18

U.S.C. §§ 1001 and 1002, they appealed on the ground that the judge's reversal of a prior ruling had deprived them of a fair trial.

Held, conviction vacated in part and remanded for a new trial. The Second Circuit decided that the vice-president was deprived of a fair trial when the trial judge indicated that he would disregard certain testimony of a government witness and then changed his mind. The court reasoned that if the trial court elects to announce credibility determinations in the midst of trial, defense counsel cannot be faulted for reliance on that determination in formulating its ensuing strategy. United States v. Mendel, 746 F.2d 155 (1984), 21 CLB 260.

Court of Appeals, 2d Cir. Following the conviction of several congressmen and a senator resulting from the government's Abscam investigation, defendants appealed on the ground that their due process rights had been violated.

Held, convictions affirmed as to defendants' claims that the investigation violated the standards of the due process clause of the Fifth Amendment. The Second Circuit found that the government's involvement in the Abscam operation was not so excessive as to violate due process. The court further found that the district court's finding at a due process hearing that defendant congressmen were not "play-acting" when they accepted bribes was not clearly erroneous. The court reasoned that the "coaching" of defendants by a government agent during the investigation was not outrageously coercive since it was the congressmen themselves who set the ground rules under which the bribes were offered. United States v. Myers, 692 F.2d 823 (1982), cert. denied, 461 U.S. 961, 103 S. Ct. 2437 (1983).

Court of Appeals, 4th Cir. After defendants were convicted in the district court on Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, and Travel Act violations, they appealed on the ground that an assistant district attorney's participation in the case was improper, since he had formerly represented them in connection with the same matter.

Held, affirmed in part and reversed in part. The Fourth Circuit ruled that the prosecutor's participation in the case was per se illegal, and that the defendants' right to a fair trial was fatally compromised, especially since he had represented them as to a matter identical to the one on trial. United States v. Schell, 775 F.2d 559 (1985), 22 CLB 282.

Court of Appeals, 5th Cir. Defendant petitioned for removal of a state court prosecution for perjury on the ground that the Texas state court had denied him due process by failing to provide him with an "examining trial" prior to indictment, and he appealed from the dismissal of the petition.

Held, affirmed. The Fifth Circuit held that no federal law guarantees a defendant the right to an "examining trial" or probable cause hearing prior to indictment, and thus defendant was not entitled to removal of the state prosecution on the ground that the state violated his civil rights by selectively providing examining trials on the basis of race. The court observed that since failure under Texas law to grant an examining trial prior to the return of the indictment in no way affects its validity, the federal courts lacked jurisdiction in the absence of evidence that the federal civil rights statute was vio-

lated. Texas v. Reimer, 678 F.2d 1232 (1982), 19 CLB 77.

§ 48.01 —Interpretations by state courts (New)

Alaska Defendants were convicted of unrelated criminal charges. After their arrests they were taken to police stations and questioned by police officers. Both defendants made inculpatory statements during their respective interrogations. In both cases, a functional audio or video recording device was present in the interrogation rooms and was used during part, but not all, of the interrogations. Before their respective trials, defendants moved to suppress their confessions. They both claimed that their confessions were obtained in violation of their due process rights. The police officers in the two cases offered accounts of the interrogations that conflicted with those of the defendants. In both cases, the trial court chose to believe the police officers' recollections of the interrogations and decided that the confessions were voluntary and admissible. Defendants were ultimately convicted of the charges, and they appealed on the ground that the failure to record their interrogations constituted a violation of their due process rights under the Alaska Constitution.

Held, reversed and remanded. The Alaska Supreme Court found that the unexcused failure to record electronically the custodial interrogations conducted in places of detention violated defendants' due process rights under the Alaska constitution. The court stated that such recordings are required by state due process provisions when the interrogation occurs in a place of detention and such recording is feasible, as in the present case. Recording, ruled the court, is now a reasonable and necessary safeguard against the violation of an accused's right to counsel, right against self-incrimination, and right to a fair trial. To satisfy these due process requirements, the recording must clearly indicate that it recounts the entire interrogation, so that courts are not left to speculate about what really transpired. Stephan v. State, 711 P.2d 1156 (1985), 22 CLB 296.

Arkansas Defendant appealed his conviction and fine for contempt. At the end of a hearing, defendant, a lawyer, was told that some of his earlier actions were unethical, and he was fined for contempt. Defendant never received notice that he was charged with contempt. At issue was whether the trial court violated defendant's right to due process in a contempt proceeding.

Held, reversed and remanded. The court first had to decide whether contempt in this case was civil or criminal. Because the relief provided by the trial court was a punitive fine paid to the court, which could not be avoided if defendant performed some action required by the court, the contempt was criminal. Due process requires that an alleged contemner be notified that a charge of contempt is pending against him and be informed of the specific nature of that charge. Because defendant was not notified, the court reversed the contempt conviction. Fitzhugh v. State, 752 S.W.2d 275 (1988).

Colorado Defendant was charged with introduction of contraband in the first degree. Bond was posted for her release, and she was subsequently convicted of the charged offense. After her conviction, and while still on bond, defendant was ordered to appear be-

fore the trial court for rulings on her motion for a new trial, and for sentencing. Defendant failed to appear, and a warrant was issued for her arrest. She was then arrested and charged with violating bail bond conditions. Subsequently defendant was convicted of that offense and sentenced to a mandatory one-year prison term to be served consecutively to her sentence for the introduction of contraband conviction. Defendant appealed the one-year sentence, on the grounds that a statutorily imposed minimum prison term and a prohibition against the introduction of mitigating circumstances by a person convicted of bail bond violation were unconstitutional abridgements of equal protection and due process. Defendant claimed that the relevant statute drew an impermissible distinction between persons failing to appear for judicial proceedings and persons convicted of other class five felonies.

Held, conviction and sentence affirmed. The Colorado Supreme Court stated that a distinction between different classes of felonies or between different crimes within the same felony class was not unconstitutional. The distinction made was neither arbitrary nor unreasonable, and the legislature therefore had the right to draw such a distinction. The legislature could rationally decide that the failure to appear for judicial proceedings, as required by a bail bond, constituted a sufficiently egregious disruption of the judicial system as to justify the imposition of a mandatory minimum sentence. People v. Garcia, 698 P.2d 801 (1985).

Delaware Defendant was convicted of attempted murder in the first degree, possession of a deadly weapon during the commission of a felony, and assault in the second degree. On appeal, defendant contended that a question asked by the prosecutor of defendant denied him a fair trial and justified the declaration of a mistrial. The question at issue involved an alleged statement by defendant about "loose white women." Defendant's attorney objected to the question and moved for a mistrial on the ground that the state had brought racial prejudice into the case by this question. Although the state originally had contended that the prosecutor's question, admittedly improper, constituted a harmless error after the judge's instruction to the jury to disregard the question, the attorney general later said that he no longer believed the question was harmless.

Held, reversed and remanded. A confession of error does not require the reversal of the judgment of conviction in the trial court. In determining whether the fairness of the trial was adversely affected by prosecutorial action, the court generally considers three factors: (1) the centrality of the issue affected by the alleged error; (2) the closeness of the case; and (3) the steps taken to mitigate the effects of the alleged error. A central issue in the case was the credibility of defendant vis-à-vis the credibility of the victim. Although the court has often held that even when prejudicial error is committed, it will usually be cured by the trial judge's instruction to the jury, the court did not find this here. When racial prejudices are improperly injected into a criminal trial, "the due process and equal protection clauses overlap or at least meet." One of the purposes of the equal protection clause is to eradicate racial considerations from criminal proceedings. There is also nothing more fundamental to the due process requirements of a fair trial

than the right for the accused to have his case heard by an impartial jury. A question that improperly injects race as an issue before the jury poses a serious threat to a fair trial. Race is an impermissible basis for any adverse governmental action in the absence of compelling justification, of which there was none in this case. The court held that the improper injection of race as an issue into a criminal proceeding violated the right of due process, which is guaranteed to all defendants in a criminal case under the constitution of the state. Defendant's motion for a mistrial should have been granted. Weddington v. State, 545 A.2d 607 (1988).

Kansas Defendant was convicted of vehicular homicide and driving under the influence of alcohol. At a preliminary hearing and later at trial, the court allowed the media to cover the proceedings through the use of photographic, video, and audio reproductions. An appeal, defendant argued that the presence of cameras and audio recording devices in the courtroom deprived him of his right to a fair trial. He argued that the district court erred in permitting photographic, video, and audio coverage of the preliminary hearing and of the trial itself. Specifically, defendant maintained that the photographic and audio reproduction of the preliminary hearing was inherently corruptive to potential jurors and thus had the effect of preventing a fair and impartial trial later.

Held, affirmed as to media coverage. The Kansas Supreme Court determined that the district court did not err in allowing the media coverage because the presence of cameras and audio recording devices in the courtroom did not deprive defendant of a fair trial. The court stated that, generally,

> the propriety of granting or denying permission to the media to broadcast, record, or photograph court proceedings involves weighing the constitutional guarantees of freedom of the press and the right to a public trial on the one hand and, on the other hand, the due process rights of the defendant and the power of the courts to control their proceedings in order to permit the fair and impartial administration of justice.

The court cited Chandler v. Florida, 449 U.S. 560, 101 S. Ct. 802 (1981) as to the effect of television coverage of judicial proceedings on the due process rights of criminal defendants. In *Chandler*, the U.S. Supreme Court held that the due process rights of an accused are not inherently denied by television trial coverage, and that no constitutional rule as such prohibits states from permitting broadcast or photographic coverage of criminal trial proceedings. The question of whether due process is violated by such coverage depends on the specific circumstances of each case, particularly whether such coverage would have an adverse effect on a trial participant's, especially a defendant's, ability to present his or her case. In this case, defendant did not show that his due process rights were adversely affected by the media coverage of the preliminary hearing or of the trial itself. Defendant presented no evidence to show that any individual juror's ability to judge defendant without prejudice was affected by the pretrial coverage. Defendant likewise failed to show that the preesnce of photographic, audio, and video

equipment in the courtroom during his trial hampered his ability to present his case or the ability of the jury to judge defendant fairly. Thus, defendant failed to show that the trial court erred in allowing the presence of broadcast and photographic reproduction of his preliminary hearing or of his trial. State v. McNaught, 713 P.2d 457 (1986).

Nevada Defendant appealed her conviction of first-degree murder, contending that she had ineffective assistance of counsel during her pretrial plea negotiation. Defendant murdered her sleeping husband who had been abusing her, and defense counsel wanted her to plead not guilty on the grounds of self-defense. Counsel believed her acquittal would greatly enhance his career. When defendant was offered the option to plead guilty to voluntary manslaughter, a probationable offense, she accepted. Defense counsel kept defendant's psychiatric report, which would have served as a mitigating factor in determining probation, from the state. He then told his client to change her plead to not guilty if the court requested the report. Although counsel gave no explanation for this reasoning, defendant heeded the advice. When the court ordered defense to release the information to the state, defendant changed her plea.

Held, conviction reversed and remanded. The court held that the defense counsel was acting only to benefit his own career, not his client's best interest. Because of his conduct, defendant was denied her constitutionally guaranteed right to effective assistance of counsel. Larson v. State, 766 P.2d 261 (1988).

New Hampshire In 1973, defendant entered a plea of not guilty by reason of insanity to a charge of murder, in connection with the killing of his mother. The court accepted the plea, and defendant was subsequently committed to the state hospital for life until or unless released earlier by due course of law. Under the law then in effect, defendant was not guaranteed the right to periodic review of his commitment. Later changes in statutory and case law, however, gave him that right, and he was recommitted in 1977, 1979, and 1981. In 1982, the legislature amended the recommittal statute, providing for a judicial hearing for recommital. At the hearing, when the court was satisfied by proof beyond a reasonable doubt that the hospital patient suffered from a mental disorder and that it would be dangerous for him to go at large, the court was obliged to renew the order of committal. A court is required to find the hospital patient dangerous if his crime caused death or serious bodily injury and his mental condition is substantially unchanged. At the hearing the court found it would be dangerous for defendant to go at large only by applying the 1982 statutory amendment to this matter, and accordingly ordered defendant recommitted subject to the continuation of his parole.

Held, reversed and case remanded. The Supreme Court of New Hampshire reversed by holding that the irrebutable presumption of dangerousness, based on defendant's past dangerous act and on the fact that the mental condition that led to his acquittal by reason of insanity had not substantially changed, offended the state constitution's due process clause. The court stated that due process requires

that the patient be given a chance to defeat the statutory presumption with additional evidence. By denying the patient that chance the 1982 amendment subverts the patient's right to confront the state on the issue of dangerousness and invites serious questions about punitive intent on the part of the legislature. State v. Robb, 484 A.2d 1130 (1984), 21 CLB 472.

Missouri Defendant was convicted by a jury of rape and sodomy of a six-year-old girl. Prior to trial, defendant moved for a declaration of invalidity of the statute that allows out-of-court statements to be entered as evidence in the court. Defendant's motion was denied, and the victim's statements to an officer were admitted. Defendant asserted on appeal that the statute was facially unconstitutional and denied him both equal protection under the laws and his due process right to a fair trial.

Held, affirmed. The statute making admissible, under certain circumstances, out-of-court statements made by children under the age of twelve relating to offenses against the person, sexual offenses, or offenses against family members, was neither facially invalid nor a denial of equal protection or due process. Although defendant claimed he lost his "fundamental right" of confrontation because the victim's out-of-court statements were allowed, the child was at the court and was subject to cross-examination. The court said that such statements may on occasion be more reliable than the child's courtroom testimony, which could suffer distortion by the trauma caused by the procedure. Defendant also claimed that the statute was arbitrary and lacked a reasonable basis, but defendant failed to demonstrate how allowing the court to consider the value of a child victim's statements and admitting them when they were reliable was not rationally related to a legitimate governmental interest. The court had no basis for finding that defendant had been denied due process. The statute did not prevent the introduction of evidence pertinent to the defense or deprive defendant of a meaningful opportunity to defend against the charges; rather, it merely allowed the jury to consider certain relevant evidence offered by the state. Neither was due process denied by the victim's questioning officer's testimony. The testimony was not, as defendant claimed, duplicative of the victim's testimony at trial, and the victim's out-of-court statements were a species of evidence distinct from her testimony at trial. State v. Wright, 751 S.W.2d 48 (1988).

South Dakota A South Dakota statute permits a person suspected of driving while intoxicated to refuse to submit to a blood-alcohol test, but authorizes revocation of the driver's license of a person so refusing the test. The statute permits the driver's refusal to be used against him at trial. When defendant was arrested by police officers in South Dakota for driving while intoxicated, the officers asked him to submit to a blood-alcohol test; they warned him that he could lose his license if he refused but did not warn him that the refusal could be used against him at trial. The state supreme court affirmed the order of the trial court suppressing evidence of defendant's refusal on the ground that the statute allowing introduction of evidence of the refusal violated defen-

dant's Fifth Amendment privilege against self-incrimination. The U.S. Supreme Court granted certiorari, and held that the admission into evidence of a defendant's refusal to submit to a blood-alcohol test does not offend his right against self-incrimination.

Held, admission of refusal denied on another ground. On remand, the majority of the South Dakota Supreme Court again suppressed defendant's refusal to submit to a blood-alcohol test, this time on state due process grounds, which "inherently" require a defendant to be fully informed of the consequences of a refusal to submit to such a test, namely, that his refusal could be used as evidence in a subsequent driving-while-intoxicated trial. The warnings in this instance dealt only with license revocation and *Miranda* warnings. Therefore, the court found that defendant did not voluntarily, knowingly, and intelligently waive his constitutional protection of due process and prohibition against self-incrimination. State v. Neville, 346 N.W.2d 425 (1984), 21 CLB 84.

Tennessee Plaintiffs brought a class action suit against the department of correction protesting the commingling of juvenile "status offenders" with delinquent offenders in secure correctional facilities. A delinquent child is one who has committed an act that would have been a crime if committed by an adult and who is found to be in need of treatment. A "status offender" is a child whose conduct would not be a crime if committed by an adult and who commits acts that are proscribed by the legislature solely because of age. Although defined differently by the legislature, they were treated equally at the correction facility in which they were housed.

Held, affirmed and remanded. The court said that although the state may impose restrictions upon a child, including confinement, children are also entitled to due process rights. The state may not assert retributive punishment unless a child has violated a criminal law. If punishment is imposed without a prior adjudication of guilt, the punishment is "per se illegitimate." Since "status offenders" have been found guilty of no crime, the confinement of them with delinquents and the similar treatment as delinquents amounted to punishment of the plaintiffs without an adjudication of guilt. The court concluded the practice violated the principles of substantive due process under the state and U.S. Constitutions. Doe v. Norris, 751 S.W.2d 834 (1988).

§ 48.05 —Drug violations

Court of Appeals, 11th Cir. Defendants were convicted of conspiracy to possess marijuana with intent to distribute it. They appealed the district court's denial of their motion to dismiss the indictment because of government overreaching in violation of their due process rights. The Drug Enforcement Administration (DEA) conceived a plan under which DEA agents posed as sellers of large quantities of marijuana, spread the word through undercover agents and informants that marijuana was for sale, and arrested individuals who "purchased" marijuana once the "sale" was consummated. In furtherance of the plan, the DEA placed in a warehouse about 10,000 pounds of marijuana that it had seized in a separate operation. The execution of the plan resulted in the arrests and convictions of defendants.

Held, affirmed. The government's enforcement techniques did not violate defendants' due process rights because they were not outrageous, in violation of fundamental fairness, or shocking to the universal sense of justice. Defendants' argument that the government "created" their crimes was rejected. All the government did was present defendants with an opportunity they were willing to take and could have found elsewhere without undue difficulty. United States v. Savage, 701 F.2d 867 (1983).

Florida Defendants were charged in a two-count indictment with possessing cannabis and conspiring to traffic in more than 200 pounds of cannabis. Defendants filed motions to dismiss All the government did was present the information because of entrapment and prosecutorial misconduct These motions relied primarily upon the agreement between the sheriff and a paid informer. Under the agreement, the informer was to receive 10 percent of all civil forfeitures arising out of successful narcotics investigations he completed in the county. The district court dismissed the information after finding that prosecutorial misconduct in this case had deprived defendants of their right to due process under the Florida constitution. The state appealed the affirmation of the trial court's holding, arguing that defendants' due process defense was both procedurally and substantively inapplicable in this case.

Held, district court decision approved. The Supreme Court of Florida pointed out that the informer "had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. . . . [He had] what amounts to a financial stake in criminal convictions." The court held, therefore, that a trial court "may properly dismiss criminal charges for constitutional due process violations in cases where an informant stands to gain a contingent fee conditioned upon cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution." State v. Glosson, 462 So. 2d 1082 (1985), 21 CLB 474.

Louisiana Defendant pled guilty to possession of controlled dangerous substances. Subsequently, the state filed a petition seeking forfeiture of $1,400 in cash and defendant's automobile. Under state statute, certain property is subject to forfeiture if that property is used to facilitate the transportation, sale, possession, or manufacture of controlled dangerous substances. Contraband per se is classified as items, the possession of which is intrinsically illegal, such as illegal narcotics. Derivative contraband is classified as items that are subject to forfeiture because they are the immediate instruments of a crime, but the possession of which are not intrinsically illegal, such as automobiles, guns, and currency.

Held, affirmed in part and reversed in part. The Supreme Court of Louisiana affirmed the forfeiture of defendant's automobile as contraband and reversed as to the $1,400 because the statutory presumption, rebuttable only by clear and convincing evidence, that cash seized in close proximity to illegal controlled substances is forfeitable contraband denies due process and violates state constitutional property rights. The majority of the court declared that the state must bear the

burden of proving that cash is derivative contraband. Although the state constitution does not go so far as to forbid the forfeiture of derivative contraband, it does require proof that the property was used as an immediate instrument of crime. The presumption in question impermissibly relieves the state of its burden of proof on that issue. State v. Spooner, 520 So. 2d 336 (1988).

Louisiana Defendant moved to quash an information charging him with distribution of marijuana, asserting that his ability to effectively defend himself had been impaired by the passage of thirteen months between the date of the offense and date of his arrest; specifically, he claimed that the delay made it impossible to establish an alibi defense.

At a hearing before the trial court, the state contended that an immediate arrest of defendant would have jeopardized a continuing undercover investigation. Defendant's motion was denied by the trial court and defendant pled guilty to the charges, reserving his right to appeal on the issue of prearrest delay.

Held, conviction affirmed. The Louisiana Supreme Court stated that the state's interest in protecting "an ongoing undercover operation is a legitimate excuse for prearrest delay," it said. Finding that the prejudice asserted by defendant was not sufficient to outweigh the justification for the delay, the court concluded, on balance, that defendant was not entitled to a dismissal of the charges. State v. Jenkins, 419 So. 2d 463 (1982), 19 CLB 268.

§ 48.10 —Felonious homicide

U.S. Supreme Court Defendant was found guilty of murder, robbery, and assault after a jury trial in Florida state court. The same jury heard further testimony and argument during the sentencing phase and recommended that the death penalty be imposed. The trial court followed the recommendation, and the Florida Supreme Court affirmed the conviction and sentencing, rejecting petitioner's contention that the prosecution's closing argument during the guilt phase of the trial violated the Eighth Amendment. The prosecutor's argument included reference to the fact that defendant was on weekend furlough from an earlier sentence when the crime occurred; implied that the death sentence was the only guarantee against a future similar act; and referred to defendant as an animal. Defendant sought habeas corpus relief that was denied by both the district court and court of appeals.

Held, affirmed and remanded. The Court found that the prosecutor's comments did not deprive the defendant of a fair trial and there was no denial of due process. The Court observed that the comments did not manipulate or misstate the evidence, and most of the objectionable content was responsive to opening summation of the defense. Darden v. Wainwright, 106 S. Ct. 2464 (1986), reh'g denied, 107 S. Ct. 24 (1986).

Connecticut Defendant was convicted of felony murder. On appeal, he claimed that the trial court should have granted his motion to suppress statements that he gave to the police because the police failed to inform him of counsel's repeated efforts to contact him to provide pertinent legal assistance prior to his station house confession thus rendering inoperative his waiver of the presence of counsel. Defendant contended that the due pro-

cess clause of the Connecticut constitution requires the police to inform a suspect in custody of timely efforts by a specific attorney to provide pertinent legal assistance. Defendant conceded, however, that his claim was untenable under federal constitutional law.

Held, judgment set aside and case remanded for new trial. The court found that a suppression of defendant's statements was required because the state constitution creates a duty to apprise the suspect of counsel's efforts. The majority of the court concluded that a breach of that duty may prevent defendant from validly waiving his right to consult with counsel before submitting to interrogation by police. An attorney need not appear in person at the police station, the majority continued, but instead may, as in this case, attempt to contact his client by phone, and no preexisting client-attorney relationship need be shown. State v. Stoddard, 537 A.2d 446 (1988).

Tennessee Defendant was convicted of first-degree murder in the perpetration of robbery and sentenced to death upon the jury's finding of three aggravating circumstances. Defendant contested the application of Section 39-2-203(1)(12) of the Tennessee Code Annotated, a statute unique to Tennessee, which provided for an aggravating circumstance involving "mass" or "serial" murder in its death penalty statute. Section 39-2-203(1)(12) defines mass murder as the murder "of three or more persons within the State of Tennessee within a period of forty-eight (48) months (committed) in a similar fashion in a common scheme or plan." Defendant attacked the constitutionality of the statute, arguing that the statute was void for vagueness because the definition of mass murder left unclear whether a conviction, indictment, or neither was required to show the commission of the requisite murders.

Held, reversed. The Supreme Court of Tennessee found the language of Section 309-2-203(1)(12) to be ambiguous, because it "may readily be interpreted not to require that the state show a defendant had been convicted of these murders, but it may also be construed to require a showing of three or more convictions of murder." If the state were not required to prove that defendant had been convicted of the triggering murders, the death penalty proceeding would serve also, in effect, to try defendant for the offenses that trigger the mass-murder aggravating circumstances of the death penalty statute. It would violate the concept of fundamental fairness, embodied in due process of law, to present evidence of murders for which defendant had not yet been convicted, the effect of which would be to try defendant without substantive and procedural protections afforded by the Tennessee constitution and the due process clause of the Fifth and Fourteenth Amendments. The court concluded, however, that Section 39-2-203(1)(12) of the Tennessee Code Annotated, may be constitutionally applied if the offenses used to trigger the mass-murder aggravating circumstances of the death penalty statute are shown only by convictions that have been entered prior to the sentencing hearing. Because defendant did not have the sufficient number of triggering convictions for the murders of three or more persons within the state of Tennessee, the court held that the mass-murder aggravating circumstances could not be applied in this case. State v. Bobo, 727 S.W.2d 945 (1987).

§ 48.15 —Firearms violation

Pennsylvania Defendant was convicted of a felony offense and was sentenced to a five-year prison term, as required by the Mandatory Minimum Sentencing Act, which mandates a minimum five years' total imprisonment for visible possession of a firearm during commission of specified felonies. On appeal, defendant argued that the firearm possession should have been treated as an underlying element of the offense. Defendant claimed that to do otherwise would effectively create a new class of upgraded felonies of which visual possession is a material element. Defendant went on to argue that the mandatory sentence was an unconstitutional violation of his due process rights.

Held, conviction affirmed. The Pennsylvania Supreme Court upheld the sentence imposed on defendant. The due process clause of the federal constitution as applied to the act in question through the Fourteenth Amendment does not require that physical possession of a firearm during commission of certain felonies be treated as an element of an underlying offense. Visible possession should not be considered as a separate crime, but relates only to the sentence imposed on defendant for the offense of which he was convicted. This provision does not remove the state's burden to prove the crime beyond a reasonable doubt, and does not deprive defendant of his due process rights. Commonwealth v. Wright, 494 A.2d 354 (1985).

§ 48.30 —Sex crimes

"Depo-Provera for the Sex Offender: A Defense Attorney's Perspective," by Rodney J. Uphoff, 22 CLB 430 (1986).

Illinois Defendant was convicted of aggravated criminal assault and unlawful restraint. On appeal, the sole issue raised by defendant concerned the constitutionality of the statutory privilege for communications between rape crisis counselors. An Illinois statute provides an absolute privilege for communications between rape crisis counselors and rape victims. Defendant contended that the statutory privilege violates his federal constitutional rights to due process and to confront the witnesses against him. Defendant requested an in camera inspection by the trial court of the victim's counseling file.

Held, conviction affirmed. The court found that the strong policy of confidentiality expressed in the statutory section and the absence of any indication by defendant that the victim's communications with the counselor would provide a source of impeachment militated against breaching the privilege in this case. The court found that defendant was not denied due process, nor was his confrontation right violated, by the trial judge's refusal to conduct an in camera inspection of the victim's counseling records. People v. Foggy, 521 N.E.2d 86 (1988).

Utah Defendant appealed his conviction for sodomy on a child. He pleaded guilty and mentally ill. Defendant challenged the constitutionality of the statute by which he was sentenced, claiming it was vague.

Held, conviction vacated and remanded. The court determined that two of the criteria for determining defendant's mental state were vague, thereby violating his right to due process guaranteed by the Utah Constitu-

tion. The court noted the statute for determining the mental state of a criminal was based on the unrelated statute for determining involuntary commitment for everyone except convicted criminals. The court found the following unconstitutional: defendant will be found mentally ill (1) if he lacks the ability to weigh the benefits of treatment; and (2) if there is no appropriate treatment alternative to a court order of hospitalization. Both definitions concern individual freedom for a person threatened by involuntary commitment. The first criterion deals with someone who may need to be confined for mental health but fights commitment because it would infringe upon his personal liberty. The second criterion explains that less drastic forms of treatment, if available, should be considered because the court does not want to remove someone's freedom. Defendant's liberty, however, had already been curtailed because he was convicted. In this situation, hospitalization is preferred from the convicted individual's perspective, whereas in involuntary civil commitment cases, the individual's preferred choice is nonhospitalization. Because the two commitment criteria in the statute serve a wholly different function in the guilty and mentally ill statute than they serve in the involuntary civil commitment statute, they are so arbitrary and capricious as to violate the defendant's due process rights. The court therefore struck down the two requirements in question. State v. Copeland, 765 P.2d 1266 (1988).

49. EQUAL PROTECTION

§ 49.00 In general

Court of Appeals, 2d Cir. After the district court dismissed the Connecticut prisoner's petition for a writ of habeas corpus, claiming a denial of equal protection relating to good-time credits, he appealed.

Held, affirmed. The Second Circuit ruled that the state statute, which increased the good-time credit only for inmates sentenced after October 1, 1976, did not violate equal protection by discriminating against prisoners sentenced prior to that date since it was rational for the Connecticut legislature to avoid a retroactive legislative modification of judicial sentences which had taken into account existing systems of computing good time. The court commented that the fact that retroactivity may be permissible under other circumstances does not preclude the legislature from denying it where a rational basis exists for such action. Frazier v. Manson, 703 F.2d 30, 19 CLB 481, cert. denied, 464 U.S. 934, 104 S. Ct. 339 (1983).

Illinois After submitting to a breathalyzer test, which revealed a blood-alcohol concentration (BAC) of 0.16, and being charged with driving under the influence of alcohol, defendant had her driving license suspended. Defendant contended that the statutory provisions that authorize the summary suspension of driving privileges violate the equal protection clauses and the due process of law of the state and U.S. Constitutions. The challenged statute implements the so-called implied consent concept and establishes the civil consequences, namely, that any person who drives or is in actual physical control of a motor vehicle upon the public highways of Illinois shall be deemed to have given consent

to a chemical test or tests of blood. If that person tests positively for BAC of 0.10 or more, or refuses to take a test, his license is suspended. The circuit court rescinded defendant's summary suspension, and the state brought direct appeal.

Held, reversed. The summary suspension procedure established by the statute was constitutional under the equal protection and due process clauses of the federal and the state constitutions. The equal protection guarantee does not prohibit the legislature from choosing to focus particularly on the hazard posed by drunk drivers on public highways. Therefore, the court concluded that the legislature acted rationally when it imposed summary suspension on drivers with an alcohol concentration of 0.10 or more, but not on other categories of impaired drivers. Defendant argued that the failure to afford an evidentiary hearing prior to suspending the driver's license of a motorist who submits to a chemical test that reveals an alcohol concentration of 0.10 or more violates due process. After consideration of the opportunity for hardship relief, the limited duration of the suspension, and the availability of prompt post-suspension review, the court concluded that neither the nature nor the weight of the private interest required a prior evidentiary hearing to satisfy due process. People v. Esposito, 521 N.E.2d 873 (1988).

Illinois Defendant was charged with committing the offense of unlawful restraint and the offense of armed violence based on the underlying felony of unlawful restraint. The state appealed the trial court's judgment that the armed violence statute as applied to the unlawful restraint statute violated the constitutional assurances of proportionate penalties and due process guaranteed by the constitution of the State of Illinois and by the Fourteenth Amendment. The statutory scheme punished armed unlawful restraint more severely than armed kidnapping.

Held, affirmed. The statutory scheme provided an arbitrary and capricious classification of penalties. As Illinois law views unlawful restraint as a less serious crime than kidnapping, the commission of unlawful restraint while armed (which constitutes the offense of armed violence) should be regarded as less serious, and be punished less severely, than the commission of kidnapping while armed. When one adds the identical element of the presence of a gun to each crime, the lesser offense of unlawful restraint should not thereby become a greater offense than kidnapping. Otherwise, the result is unconstitutionally disproportionate penalties. People v. Wisslead, 446 N.E.2d 512 (1983).

Minnesota Defendant was arrested and convicted twice for the offense of driving while under the influence of alcohol (DWI). The second arrest was made without the officer observing any driving conduct, operation, or actual physical control of the motor vehicle by defendant, and the offense was not committed in his presence. However, the said arrest was facially valid under 1982 amendments to the Minnesota statute which authorize the arrest of DWI suspects on probable cause where an accident has occurred. The question, on appeal, was whether the amended statute violated the constitutional right to equal protection by allowing a DWI arrest for acts not committed in the presence of police, in cer-

tain limited circumstances, if probable cause is established.

Held, affirmed. The Supreme Court of Minnesota found the statutory amendment not to violate the state and federal constitutions. Even though, in Minnesota, a person may not be arrested for a misdemeanor offense without a warrant unless the offense was committed in the officer's presence, a DWI offense was made an exception to the rule. The court found that the classification by the legislature of the amendment to the statute was relevant to the purpose of the law. That purpose was to ensure public safety by removing intoxicated drivers from the road before they could cause further damage, when there was probable cause to believe that they had already been the cause of injury to persons or property, and to ensure that such offenders were effectively prosecuted for their violations. State v. Nordstrom, 331 N.W.2d 901 (1983).

South Dakota Defendant was convicted of third-degree burglary and of being a habitual offender. He appealed, claiming that South Dakota's third-degree burglary statute violated the equal protection clause of the U.S. Constitution. Specifically, he argued that his conduct was chargeable either under the third-degree burglary statute, for which the maximum penalty is ten years in prison and a $10,000 fine or under the unlawful entry statute, for which the maximum penalty is one year in prison and a $1,000 fine. He argued that, under the statutes, two individuals committing identical acts could receive different penalties.

Held, affirmed. Defendant could not avoid conviction on equal protection grounds because he did not show that the government exercised selective enforcement of the law on an invidious discriminatory basis. He did not claim that the state's decision to charge him with third-degree burglary instead of unlawful entry was deliberately based upon an unjustifiable standard or classification. Selective enforcement by itself is not unconstitutional. State v. Secrest, 331 N.W.2d 580 (1983).

§ 49.05 Drug violations

Georgia Defendant, charged with trafficking in cocaine, moved to quash the indictment on the ground, inter alia, that the applicable statute violated constitutional equal protection and due process guarantees. The statute in issue provided that "any person who knowingly sells, manufactures, delivers, or brings into this State, or who is knowingly in actual possession of 28 grams or more of cocaine or any mixture containing cocaine . . . shall be guilty of the felony of 'Trafficking in Cocaine.'" Defendant argued that the classification scheme aggregating the total amount of cocaine and noncontraband substance without regard to the actual amount of pure cocaine was not rationally related to the state's purpose of combatting the illicit drug trade. Punishment for trafficking in cocaine, he asserted, could only be constitutionally imposed if based upon the amount of pure cocaine, not the total mixture. The trial judge denied defendant's motion.

Held, interlocutory appeal affirmed. The Supreme Court of Georgia rejected defendant's contention. The high court applied the "rational relationship" test: "If the classification scheme has a rational relationship to a legitimate state objective, the court will uphold it. Under this test it is not necessary that the scheme selected be the 'best' one available." Under

the test, continued the court, the analysis was limited to identifying the legislature's objectives in enacting a particular statute and ensuring that the means chosen are rationally related to the promotion of those objectives; the court's concern, it explained, was not whether the statute was abstractly fair or could produce inequitable results. Here the legislature intended to restrict cocaine trafficking by imposing more severe penalties on persons distributing the substance and mandating greater punishment for the possession of great quantities of cocaine in pure or mixed form. Since pure cocaine is rarely encountered, it was reasonable for the legislature to deal with it as it is actually marketed, i.e., mixed with other substances. Lavelle v. State, 297 S.E.2d 234 (1982).

§ 49.10 Discrimination in law enforcement (New)

Minnesota Defendant, who is black, was arrested and charged with theft. The charge was based on evidence that defendant participated in the sale of stolen goods to a black undercover officer who was running a so-called "sting operation" out of a townhouse. Defendant and a number of other defendants whose charges also arose out of the sting operation moved to dismiss before trial on the ground of racially discriminatory enforcement of the law. The motion was denied and a jury found defendant guilty as charged. On appeal, defendant claimed the trial court erred in denying the pretrial motion to dismiss because the state violated the equal protection clause of the federal constitution in selecting defendant and other black defendants for prosecution.

Held, conviction affirmed. The Supreme Court of Minnesota applied the test that was summarized in United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). Under this test, a defendant claiming racially discriminatory law enforcement must establish a prima facie case of racially discriminatory impact and discriminatory intent, purpose, or motive in order to trigger strict scrutiny. Here, defendant failed to meet his burden of establishing a prima facie case of racially discriminatory impact by a clear preponderance of the evidence. State v. Russell, 343 N.W.2d 36 (1984).

50. EX POST FACTO

§ 50.05 Applicability to sentencing

U.S. Supreme Court After defendant was convicted of sexual battery and other crimes, the Florida state judge imposed a seven-year sentence based on revised sentencing guidelines. The guidelines in effect when the crimes occurred would have required a presumptive sentence of three and one-half to four and one-half years of imprisonment. The state district court of appeals vacated the sentence, but the Supreme Court of Florida reversed.

Held, reversed and remanded. The U.S. Supreme Court held that the application of the revised guidelines to the defendant, whose crimes occurred before the guidelines became effective, violated the ex post facto clause. Application of the revised guidelines displayed all elements of an ex post facto violation: the revised law changed the legal consequences of an act committed before its effective date, was more onerous than the supplanted law, and was not merely a procedural change. Miller v. Florida, 107 S. Ct. 2446 (1987).

Nebraska Defendant was convicted of assault in the first degree, a class III felony, which, at the date crime was committed, was punishable by statute with a sentence of not less than one year nor more than twenty years' imprisonment, a fine not to exceed $25,000, or both. Ten days after defendant committed the crime but before trial, a new statute became effective that permitted the sentencing court to order defendant to "make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the [assault] offense." Subsequently, defendant was sentenced to three to seven years' imprisonment and was ordered to pay restitution for the medical expenses of the victim. On appeal, defendant assigned error to that portion of the sentence concerning the restitution.

Held, affirmed as modified. The Nebraska Supreme Court held that the statute granting sentencing courts authority to order payment of restitution as part of a sentence could not be given retroactively to a crime committed prior to statute's effective date. The statute, which inflicted a greater punishment than the law annexed to the crime when it was committed, was an ex post facto law, and insofar as it affected the punishment of defendant to his disadvantage, was void. State v. Duran, 401 N.W.2d 482 (1987), 23 CLB 500.

51. FREEDOM OF THE PRESS

§ 51.00 In general

U.S. Supreme Court A judge in an Arizona murder trial where there were connections with organized crime and extensive publicity which frightened the jurors, ordered court personnel, counsel, witnesses, and jurors not to speak directly with the press. The judge appointed a court employee as "liaison with the media" to provide a "unified and singular source for the media concerning these proceedings." In addition, the judge ordered that all drawings of jurors that are to be broadcast on television be reviewed by the court before being broadcast.

Held, application for stay of orders of trial court denied. Justice Rehnquist found that the mere potential for confusion of unregulated communication between the trial participants and the press was enough to justify the court order, and that there was no restriction on reporting of the proceedings in open court. Justice Rehnquist further ruled that although it was not clear why the trial judge required clearance before sketches of jurors could be shown on television, since no such requirement was imposed for sketches to be reproduced in newspapers, stay of the order was not warranted. KPNX Broadcasting Co. v. Arizona Superior Court, 103 S. Ct. 584 (1982).

U.S. Supreme Court After a newspaper challenged an order of a Massachusets trial judge closing a criminal trial involving a child who was the victim of a sex offense, the Supreme Court vacated and remanded. On remand, the Supreme Judicial Court of Massachusetts held that the statute that the trial judge relied upon was constitutional.

Held, judgment reversed. The Court held that the state had failed to show that the exclusion of the press was necessitated by a compelling governmental interest or that the statute was narrowly tailored to serve that interest. The Court reasoned that the statute

cannot be justified on the basis of either the state's interest in protecting minor victims of sex crimes from further trauma and embarrassment or in encouraging victims to come forward and testify in a truthful and credible manner. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S. Ct. 2613 (1982), 19 CLB 69.

Court of Appeals, 2d Cir. During a district court trial of a congressman and other defendants for public corruption in the obtaining of federal contracts, the trial judge issued a "gag" order restraining the trial participants from speaking to the press. Various news agencies appealed from the order of the district court, challenging the restraint of extra-judicial speech in a criminal case.

Held, affirmed. The Second Circuit ruled that while the news agencies had standing to bring the appeal, the district court order was not a prior restraint and was justified by pretrial publicity. The court reasoned that the sensational public nature of the case and prior leaks of grand jury information created a real possibility that defendants would not receive a fair trial. In addition, the court noted the district court had determined that alternatives to the gag order were inadequate; these alternatives included a change of venue, postponement of the trial, or sequestration of jurors. The court further commented that there is a substantial difference between a restraining order directed against the press in general, and the order here, which was directed solely against the trial participants and was challenged only by the press. In re Dow Jones & Co., 842 F.2d 603 (1988).

Court of Appeals, 2d Cir. CBS appealed from the denial of its application for a copy of a witness' videotaped deposition previously introduced during an ongoing criminal trial. The videotaped deposition testimony had been held to be admissible due to the illness of the witness, whose deposition was taken at a prison hospital.

Held, denial of application reversed. The Second Circuit found that the common-law right to copy and inspect judicial records for possible broadcast was applicable to videotaped depositions and that absent exceptional circumstances, one who testifies at trial testifies before the public and thus has no right to privacy in the judicial proceeding. In re CBS, Inc., 828 F.2d 958 (1987), 24 CLB 175.

Court of Appeals, 3d Cir. Various newspapers and broadcast companies appealed from an order of the district court denying them permission to copy audiotapes admitted into evidence at the trial of seven former Philadelphia police officers. The district court also denied them access to transcripts of tape recordings that had been given to the jury.

Held, judgment reversed and case remanded. The Third Circuit found that there is a strong presumption in favor of the common-law right of access to the audiotapes and even to the transcripts that had not been admitted into evidence. The court noted that access should not have been denied on the basis that it would jeopardize defendants' rights to a fair and impartial trial since the requested material was not lurid or inflammatory and had already been widely reported in the media. United States v. Martin, 746 F.2d 964 (1984), 21 CLB 259.

Court of Appeals, 4th Cir. The Knight Publishing Co. filed a writ of mandamus and prohibition contesting the actions of the district court in closing the courtroom to the public during the trial of North Carolina State Senator R. C. Soles, who was acquitted. The judge ordered the court closed to consider several motions filed by the defendant relating to alleged misconduct by the prosecutor.

Held, writ denied. The Fourth Circuit found, however, that the district court had not given the press or others present notice and opportunity to object. The court further found that if the district court believed it necessary to close the courtroom after hearing objections, the findings should have been stated on the record, and they should have been specific enough to enable a reviewing court to determine whether the closure order was proper. However, the court found it unnecessary to issue a writ since it expressed its "confidence" that the district judges would follow these procedures in the future. In re Knight Pub. Co., 743 F.2d 231 (1984), 21 CLB 180.

California After the state supreme court denied a motion by a member of the news media to gain access to transcripts of preliminary hearings in a criminal prosecution, a mandamus news media to compel opening of the proceeding was commenced by the transcripts. The prosecution joined in the motion. Defendant, who was charged with the murder of twelve hospital patients by administering massive doses of a heart drug, opposed the motion, presenting evidence of the widespread publicity given to the case by the media. The trial judge found that "there is a reasonable likelihood that making all or part of the transcript public might prejudice the defendant's right to a fair and impartial trial," and ordered that the transcript remain sealed.

Held, mandamus denied. A majority of the California Supreme Court, en banc, held that the First Amendment right of access to trial proceedings does not extend to preliminary hearings. The court went on to distinguish two cases concerning access to trials, not preliminary hearings, by finding that the problem of potential prejudice to the defendant is substantially different. In 1982, the California legislature amended the automatic closure statute to make preliminary hearings presumptively open unless closure is "necessary" to protect a defendant's right to a fair and impartial trial. Faced with a dispute over how to determine whether closure is "necessary," the court declared that preliminary hearings may be closed if a defendant demonstrates a "reasonable likelihood of substantial prejudice" to the right to a fair trial. The closure statute makes clear, the court stated, that the primary right is to a fair trial and that the public's right of access must give way when there is a conflict. Press-Enterprise v. Superior Court (Diaz), 691 P.2d 1026 (1984).

New Jersey A reporter contested his subpoena to testify at a kidnapping-murder trial. The reporter interviewed the defendant who confessed to the crimes. This confession was published by the reporter's paper. The prosecution wanted to introduce the interview into evidence, but needed the testimony of the reporter. The reporter claimed that the New Jersey Shield Law protected him from testifying.

Held, reversed. The court noted that the Shield Law gives a newsperson the privilege "to refuse to disclose any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated." In this case, although the confession was published, it is still protected, and the reporter cannot be made to testify. The court refused to change the will of the legislature and distinguish between disclosed and undisclosed information or sources. They also noted that because the reporter's paper was small, tying it up in a costly legal battle concerning the reporter's refusal to testify would hinder its activities and therefore violate the First Amendment's guarantee of freedom of the press. In re Schuman, 552 A.2d 602 (1989).

§ 51.05 Applicability to "obscenity"

U.S. Supreme Court The owner and operator of a theater which had been enjoined by the Michigan state court from displaying an obscene film sought a stay of that order. Petitioner argued that the delay entailed in processing their appeal before the Michigan Court of Appeals—which could extend up to six months—violated the "procedural safeguards" that must attend the imposition by a state of a prior restraint on free speech in violation of the First Amendment.

Held, motion for a stay of the preliminary injunction granted. Justice Brennan concluded that a stay could be issued where the state Supreme Court had refused to lift the challenged restraint and had failed to provide for immediate appellate review. MIC, Ltd. v. Bedford Township, 463 U.S. 1341, 104 S. Ct. 17 (1983), 20 CLB 164.

U.S. Supreme Court A New York statute prohibits persons from knowingly promoting a sexual performance by a child under the age of sixteen by distributing material depicting such a performance. The statute defines "sexual performance" as any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals. Defendant bookstore proprietor was convicted under the statute for selling films depicting young boys masturbating, and the appellate division affirmed. On appeal, the court of appeals reversed and held that the statute violated the First Amendment as being both underinclusive and overbroad. Certiorari was granted.

Held, reversed and remanded. The Supreme Court held that child pornography is not entitled to First Amendment protection provided that the conduct to be prohibited is adequately defined by applicable state law. Applying this test to the New York statute, the Court found that it was not constitutionally underinclusive or overbroad since it listed the forbidden acts to be depicted with sufficient precision. New York v. Ferber, 102 S. Ct. 3348, 458 U.S. 747, (1982), 19 CLB 73.

53. FREEDOM OF SPEECH AND EXPRESSION

§ 53.00 In general

Hawaii Defendants, clerks in adult bookstores, were convicted for promoting pornographic adult magazines under the applicable Hawaii statute. On appeal, they contended that the statute unconstitutionally violates the

state constitutional right to privacy. Under the statute, a person promotes pornography if, knowing that material is pornographic under the three-part test of Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973), the person disseminates the material for money. Although the material in question was found to be pornographic under the *Miller* test, the state would not be able to prohibit an individual from possessing and viewing such material in the privacy of his home pursuant to Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243 (1969). The question on appeal was whether the privacy right to own such material is violated when an individual is effectively denied the right to obtain such material.

Held, convictions reversed. The Supreme Court of Hawaii found that the state statute prohibiting dissemination for monetary consideration of any pornographic material infringed on a customer's right to privacy under the Hawaii constitution. The constitutional provision, which affords a much greater privacy right than the First Amendment, demands the showing of a compelling state interest. Therefore, unless the state can point to a compelling government interest, which it failed to do, the right to privacy is infringed upon by the prohibition against the sale of sexually explicit adult material. Since a person has the right to view pornographic items at home, there necessarily follows a correlative right to purchase such materials for this personal use, or the underlying privacy right becomes meaningless. State v. Kam, 748 P.2d 372 (1988).

Missouri Defendant was convicted of child abuse for taking nude photographs of a child under the age of seventeen. According to the statute under which defendant was convicted, "A person commits the crime of abuse of a child if he photographs or films a child less than seventeen years old engaging in a prohibited sexual act. . . ." The statute goes on to state that prohibited sexual acts include nudity, "if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." On appeal, defendant argued that this definition was unconstitutionally vague, and that in any case his actions were protected by the First Amendment.

Held, conviction affirmed. The Missouri Supreme Court upheld the conviction, ruling that the statute was not unconstitutionally vague, and that defendant's conduct was not shielded from statutorily imposed sanctions by the First Amendment, because the statute proscribing the photographing of nude children did not violate the First Amendment overbreadth doctrine. The court stated that "The fundamental observation supporting this conclusion is that the activity engaged in by the defendant and prohibited by the statute is distinctly conduct, as contrasted with speech. . . . Furthermore, the prohibited conduct is clearly that in which the state has a compelling interest to prevent." That is, the issue is one of child abuse and not freedom of speech. State v. Helgoth, 691 S.W.2d 281 (1985).

Oregon Defendant was convicted of dissemination of obscene material after a warranted search of his adult bookstore resulted in the seizure of almost his entire inventory. On each conviction, defendant was fined $1,000 and sentenced to consecutive terms of

thirty days' imprisonment. On appeal, defendant argued that the state statute making dissemination of obscene material a crime violated his constitutional right to freedom of expression.

Held, reversed. The Oregon Supreme Court held that obscene expression was protected under the state constitution, and thus, the statute making dissemination of obscene material a crime was unconstitutional and could not be justified as an historical exception. "Obscenity" under any definition cannot be deprived of protection under the state's constitutional guarantee of freedom of expression, whether established in Roth v. United States, 354 U.S. 476 (1957), as "material which deals with sex in a manner appealing to prurient interest" and "utterly without redeeming social importance," or, as further modified in Miller v. California, 413 U.S. 15 (1973), which the statute resembled, "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." Historically, restrictions on sexually explicit and obscene expression were not well established when this statute was passed. When obscenity was repressed, it was, in other jurisdictions, because of anti-establishment irreverence and, in this state, to protect the morals of youth. Finally, the court conceded that obscenity certainly should be regulated when the interests of unwilling viewers, captive audiences, minors, and beleaguered neighbors are at stake, or to determine the limits of conduct of producers and participants in the production of such sexually explicit material. However, none of these factors was at issue in this case, and no law could prohibit or censor the communication itself. In this state, any person could write, print, read, say, show, or sell anything to a consenting adult even though that expression may be generally or universally considered obscene. State v. Henry, 732 P.2d 9 (1987), 23 CLB 497.

Tennessee Defendant was charged under a statute which imposed criminal penalties for distributing anonymous written statements concerning candidates for public office. His motion to dismiss the indictment on First Amendment grounds was granted, with the trial court holding that the statute constituted an overbroad restraint on the freedom of expression. The state appealed.

Held, reversed and remanded. The Tennessee Supreme Court found that the purpose of statutes imposing criminal sanctions on persons who anonymously disseminate written statements about candidates for public office is to promote honesty and fairness in the conduct of election campaigns, and also to insure that voters will have information that will aid them in assessing the bias, interest, and credibility of the person or organization disseminating information about political candidates and in determining the weight to be given a particular statement. Noting that the legitimate purposes of the statute could not be accomplished by less restrictive means, the court concluded that the statute was not overbroad. State v. Acey, 633 S.W.2d 306 (1982), 19 CLB 78.

Washington Defendants were convicted of promoting pornography in violation of the Washington statute. After buying a sadomasochistic magazine with pictures of scantily clad women who were being whipped, bound, and threatened, and some of whom appeared to have welts and

blood smears, an officer obtained a warrant authorizing the seizure of any additional copies of the magazine, as well as any other literature explicitly depicting violent or destructive sexual acts. Defendants were convicted on the evidence of the magazine. The trial court determined the work violated the section of the statute prohibiting violent or destructive sexual acts, including rape or torture. On appeal, defendants claimed the statute forbidding the sale of pornography was in violation of the First Amendment guarantee of freedom of speech.

Held, affirmed. The court cited Miller v. California, 413 U.S. 15, 92 S. Ct. 2607 (1973) in which the Supreme Court established the rules for determining pornography: the work, taken as a whole, lacks serious literary, artistic, political, or scientific value, and the work must fail to meet "contemporary community standards." Although *Miller* required state law to specify the type of sexual acts that may be obscene, state courts are allowed to construe state statutes sc as to cure facial deficiencies. Defendants claimed error in the fact that the statute does not refer to "contemporary community standards." However, the jury instructions before deliberation supplied this missing element and thereby cured any facial deficiency in the statute. Defendants argued that the law was too broad; again, instructions to the jury properly limited the statute. Defendants also contended that the listing of violent or destructive sexual acts was improper because it went beyond the types of acts expressly contemplated in *Miller*. *Miller,* however, made clear that its examples were not all-encompassing and that the states were free to regulate, within constitutional guidelines, any form of "hard core" sexual conduct. Therefore, the court concluded that state statute withstood scrutiny under the First Amendment. State v. Reece, 757 P.2d 947 (1988).

54. IDENTIFICATION PROCEDURES

§ 54.05 Show-ups

Court of Appeals, 1st Cir. Convicted defendant brought a petition for a writ of habeas corpus, alleging that the initial show-up identification of the defendant as a murderer was so suggestive and unreliable that it prevented a fair trial. The district court denied the petition and an appeal was taken.

Held, reversed and petition for habeas corpus granted. The First Circuit stated that the show-up procedure at the police station where the witnesses were shown defendant created a substantial likelihood of misidentification which tainted their subsequent in-court identification and entitled defendant to habeas relief. The court noted that defendant was shown to the witnesses at the police station at 3 A.M. and the police officers asked the witnesses, "This is him, isn't it?" Velez v. Schmer, 724 F.2d 249 (1984).

New York In two separate cases, defendants were, respectively, convicted of robbery and robbery, kidnapping, and assault. A few hours after the crimes were committed, defendants in both cases were identified during showup identifications at police station houses. In the first case, defendants were the only two people in the room not in uniform and the stolen property and weapon used in the crime were

laid out on a table near them. In the second case, defendants were handcuffed and in civilian clothes at the time of identification. On appeal, defendants challenged the admission of the station house showup identifications, alleging that they were unduly suggestive.

Held, convictions reversed. Although showup identifications are strongly disfavored, they are permissible if exigent circumstances require immediate identification. Unreliability of the most extreme kind infects showup identifications of arrested persons held at police stations; unless exigency warrants otherwise, the evidence will be inadmissible as a matter of law. In both the cases at hand, the police explanation for arranging suggestive station house showups was not supportable; in the first, the only proffered reason was that the station house was undergoing renovation while in the second, the justification for failing to conduct a lineup was to minimize the length of detention of suspects who may have been innocent. The state bears the heavy burden of overcoming the inevitable suggestiveness of the combined setting and showup in each case and they must demonstrate to the court what steps were taken to insure that the identifications in the particular cases were free of both the basic unreliable suggestiveness and of exacerbating exploitation. Because the state could not do so in either case at hand, the court found the admission of evidence obtained by the showup identifications to be unduly suggestive and inadmissible as a matter of law. However, the inadmissibility of showup identification evidence alone does not preclude admission of identifications subsequent to the showup ones if they are justified by independent sources; thus, the court remanded both cases. People v. Riley, 517 N.E.2d 520 (1987).

§ 54.10 Suggestiveness of identification procedure

Court of Appeals, 8th Cir. A South Dakota state prisoner, who had been incarcerated after conviction for kidnapping and rape, petitioned for a writ of habeas corpus on the ground, among others, that identification evidence had been improperly admitted at trial. The district court granted the petition.

Held, reversed. Petitioner's constitutional rights were not violated by the state court's admission of the victim's identification testimony, even though a prior out-of-court identification was suggestive. The court observed that, in determining whether a suggestive confrontation created a very substantial likelihood of irreparable misidentification of a defendant by a witness, the court must weigh the corrupting effect of suggestive identification against the opportunity of the witness to view at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. In weighing these factors, the court found that even though the prior "showup" was impermissibly suggestive, the victim's mere failure to give a prior description of defendant did not render her trial identification testimony improper. Graham v. Solem, 728 F.2d 1533, 20 CLB 464, cert. denied, 105 S. Ct. 148 (1984).

Arkansas Defendant was convicted of one count of aggravated burglary and five counts of kidnapping. Four of

the victims viewed a lineup within five weeks of the crime and made positive identifications. The fifth victim viewed a photographic spread five months after commission of the crimes and also made a positive identification. On appeal, defendant argued, among other things, that the pretrial lineup and photographic spread were unduly suggestive.

Held, affirmed. The Arkansas Supreme Court held that the pretrial lineups and the photographic spread were not unduly suggestive, and the identifications of defendant were therefore admissible. Defendant contended that the victims' identifications were tainted because their descriptions varied and they discussed them among each other. The credibility of the victims was maintained, however, since they had observed defendant at a close range for more than an hour in a well-lit room at the time the crime was committed, their descriptions were reasonably accurate, there was no misidentification, and all five were certain that defendant was the culprit. The totality of the circumstances established that the lineup was not unduly suggestive. Moreover, in terms of the photographic spread that contained five pictures of white males with mustaches and beards, similar in physical appearance and age to defendant, none of these suggested that defendant was the criminal, and there was no suggestion at the pretrial hearing that the police attempted to influence victims' identifications. Frensley v. State, 724 S.W.2d 165 (1987), 23 CLB 496.

55. RIGHT TO JURY TRIAL

§ 55.00 In general

Court of Appeals, D.C. Cir. After defendant was convicted of murder and sentenced to life imprisonment, he filed a petition to vacate his sentence, alleging a denial of his right to trial by an impartial jury. His petition was based on the affidavit of a juror at his murder trial, stating that prior to the trial the juror had seen defendant in his cleaning store seven or eight times and that this series of casual observations gave rise to the possibility that the juror possessed a subconscious memory of defendant that may have prejudiced him during the jury deliberations. The district court dismissed the petition.

Held, affirmed. The Court of Appeals for the District of Columbia affirmed, holding that the juror's affidavit as to a nonprejudicial "subconscious memory" that was unrecalled over ten years previously on voir dire cannot constitute a post hoc basis for a hearing to challenge a juror's competency. The court observed that mere allegations of "possibility" of some undefined prejudice is completely speculative and not sufficient to trigger the right to a post-trial evidentiary hearing, especially where, as here, the juror's failure to disclose the relevant facts during voir dire was non-intentional. United States v. Brooks, 677 F.2d 907 (1982).

Court of Appeals, 6th Cir. A habeas corpus petitioner who was convicted in Michigan state court of rape and kidnapping, argued that he was denied his right to a jury trial and due process when his attorney conceded that he had committed the acts as alleged, while interposing an insanity defense. The district court denied relief.

Held, affirmed. Reliance solely on the insanity defense did not deprive

defendant of a fair trial where there was no evidence that defendant did not agree to this trial tactic. The court also observed that this tactic was not the functional equivalent of a guilty plea because, under Michigan law, a plea of "not guilty by reason of insanity" is not a guilty plea. Duffy v. Foltz, 804 F.2d 50 (1986), 23 CLB 289.

Hawaii Defendant was found guilty by a trial court of driving under the influence of intoxicating liquor (DUI). After he was issued a citation, defendant refused to submit to breath or blood tests to determine the alcohol content in his body. After a statutorily mandated implied consent hearing, defendant demanded a jury trial, but his request was denied. The trial court found him guilty of the DUI charge; since defendant had previously been convicted of a DUI offense, he was given a $500 fine and a one-year suspension of his driver's license. On appeal, defendant argued that he was entitled to a jury trial.

Held, conviction reversed and case remanded for retrial by jury. The Hawaii Supreme Court ruled that defendant had the right to a jury trial, because DUI, with which defendant was charged, is a constitutionally serious offense. Although an individual is not constitutionally entitled to a jury trial for all offenses, a criminal charge that is not "petty," but "serious," entitles an individual to a trial by an impartial jury. To determine whether a crime is serious or not, courts look to its treatment at common law, the authorized penalty, and the gravity of the offense. Automobiles are not covered by common law; but, because of their importance in modern society, courts have had to supplement common law with their own standards. It is this precedent that the court looked to in this case. DUI, which can cause injury to others, and which carries cumulatively more severe punishments for repeat offenses, is of such a magnitude as to qualify as a serious crime; thus, a defendant charged with DUI is entitled to a jury trial. State v. O'Brien, 704 P.2d 883 (1985).

Nevada Defendant was convicted of first-degree murder, burglary, robbery, and attempted sexual assault. At trial, the prosecutor used six of his seven peremptory challenges to remove all four blacks and both Hispanics from the potential jury panel. Defendant was himself black, and the eventual jury was entirely white, as was the murdered man and his wife, who was the target of the attempted sexual assault. On appeal, defendant argued that the prosecutor misused his peremptory challenges to remove the black and Hispanic jurors solely on the basis of their minority group membership, thereby denying defendant his Sixth Amendment right to a jury drawn from a fair cross-section of the community.

Held, conviction affirmed. The Nevada Supreme Court ruled in part that the prosecutor's action in removing all black and Hispanic jurors from the panel did not deprive defendant of his Sixth Amendment right to a trial by impartial jury. The high court cited Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965), as dispositive on the issue of whether a prosecutor may use peremptory challenges to remove from a jury panel all members of a specifically recognizable group, particularly a racial or ethnic minority. The court held in *Swain* that the peremptory removal of all members of a defendant's minority group does not offend the

equal protection clause. A peremptory challenge is by nature subjective, and may be open to prejudice. Nonetheless, a peremptory challenge may be exercised without given reason, and is not subject to judicial inquiry into its motive. Thus, following *Swain*, the Nevada Supreme Court decided in this case that the prosecutor had a right to peremptorily challenge jurors as he did. Nevius v. State, 699 P.2d 1053 (1985).

North Carolina Defendant was convicted of rape, kidnapping, and armed robbery, and he appealed. Defendant contended that the trial judge's inquiry into the numerical division of the jury was reversible error because it tended to coerce a verdict. More specifically, defendant argued that asking the jury how it was divided numerically violated his right to due process of law and trial by jury under the federal and state constitutions.

Held, conviction affirmed; no error. The Supreme Court of North Carolina affirmed concluding that the U.S. Supreme Court ruling in Brasfield v. United States, 272 U.S. 448, 47 S. Ct. 135 (1926), was based on its supervisory power over the federal courts and therefore was not binding on the state court. At most, the court stated, *Brasfield* sets out a rule of federal practice and is not binding on the courts of North Carolina. The court, therefore, held that a trial court's question on the division of the jury does not as a matter of law violate a defendant's right to due process of law and trial by jury under either the federal or North Carolina constitutions. With respect to the question of whether in the totality of the circumstances the trial court's question concerning the division of the jury was coercive, the high court found it to be not coercive so that defendant was not prejudiced in any way. State v. Fowler, 322 S.E.2d 389 (1984).

§ 55.05 —Procedural requirements

U.S. Supreme Court Defendant and others were indicted for armed robbery in Rhode Island state court. During the trial, four uniformed state troopers sat in the first row of the spectator's section of the courtroom to supplement the customary security force. Defense counsel's objections were overruled after the jurors responded during voir dire that the troopers' presence would not affect defendant's ability to get a fair trial. Defendant was convicted, and the Rhode Island Supreme Court affirmed. Defendant's habeas corpus petition was denied in the district court, but the court of appeals reversed.

Held, reversed and habeas corpus petition denied. The Court found that the troopers' presence at trial was not so inherently prejudicial that defendant was denied his constitutional right to a fair trial. The Court reasoned that every practice tending to single out the accused from everyone else in the courtroom must not necessarily be struck down. Holbrook v. Flynn, 106 S. Ct. 1340 (1986).

Court of Appeals, D.C. Cir. After the two defendants were convicted in the district court of conspiracy to commit bribery and soliciting bribery, and another defendant was convicted of conspiring to defraud the District of Columbia, they appealed on the grounds that the dual jury procedure used at trial was prejudicial.

Held, convictions affirmed. The District of Columbia Court of Appeals found that the joint trial of severed

defendants before two juries is acceptable in a criminal prosecution as long as it comports with due process. In evaluating the facts of this particular case, the court concluded that the trial court's decision—to use a dual jury in order to allow the admissions of one of the defendants not to be used against the others—was proper. United States v. Lewis, 716 F.2d 16, 20 CLB 165, cert. denied, 464 U.S. 996, 104 S. Ct. 492 (1983).

56. PROPRIETY OF EXERCISE OF POLICE POWER

§ 56.00 In general

"Law Enforcement: Police Pursuits—Linking Data to Decisions," by Geoffrey P. Alpert, 24 CLB 453 (1988).

"Law Enforcement: Testing the Police for Drugs," by Roger G. Dunham, Lisa Lewis, and Geoffrey P. Alpert, 24 CLB 155 (1988).

"Enforcement Workshop: Policing the Homeless," by Candace McCoy, 22 CLB 263 (1986).

"Enforcement Workshop: The Supreme Court's New Rules for Police Use of Deadly Force," by James J. Fyfe, 22 CLB 62 (1986).

"Enforcement Workshop: Lawsuits Against Police—What Impact Do They Really Have?" by Candace McCoy, 20 CLB 49 (1984).

"Enforcement Workshop: The Los Angeles Chokehold Controversy," by James J. Fyfe, 19 CLB 61 (1983).

U.S. Supreme Court Respondent sued the city of Los Angeles and certain of its police officers in Federal District Court alleging that he was stopped by the police officers for a traffic violation and that even though he did not resist, the officers seized him and applied a "chokehold," rendering him unconscious and damaging his larynx. In addition to seeking damages, the complaint sought injunctive relief against petitioner, barring the use of chokeholds except in situations where the proposed victim reasonably appeared to be threatening the immediate use of deadly force. It was alleged that, pursuant to petitioner's authorization, police officers routinely applied chokeholds in situations where they were not threatened by the use of any deadly force; that numerous persons had been injured as a result thereof; that respondent justifiably feared that any future contact he might have with police officers might again result in his being choked without provocation; and that there was thus a threatened impairment of various rights protected by the Federal Constitution. The District Court, on the basis of the pleadings, ultimately entered a preliminary injunction against the use of chokeholds under circumstances that did not threaten death or serious bodily injury. The Court of Appeals affirmed.

Held, reversed. There was failure to allege a case or controversy, since there was no real or immediate threat that the plaintiff would be choked again or that Los Angeles police routinely applied chokeholds where they were not threatened by use of deadly force. City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983), 20 CLB 58.

Illinois Plaintiffs sought an injunction and a declaratory judgment that

an ordinance of the village of Morton Grove banning the possession of all operable handguns violates the Illinois constitution, Art. 1, § 22, and is an unreasonable exercise of police power. The constitutional provision, ratified in 1970, states that "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."

Held, judgment affirmed and injunction denied. The majority of the Supreme Court of Illinois employed a rational basis analysis to assess the validity of the ordinance under police power. The preamble to the ordinance defines the village's interest as reducing "the potentiality of firearm-related deaths and injuries." The majority found that the ordinance bore a rational relationship to this legitimate governmental interest; thus it is a valid exercise of police power. The majority also concluded that Art. 1, § 22 is broader than its federal counterpart and gives individuals the affirmative right to bear arms of some kind, thereby putting a complete ban on firearms beyond the power of any legislative body. Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (1984), 21 CLB 267.

§ 56.10 —Automobiles (New)

Illinois Defendant was charged with possessing an automobile with a removed and falsified vehicle identification number (VIN) in violation of the Illinois Vehicle Code. A person convicted of violating this code section would be guilty of a misdemeanor punishable by imprisonment. Defendant admitted that the legislature has the authority to create absolute-liability offenses, but contended that this authority is subject to constitutional limitations. He argued that it is arbitrary and unreasonable to impose a statutory duty to inspect and verify the VIN on a mere possessor of a motor vehicle, and that the duty should have been limited to buyers, sellers, owners, etc. He claimed that the Code section as applied to him violated due process of law. After the lower court dismissed the complaint on constitutional grounds, the state brought a direct appeal to the Illinois Supreme Court.

Held, reversed. The court found that the Code section imposing penalties on owners, sellers, buyers, and possessors of motor vehicles having a falsified or removed VIN is not arbitrary or unreasonable legislation under the police power, since it falls under the category of regulatory measures designed to promote the public welfare and safety. The broad purpose of the legislation is to protect automobile owners against theft. Therefore, the Code section, although silent on the requirement of scienter, is a regulatory measure that was enacted as part of a general statutory scheme entitled "Antitheft Laws." As such, it does not require specific intent or knowledge by the possessor of a motor vehicle that the VIN is falsified or removed. People v. Brown, 457 N.E.2d 6 (1983).

57. RETROACTIVITY OF CONSTITUTIONAL RULINGS

§ 57.00 Self-incrimination

U.S. Supreme Court An Ohio state prisoner sought habeas corpus, which was granted by the district court, and the Court of Appeals for the Sixth Circuit affirmed. The superintendant of the correctional institution, who was the prisoner's custodian, petitioned for a stay.

Held, stay granted in view of the doubtfulness of the underlying decision that the use at the prisoner's trial of statements that he made, after he had invoked his rights to silence and to the presence of an attorney would require the grant of a new trial. The court reasoned that Edwards v. Arizona, 451 U.S. 477 (1981), should not retroactively render inadmissible a statement such as that presented here, which was obtained by the police years before *Edwards* was decided. Tate v. Rose, 466 U.S. 1301, 104 S. Ct. 2186 (1984), cert. denied, 105 S. Ct. 1353 (1985), 21 CLB 71.

U.S. Supreme Court After purchasing a one-way airline ticket to New York City at Miami International Airport under an assumed name and checking two bags with false identification tags, the respondent was stopped by two detectives and produced, upon request, his airline ticket and a driver's license bearing his true name. Without returning his airline ticket or driver's license, the detectives asked him to accompany them to a small room and retrieved his luggage from the airline. While he did not respond to the detectives' request that he consent to a search of the luggage, respondent produced a key and unlocked one of the suitcases, in which marijuana was found. The detectives pried open the second suitcase and found more drugs. Following his conviction in Florida State Court, the Florida District Court of Appeals reversed.

Held, conviction affirmed. The Supreme Court ruled that while the respondent and his luggage were lawfully detained so they could verify or dispel their suspicions that he was a drug courier, the police exceeded the limits of an investigative stop where they asked the respondent to accompany them to a small police room, and retained his ticket and driver's license and indicated in no way that he was free to depart. Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319 (1983), CLB 475.

§ 57.20 Traffic violations (New)

Colorado Defendant's driver's license was revoked after his conviction for driving while impaired by the consumption of alcohol within five years of a prior conviction for the same offense. According to a Colorado state statute enacted between the time of defendant's previous conviction and his latest one, license revocation became mandatory for a second offender convicted "within the previous five years" of driving while impaired. On appeal, defendant argued that the application of the new law to his case constituted retroactive punishment and offended the constitutional proscription against ex post facto legislation.

Held, affirmed. The Colorado Supreme Court, en banc, sustained defendant's conviction and license revocation. The prohibition against retrospective legislation applies only to criminal penalties, and, besides, defendant's license revocation, based on a prior conviction but triggered by the latest one, was not an additional penalty for the earlier conviction, but a more severe penalty for the recent one. In addition, the relevant statute, before its emendation, also required license revocation upon a second conviction "within a period of five years" for driving while impaired. Thus, the court held, the legislature's intent was clearly to impose a stiffer penalty on repeat offenders convicted twice within a five-year period. Zaragoza v. Direc-

tor of Dep't of Revenue, 702 P.2d 274 (1985).

58. PROHIBITION AGAINST UNLAWFUL SEARCHES AND SEIZURES

SCOPE AND EXTENT OF RIGHT IN GENERAL

BASIS FOR MAKING SEARCH AND/OR SEIZURE

ELECTRONIC EAVESDROPPING

CONSENT AND WAIVER

SUPPRESSION OF EVIDENCE IN GENERAL

FRUITS OF THE POISONOUS TREE

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 58.00 What constitutes a search

U.S. Supreme Court After a shopkeeper wounded an assailant who attempted to rob him, police officers found the defendant, who was suffering from a gunshot wound to his left chest area. The victim identified the defendant, and the Commonwealth of Virginia moved in state court for an order directing him to undergo surgery to remove a bullet lodged in his left collarbone. After the Virginia Supreme Court denied the defendant's petition for a writ of prohibition or habeas corpus, his action to enjoin the operation was eventually granted by the district court, and the court of appeals affirmed.

Held, affirmed. The Supreme Court stated that the proposed surgery would violate the defendant's right to be secure in his person, and the search would be "unreasonable" under the Fourth Amendment. The Court explained that such a compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion would be unreasonable even though likely to produce evidence of a crime. While finding that the reasonableness of surgical intrusions must be decided on a case-by-case basis, the Court based its ruling in this case on the need for a general anesthetic, which would involve a virtual total divestment of the patient's ordinary control, and the fact that the state had available substantial additional evidence against the defendant. Winston v. Lee, 105 S. Ct. 1611 1985), 21 CLB 463.

U.S. Supreme Court After a New Jersey high school teacher found the respondent smoking in a school lavatory in violation of a school rule, a search of respondent's purse uncovered evidence of marijuana, a pipe, a substantial quantity of money, an index card that appeared to be a list of students who owed respondent money, and two letters that implicated respondent in marijuana dealings. Thereafter, the state brought delinquency charges against the respondent, and the New Jersey Appellate Court affirmed the trial court's finding that there had been no Fourth Amendment violation. The New Jersey Supreme Court reversed and ordered the suppression of the evidence found in respondent's purse.

Held, reversed. The Supreme Court concluded that while the Fourth Amendment prohibits unreasonable searches conducted by public school officials, the search of the student's purse here was reasonable. The Court reasoned that the report that the respondent had been smoking warranted a reasonable suspicion that she had cigarettes in her purse and, thus, the search was justified. School children have legitimate expectations of privacy according to the Court. But striking the balance between school children's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions to which searches by public authorities are ordinarily subject. New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

U.S. Supreme Court After defendants were convicted in the district court of possession of an illegal substance with intent to distribute, they appealed on the ground that illegally seized evidence had been improperly intro-

duced. The Court of Appeals for the Eighth Circuit reversed, and the U.S. Supreme Court granted certiorari.

Held, reversed. Removal by federal agents who had been informed by a private freight carrier's employees that they had observed a white powdery substance in plastic bags concealed in a tube inside a damaged package of the tube did not constitute a Fourth Amendment search. The Court reasoned that there was no reasonable expectation of privacy. Although the agents had "seized" the package, such warrantless seizure was not unreasonable. The Court also held that the federal agents were not required to have a warrant before testing a small quantity of a power to determine whether it was cocaine. United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652 (1984), 21 CLB 463.

Court of Appeals, 2d Cir. After defendants were convicted in the district court of various narcotics, firearm, and racketeering offenses, they appealed on the ground, among other things, that a search warrant based upon information gained from a trained dog was invalid.

Held, conviction affirmed. The Second Circuit found that although the search warrant was not based on probable cause, the officers' good-faith reliance on the warrant rendered the search valid. The court found that the use of a trained dog to sniff for narcotics outside defendants' apartment constituted a search that, when conducted without a warrant, violated the Fourth Amendment. United States v. Thomas, 757 F.2d 1359 (1985), 21 CLB 469.

Colorado Defendant was charged with third-degree burglary. He was an employee of a motel and allegedly stole money from a coin-operated laundry in the motel. Defendant was identified with the use of fluorescent powder and paste that was placed on the laundry machines. As a suspect in the case, defendant was asked by the police to put his hands under an ultraviolet light that detects the presence of fluorescent powder. On the basis of this examination, which discovered fluorescent powder and paste on defendant matching that placed on the machines, defendant was arrested. Defendant moved to suppress the result of the police officer's examination of his hands by the ultraviolet light, on the ground that the examination constituted a warrantless search.

Held, conviction reversed. The Colorado Supreme Court found that requiring defendant to subject his hands to the examination was a search. Defendant had a reasonable expectation that a police officer would not subject his hands to an ultraviolet lamp examination to discover incriminating evidence not otherwise observable; thus, requiring defendant to submit to such an examination constituted a search. People v. Santistevan, 715 P.2d 792 (1986), cert. denied, 107 S. Ct. 468 (1986).

Hawaii A member of the Drug Enforcement Administration (DEA) Task Force assigned to Honolulu International Airport brought his dog to an express mail office at the airport. With the permission of the office, the officer let the dog run loose in the package holding area. It stopped at a package addressed to defendant and scratched it signalling the possible presence of drugs. None of the humans present could detect the smell of a contraband substance. Based solely on the dog's

actions, the police obtained a search warrant, opened the package, and found cocaine. They then resealed the package, allowed defendant to pick it up, and arrested him. A grand jury indicted defendant for promoting a dangerous drug in the second degree. Defendant filed a motion to suppress the presentation of cocaine on the ground that the dog's actions constituted an illegal search. At the suppression hearing, the trial judge granted the motion. The state appealed his ruling.

Held, reversed. The Supreme Court of Hawaii held that use of a trained narcotics detection dog to sniff the airspace around a closed container is not a "search" under the Fourth Amendment or the Hawaii constitution. Only the surrounding airspace was examined, and not the package's contents. The court further held that the reasonableness of the dog's use in the particular circumstances should be determined by balancing the state's interest in using the dog against the individual's interest in freedom from unreasonable government intrusion. In view of the fact that one-fourth of the illegal drugs brought into Hawaii by air are transported by this particular express mail company, the government had a substantial interest in detecting drugs concealed in its packages. In contrast, defendant's interest in freedom from a drug detection dog's sniffing of the airspace around his package was minimal. Therefore, the court concluded the state's use of the dog to sniff the package holding area was reasonable. A valid search warrant is still required, however, to open private containers identified by a drug detection dog. State v. Snitkin, 681 P.2d 980 (1984), 21 CLB 85.

Nebraska Defendant appealed her conviction for manufacturing a controlled substance. Defendant's boyfriend died. His ex-wife wanted to get some of his property from his farm for her son. After convincing the police she needed their assistance to enter the farm, she went and searched his house. During this search, police found marijuana plants in a barn and some growing in a plot nearby. In the house the woman's son found a 3½-pound bag of marijuana seed. Defendant contended that her motion to suppress the evidence should have been granted because the evidence was a product of a search in violation of the Fourth Amendment's prohibition against warrantless search and seizure. The state contended that the evidence was found as a result of a search by private individuals and was therefore not bound by Fourth Amendment prohibitions.

Held, conviction reversed and remanded. The court noted that when a public official becomes part of a search, it becomes subject to the Fourth Amendment. The prosecution contended that the court should consider that there were two searches: one by the police and one by the son. The court felt such a bisection was as impossible as it was illogical. In this case, the search could not have occurred without the police. The ex-wife could not have gained entry into the house had not defendant believed she had an official sanction to conduct a search. State v. Abdouch, 434 N.W.2d 317 (1989).

Nevada Defendant was charged with possession of cheating devices, slot machine "slugs." He moved to suppress the physical evidence on the grounds of an illegal search, arguing that the

arresting officer's binocular-assisted observations of his activities violated his Fourth Amendment rights. At the hearing on defendant's motion, it developed that the officer saw defendant and another in a public alleyway in an area known for drug trafficking; suspecting that a drug transaction was occurring, the officer stepped from his vehicle and, through binoculars, saw defendant holding the slugs. As defendant entered a nearby gambling casino, the officer placed him under arrest. The trial court granted defendant's motion, and the prosecution appealed.

Held, reversed and remanded. The Supreme Court of Nevada reversed the trial court's order and remanded the case for trial, holding that the Fourth Amendment does not protect "what a person knowingly exposes to the public." Here, defendant was seen in a public place in possession of contraband, by a police officer observing from a vantage point he had a right to use. The officer's use of binoculars to enhance his vision did not convert his otherwise unobjectionable observations into a prohibited search. State v. Barr, 651 P.2d 649 (1982), 19 CLB 390.

Texas Defendants, convicted of possessing marijuana, argued on appeal that the contraband should have been suppressed as the product of an unlawful, warrantless search of defendant Bousley's apartment. A building maintenance man, while performing repairs in the apartment, had observed two defendants smoking marijuana and the three other defendants weighing and bagging quantities of the substance; he immediately notified the building manager, who summoned police. Within minutes, several officers arrived at the premises, proceeded to Bousley's apartment, knocked on the door and identified themselves. When Bousley opened the door, the officers smelled the odor of burning marijuana and saw the substance inside the apartment. The marijuana was seized and defendants placed under arrest.

Held, affirmed. The Texas Court of Criminal Appeals, *en banc,* found that, although defendants were in private quarters, they chose not to preserve their privacy but to conduct their illegal activities in front of a member of the public, the maintenance man; this, the Court continued, demonstrated that they had no reasonable expectation of privacy in the premises. Absent such an expectation of privacy, it could not be said that defendants were "searched" within the meaning of the Fourth Amendment. The Court rejected defendants' argument that police had no right to enter the apartment to investigate reported possession of marijuana, stating that

> [n]othing in our Constitution prevents a police officer from addressing questions to citizens on the street; it follows that nothing would prevent him from knocking politely on any closed door. Further, nothing in the statutes or governing constitutional provisions requires any citizen to respond to a knock on his door by opening it. Indeed, the very act of opening the door exhibits an intentional relinquishment of any subjective expectation of privacy, particularly when illegal activity may be readily detected by smell and sight by anyone standing at the doorway.

As no search warrant was required and the officers observed defendants'

commission of an offense, the warrantless arrests were also held lawful. State v. Rodriguez, 653 S.W.2d 305 (Crim. App. 1983), 20 CLB 173.

Washington Defendant was convicted of the manufacture and possession of marijuana. A Sheriff's Department officer and a Drug Enforcement Administration (DEA) agent viewed defendant's 80 acres of property from an altitude of 1,500 feet above ground level and identified marijuana on defendant's property. Based on this information the officer obtained a warrant to search defendant's property but not the buildings. On completion of the search of the 80 acres the officers had seized about 500 marijuana plants and numerous bags and barrels of marijuana leaves and other evidence of marijuana cultivation. At trial, the court denied defendant's motion to suppress and admitted all evidence discovered on the property. On appeal, defendant contended that the overflight of his property was a search within the meaning of the Fourth Amendment as well as Art. 1, § 7 of the Washington constitution.

Held, conviction affirmed. The Supreme Court of Washington noted that the language of the Fourth Amendment and Art. 1, § 7 differs significantly. The court added that the language of Art. 1, § 7 precludes a "protected places" analysis as appears in the federal cases and mandates consideration of the protection of the person in his private affairs. Thus, the court focuses on those privacy interests that citizens of the state have held and should be entitled to hold, safe from governmental trespass absent a warrant. Here, defendant had planted several large marijuana gardens on his open property. His gardens were identifiable with the unaided eye from the lawful and nonintrusive altitude of 1,500 feet above ground level. For these reasons, the court found that the aerial surveillance of defendant's property was not a search under Art. 1, § 7 of the Washington constitution. State v. Myrick, 688 P.2d 151 (1984), 21 CLB 266.

Wisconsin Plaintiff, who was allegedly the subject of official police surveillance at softball games and taverns, brought a 42 U.S.C. § 1983 action against the city. The plaintiff claimed to be the victim of a conspiracy among his wife and two police officials. The complaint was dismissed for failure to state a claim upon which relief could be granted. On appeal, plaintiff argued that the police misconduct deprived him of his Fourth Amendment right to be free from unreasonable searches and seizures.

Held, affirmed. The Wisconsin Supreme Court declared that police surveillance of what a person does in public infringes on no constitutional right even if there is no legitimate reason for the police to be interested. The plaintiff alleged that, at the police chief's order, he was followed to softball games and taverns. An officer allegedly conducted license checks on cars in the parking lots of places plaintiff frequented and took notes on plaintiff's activities. The police justified their conduct by publicly claiming that plaintiff was suspected of selling and using drugs, even though they allegedly knew these allegations to be baseless. The court pointed out that what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. Not all government surveillance is per se violative of constitutional rights. Weber v.

City of Cedarburg, 384 N.W.2d 333 (1986).

§ 58.03 Property subject to search (New)

"Enforcement Workshop: *Oliver v. United States*—Legitimate Police Illegality," by James J. Fyfe, 20 CLB 442 (1984).

U.S. Supreme Court DEA agents placed "beepers" in large quantities of chemicals and equipment purchased by defendant and traced the equipment and chemicals container to a barn about sixty yards behind his house. The barn was not enclosed by the fence surrounding the house, and police officers standing in an open field could see inside the barn. After officers shined flashlights into the barn and observed what they took to be a drug laboratory, they obtained a search warrant and executed it. Defendant was convicted in the district court, but the Court of Appeals for the Fifth Circuit reversed.

Held, reversed. The Supreme Court stated that the area near the barn was not within the curtilage of the house for Fourth Amendment purposes since it was not surrounded by the fence demarking the house area, and the entrance by officers to the open field adjacent to the barn was not an unreasonable search. The Court also found that the use of flashlights to aid the naked eye observations without probable cause was permissible. United States v. Dunn, 107 S. Ct. 1134 (1987).

U.S. Supreme Court A California local police department received an anonymous telephone tip that marijuana was growing in defendant's backyard, which was enclosed by two fences and shielded from view. An officer flew over the property in an airplane and identified marijuana plants growing in the yard. A warrant was secured and executed, and the plants were seized. The California trial court denied defendant's motion to dismiss, but the California Supreme Court of Appeals reversed on the ground that the warrantless aerial observation of defendant's yard violated the Fourth Amendment.

Held, reversed. The Court declared that the Fourth Amendment was not violated by the naked-eye aerial observation of defendant's backyard. The Court reasoned that defendant had no reasonable expectation of privacy from all observations of his backyard, and that the public observations in this case took place within public navigable airspace, in a physically nonintrusive manner. California v. Ciraolo, 106 S. Ct. 1809 (1986), reh'g denied, 106 S. Ct. 3320 (1986).

U.S. Supreme Court In two separate cases, heard together before the Court, law enforcement officers discovered marijuana on private land after walking around locked gates and past "No Trespassing" signs. Each of the two property owners had been indicted and the issue for each had been whether, in applying Katz v. United States, 88 S. Ct. 507 (1967), he had had a reasonable expectation of privacy, having done whatever was possible to assert the privacy of the area, or whether, under Hester v. United States, 44 S. Ct. 445 (1924), the marijuana plots were "open fields" where there could be no such expectation.

Held, against defendants. The open fields doctrine of *Hester* applied here. In both cases, the marijuana was found

on property so far away from the residence that it was not part of the curtilage, the area immediately adjacent to the home, to which Fourth Amendment protections attach. Unlike the curtilage area and other areas subject to Fourth Amendment protection, open fields do not provide the setting for intimate activities that the Amendment intends to shelter from government interference or surveillance. There is no social interest in protecting the privacy of those activities that occur in open fields, such as the cultivation of crops. Moreover, such lands are to some extent accessible to the public and police; for instance, they can be viewed lawfully from the air. In any event, the protectable expectations of privacy must be legitimate, and here they were not. The government's intrusion did not infringe personal and societal values protected by the Fourth Amendment. Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735 (1984).

Court of Appeals, 2d Cir. After defendant was convicted in the district court of narcotics offenses, he appealed on the grounds that the search of his bags, which led to the discovery of the cocaine, was illegal.

Held, conviction affirmed. The Second Circuit found that defendant failed to show he had a legitimate expectation of privacy in the bag in question, or that the search of the bag pursuant to consent of the occupant of the apartment was illegal. The court noted that defendant had offered no proof that he had exclusive possessory interest in the bag or that the bag was obviously his and not the occupant's of the apartment. United States v. Zapata-Tamallo, 833 F.2d 25 (1987), 24 CLB 261.

Colorado Defendant was charged with possession of a controlled substance after police confiscated a packet of cocaine from under a small piece of carpeting used as a doormat in front of the basement apartment where he resided. Three informants who had provided reliable information in the past described defendant to the police and reported that he was selling cocaine from the apartment, which had a private entrance not common with other residences in the building. After observing from an unmarked car that defendant was behaving in a nervous manner outside the apartment, detectives met him and identified themselves as police officers. After questioning and frisking defendant, detectives then noticed the worn doormat covering a concrete drain. Upon lifting the doormat, detectives found a plastic bag containing a white packet of cocaine. The trial court suppressed the evidence, and the state made an interlocutory appeal.

Held, reversed and remanded. The Colorado Supreme Court, en banc, held that although the police had neither probable cause nor a warrant to search the area underneath the doormat, that area was not constitutionally protected from an unauthorized search. The frayed piece of carpeting, under which the detective found cocaine, was not secured to the landing in any manner and was in an area open to the public. In investigating narcotic transactions at the apartment, the detectives had seen many people enter and leave shortly thereafter. The carpet could be moved, walked upon, or lifted by a business or personal visitor. Defendant could not reasonably expect privacy in an unsecured area that was often visited by people in the occu-

pant's business or in social use of the rental unit. Moreover, the record disclosed that defendant was an occasional overnight guest at a woman's house in the neighborhood and that he claimed that house as his home during a prior narcotics arrest. People v. Shorty, 731 P.2d 679 (1987), 23 CLB 495.

Florida A state trooper and a local police officer entered defendant's automotive repair shop to check a truck that they suspected had an altered identification number. They located the truck on defendant's property, ascertained that the identification number had been changed, seized the truck, and arrested defendant. Defendant filed a motion to suppress, alleging that the statute providing for warrantless administrative searches of junkyards, motor vehicle repair shops, and other establishments dealing with salvaged motor parts unconstitutionally allowed warrantless searches and seizures in violation of the Fourth Amendment, as well as the state constitution. The trial court declared the statute unconstitutional, and on appeal the district court reversed.

Held, district court affirmed. The Supreme Court of Florida found the statute constitutional since it is limited to business establishments that easily could be involved in the theft and unlawful disposition of vehicles, and is restricted to normal business hours. The owners of subject businesses are on notice by the clear language of the statute that their premises will be inspected. Moore v. State, 442 So. 2d 215 (1983).

Nebraska Defendant was convicted of "manufacturing" marijuana, a controlled substance. He grew the marijuana near a creek on a 250-acre farm in a rural area of Nebraska. The farm was fenced and posted, and the marijuana was not visible from the roads around the farm. The marijuana was discovered by state patrol officers during a low-level photographic investigative overflight conducted to search for unlawful growths of marijuana. After the overflight, officers entered defendant's farm through a fence from a public road; they did not have a warrant. About one-quarter mile from the farm buildings, the officers discovered four patches of growing marijuana. Patrol officers subsequently made five more warrantless entries onto defendant's property. On the fifth entry, officers arrested defendant when he appeared near the marijuana. On appeal, defendant argued that the marijuana was uncovered as the result of an unreasonable search and seizure. He argued that because Nebraska is an agrarian state dominated by large areas of farmland and ranchland, the activities engaged in on those "open fields" should be given the same constitutional protection as those enclosed within buildings or walls.

Held, affirmed. The Nebraska Supreme Court declared that no constitutional protection attached to defendant's marijuana growing activities, because those activities occurred in "open fields" where defendant had no expectation of privacy. Consequently, law enforcement officers could enter and search the open fields without a warrant. The court cited Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735 (1984), which reaffirmed the open fields doctrine first articulated in Hester v. United States, 265 U.S. 57, 44 S. Ct. 445 (1924). In *Oliver,* the U.S.

Supreme Court held that the key to whether a search and seizure is constitutional turns on the question of whether a person has a constitutionally protected, reasonable expectation of privacy. In the instant case, defendant's activities were conducted in open fields where he had no legitimate expectation of privacy. No constitutional protection attached to defendant's activities in his open fields, and the police could enter and search defendant's open field without probable cause or a search warrant. State v. Havlat, 385 N.W.2d 436 (1986).

North Carolina The state appealed the decision to suppress evidence spotted by a police detective. An officer received a call from an unreliable informant concerning marijuana plants. The detective went to investigate without a warrant, and through a small crack in the bottom of a wall of a nonresidential building saw the plants growing. He then obtained a warrant and seized the plants. The trial court found the first inspection in violation of the Fourth Amendment's provision against warrantless searches. Citing United States v. Dunn, 107 S. Ct. 1134 (1987) the state claimed that the evidence was improperly suppressed.

Held, affirmed. The court said that the *Dunn* decision did not apply in this case, and that defendant had a reasonable expectation of privacy in the building that the officer inspected. Because the officers in *Dunn* had spotted drug apparatus through an open door of a barn in a constitutionally unprotected "open field," defendant in that case had no expectation of privacy. In this case, the presence of tiny cracks near the floor on the interior wall of a second floor porch was not the kind of exposure that served to eliminate defendant's reasonable expectation of privacy. Boarded windows and nailed doors prohibited observation of the inside from all but the most rigorous scrutiny, and, therefore, the detective's peering through cracks in the rear wall violated the Fourth Amendment. State v. Tarantino, 368 S.E.2d 588 (1988).

§ 58.05 Constitutionally protected areas

U.S. Supreme Court Police twice obtained from defendant's regular trash collector garbage bags left on the curb in front of his house. Items in the garbage were indicative of narcotics use. Police obtained warrants to search the house, discovered controlled substances, and arrested the respondents on narcotics charges. The state superior court dismissed the charges, finding that probable cause to search the house would not have existed without the evidence obtained from the trash. The California Court of Appeals affirmed and certiorari was granted.

Held, reversed and remanded. The Supreme Court found that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home, and therefore defendants did not have reasonable expectation of privacy protected by the Fourth Amendment. California v. Greenwood, 108 S. Ct. 1625 (1988).

U.S. Supreme Court Officials of a state hospital received allegations regarding improprieties by a doctor, particularly relating to his acquisition of a computer and his sexual harassment of female hospital employees. While he was on leave pending investigation of the charges, hospital officials searched his office and seized personal

items and file cabinets that were used in administrative proceedings resulting in his discharge. The doctor filed a Section 1983 claim under 42 USC § 1983 against the hospital officials, claiming the search of his office violated the Fourth Amendment. The district court granted a motion for summary judgment, concluding that the search was proper because there was a need to secure state property. The court of appeals reversed in part, granting partial summary judgment for the doctor.

Held, reversed and remanded. The U.S. Supreme Court held that both lower courts were in error in granting summary judgment, since there was a factual dispute about the justification for the public employer's search of an employee's office, and the record was inadequate for a determination of the reasonableness of the search and seizure. A search to secure state property is valid if the hospital had a reasonable belief that the employee's office contained government property that needed to be secured, and the scope of the intrusion was reasonable in view of its justification. O'Connor v. Ortega, 1075 S. Ct. 1492 (1987), 23 CLB 485.

U.S. Supreme Court When petitioner-company denied a request by the Environmental Protection Agency (EPA) for an on-site inspection of its plant, the EPA employed a commercial aerial photographer to take photographs of the facility. Petitioner brought suit in the district court to bar this procedure, alleging that the EPA's action violated the Fourth Amendment. The district court granted summary judgment for petitioner, but the court of appeals reversed, holding that the aerial photography was not a search prohibited by the Fourth Amendment.

Held, affirmed. The Court found that the EPA's taking without a warrant of aerial photographs of petitioner's plant from an aircraft lawfully in public navigable airspace was not a search prohibited by the Fourth Amendment. The Court reasoned that the intimate activities associated with family privacy and the home simply do not reach the outdoor areas or space between structures and buildings of a manufacturing plant. Dow Chemical Co. v. United States, 106 S. Ct. 1819 (1986).

U.S. Supreme Court After two homeowners were charged with arson, the Michigan state trial court denied their motion to suppress evidence, and an appeal was taken. The Michigan Court of Appeals reversed. The record showed that five hours after a fire destroyed the premises, a team of arson investigators conducted an extensive search of the premises without obtaining either consent or an administrative warrant. The investigators determined that the fire was caused by a timing device and seized the incriminating evidence.

Held, affirmed, that is, evidence seized in the search must be suppressed. The Supreme Court held that a criminal warrant is required pursuant to the Fourth Amendment when the primary object of a search is to gather evidence, and an administrative warrant will suffice if the primary object is to determine the cause and origin of the fire. The Court reasoned that defendants had a reasonable expectation of privacy in the fire-damaged home since they had made arrangements to secure the premises following the fire. Michigan v. Clifford, 464 U.S. 287,

104 S. Ct. 641, reh'g denied, 104 S. Ct. 1457 (1984).

Court of Appeals, 4th Cir. After the defendant and his textile company were convicted in district court of conspiring to import hashish, he appealed on the grounds that the search of his company property had been illegal.

Held, affirmed. The Fourth Circuit held that defendant and his company did not have a reasonable expectation of privacy in packets of hashish concealed in imported Indian cotton sold to a fabric-finishing company, when the packets contained neither the names nor addresses. United States v. Mehra, 824 F.2d 297 (1987).

Court of Appeals, 9th Cir. Co-defendants Harvey and Chase were convicted in separate district court proceedings of involuntary manslaughter. Both convictions arose from alcohol-related highway accidents on Indian reservations. In their consolidated appeal, defendants argued that the results of blood-alcohol tests should have been suppressed when neither defendant was formally arrested at the time the blood samples were taken. The trial court concluded that Chase was so delirious that it was unnecessary for the officer to have arrested him prior to having the blood sample taken. A similar conclusion was not reached about Harvey.

Held, Harvey's conviction was reversed and Chase's was affirmed. A formal arrest must proceed, or be substantially contemporaneous with, the seizure of blood from a suspect if the seizure occurred without consent. The Ninth Circuit rejected prosecution's argument that Harvey was under the "functional equivalent" of an arrest at the time the blood sample was taken. Placing a suspect under formal arrest helps ensure that the police do not arbitrarily violate an individual's privacy. It also helps prevent after-the-fact justification of seizures by sharply delineating the moment at which an officer determined that there was probable cause to arrest. Furthermore, the formal announcement of arrest gives rise to certain rights for the suspect and responsibilities for the arresting officer. However, the Ninth Circuit held that a formal arrest of Chase was not necessary because he was too incapacitated to appreciate its significance. The seizure of Chase and his blood sample was valid because it was supported by probable cause. United States v. Harvey, 701 F.2d 800 (1983).

Florida Defendant was convicted of unlawful possession and manufacture of marijuana. A police officer, acting upon an anonymous tip that marijuana was being grown in a greenhouse on defendant's property, obtained a helicopter to fly over defendant's property after unsuccessfully trying to discern the contents of the greenhouse from the road. At about 400 feet above defendant's property, the officer saw what he believed to be marijuana through openings in the roof and through one or more of the open sides of the greenhouse. A warrant was obtained and forty-four marijuana plants were found growing in the greenhouse. On appeal, defendant contended that the aerial surveillance of his greenhouse was in violation of his rights under the Fourth Amendment and that therefore, the evidence should be suppressed.

Held, reversed. Although a few panels were missing from the roof of the greenhouse, defendant had clearly exhibited a subjective expectation of

privacy in it and its contents; the opaque greenhouse was located within the curtilage area of his home and the entire area surrounded by a fence with a "DO NOT ENTER" sign. Moreover, it was not unreasonable of defendant to expect that the contents of the greenhouse would not be examined from a helicopter hovering below 500 feet. While there is little that an individual can do to bar either the public or police from aerial viewing of an open area, even if the area is within the curtilage and otherwise entitled to Fourth Amendment protection, the court stated that this did not mean that individuals relinquish all expectations of privacy in their residential yards; the right to be let alone includes the right to enjoy outdoor activities in private in one's own backyard. Defendant had a reasonable expectation that his activities inside his greenhouse would remain private and out of the view of aerial observers; thus, by descending below "public navigable airspace," the police officer impermissibly invaded defendant's privacy. Because the officer's aerial search was illegal, the evidence seized was accordingly suppressed. Riley v. State, 511 So. 2d 282 (1987).

Georgia Defendant was convicted of murder for killing a grocery clerk during the course of a robbery. An anonymous witness telephoned a report of the crime to police and gave a description of the getaway car. Police stopped the car, and conducted a search which uncovered the murder weapon and ammunition; defendant and a codefendant, who had been in the car, were placed under arrest. After *Miranda* warnings, both gave statements in which they admitted stealing the car and pistol two days earlier, as well as admitting their involvement in the robbery-murder. On appeal, defendant argued that the warrantless search of the vehicle was unlawful and the products of the search, i.e., the weapon and his incriminating statements, should have been suppressed.

Held, affirmed. The Supreme Court of Georgia rejected defendant's contention, ruling that under Rakas v. Illinois, 439 U.S. 128 (1978), defendant had no legitimate expectation of privacy in the stolen car and no possessory interest in the stolen property seized. Since both the search and the discovery of the pistol were lawful, continued the Court, the ensuing arrest was based upon probable cause and defendant's subsequent statements were not inadmissible. Sanborn v. State, 304 S.E.2d 377 (1983), 20 CLB 174.

Pennsylvania Defendant was convicted of possession of a controlled substance and manufacture of marijuana. Police had received a tip from an informant that plants, suspected of being marijuana, were growing in the greenhouse attached to defendant's home. Because the house was approximately 200 feet from the road, a trooper who drove by the residence was unable to identify the plants growing in the greenhouse. However, with the aid of binoculars and a zoom lens, the same tropper and another officer were later able to identify the plants as marijuana. The plants were also identified at close range when the two officers conducted an investigation on defendant's property. A search warrant was prepared and one and one-half pounds of marijuana seized during the subsequent search of defendant's home. On appeal, defendant filed a motion to suppress the marijuana, alleging that

visual intrusion and physical trespass by the officers constituted an illegal search and, thus, the evidence seized was inadmissible.

Held, reversed and remanded. In accordance with Smith v. Maryland, 99 S. Ct. 2577 (1979), a person who invokes the protection of the Fourth Amendment may claim a "reasonable expectation of privacy" if he or she has "exhibited an actual (subjective) expectation of privacy and that expectation of privacy is "one that society is prepared to recognize as reasonable." Defendant lived on a dead-end dirt road in a rural area and little could be seen inside the greenhouse from the road. Because this setting did not invite casual intrusion, it was determined that defendant clearly expected to have privacy. Although anything growing in the greenhouse could have been viewed by the postman or anyone who would ordinarily come to the front door of defendant's dwelling, this fact did not justify a police officer's use of binoculars and a zoom lens from a distance of 200 feet. The greenhouse was within the curtilage area and was not exposed to public view. In order to view it, the officers had to find an opening in the brush and shrubbery along the property line of the house. Much more than the naked eye was necessary to view the greenhouse's contents. In the course of their investigation, the officers entered onto defendant's property without a warrant, without consent, and without exigent circumstances. As the marijuana was not within "plain view" of the officers, the court determined that in addition to the visual intrusion, the officer's physical intrusion onto defendant's property and their subsequent warrantless search were in violation of defendant's constitutional rights. Commonwealth v. Lemanski, 529 A.2d 1085 (1987).

§ 58.10 Property subject to seizure

Court of Appeals, 3d Cir. Defendant, charged with possession of cocaine with intent to distribute, moved to suppress evidence seized during the execution of a search warrant. A district court denied the motion, and defendant was convicted of possession with intent to distribute twelve kilograms of cocaine.

Held, sentence vacated, otherwise affirmed. The Third Circuit declared, among other things, that police officers were authorized to search defendant's purse while executing a search warrant for the premises. The court noted that agents observed defendant entering the premises carrying the purse and that the warrant authorized the search of the house for cocaine and also permitted agents to search for proof of residency or occupancy. Also, at the time of the search, the purse was in the dwelling about four feet away from defendant. The court also found that defendant's claim that the search warrant violated a federal rule was not raised before trial and thus was reversible only for plain error on appeal. United States v. Martinez-Zayas, 857 F.2d 122 (1988).

Alabama Defendant was convicted of felony possession of marijuana. The marijuana was discovered by an off duty police officer working part-time as an exterminator, who entered defendant's apartment to spray for bugs. The officer, who gained entrance to defendant's apartment with a pass-key supplied by the apartment manager, did not have defendant's permission to enter the premises, and did so with-

out defendant's knowledge. During the course of the spraying, the exterminator/officer noticed what he suspected to be marijuana plants, and he took a leaf as a sample. Upon verification by a police lab that the substance was marijuana, the police officer signed an affidavit and obtained a search warrant. Defendant's apartment was entered and searched, and marijuana plants were seized. On appeal, defendant argued that the initial taking of the leaf by the exterminator *cum* police officer constituted a warrantless, and thus, unlawful search and seizure.

Held, judgment reversed and cause remanded. The Alabama Supreme Court ruled that the off duty police officer's taking of a leaf from defendant's apartment constituted a warrantless seizure by a government officer, proscribed by the state and federal constitutions. The police officer stepped out of his exterminator role and became a government agent when he examined and seized the leaf in defendant's apartment. The police officer used knowledge and skill acquired from his police training and experience to recognize the marijuana, and when he took the leaf from defendant's apartment, he did so not as a private citizen, but as an agent of the government. The warrantless seizure and search, then, violated the Alabama constitution and the Fourth Amendment to the United States Constitution. Ex parte Kennedy, 486 So. 2d 493 (1986).

§ 58.15 —Plain view

U.S. Supreme Court A customs officer at the Chicago airport opened a large, locked container shipped by air from Calcutta to respondent. The officer found a wooden table with marijuana concealed in a compartment, and a Drug Enforcement Administration (DEA) agent confirmed that it was marijuana, so the table and container were resealed. The next day, the DEA agent and a Chicago police officer posed as delivery men and delivered the container to respondent, leaving it in the hallway outside his apartment. The DEA agent stationed himself to keep the container in sight and observed respondent take the container into his apartment. When the other officer left to secure a warrant to search the apartment, the DEA agent maintained surveillance of the apartment. Some 30 or 45 minutes after the delivery, but before the other officer could return with a warrant, respondent emerged from the apartment with the shipping container and was immediately arrested and taken to the police station; there the container was reopened and the marijuana found inside the table was seized. No search warrant had been obtained. Prior to trial on charges of possession of controlled substances, the Illinois state trial court granted respondent's motion to suppress the marijuana. The Illinois Appellate Court affirmed, holding that a "controlled delivery" had not been made, so as to render a warrant unnecessary, because the DEA agent was not present when the container was resealed at the airport by the customs officers and the container was out of sight while it was in respondent's apartment.

Held, reversed and remanded. The warrantless reopening of the container following its reseizure did not violate respondent's Fourth Amendment rights.

There was no substantial likelihood that the contents of the shipping container previously found by the police to contain illicit drugs was changed

during the brief period that it was out of sight of the surveilling officer. The Court reasoned that once the container had been found to contain illicit drugs, the contraband became like objects physically in plain view, so that the claim of privacy was lost and the subsequent reopening of the container was not a "search" within the scope of the Fourth Amendment. Illinois v. Andreas, 463 U.S. 765, 103 S. Ct. 3319 (1983), 20 CLB 162.

U.S. Supreme Court A Texas police officer stopped respondent's car at night at a routine driver's license checkpoint, asked him for his license, shined his flashlight into the car, and saw an opaque, green party balloon, knotted near the tip, fall from respondent's hand to the seat beside him. Based on his experience in drug offense arrests, the officer was aware that narcotics frequently were packaged in such balloons, and while respondent was searching in the glove compartment for his license, the officer shifted his position to obtain a better view and noticed small plastic vials, loose white powder, and an open bag of party balloons in the glove compartment. After respondent stated that he had no driver's license in his possession and complied with the officer's request to get out of the car, the officer picked up the green balloon, which seemed to contain a powdery substance within its tied-off portion. Respondent was then advised that he was under arrest, an on-the-scene inventory search of the car was conducted, and other items were seized. At a suppression hearing in respondent's state-court trial for unlawful possession of heroin, a police department chemist testified that heroin was contained in the balloon seized by the officer and that narcotics frequently were so packaged. Suppression of the evidence was denied, and respondent was convicted. The Texas Court of Criminal Appeals reversed, holding that the evidence should have been suppressed because it was obtained in violation of the Fourth Amendment. Rejecting the State's contention that the so-called "plain view" doctrine justified the seizure, the court concluded that under Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564, for that doctrine to apply, not only must the officer be legitimately in a position to view the object, but also it must be "immediately apparent" to the police that they have evidence before them, and thus the officer here had to *know* that incriminating evidence was before him when he seized the balloon.

Held, reversed and remanded. Where the officer validly stopped the automobile as part of a routine license check and saw the knotted balloon in the driver's hand, the seizure of the balloon was proper under the plain view doctrine. The Court particularly noted that when the officer shifted his position to get a better view, he noticed small plastic vials, loose white powder, and an open bag of party balloons in the glove compartment. In so holding, the Court rejected the argument that for the plain view doctrine to apply, it must be "immediately apparent" to the police that they have incriminating evidence before them at the time of seizure. Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535 (1983), 20 CLB 57.

Court of Appeals, 2d Cir. Defendant was convicted of conspiring to maliciously damage buildings by means of explosives. Officers, who were searching defendant's home pursuant to a valid search warrant, saw a handgun

when they found a rifle under a floorboard in the home. On returning for the purpose of seizing the handgun, the officers saw a transparent plastic bag containing an envelope with the inscription "Tap on Ben Bon Hoft." There was a tape cassette inside the envelope which they also seized.

Held, conviction affirmed. The Second Circuit found that the tape cassette inside a clear envelope had been lawfully seized under the plain view doctrine, and that the officers were not required to get a separate warrant before playing the cassette. The court reasoned that there was no expectation of privacy as to the cassette because the envelope containing the cassette bore the inscription "Tap on Ben Bon Hoft." United States v. Bonfiglio, 713 F.2d 932 (1983), 20 CLB 165.

Colorado Defendant was convicted of possession of cocaine and marijuana. Defendant's house had been burglarized and a safe stolen therefrom. Police apprehended a suspect who told them that he and two others had burglarized a nearby residence from which they had removed the safe because they believed it contained money and drugs. Police located the house, where they found the front door open and the door jamb splintered. They shouted "police," and then entered the house, where they observed a triple-beam scale, a mirror, two teaspoons, and a playing card, all bearing a white residue. Based on their suspicion that defendant's safe recovered from the burglars contained drugs, the police held the safe overnight at headquarters before a search warrant was obtained. During this period an exploratory sniff of the safe by a narcotics detection dog was conducted to determine whether it contained drugs. The result was positive. After obtaining a search warrant, the safe was opened and both cocaine and marijuana were discovered inside. Defendant appealed, contending that his conviction was based on evidence that the district court should have suppressed because it was obtained in violation of the Fourth Amendment and the state constitution.

Held, conviction affirmed. The Colorado Supreme Court found that the narcotics detection dog's sniff of the stolen safe that had been taken to the police station was a Fourth Amendment search, but it required neither a warrant nor probable cause because the police had reason to believe that the safe contained controlled substances. Having decided that the sniff was a search, the majority turned to the degree of suspicion required to support it. Weighing the government's interest in detecting illegal narcotics against the limited intrusiveness of this kind of search, the majority concluded that the balance was best struck by requiring only reasonable suspicion. Statements by the burglar who stole the safe and a police officer's observation of drug paraphernalia in plain view in the safe owner's home justified a reasonable suspicion that the safe contained drugs. People v. Unruh, 713 P.2d 370 (1986), cert. denied, 106 S. Ct. 2894 (1986).

Mississippi Defendant was convicted of possession of more than one ounce of marijuana with intent to deliver. During the search of defendant's home for a stolen television and radio, a small envelope of marijuana was found, which precipitated a full search of the house, within which many small bags of marijuana were found. The

envelope was discovered at the same time as the television and the radio. Defendant appealed his conviction because he claimed that the police had a warrant for only the television and the radio, and the marijuana was the fruit of an illegal search and seizure. The trial court, he believed, should have suppressed the marijuana.

Held, reversed and remanded. The court held that the envelope was admissible under the "plain view" doctrine, but not the rest of the marijuana found. In order to be a proper seizure, the seizure must have occurred pursuant to a lawful search. As the search warrant was properly issued only for the television and radio, then only that contraband discovered in plain view during the search for them was properly admissible. Only the envelope was found in plain view. The court held that when the television and the radio were found, the search should have stopped. If the police felt that there was more marijuana in the house, they should have procured a warrant. The court said that they would not sanction the use of indirect search warrants, and, therefore, concluded that the marijuana found after the initial envelope should have been suppressed. Carney v. State, 525 So. 2d 776 (1988).

North Carolina Defendant was convicted of felonious and misdemeanor possession of stolen property. City police officers, armed with a search warrant, pried open the door of defendant's home and seized property suspected of being the fruits of crime. Although the warrant possessed by these officers listed only a stereo, watch, and two pistols as the items to be seized, the officers in fact seized some fifty-five items. The latter were stolen during break-ins that were under investigation by police. The only item found that was actually listed in the application for the search warrant was the stereo. Defendant contended that his Fourth and Fourteenth Amendment rights were violated by the seizure of the items not listed on the warrant application, and that the items should be suppressed from admission into evidence.

Held, affirmed in part and reversed in part. The court ruled that stolen items, which were not specifically identified in the search warrant, but, which were mentioned in county police incident reports, and, which city police found while executing the warrant for the search of defendant's home for stolen property, were properly seized under the "plain view" exception to the warrant requirement. Under this exception, carved out in Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971), police may lawfully seize evidence in plain view if the initial intrusion that reveals the items is lawful, the discovery is inadvertent, and it is immediately apparent that the items constitute evidence of crime. The court majority, unable to find a precise definition of "inadvertent" in *Coolidge,* declared that so long as the police officers' expectation of finding the items did not rise to the level of probable cause, their discovery would be deemed inadvertent for purposes of the plain view exception. State v. White, 370 S.E.2d 390 (1988).

Washington Defendant was charged with possession of marijuana. Defendant's home had been the scene of a fire that charred one wall from floor to ceiling. As part of common practice,

fire fighters were sent to check the attic directly over the burned area. After discovering what appeared to be a marijuana-growing operation, the fire marshal telephoned the deputy prosecutor, who recommended that the evidence be confiscated. The fire marshal then called a deputy sheriff to assist in the seizure of evidence. At no time was a search warrant obtained. The court of appeals held that the warrantless seizure did not violate the state and Federal Constitutions. Defendant appealed.

Held, affirmed and remanded. The Supreme Court of Washington stated that once the privacy of a residence has been lawfully invaded, there is no need for others to obtain a warrant to enter and complete what those already on the scene would be justified in doing. The fire fighters' discovery of the marijuana was held to fall within the plain view exception of the warrant requirement. Because the fire fighters had lawfully discovered evidence of criminal activity, it was not necessary for police officers to obtain a warrant before entering defendant's residence to seize that evidence. State v. Bell, 737 P.2d 254 (1987) (en banc).

§ 58.20 —Abandonment

"Enforcement Workshop: Systemic Integrity—Back to Basics in the Exclusionary Rule Debate," by Candace McCoy, 20 CLB 361 (1984).

Court of Appeals, 2d Cir. After defendants were convicted in the district court of violations of federal narcotics laws and conspiracy, they appealed on the grounds that evidence seized from their trash cans had been improperly admitted into evidence.

Held, conviction affirmed on this point and reversed in part on other grounds. The Second Circuit found that the warrantless search of defendants' trash bags over a six-month period by Drug Enforcement Administration (DEA) agents did not violate their reasonable expectation of privacy. The court reasoned that, absent evidence indicating an intent by the former owner to retain some control over or interest in discarded trash, his placement of it for collection on a public sidewalk is inconsistent with the notion that he retains a privacy interest in it. When plastic trash containers and their contents are carted to a public waste disposal area, the court noted, common experience teaches that the former owner obtains no implicit assurance that the trash will remain inviolate and free from examination. United States v. Terry, 702 F.2d 299, cert. denied, 464 U.S. 992, 103 S. Ct. 2095 (1983), 19 CLB 478.

Minnesota Defendant was charged with possession of and intent to distribute cocaine. He moved to suppress evidence in the prosecution, arguing that the affidavit in support of the warrant application contained information that was obtained in two illegal, warrantless searches of his garbage. The court of appeals reversed a pretrial order suppressing the evidence. Defendant petitioned for review.

Held, affirmed. The Supreme Court of Minnesota found the property in question—a discarded, unwrapped UPS box and garbage tied in opaque plastic bags—to be abandoned property in which defendant no longer had a reasonable expectation of privacy. Because defendant lived in a multiparty dwelling and had placed his garbage for collection in the back of the building near an alley, an area where visitors, including his customers, typi-

cally walked, the court also determined that defendant did not have a reasonable or even an actual expectation that the area where the garbage was located would be treated as a dwelling for Fourth Amendment purposes. Accordingly, defendant's Fourth Amendment rights were not violated by the police when they went onto the land in order to seize the abandoned property. State v. Krech, 403 N.W. 634 (1987).

§ 58.25 —Exigent circumstances

Court of Appeals, 4th Cir. After defendant was convicted in the district court of possession of marijuana, he appealed on the ground that the police had improperly conducted a warrantless search of his property.

Held, conviction affirmed. The Fourth Circuit stated that a warrantless, protective sweep of defendant's "curtilage" did not violate the Fourth Amendment. The court reasoned that the sweep was necessary for the officers' safety and, therefore, within the "exigent circumstances" exception to the warrant requirement. United States v. Bernard, 757 F.2d 1439 (1985), 21 CLB 468.

Indiana Defendant appealed his conviction for numerous drug-related felonies. Defendant claimed his Fourth Amendment right against unreasonable search and seizure was violated when police entered his house to search for "buy money." A third party entered defendant's house to buy drugs with money she received from the police. The police had taken the serial numbers of these bills so that they could be identified later. After the third party exited with drugs, the police entered the house to recover the "buy money." When the money was recovered, the police obtained a warrant, made a thorough search, and found numerous controlled substances and drug paraphernalia.

Held, affirmed. The Supreme Court of Indiana found that the circumstances required the police to enter. The court, citing Short v. State, 443 N.E.2d 298 (Ind. 1982), stated that if there is reasonable belief that evidence is being or going to be destroyed, the police may enter without a warrant. In this case, the evidence the police feared losing was the "buy money." The police observed many people coming and going from the residence and feared the "buy money" might be used as change in a transaction. Therefore, the police violated no one's rights when they moved to recover the money. Diggs v. State, 531 N.E.2d 461 (1988).

Maine Defendant, charged with the possession and distribution of marijuana, was granted a pretrial motion to suppress from evidence a brown paper bag filled with marijuana, which police officers found while conducting a warrantless search of defendant's automobile. The state appealed, contending that the search was permissible under the "automobile exception" to the Fourth Amendment of the U.S. Constitution. The search was prompted by a telephone call from an informant in which he reported that defendant would procure marijuana the next morning and informed the police of defendant's whereabouts and what route he would take to the site of procurement. The same informant had provided the police with reliable information on at lease four prior occasions. The next morning, police officers followed defendant, detained him, and began a search of his car without a warrant and without defendant's con-

sent. The bag in question was discovered and seized. The trial court granted the suppression motion, and the supreme judicial court affirmed. The U.S. Supreme Court granted the state's petition for certiorari, vacated the trial court's judgment, and remanded to the supreme judicial court.

Held, the trial court judgment was reversed. The search was permissible because exigent circumstances prevented the police from timely obtaining a search warrant. The police were never in a position where they could predict with a reasonable degree of certainty when they would have probable cause to obtain a warrant. Until defendant actually arrived at the site where he was to procure marijuana and commenced evasive driving behavior, which was only minutes before the search, probable cause was not self-evident. Thus, the search was validated by the "automobile exception." State v. Patten, 457 A.2d 806 (1983).

Nebraska Defendant was convicted of first-degree false imprisonment and use of a knife to commit a felony. On December 31, 1983, defendant was picked up by a young couple while hitchhiking in Omaha, Nebraska. The weather was snowy and cold, and the couple offered defendant a ride home. He accepted, and directed them to his residence, whereupon he pulled out a hunting knife and threatened to kill the female member of the couple if the male did not accompany him inside. The male refused to leave the car, and proceeded to drive the car to a police station, where he rammed his car into a police vehicle. The couple escaped from defendant, who fled the scene. The couple flagged down a car, which returned them to the police station. They told their story to a police officer, who sent another officer to defendant's home, where a neighbor stated that he had just seen a man fitting defendant's description enter the apartment house. The officer walked up the porch steps, saw that the front door was open, and entered the building where he saw snowy footprints in the hall leading to apartment #10. The officer knocked on the door of that apartment, but there was no response from inside. An apartment resident subsequently directed the officer to a caretaker, who returned with the officer to apartment #10. When there was again no answer to a knock on the door, the police officer opened the door with a passkey. The officer found defendant in bed, and arrested him. Defendant was taken to the police station, identified by the couple, and charged. He was subsequently convicted and sentenced for the offenses charged. On appeal, defendant argued that his arrest violated the Fourth Amendment, in that the police officer did not have a warrant to enter defendant's home when he arrested him.

Held, conviction and sentence affirmed. The Nebraska Supreme Court stated that absent exigent circumstances, a warrantless entry and arrest is presumed unreasonable and, thus, unconstitutional. In this case, though, there were exigent circumstances that allowed the police officer to enter defendant's residence without a warrant. Exigent circumstances exist when a law enforcement officer has (1) probable cause to believe that a suspect has committed a serious offense; (2) a reasonable belief that a suspect is on the premises to be entered; and (3) a factual basis to reasonably believe that a delay will pose a danger to an officer or another, or will allow a suspect to escape or remove or destroy evidence. In this case, the court ruled that the

arresting officer had probable cause to believe that a serious crime had been committed, in that the couple had been kidnapped at knifepoint by a man whose description matched defendant's; reasonable belief that defendant was present, in that a neighbor told the officer that he had chased a man fitting defendant's description from his yard into the apartment house; and a factual basis for believing that a delay, due to the necessity of obtaining a warrant, would allow defendant to escape or destroy or remove evidence, because a shortage of officers due to the weather and other factors made surveillance impossible. Thus, the warrantless entry and arrest in this case were justified by exigent circumstances, and were, therefore, constitutionally permissible. State v. Herr, 370 N.W.2d 166 (1985).

§ 58.30 —Automobile searches

"Reevaluating the Vehicle Inventory," by Gerald S. Reamey, 19 CLB 325 (1983).

U.S. Supreme Court After a Drug Enforcement Administration (DEA) agent received information that defendant's mobile home was being used to exchange marijuana for sex, he maintained a surveillance and stopped a youth leaving the vehicle. The youth told the agent that he had received marijuana in return for sexual contacts. At the request of the agent, the youth returned to the mobile motor home and knocked on the door, whereupon the defendant stepped out. Without a warrant or consent, the agent entered the mobile motor home and observed marijuana. After his motion to suppress evidence was denied, defendant was convicted in California state court, but the California Supreme Court reversed.

Held, judgment of California Supreme Court reversed and case remanded. The Supreme Court found that the warrantless search of the mobile motor home did not violate the Fourth Amendment. The Court explained that when a vehicle is being used on the highways and is found stationary in a place regularly used for residential purposes, there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of traveling on highways. California v. Carney, 105 S. Ct. 2066 (1985).

U.S. Supreme Court After respondent was convicted of sexual battery, he appealed on the ground that evidence found in his car had been improperly seized. The car had been impounded at the time of his arrest, but the items in question were not seized until eight hours later when the car was searched. The Florida appellate courts reversed the conviction.

Held, reversed. A warrantless search of an automobile impounded and in police custody eight hours after a valid initial search conducted at the time of defendant's arrest was proper. The U.S. Supreme Court reasoned that justification of the initial warrantless search did not vanish once the car had been immobilized. Florida v. Meyers, 466 U.S. 380, 104 S. Ct. 1852 (1984), 21 CLB 73.

U.S. Supreme Court Two police officers, while on patrol after midnight, observed a car travelling erratically and at excessive speed. The car swerved off the road into a shallow ditch, so they stopped to investigate. They were met by respondent, the only

occupant of the car, at the rear of the car. Respondent, who "appeared to be under the influence of something," did not respond to initial requests to produce his license and registration, and when he began walking toward the open door of the car, apparently to obtain the registration, the officers followed him and saw a hunting knife on the floorboard of the driver's side of the car. The officers then stopped respondent and subjected him to a patdown search, which revealed no weapons. One of the officers shined his flashlight into the car, saw something protruding from under the armrest on the front seat, and upon lifting the armrest saw an open pouch that contained what appeared to be marijuana. Respondent was then arrested for possession of marijuana. A further search of the car's interior revealed no more contraband, but the officers decided to impound the vehicle and more marijuana was found in the trunk. The Michigan state trial court denied respondent's motion to suppress the marijuana taken from both the car's interior and its trunk, and he was convicted of possession of marijuana. The Michigan Court of Appeals affirmed, holding that the search of the passenger compartment was valid as a protective search under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889, and that the search of the trunk was valid as an inventory search under South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092, 49 L.Ed.2d 1000. However, the Michigan Supreme Court reversed, holding that *Terry* did not justify the passenger compartment search, and that the marijuana found in the trunk was the "fruit" of the illegal search of the car's interior.

Held, reversed and remanded. The protective search of the passenger compartment of the car during a lawful investigatory stop was reasonable. The Court noted that the search was limited to those areas in which a weapon may be placed or hidden and the officers had reason to believe that the suspect was dangerous. Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469 (1983), 20 CLB 163.

U.S. Supreme Court Defendant was the front-seat passenger in an automobile stopped for failing to signal a left turn. When two police officers approached and saw an open bottle of liquor on the floorboard, they placed defendant under arrest for possession of open intoxicants in a motor vehicle. The driver was also issued a citation for driving without a license. Before the car was towed away, a search revealed two bags of marijuana in the unlocked glove compartment. Further search revealed a revolver inside the dashboard. After defendant was convicted of possession of a concealed weapon, his motion for a new trial was denied. The Michigan Court of Appeals reversed, holding that the warrantless search of the car violated the Fourth Amendment. Certiorari was granted.

Held, reversed and remanded. The Supreme Court held that justification to conduct a warrantless search of a car stopped on the road does not vanish once the car has been immobilized. The Court reasoned that where police officers, after stopping a car, were justified in conducting an inventory search of the car's glove compartment, such discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle and to conduct a search thereof, even though both the car and its occupants were already in custody. Michigan v. Thomas, 457

U.S. 596, 102 S. Ct. 3079 (1982), 19 CLB 71.

U.S. Supreme Court After defendant was convicted in the district court of possession of narcotics with intent to distribute, the Court of Appeals for the D.C. Circuit reversed, holding that while the officers had probable cause to stop and search the car and its trunk without a warrant, they should not have opened either the paper bag or the leather pouch found in the trunk without first obtaining a warrant.

Held, reversed and remanded. The Supreme Court held that police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant. The Supreme Court reasoned that since a magistrate may authorize a search of every part of the vehicle and its contents, including all containers and packages that may conceal the object of the search, a warrantless search based upon probable cause may be just as extensive. The Court further found that since a search is not defined by the nature of the container in which the contraband is secreted, but by the object of the search and the places in which there is probable cause to believe it may be found, a search for narcotics may properly include luggage and other containers that may contain such contraband. United States v. Ross, 102 S. Ct. 2157 (1982), 19 CLB 485.

Arizona Defendant, convicted of theft of a motor vehicle, argued on appeal that his Fourth Amendment rights against unreasonable search and seizure had been violated when his vehicle was stopped for investigation by a police officer. At a pretrial hearing, it was established that defendant, a young Mexican-American male, was stopped while driving a Ford pick-up truck south toward Mexico. The arresting officer acknowledged that defendant had not been operating the vehicle improperly; rather, he had been stopped because the officer was "under the impression" from conversation with others in local law enforcement that numerous similar vehicles had been stolen and transported to Mexico by young Mexican-American males.

Held, conviction reversed and case remanded. The Arizona Supreme Court stated that the facts sufficient to justify an investigating stop vary from case to case but must "raise a justifiable suspicion that the particular individual to be detained is involved in criminal activity." While investigatory stops have been justified because a driver and vehicle fit a particular statistical "profile," noted the court, the information relied on by the officer in this case fell far short of such a formal profile. State v. Graciano, 653 P.2d 683 (1982), 19 CLB 485.

Maine Defendant, charged with the possession and distribution of marijuana, was granted a pretrial motion to suppress from evidence a brown paper bag filled with marijuana, which police officers found while conducting a warrantless search of defendant's automobile. The state appealed, contending that the search was permissible under the "automobile exception" to the Fourth Amendment of the U.S. Constitution. The search was prompted by a telephone call from an informant in which he reported that defendant would procure marijuana the next morning and informed the police of defendant's

whereabouts and what route he would take to the site of procurement. The same informant had provided the police with reliable information on at least four occasions. The next morning, police officers followed defendant, detained him, and began a search of his car without a warrant and without defendant's consent. The bag in question was discovered and seized. The trial court granted the suppression motion, and the supreme judicial court affirmed. The U.S. Supreme Court granted the state's petition for certiorari, vacated the trial court's judgment, and remanded to the supreme judicial court.

Held, the trial court judgment was reversed. The search was permissible because exigent circumstances prevented the police from timely obtaining a search warrant. The police were never in a position where they could predict with a reasonable degree of certainty when they would have probable cause to obtain a warrant. Until defendant actually arrived at the site where he was to procure marijuana and commenced evasive driving behavior, which was only minutes before the search, probable cause was not self-evident. Thus, the search was validated by the "automobile exception." State v. Patten, 457 A.2d 806 (1983).

Utah Defendant was charged, inter alia, with possession of contraband. He was arrested after a search uncovered marijuana in the trunk of a rented car driven by defendant. The arresting police officer initially became suspicious of defendant when he (the officer) observed defendant's car pulled about 150 feet off of a highway. After the officer observed defendant's car had pulled back on to the highway, the officer followed it and observed the vehicle weaving from side to side. The officer thereupon pulled defendant's vehicle over. When the officer first approached the car, he smelled marijuana coming from its interior. When a backup arrived, the first officer searched the interior of the car, where he found: (1) a loaded pistol; (2) a substance that he believed to be cocaine; and (3) cocaine paraphernalia. The officer did not find any marijuana in the passenger compartment. After seizing the items in defendant's vehicle, the first officer charged defendant with possession of a loaded firearm in a vehicle and illegal possession of a controlled substance. The officers then arranged for defendant's car to be towed to a place where a written inventory of its contents could be made. Before taking inventory, the officers considered obtaining a search warrant for the car, but concluded that they would be unable to obtain one because the county attorney and both justices of the peace were out of town. The officers then decided to conduct a warrantless inventory search. They opened the car trunk, where they found two large, plastic garbage bags. They opened the bags, where they found thirty-three pounds of marijuana. Defendant moved to suppress the introduction of the marijuana as evidence, on the ground that the warrantless search of the car trunk constituted an unreasonable search and seizure, because the inventory search was conducted as a pretext for an investigatory search. The trial court granted defendant's motion to suppress, and the state appealed.

Held, reversed and remanded. The Utah Supreme Court ruled that the inventory search of the garbage bags found in the locked trunk of defendant's lawfully impounded car did

not violate his Fourth Amendment rights against unreasonable searches and seizures. The facts of the case, including the discovery of other contraband in the passenger compartment of defendant's car, gave the arresting officer probable cause to believe that additional contraband might be concealed in the vehicle. Defendant was driving a rented car, air fresheners were found in the vehicle, along with a loaded gun, cocaine, and cocaine paraphernalia, and defendant had told the officer that marijuana was probably located in the car. Defendant conceded that there was probable cause to search his car when he was arrested, but he argued that the search could not be conducted without a warrant once the vehicle was impounded. The court rejected that argument, citing Florida v. Meyers, 466 U.S. 380, 104 S. Ct. 1852 (1984) and Michigan v. Thomas, 458 U.S. 259, 102 S. Ct. 3079 (1982) as controlling and dispositive of defendant's argument. State v. Earl, 716 P.2d 803 (1986).

§ 58.35 —Airplane passengers

U.S. Supreme Court Respondent's behavior aroused the suspicion of Drug Enforcement Administration (DEA) agents at Miami International Airport where respondent purchased a ticket to La Guardia Airport. The agents approached respondent and requested and received identification. He consented to a search of the two suitcases he had checked, but because his flight was about to depart the officers decided not to search the luggage. The officers then found some discrepancies in the address tags on the luggage and called Drug Enforcement Administration (DEA) authorities in New York to relay this information. Upon respondent's arrival at La Guardia Airport, two DEA agents approached him, said that they believed he might be carrying narcotics, and asked for and received identification. When respondent refused to consent to a search of his luggage, one of the agents told him that they were going to take it to a federal judge to obtain a search warrant. The agents then took the luggage to Kennedy Airport where it was subjected to a "sniff test" by a trained narcotics detection dog which reacted positively to one of the suitcases. At this point, ninety minutes had elapsed since the seizure of the luggage. Thereafter, the agents obtained a search warrant for that suitcase and upon opening it discovered cocaine. Respondent was indicted for possession of cocaine with intent to distribute, and the District Court denied his motion to suppress the contents of the suitcase. He pleaded guilty to the charge and was convicted, but reserved the right to appeal the denial of his motion to suppress. The Court of Appeals reversed, holding that the prolonged seizure of respondent's luggage exceeded the limits of the type of investigative stop permitted by Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889, and hence amounted to a seizure without probable cause in violation of the Fourth Amendment.

Held, affirmed. While the investigative detention of a traveler's luggage is permissible on less-than-probable cause, the ninety-minute detention of respondent's luggage was unreasonable. The Court noted that the violation of Fourth Amendment rights was exacerbated by the agent's failure to tell respondent where they were taking the luggage, how long they would keep it, and how they would return it to him. United States v. Place, 462 U.S. 696, 103 S. Ct. 2637 (1983), 20 CLB 61.

Court of Appeals, 6th Cir. After defendant was convicted in the district court of possession with intent to distribute marijuana, he appealed on the ground that he had been improperly detained at the airport.

Held, conviction and sentence vacated and case remanded. The Sixth Circuit found that defendant had been improperly "seized" at the airport when he was confronted by a DEA agent who asked him clearly incriminating questions, as well as for his license and ticket. The court also relied on the fact that defendant was not told that he was free to leave. In so holding, the court concluded that the facts that defendant checked an empty suitcase when flying from Detroit to New York, and his suitcase appeared to be weighted upon his return, and that defendant exhibited elements of the drug courier profile did not provide a reasonable basis for seizure of his person at the airport. United States v. Saperstein, 723 F.2d 1221 (1983).

Court of Appeals, 9th Cir. After defendant was convicted in the district court of two counts of possessing narcotics with intent to distribute, he appealed on the grounds that the officers lacked reasonable suspicion to seize his bags.

Held, affirmed. The Ninth Circuit stated that since defendant's admission about smoking marijuana bore no reasonable relationship to the question whether he was engaged in the transportation of narcotics, it could not be used as a basis for reasonable suspicion to seize his pack and subject it to a sniff test by dogs for drugs. However, the court found that the officers did have reasonable suspicion that the pack contained drugs where defendant appeared nervous and furtive both when disembarking the plane and walking through the airport. United States v. Erwin, 803 F.2d 1505 (1986), 23 CLB 288.

§ 58.40 —Border searches

U.S. Supreme Court Defendant was asked by police officers at Miami International Airport if he would step aside and talk with them, and he agreed. Eventually, after he agreed to the search of his luggage, three pounds of cocaine were found. The seized cocaine was suppressed by the Florida Trial Court, the Florida Appellate Court affirmed, and the Supreme Court granted certiorari.

Held, judgment reversed and remanded for further proceedings. The Supreme Court concluded that the initial contact between the officers and defendant implicated no Fourth Amendment interest, and even assuming that there was a "seizure" of the contents of his luggage, such a seizure was justified by "articulable suspicion." The Court noted that defendant and his confederates had spoken "furtively" to one another and engaged in "strange movements" in an attempt to evade the officers. Florida v. Rodriguez, 105 S. Ct. 308 (1984), 21 CLB 254.

Court of Appeals, 2d Cir. Defendant was convicted of having made false material statements to the U.S. Customs Service in violation of 18 U.S.C. § 1001 (1976). On appeal, he argued that evidence of U.S. currency found in his boot by customs inspectors should have been suppressed and that a dismissal should have been granted under the "exculpatory no" doctrine. Defendant, who sought entry into the United States, told a customs inspector that he

had been in Canada for several hours and had a case of beer to declare. A second inspector asked defendant what he had acquired from Canada, and had him fill out Form 6059-B, a customs declaration form. He answered "no" to question 11, an inquiry as to whether a traveller is carrying over $5,000 in currency. The inspector then searched the car and found a marijuana cigarette. While conducting a pocket search, the inspector discovered that defendant had purchased his coat while in Canada. After conducting a pat-down search, the inspector asked defendant to remove his boots. A plastic bag containing $19,000 in U.S. currency fell out. Defendant was subsequently arrested and subjected to a strip search.

Held, affirmed. The motion to suppress was properly denied. Defendant's claim that the money was found as a result of a strip search, which was illegal because it was not prompted by reasonable suspicion, was erroneous. The search of defendant's boots was not a strip search, but a minimal invasion of privacy. Therefore, no reasonable suspicion was required. Even if required, it was present. The inspector had reason to suspect defendant, who tried to conceal the existence of the marijuana cigarette and the purchase of his coat in Canada. Denial of defendant's motion for dismissal under the "exculpatory no" doctrine was also properly denied. Under that doctrine, a negative response cannot serve as proof of the requisite knowledge and willfulness required to convict under 18 U.S.C. § 1001, absent affirmative steps taken by the government to make reporting requirements of the law known. Evidence independent of defendant's answer to question 11 of Form 6059-B supported a finding that defendant knowingly and willfully violated Section 1001. Moreover, the form itself contained a clear statement that if one is entering the country with over $5,000, he must indicate this on the form and fill out a report. The court deemed this to be sufficient notice of the reporting requirements. United States v. Grotke, 702 F.2d 49 (1983).

Court of Appeals, 11th Cir. During a border search, an X ray revealed that defendant had swallowed 135 cocaine-filled condoms. She was convicted of importation and possession with intent to distribute under 21 U.S.C.A. §§ 952(a) and 841(a)(1). Defendant appealed, the sole issue being whether the discovery that her body contained contraband was the result of an unconstitutional search.

Held, affirmed. Although the Supreme Court in United States v. Ramsey, 431 U.S. 606, 618, n.13, 97 S. Ct. 1972, n.13 (1979), has explicitly reserved the question of "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out," the Eleventh Circuit applied the reasonableness requirement by adopting a flexible test that adjusts the strength of suspicion required for a particular search to the intrusiveness of that search. In measuring the intrusiveness of any search, including an X ray, the focus should be on the indignity of the search; it is not simply a question of whether one type of search is capable of revealing more evidence than another. In evaluating the indignity of X-ray searches, the court noted that X rays do not contain physical contact and do not expose intimate body parts. Furthermore, hospitals generally will not perform an

X-ray procedure without a person's consent. X rays are therefore a relatively unintrusive search. The X ray in this case was acceptably conducted to meet these criteria. As for the level of suspicion required, the story that defendant told to the customs inspector was not credible. She obviously was not the businesswoman that she claimed to be. The customs inspectors' suspicion that defendant was carrying cocaine internally was reasonable under the law, and this suspicion rendered the nonforced X ray performed by a physician in a hospital to be a reasonable search. United States v. Vega-Barvo, 729 F.2d 1341, cert. denied, 105 S. Ct. 597 (1984).

§ 58.43 —Inventory searches (New)

U.S. Supreme Court After a Colorado police officer arrested defendant for drunk driving, defendant's van was searched to inventory its contents. During the search, a backpack was found to contain controlled substances and paraphernalia, and a large amount of cash. Prior to trial, the evidence was suppressed, and the Colorado Supreme Court affirmed.

Held, reversed. The Fourth Amendment does not prohibit the state from proving the criminal charges with the evidence discovered during an inventory search of the van. The Court thus found that the case was controlled by the principles regarding inventory searches of automobiles rather than those governing searches of closed trunks and suitcases conducted solely for the purpose of investigating criminal conduct. There was no showing that the police were doing anything more than following standardized caretaking procedures. Colorado v. Bertine, 107 S. Ct. 738 (1987), 23 CLB 286.

Tennessee Defendant, convicted of possessing controlled substances, argued on appeal that police officers exceeded the permissible scope of an automobile inventory search by opening closed containers found in the trunk after the vehicle was impounded. While operating the auto, defendant was stopped for speeding and reckless driving. The officers, observing drugs and drug paraphernalia in the passenger compartment, arrested defendant and impounded the auto. In the course of inventorying its contents, the officers found a closed suitcase and briefcase in the trunk and, opening same, discovered them to contain heroin, LSD, cocaine and marijuana.

They also found an open grocery bag containing marijuana. The intermediate appellate court ruled that the drugs should have been suppressed as it was not lawful, absent exigent circumstances, to open the suitcase and briefcase.

Held, reversed and conviction reinstated. The state Supreme Court recognized that there is no consensus among the jurisdictions on whether inventorying the contents of a closed container found in a lawfully impounded car is reasonable or unreasonable absent exigent circumstances.

However, it noted that an inventory search is not based on probable cause or exigent circumstances, but that: "[T]he purpose of inventorying the contents of a vehicle, pursuant to a valid impoundment, is not to search for incriminating evidence but to protect the owner's property while it remains in police custody, and also, to protect the police against claims of lost or stolen property." Finding that the inventory search in this case had a legitimate purpose and was not a pretext to obtain incriminating evidence

against defendant, the court concluded that no intrusion on defendant's rights had occurred. State v. Glenn, 649 S.W.2d 584 (1983), 20 CLB 66.

Texas Defendant was convicted for possession of a controlled substance, fined, and sentenced to 101 days in jail. On appeal defendant contended that the trial court erred in overruling his motion to suppress the fruits of a search of the glove compartment of his automobile. Defendant maintained that the search of his locked glove compartment was not justified under the guise of an "inventory search," and thus violated his constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment.

Held, conviction affirmed. The majority of the Court of Criminal Appeals en banc concluded that the facts in the instant case were much like those in South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092 (1976), in which the Supreme Court said that the Fourth Amendment does not forbid police to conduct routine inventory searches, pursuant to standard procedures, of cars lawfully in their possession. The only significant difference in the facts in the instant case, the court observed, and those in *Opperman* were that defendant's car in *Opperman* was locked and the glove compartment was unlocked; whereas in the instant case the car was unlocked and the glove compartment was locked. The court did not find this difference to have any great significance insofar as the reasonableness of the inventory search was concerned. The important similarity between the facts in *Opperman* and the instant case was that the police had ready and free access to the automobile in both cases. The majority therefore held that the search conducted by the police was a lawful inventory search. Guillett v. State, 677 S.W.2d 46 (Crim. App. 1984), 21 CLB 270.

§ 58.45 —Official governmental inspections

U.S. Supreme Court Pursuant to an Illinois statute requiring licensed motor-vehicle sellers to maintain required records, a police detective entered defendant's wrecking yard and asked to see records of vehicle purchases. When told the records could not be located for five purchases. the detective received permission to look at the cars in the yard. The detective determined that three of the cars were stolen, and he seized the cars and arrested the defendant. The state trial court granted defendant's motion to suppress, agreeing with a federal court decision issued the day after the search that the state statute was unconstitutional. The Illinois Supreme Court affirmed.

Held, reversed and remanded. The U.S. Supreme Court held that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police in good faith who were acting in objectively reasonable reliance on a statute authorizing warrantless administrative searches that was subsequently found to violate the Fourth Amendment. The application of the exclusionary rule would have little deterrent effect on future police misconduct. Illinois v. Krull, 107 S. Ct. 1160 (1987), 23 CLB 484.

U.S. Supreme Court Pursuant to a New York statute authorizing warrantless inspection of automobile junkyards, police officers entered defendant's junkyard and discovered stolen

vehicles and parts. The state court denied defendant's motion to suppress the evidence. The appellate division affirmed, but the New York Court of Appeals reversed.

Held, reversed and remanded. The U.S. Supreme Court held that searches made pursuant to the New York statute fell within the exception to the warrant requirements for administrative inspections of closely regulated businesses. New York v. Burger, 107 S. Ct. 2636 (1987).

U.S. Supreme Court Officials of a state hospital received allegations regarding improprieties by a doctor of the hospital, particularly relating to his acquisition of a computer and sexual harassment of female hospital employees. While he was on leave pending investigation of the charges, hospital officials searched his office and seized personal items and file cabinets that were used in administrative proceedings resulting in his discharge. The doctor filed a Section 1983 claim against the hospital official, claiming the search of his office violated the Fourth Amendment. The district court granted a motion for summary judgment, concluding that the search was proper because there was a need to secure state property. The Court of Appeals reversed in part, granting partial summary judgment for the doctor.

Held, reversed. The Supreme Court stated that both lower courts were in error in granting summary judgment since there was a factual dispute about the justification for the search, and the record was inadequate for a determination of the reasonableness of the search and seizure. O'Connor v. Ortega, 107 S. Ct. 1492 (1987).

U.S. Supreme Court Pursuant to an Illinois statute requiring licensed motor vehicle sellers to maintain specified records, a police detective entered defendant's wrecking yard and asked to see records of vehicle purchases. When told the records could not be located for five purchases, he asked for and received permission to look at the cars in the yard. The detective determined that three of the cars were stolen and he seized the cars and arrested defendant. The state trial court granted defendant's motion to suppress, agreeing with a federal court decision, issued the day after the search, that the state statute was unconstitutional and the state supreme court affirmed.

Held, reversed and remanded. The Fourth Amendment exclusionary rule does not apply to evidence obtained by police in good faith, acting in objectively reasonable reliance upon a statute authorizing warrantless administrative searches subsequently found to violate the Fourth Amendment. The Court reasoned that the application of the exclusionary rule would have little deterrent effect of future police misconduct. Illinois v. Krull, 107 S. Ct. 1160 (1987).

U.S. Supreme Court Customs officers, while patrolling a ship channel which connects the Gulf of Mexico with Lake Charles, La., a Customs Port of Entry, sighted an anchored, forty-foot sailboat. The wake of a passing vessel caused the sailboat to rock violently, and when one of the two respondents, who were aboard the vessel, shrugged his shoulders in an unresponsive manner when asked if the sailboat and crew were all right, one of the customs officers, accompanied by a Louisiana State Police officer, boarded the sailboat and asked to see the vessel's

documentation. While examining a document, the customs officer smelled what he thought to be burning marijuana and, looking through an open hatch, saw burlap-wrapped bales that proved to be marijuana. Respondents were then arrested and given *Miranda* warnings, and a subsequent search revealed more marijuana stored throughout the vessel. Upon trial in Federal District Court, respondents were convicted of various federal drug offenses, but the Court of Appeals reversed, holding that the officers' boarding of the sailboat violated the Fourth Amendment because the boarding occurred in the absence of "a reasonable suspicion of a law violation."

Held, reversed. Customs officials, acting pursuant to a statute authorizing them to board any vessel at any time and place in the United States and to examine the vessel's manifest even absent suspicion of wrongdoing, did not violate the Fourth Amendment by boarding and inspecting the vessel located in waters providing ready access to open seas. United States v. Villamonte-Marquez, 462 U.S. 579, 103 S. Ct. 2573 (1983), 20 CLB 60.

Montana During a warrantless administration search of packages being sent from Hawaii to the mainland pursuant to the Federal Plant Pests Act, a federal agricultural inspector found what proved to be hashish. The Hawaiian police were alerted, and they in turn contacted the police in the addressee's home town of Bozeman, Montana, and arranged to send the package to them. The Bozeman police arranged for UPS to deliver the package, witnessed its delivery to defendant's residence, and obtained a warrant to search defendant's house. Defendant was arrested, tried, and found guilty of possession of dangerous drugs with intent to sell. Defense appealed on the grounds that the warrantless search and seizure of the package was unconstitutional.

Held, conviction affirmed. The Supreme Court of Montana stated that a government official is entitled to make a warrantless search of a package where there is a significant public protection involved, the intrusion is minimal, the goal is not discovery of a crime, and the purpose would be thwarted or rendered impracticable by requiring a search warrant. Since all of these elements were present, the search was a reasonable administrative search. Further, once the hashish was uncovered, the federal agricultural agent had the right to seize the package under the "plain view" rule, which allows warrantless seizure of evidence of crime inadvertently discovered by police in the course of a valid search. State v. Kelly, 668 P.2d 1032 (1983).

§ 58.50 Search by private person

Montana Defendant, convicted of possession of dangerous drugs with intent to sell, argued on appeal that his motion to suppress the physical evidence was erroneously denied. The facts, established at a hearing on the motion, were uncontroverted. Defendant had rented a storage room from a warehouse-type facility, making individual units available to the public. Just prior to closing on the day in question, defendant arrived at the facility and went to his unit. Shortly thereafter, the facility's manager, intending to close, went to defendant's unit to determine how long defendant would be on the premises. The manager opened the door to defendant's unit when there was no response to her knock and calls; defendant was seated

on the floor, pointing a gun at the door, in front of two suitcases. Defendant left immediately. The manager consulted her superiors, who told her to determine the contents of the suitcases. She then entered defendant's unit by removing the door hinges, opened the suitcases, and discovered numerous bottles containing pills. Police were advised and obtained a search warrant; the ensuing search resulted in the seizure of over 100 bottles of pills and defendant was apprehended, charged, and convicted.

Held, conviction reversed. The Montana Supreme Court, adhering to its position that as a matter of state constitutional law, "evidence obtained by a private citizen in violation of another's constitutional rights is subject to the exclusionary rule and may not be admitted into evidence in a criminal trial in this state." Here the search warrant was tainted by evidence unlawfully obtained by the manager; accordingly, the fruits of the search were subject to the exclusionary rule, said the court, expressing its view that: "To sanction the admission of the evidence gained in this unlawful manner by allowing its presentation in a criminal trial makes the courts of the state a party to violations of the constitutional rights of the defendant and runs afoul of any viable notion of judicial integrity . . . ." State v .Van Haele, 649 P.2d 1311 (1982), 19 CLB 268.

§ 58.53 Search of probationers (New)

U.S. Supreme Court Probationer was convicted in Wisconsin state court of possession of a firearm by a felon. He appealed on the ground that the search of his home was illegal. The court of appeals affirmed.

Held, affirmed. The U.S. Supreme Court held that the search of probationer's home, pursuant to a Wisconsin regulation permitting search of a probationer's home without a warrant as long as there are reasonable grounds to believe the presence of contraband, satisfied Fourth Amendment requirements. The Court noted that the supervision of probationers was a special need of the state that may have justified departure from the usual warrant and probable cause requirements. Griffin v. Wisconsin, 107 S. Ct. 3164 (1987).

California Defendant was convicted of possession of cocaine for sale and possession of a concealable firearm. A year earlier, he had been convicted of possessing concentrated cannabis and granted probation on the condition that he agree to "submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant." Defendant was still on probation when the police conducted the search which led to the discovery of cocaine, firearms, and a large sum of cash. Trial court reversed the conviction, finding no "reasonable cause" for the police to search defendant. The court stated that the conditions of probation waived defendant's right to be free from warrantless searches but not from "unreasonable" searches. The state appealed.

Held, reversed. A search conducted pursuant to a valid consent does not violate the Fourth Amendment unless the search exceeds the scope of the consent. In the case of parolees, a warrantless search pursuant to the terms of parole is unreasonable in the absence of reasonable suspicion that the parolee is engaged in criminal conduct or other violations of his parole. The probationer, unlike the parolee,

has no such rights; a probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain. Thus, the court determined that a defendant, who in order to obtain probation specifically agrees to submit to search with or without a warrant at any time, has waived not only the right to demand a warrant but also any other claims to privacy he might have had, including protection from searches without "reasonable cause." However, a waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or other arbitrary and capricious reasons. People v. Bravo, 738 P.2d 336 (1987).

§ 58.55 Search of parolees

Court of Appeals, 2d Cir. After defendant was convicted in the district court of illegal possession of U.S. Treasury checks, he appealed on the ground that evidence had been improperly seized from his person and his office.

Held, affirmed. A parolee has a diminished expectation of privacy for his person and clothing and, as a result, upon discovery by the officer of defendant's previous drug conviction, his request that defendant roll up his sleeves and his examination of defendant's person were not unreasonable. The court noted that a parolee possesses fewer constitutional rights than ordinary citizens, and a parolee's diminished expectation of privacy is further diminished while he is in his parole officer's office. United States v. Thomas, 729 F.2d 120 (1984), 20 CLB 466.

California Defendant was convicted and sentenced to death for robbery with use of a firearm and infliction of a great bodily injury, and being an ex-felon in possession of a firearm. The incident involved the robbery of a 7-Eleven store and the killing of the store clerk. The evening after the killing, investigating officers found a 7-Eleven paper bag containing two $5 bills during a warrantless search of defendant's apartment. Prior to trial, defendant moved to suppress the paper bag. The trial court denied defendant's motion, ruling that the search was valid as an incident to defendant's status as a parolee. On appeal, defendant argued that the trial court erred in ruling that the evidence was admissible.

Held, affirmed as to reasonableness of the search. The court upheld the warrantless search on the ground that the defendant's parole agent had authorized the search. The court indicated that the search was a valid incident of defendant's felony parole status. Unlike probationers, the court added, parolees have served time in prison for their crimes. They have been imprisoned because courts have found them to pose a greater risk to society. This fact, the court stated, justifies the inclusion of a warrantless search condition among the terms on which felony parole is granted. Therefore, warrantless searches of parolees are not per se unreasonable if conducted for a purpose properly related to parole supervision. People v. Burgener, 714 P.2d 1251 (1986).

§ 58.60 Search of prisoners

"Corrections Law Developments: Search and Seizure of Prison Cells—The Constitution Takes a Holiday," by Fred Cohen, 21 CLB 171, 237 (1985).

§ 58.61 Search of escaped convict (New)

Court of Appeals, 2d Cir. Defendant, an escaped felon, had been charged with unlawful possession of firearms and had obtained an order by the trial court suppressing guns and other items found in the car he had been operating. The government appealed to vacate the order, claiming that the district court erred in holding that the initial stopping of defendant's car and its subsequent search and seizure were unreasonable and thus violated the Fourth Amendment. The threshold question was whether defendant, as an escaped felon, had a legitimate expectation of privacy in the automobile that was violated by the search.

Held, order vacated and case remanded. Defendant had no legitimate expectation of privacy in the passenger compartment or trunk of his car. Therefore, he could not successfully challenge the conduct of the police officers. The test to ascertain whether a legitimate expectation of privacy exists in a given situation is: "[F]irst that a person have exhibited an acutal (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." Katz v. United States, 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring). Although defendant exhibited an expectation of privacy by locking weapons in the automobile trunk, his expectation of privacy in the automobile was not one that society is prepared to recognize as legitimate. His legitimate privacy expectations as an inmate had been severely curtailed. Since he would not have had a legitimate expectation of privacy against the government's intrusion while incarcerated, the court would not recognize such an expectation of privacy after his escape. There were security reasons for the curtailment of his privacy in prison. After his escape, it was the outside community that needed protection from him, and that need argued against according him any greater Fourth Amendment rights because of his criminal act of escape. United States v. Roy, 734 F.2d 108 (1984), cert. denied, 106 S. Ct. 1520 (1986).

§ 58.62 Search for illegal aliens (New)

U.S. Supreme Court After warrants were issued showing probable cause that illegal aliens were employed at a garment factory, Immigration (INS) agents conducted factory "surveys" of the work force in search of illegal aliens. Certain employees and their union filed an action alleging that the factory surveys violated their Fourth Amendment rights. The district court granted summary judgment for the INS, but the court of appeals reversed, holding that the surveys constituted a seizure of the entire work force.

Held, reversed. The factory surveys did not result in the seizure of the entire work force, and the individual questioning of the employees by INS agents concerning their citizenship did not amount to a detention or seizure under the Fourth Amendment. The Court observed that interrogation relating to one's identity by the police does not, by itself, constitute a Fourth Amendment seizure unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded. INS v. Delgado, 466 U.S. 210, 104 S. Ct. 1758 (1984), 21 CLB 76.

§ 58.65 What constitutes an arrest

Colorado Defendant was charged with burglary. The state appealed the trial court's ruling suppressing a statement defendant made during a station house interrogation and suppressing stolen property subsequently recovered by the police as a result of defendant's statement. The trial court believed such evidence to be the fruits of defendant's warrantless arrest at his home. The state argued that no arrest had occurred before the suppressed statement had been made, and that the trial court erred in its determination of when the arrest took place by basing it on an arresting officer's statement that he would have chased defendant had he fled.

Held, reversed and remanded. The trial court improperly used a subjective standard based upon the officer's belief, rather than an objective standard based upon the belief of a reasonable person in defendant's condition, in its determination of when the arrest occurred. Pertinent factors would ininclude time, place, and purpose of the encounter, words used by the officer, his tone of voice and general demeanor, his statements and responses to others present during the encounter, and defendant's responses to any directions given to him by the officer. If an arrest did occur before defendant made the statement, then it and the stolen property seized as a result thereof were to be suppressed. If defendant voluntarily consented to accompany the officer to the police station for questioning, and thereby waved his *Miranda* rights, the evidence was admissible. People v. Pancoast, 659 P.2d 1348 (1982).

Illinois State appealed court's decision to suppress police determination of defendant's identity. The Illinois state police observed defendant speeding towards the state line into Iowa and pursued. About two blocks into Iowa, defendant stopped, exited his car, and approached the police car. The police did not ask for his license, but asked him to return to Illinois to receive his ticket. One officer knew the defendant and could identify him. Defendant claimed the identification should be suppressed because the police were not in their jurisdiction, and, therefore, the stop was illegal.

Held, reversed and remanded. The court said that the officers did not stop defendant. The court noted the police could not stop defendant because they were simply private citizens once they entered Iowa, but defendant stopped and left his car of his own free will. The officers did not take his license, and defendant was only identified because one officer recognized him. The court could not expect any private citizen who is a police officer to turn his head to avoid recognizing another. The court determined that there is no violation of the Fourth Amendment's prohibition against illegal search when one private citizen recognizes another. People v. Fenton, 532 N.E.2d 228 (1988).

§ 58.70 Stop and frisk

"Stop and Frisk: The Triumph of Law Enforcement Over Private Rights," by Matthew Lippman, 24 CLB 24 (1988).

Colorado Defendants were charged with first-degree criminal trespass of a motor vehicle to steal something of value. After receiving a call concerning a robbery involving a blue van, an officer drove to the crime's location, where he noticed a blue automobile pulling away from the curb. Believing

that this might be the reported vehicle, he stopped it. When defendant could not give a satisfactory explanation of his presence at the location, the officer conducted a "pat down" search, and feeling what he believed were cassette tapes in defendant's rear pocket, removed one item to verify that it was indeed a tape. A second officer arrived and observed second defendant place some object under the front seat. The officer, believing that defendant was possibly hiding a weapon, asked defendant to leave the car and made a protective search. He observed some loose wires protruding from under the seat on the passenger side, entered the automobile, and removed an AM-FM stereo unit from under the front seat. The first officer joined the second and found wire cutters, tools, and a metal plate for the stereo, and moments later discovered the pickup from which the stereo had been removed. The district court granted a motion by defendants to suppress the evidence seized by the officers, and the state appealed. At issue was whether there was a violation of the Fourth Amendment forbidding illegal search and seizure.

Held, reversed. The court concluded that the officers were constitutionally justified in making a protective search of the automobile. Owing to the observation of the second officer and the facts of the case, entry into the automobile for the purpose of conducting a protective search for weapons was constitutionally justified, as was the ensuing protective search. For a protective search to be effective, the officers must carefully examine everything to verify that no weapon has been secreted away. The court held that the discovery of the stereo and tools during the protective search provided the officers with probable cause to believe that these objects were the fruits and instrumentalities of a crime and thus were subject to seizure under the plain view doctrine. Probable cause for a "plain view seizure" requires that the facts available to the officers should warrant a person of reasonable caution in the belief that certain items are contraband, fruits, or instrumentalities of a crime, or evidence of criminal activity. The court determined that the officer had probable cause to believe the objects discovered during the protective search were associated with criminal activity. Finally, the court underscored the principle that probable cause to believe that an object is incriminating must be determined on the basis of the cumulative state of facts known to the officers when the object in question is discovered. The seizure of these items, therefore, was constitutionally justified under the plain view doctrine. People v. Melogosa, 753 P.2d 221 (1988).

Louisiana Defendant, convicted of possessing LSD and marijuana, argued on appeal that his motion to suppress the physical evidence seized at the time of his arrest was erroneously denied. At a hearing on defendant's motion, police officers testified that they observed defendant hand a clear plastic bag containing brown vegetable matter to a companion. Believing the bag to contain marijuana, the officers identified themselves, whereupon defendant's companion threw the bag over his shoulder; the bag was retrieved and marijuana found inside. Defendant and his companion were arrested and, during the ensuing search of defendant's person, LSD was recovered.

Held, conviction affirmed. The Supreme Court of Louisiana found that the officer's observations may not have

amounted to probable cause sufficient to justify an arrest but were enough to stop and question defendant and his companion. As there was no "unlawful intrusion into defendant's right of freedom from governmental interference," it said, the property abandoned by defendant's companion could be seized lawfully. Only where police do not have the right to make an investigatory stop would it be unlawful to seize property abandoned as a result of such a stop, stated the Court. Finding that the initial stop and the arrest after recovery of the contraband were both lawful, the Court concluded that the subsequent incidental search of defendant's person was lawful as well. State v. Andrishok, 434 So. 2d 389 (1983), CLB 176.

Virginia Stolen property was found on defendant's person when a van in which he was a passenger was stopped for reckless driving and for attempting to elude police. The three occupants of the van were detained by the first officer on the scene, who took their names. A second police officer arrived shortly in answer to the first officer's call for assistance and helped the first officer to pat down the three men. In removing a rectangular brass box from defendant's shirt pocket, police also inadvertently removed a credit card and a rosary.

The credit card was not in the defendant's name, and the rosary also proved to be stolen. Stolen jewelry was also found on defendant's person when he was searched either just before or just after he was arrested for possession of the stolen credit card—police testimony was unclear on this point. At his robbery trial, defendant moved to have the credit card, rosary, and jewelry suppressed, contending that they were the products of an illegal detention, search, and seizure. The motion was denied, and he appealed his conviction.

Held, conviction affirmed. The court stated that under Virginia law, a police officer may detain a person whom he reasonably suspects of involvement in a felony *or* of possession of a concealed weapon and may search the suspect for a weapon if he fears that the suspect intends him bodily harm. The search met this standard, as well as the standard set by the Supreme Court decision in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), which allows a police officer who suspects "criminal activity may be afoot" to search a suspect's outer clothing for a concealed weapon that "might be used to assault him." The first police officer suspected that a vehicle driven so recklessly as the van might be fleeing the scene of a crime. The fact that he radioed for assistance showed that he did in fact have some concern for his own safety, based on the totality of circumstances. Although defendant did nothing to indicate he possessed a concealed weapon, the fact that the first officer to arrive had been confronting three men alone in an unlit area made it reasonable for him to ask the second officer on the scene to pat them down. It was also reasonable for police to remove the brass box when patting down defendant revealed a hard object under his jacket that could have been a weapon; thus the inadvertently disclosed credit card and rosary were admissible as evidence. Once the stolen credit card was revealed, police had probable cause to arrest defendant; thus the search of defendant's person in which the jewelry was revealed was permissible as a search incident to arrest, whether it occurred immediately before defendant's arrest or immedi-

ately after. Lansdown v. Commonwealth, 308 S.E.2d 106 (1983), cert. denied, 465 U.S. 1104, 104 S. Ct. 1604 (1984).

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§ 58.75 Search warrant

"[The] Fourth Amendment in Action: An Empirical View of the Search Warrant Process," by Paul Sutton, 22 CLB 405 (1986).

"[A] Lawyer's Guide to Search Warrants and the New Federalism," by John A. McLaren, 22 CLB 5 (1986).

"Enforcement Workshop: The Good-Faith Warrant Cases—What Price Judge-Shopping?" by Candace McCoy, 21 CLB 53 (1985).

U.S. Supreme Court Relying on information from a confidential informant, officers of a municipal police department initiated a drug-trafficking investigation involving surveillance of defendants' activities. Based on an affidavit summarizing the observations of the police officers, one of them prepared an application for a warrant to search three residences and defendants' automobiles for a long list of items. The application was reviewed by several deputy district attorneys, and a facially valid search warrant was issued by a district court judge. Ensuing searches produced substantial quantities of drugs and other incriminating evidence. Defendants were indicted for federal drug offenses, and filed motions to suppress the evidence seized pursuant to the warrant. After an evidentiary hearing, the district court granted the motions in part, concluding that the affidavit was insufficient to establish probable cause. Although acknowledging that the officer who prepared the affidavit had acted in good faith, the court rejected the government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable, good-faith reliance on a search warrant. The Ninth Circuit affirmed. The government's petition for certiorari presented only the question "[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." Certiorari was granted.

Held, judgment reversed. The Fourth Amendment exclusionary rule can be modified somewhat by recognizing a good-faith exception. The court concluded that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. In so limiting the suppression remedy, the court left untouched the probable cause standard and the various requirements for a valid warrant. In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. The application for a warrant clearly was supported by much more than a "barebones" affidavit. The affidavit related the results of an extensive investigation, and provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable

cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate. United States v. Leon, 104 S. Ct. 3405 (1984), 21 CLB 77.

Court of Appeals, 5th Cir. Defendant was convicted of using a firearm during the commission of a felony; a predicate felony for the federal charge was possession with intent to distribute controlled substances. On appeal, defendant contended that the district court erred in failing to suppress evidence, including firearms and illegal drugs, obtained during the search. Acting on a tip that defendant was trafficking in drugs, a state narcotics agent prepared a search warrant affidavit for defendant's residence and submitted it to a county judge. After the judge signed the warrant, however, it was determined that defendant's house trailer was actually in the adjacent county. Consequently, the agent took the affidavit to a judge in the proper county and presented it to him. The judge appeared to read the affidavit and questioned the agent for about five minutes concerning the existence of probable cause. The judge then issued the warrant, and a search was conducted pursuant to it.

Held, conviction affirmed. The Fifth Circuit stated that the primary purpose of the exclusionary rule is to deter police misconduct; it then applied the good faith exception to the exclusionary rule as set forth in United States v. Leon, 104 S. Ct. 3405 (1984). In *Leon,* the Supreme Court held that suppression of evidence is unnecessary where law enforcement officers have reasonably relied on the validity of a warrant issued by a magistrate; hence, exclusion would not deter police from illegality. The court stressed that the deterrence rationale behind the exclusionary rule must be kept in mind; however, "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." United States v. Breckenridge, 782 F.2 1317 (1986), cert. denied, 107 S. Ct. 136 (1986).

Court of Appeals, 5th Cir. After defendant was convicted in the district court of possession of cocaine with intent to distribute, he appealed on the ground that three pounds of cocaine found in a safe in his garage had been improperly seized.

Held, conviction affirmed. The Fifth Circuit concluded that under Texas state law, the search of the garage, which was enclosed along with the house by a single fence, was within the scope of a warrant authorizing the search of premises described as "a certain building, house or place" of the defendant. The court noted that Texas state courts have held search warrants with similar language to include doghouses, garages, and other buildings as much as fifty feet from houses. United States v. Moore, 743 F.2d 254 (1984), 21 CLB 180.

Court of Appeals, 11th Cir. Defendant was convicted of operating a business through a pattern of racketeering activity, embezzlement of funds from an employee welfare benefit plan, mail fraud, and filing false income tax returns. An Internal Revenue agent went to defendant's offices under instructions from the IRS Strike Force to conduct a civil audit of defendant's books and records. Although the agent revealed that he was a Revenue Agent, he did

not disclose his association with the strike force. Information obtained from the audit was given to the Department of Justice Organized Crime Strike Force so that it could establish probable cause to conduct its own warranted investigation of the criminal charges. Defendant appealed the district court's denial of his motion to suppress evidence obtained through the search by the Justice Department. He asserted the following specific grounds of error: his consent to the IRS audit was ineffective because the Revenue Agent concealed his affiliation with the IRS Strike Force; the warrant did not contain a sufficiently particular description of the items to be seized; and the execution of the warrant was overbroad.

Held, conviction affirmed. The Revenue Agent's failure to disclose his strike force connections did not constitute an affirmative act of fraudulently misrepresenting the nature of the inquiry, and so did not render defendant's consent to the audit ineffective. The agent's disclosure that he was from the IRS was sufficient for Fourth Amendment purposes. All taxpayers, especially businessmen, are presumed to be aware that routine civil audits can lead to criminal proceedings if discrepancies are uncovered. The search warrant was sufficiently particular for Fourth Amendment purposes because it enabled the searching officers to reasonably identify the records they had authority to seize. The particularity requirement is a flexible one satisfied by a description of property as specific as the circumstances of an activity under investigation permit. Finally, the search itself did not violate the Fourth Amendment just because it was lengthy and extensive. The complexity of the activities under investigation justified a search of broad scope. United States v. Wuagneux, 683 F.2d 1343 (1982), cert. denied, 464 U.S. 814, 104 S. Ct. 69 (1983).

§ 58.80 —Sufficiency of underlying affidavit

"Illinois v. Gates: What It Did and What It Did Not Do," by Charles E. Moylan, Jr., 20 CLB 93 (1984).

U.S. Supreme Court After defendant was convicted in Massachusetts Superior Court of burglary, receiving stolen property, and related crimes, he appealed on the ground that evidence had been improperly admitted against him at trial. The Massachusetts Supreme Court reversed and remanded.

Held, reversed. Under Illinois v. Gates, 103 S. Ct. 2317 (1983), the probable cause requirement for a search warrant should be decided upon the totality of the circumstances made known to the magistrate. The Court thus found that the Massachusetts court had misinterpreted *Gates* as merely refining or qualifying the "two-pronged test" of *Aguilar* and *Spinelli,* when, in fact, that test had been entirely discarded. In applying the proper test, the Court found that the affidavit, which relied on an informant's tip, was insufficient to establish probable cause. Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085 (1984), 21 CLB 69.

U.S. Supreme Court A municipal police department in Illinois received an anonymous letter stating that respondents, husband and wife, were engaged in selling drugs, that the wife would drive their car to Florida on May 3 to be loaded with drugs, and the husband would fly down in a few days to drive the car back; that the car's trunk would be loaded with drugs; and

that respondents presently had over $100,000 worth of drugs in their basement. Acting on the tip, a police officer determined respondents' address and learned that the husband made a reservation on a May 5 flight to Florida. Arrangements for surveillance for the flight were made with an agent of the Drug Enforcement Administration (DEA), and the surveillance disclosed that the husband took the flight, stayed overnight in a motel room registered in the wife's name, and left the following morning with a woman in a car bearing an Illinois license plate issued to the husband, heading north on an interstate highway used by travelers to the Bloomingdale area. A search warrant for respondents' residence and automobile was then obtained from an Illinois state-court judge, based on the Bloomingdale police officer's affidavit setting forth the foregoing facts and a copy of the anonymous letter. When respondents arrived at their home, the police were waiting and discovered marijuana and other contraband in respondents' car trunk and home. Prior to respondents' trial on charges of violating state drug laws, the trial court ordered suppression of all the items seized, and the Illinois Appellate Court affirmed. The Illinois Supreme Court also affirmed, holding that the letter and affidavit were inadequate to sustain a determination of probable cause for issuance of the search warrant under Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723, and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637, since they failed to satisfy the "two-pronged test" of (1) revealing the informant's "basis of knowledge" and (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's report.

Held, reversed. The rigid "two-pronged test" under *Aguilar* and *Spinelli,* for determining whether an informant's tip establishes probable cause for issuance of a warrant, would be abandoned and a "totality of the circumstances" approach that traditionally has informed probable cause determinations would be substituted in its place. The Court observed that probable cause for the warrant was established here by the anonymous letter indicating that the respondents were engaged in criminal activities and were planning future illegal acts, especially. where major portions of the letter's predictions were corroborated by information learned by federal agents, Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983), reh'g denied, 104 S. Ct. 33 (1983), 20 CLB 59.

Court of Appeals, 1st Cir. After defendants were convicted in the district court of various narcotics offenses, they appealed on the ground, among other things, that they had been denied a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978), to determine whether false information was included in the affidavit in support of the search warrant.

Held, affirmed. The First Circuit declared that defendants were not entitled to a *Franks* hearing challenging the truthfulness of statements contained in the search warrant affidavit. The court reasoned that the statements were not necessary to a finding of probable cause, so the affidavit would contain sufficient truthful information even if the challenged information were eliminated. United States v. Paradis, 802 F.2d 553 (1986).

Arkansas Defendant was convicted of possession of a controlled substance, marijuana. The marijuana was found in a search, pursuant to a warrant, based on a form affidavit with the information inserted in blanks. The only statements in the affidavit in the present tense were those preprinted on the form. The wording was in the past tense and was imprecise as to when in the past the criminal activity allegedly occurred. At trial, defendant moved to suppress the evidence on the ground that the search warrant was invalid because the affidavit on which it was based failed to mention the time during which the criminal activity was observed.

Held, conviction reversed. The Arkansas Supreme Court found that the affidavit, which contained no reference to the time at which defendant allegedly possessed marijuana, did not provide sufficient information to make a probable cause determination. The court stated that the primary issue in this case was the application of the good faith exception to the exclusionary rule enunciated by the U.S. Supreme Court in United States v. Leon, 104 S. Ct. 3405 (1984). In *Leon,* the Supreme Court enumerated four errors which a police officer's "objective good faith" cannot cure. Errors three and four relate to indicia of probable cause in an affidavit and deficiencies of a search warrant, respectively. The court further stated that pursuant to *Leon,* the absence of a reference to time in an affidavit does not make the subsequent search warrant automatically defective. Rather, the court looks to the "four corners" of the affidavit to determine if it can establish with certainty the time at which the criminal activity was observed. If the time can be so inferred, then the officer's objective good faith reliance on a magistrate's assessment will cure the omission. In this case, though, the omission of any reference to time in the affidavit meant that none could be inferred, and the affidavit was defective. The warrant based on the affidavit, therefore, was also invalid, and the results of the unreasonable search and seizure should have been suppressed. Herrington v. State, 697 S.W.2d 899 (1985), 22 CLB 297.

Colorado Defendant moved to suppress evidence of marijuana growing seized pursuant to warrants issued upon affidavits. The warrants were based partly upon information supplied by a first-time, confidential informant who related that defendant was growing marijuana for illegal sale in two residences. The informant, who had used marijuana in the past and was thus familiar with its use and sales methods, claimed to have been inside defendant's residence in the recent past. On the basis of this information, two detectives accompanied the informant to defendant's house to verify the information. After viewing defendant's residences from outside and verifying that the houses matched the informant's descriptions, the detectives prepared an affidavit in order to obtain search warrants. A district attorney, though, questioned the time period of "recent past." The detectives thereupon prepared a second, additional affidavit, which included information that the informant had been in the house within the last thirty days. On the basis of the informant's information and independent corroborative observations and research by the police, a judge issued warrants to search both of defendant's houses. The officers immediately executed the warrants and found a marijuana growing

operation inside both houses. The district court suppressed the evidence seized from both of defendant's residences, because the reference to the recent past in one of the affidavits was too vague to constitute probable cause for the issuance of a search warrant. In addition, the court concluded that the informant's claim to have been inside defendant's house within the last month failed to establish the affiant's basis of knowledge. The district court ruled that neither affidavit conformed to the totality of the circumstances analysis mandated in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983).

Held, reversed and remanded. The Colorado Supreme Court found that there was probable cause for the issuance of warrants to search defendant's residences for marijuana. The court stated that the second affidavit, which incorporated information contained in the first one, contained sufficient information "within its four corners" to establish probable cause for the issuance of a search warrant under the Fourth Amendment to the U.S. Constitution and under the Colorado constitution. The task of an issuing judge is to make a "practical, common-sense decision" whether, given the totality of the circumstances set forth in an affidavit, there is a "fair probability" that evidence of a crime will be found in a particular place. The totality of the circumstances in this case included not only the informant's tip, but independent police corroboration of such information. The detectives who prepared the affidavits conducted their own investigation to add credibility to the confidential informant's tip. The combination of this independent corroboration by the detectives and the detailed statements provided by the informant, when viewed under the "practical and common-sense analysis mandated by *Gates*," ruled the court, established probable cause to issue warrants to search defendant's houses. People v. Pannebaker, 714 P.2d 904 (1986).

Colorado Defendant was charged with illegally manufacturing, selling, and distributing metamphetamine. The state appealed the trial court's grant of defendant's motion to suppress evidence seized from his home and garage pursuant to a search warrant. More than a year after receiving information that defendant was involved in the activities for which he was charged, several police officers surveilled defendant's house and garage without a warrant. The officers then asked one Agent Keller to draft an affidavit in support of their request for a search warrant. They informed Keller that the level of activity on defendant's street was a strong indication of drug dealing and that an odor of metamphetamine emanated from the garage. The officers then returned to defendant's house, entered it, arrested defendant, and seized evidence from the house, garage, and defendant's pockets. Afterwards, the affidavit was completed and sent to a judge who issued the search warrant shortly after midnight. Then the officers returned to the house and garage, seizing all of the remaining evidence. The trial court, in granting defendant his suppression motion as to all of the evidence, held that there were no exigent circumstances justifying the warrantless search by the police and so the affidavit underlying the search warrant was insufficient.

Held, reversed as to the second search. The trial court correctly held that there were no exigent circumstances justifying the warrantless search. The illegal initial search, however, did not taint the second search

pursuant to the warrant because there was clear and convincing evidence that the affidavit in support of the warrant was based on information independent of the illegal search. Much of the information in the affidavit was taken from police records established prior to the initial search. Thus, there was probable cause for the second search. People v. Turner, 660 P.2d 1284 (1983) (en banc).

New Hampshire State appealed trial court's decision to suppress evidence. An informant gave police reason to believe that defendant was involved with the sale of cocaine. Informant made arrangements to buy drugs, contacted police each time defendant called him, and told police of the movement of the drugs. Because of police surveillance, this movement was observed. When the drugs arrived, the informant was stripped of his possessions, given cash, sent into the house to buy drugs, and upon his return, he gave the officers the cocaine. Based upon this transaction and information given by another officer who said he had a very reliable informant who implicated defendant in drug distribution, the police filed an application and supporting affidavit, obtained a warrant, and searched defendant's home where they found evidence of drug distribution. The trial court agreed with defendant who contended that the affidavit did not support the issue of a warrant. Therefore, the warrant was in violation of the Fourth Amendment prohibition against illegal searches, and defendant's motion to suppress was granted.

Held, reversed and remanded. The court said the police had to have probable cause, not absolute certainty to obtain a warrant. The court said "probable cause" should be determined by using the totality-of-the-circumstances test, but veracity and basis of knowledge should also be factors. In this case, the police had a great body of information: the informant's word, the surveillance, the actual buy, and the word of another officer. The court noted the police had reason to believe their information was true. They conducted the buy so that they could reasonably prove the buy occurred in defendant's home, although they did not actually see the buy. They also know the other officer's informant had been very reliable in the past. The warrant is invalid if it is shown that the police made misrepresentations in their affidavit. The police acted with the best of their knowledge, and defendant did not challenge their truthfulness. State v. Carroll, 552 A.2d 69 (1988).

Pennsylvania Defendant was convicted of possession with intent to deliver a controlled substance and possession of a controlled substance. Prior to trial, defendant filed a motion to suppress, which was denied. Contraband seized by police during execution of a search warrant was introduced as evidence against him. Defendant appealed, and the superior court reversed, holding that the affidavit in support of the search warrant lacked sufficient specificity as to time "upon which is issuing authority or the suppression court could determine whether the information was stale"; therefore, the affidavit failed the test for probable cause. The state filed and was granted petition for allowance of appeal.

Held, reversed and remanded. The Pennsylvania Supreme Court held that under the totality of circumstances, the magistrate had probable

cause to issue the search warrant based on the affidavit, which recited that between March 5 and 12, 1981, defendant had controlled substance containing T.H.C. in his possession and had related to informant that he was expecting a larger quantity on or about March 11 or 12. The affidavit also said that informant observed defendant cutting a controlled substance containing T.H.C., that deliveries were made to informant while he was under surveillance by police and drug officials, and that informant had many previous drug transactions with defendant prior to March 1981. The magistrate was justified in issuing the warrant, because he was presented with clear indications that a crime was being or had recently been committed, as well as reliable information that another crime was about to be or had been committed (i.e., the delivery of a large quantity of substance containing T.H.C.). "Staleness" should not be determined by rigorous exactitude, but rather by the experience of reasonable men, particularly in this case, because police informants, who were often victims of drug-related offenses, could have a permanent, dateless frame of time. Magistrates, using the experience of reasonable men under these circumstances, should prevent drug offenders from walking free when evidence may be "stale." In addition, in this case the reference to the numerous occasions on which the informant had contact with defendant indicated a course of dealing between the two that gave veracity and a basis of knowledge to informant's tip about the crime at hand. Commonwealth v. Baker, 518 A.2d 802 (1986), 23 CLB 493.

Pennsylvania Commonwealth appealed an order granting defendant's motion to suppress evidence obtained during a search pursuant to a warrant. In obtaining the warrant, Detective Knowles stated in an affidavit that he had received from an unnamed informant a communication implicating defendant in the robbery of Korman's Discount Store. The affiant recited that the informant gave him past information that led to four arrests and the recovery of stolen property. Upon execution of the warrant at defendant's residence, the police found a sawed-off shotgun and jewelry later identified as having been stolen in the robbery. Defendant was placed under arrest and, prior to trial, filed a motion to suppress the physical evidence seized at his home. At the hearing on the motion, defendant argued that the search warrant had been "issued unlawfully or executed unlawfully" because the affidavit did not recite adequate indicia of the informant's reliability and thus did not set forth probable cause for the search. In support of the suppression motion, defense counsel attempted to elicit from Knowles, on cross-examination, the names of those persons anonymously referred to in the affidavit as having been previously arrested on the strength of "tips" from the informant. Knowles refused to provide their names, claiming that because the informant lived in the same neighborhood and had daily contact with their families, disclosure of the prior arrestees might result in the revelation of informant's identity and endanger his life. The trial court ordered detective's testimony stricken from the record and granted motion to suppress evidence seized at defendant's home.

Held, order vacated and case re-

manded. The Pennsylvania Supreme Court held that the names of persons anonymously referred to in the affidavit as having been arrested on the strength of "tips" from informant would reasonably lead to revelation of informant's identity, thereby jeopardizing his safety, and thus were not required to be disclosed. Citing Commonwealth v. Hall (302 A.2d 342 (Pa. 1973)), which established that defendant is entitled to make an inquiry into the veracity of statements in an affidavit supporting a warrant, the court however held that the *Hall* rule, in the instant case, does not permit the disclosure of the identity of an informant relied upon by affiant where such information would jeopardize the safety of the aforementioned. This ruling includes disclosure of information that would lead directly to the ascertainment of the identity of the informant. Moreover, it is the veracity of the police official who requested the warrant, and not the informant, that is the subject of inquiry. The justification for employing the exclusionary device is to deter perjurious police statements and, therefore, the reliability of the informant's information must be determined from facts supplied by the police official. The possibility that the limitation upon *Hall* may permit a perjured police statement to go undetected is outweighed by the importance informants have in aiding effective law enforcement and the injury that might result from rendering them vulnerable to reprisals for their assistance. Commonwealth v. Miller, 518 A.2d 1187 (1986), 23 CLB 400.

Utah Defendant was convicted of possessing a controlled substance with intent to distribute for value. In making the arrest, Detective Harold Howard stated that a confidential informant had told him that an individual living at defendant's address possessed one-half pound of cocaine valued at approximately $16,000. Howard further stated that he considered the informant reliable from previous tips that led to the arrests of three individuals on drug-related charges, and that he had confirmed the informant's tip. The warrant authorizing a search for narcotics was issued and executed, seventeen and a half grams of cocaine, or a little more than one-half ounce, were found, and defendant was arrested. The prosecution, however, revealed that Howard's affidavit, the sole support for the search warrant, contained false statements in that Howard did not know the informant, never had personal contact with him, and had no personal knowledge of any facts relevant to the informant's credibility. Instead, Howard had been informed of the facts set forth in the affidavit by another police officer, Lieutenant Blair. On appeal, defendant argued that intentional misstatements in Howard's affidavit rendered the warrant invalid and the ensuing search unreasonable and a violation of his rights under the Fourth Amendment. Accordingly, defendant moved to suppress the evidence obtained in the search.

Held, conviction affirmed. The Supreme Court of Utah held that the police officer's false representation in the application for a search warrant was not material to the magistrate's finding of probable cause, since information concerning the informant was conveyed to the officer by another officer who did know informant personally, so that the magistrate would have had sufficient knowledge to find that

the informant was reliable had Howard revealed that he had received information that was second-hand. The Supreme Court of Utah cited Franks v. Delaware, 438 U.S. 154, 165 (1978), which held that when an affidavit fails to support a finding of probable cause after false statements are excised or the omitted information is added, any evidence obtained under the improperly issued warrant must be suppressed. The court found that, presuming police officers will be truthful in their communications with each other, the use of double hearsay evidence would have supported the issuance of a warrant had the information been attributed to its correct source, Lieutenant Blair. State v. Nielsen, 727 P.2d 188 (1986), 23 CLB 294, cert. denied, 107 S. Ct. 1565 (1987).

Washington Defendant was charged with possession of cocaine with intent to deliver and keeping a dwelling resorted to by persons for unlawful use of controlled substances. A "professional agent," contacted by local police, had moved to the area to assist with drug investigations. The agent provided information on defendant's drug-related activities to the police. This information was included in the affidavit prepared for the warrant to search defendant's home. Defendant moved to suppress the evidence that was seized as a product of the subsequent search, alleging that the search warrant had been based on deliberate or reckless misrepresentations. She also sought an in camera interrogation of the agent prior to a hearing on her motions. The trial court held that the informant was a paid state agent whose involvement with the police had been so great that he constituted a de facto police officer. Thus, the "informer's privilege" did not apply and the prosecution was ordered to produce the agent at defendant's suppression hearing. The state appealed.

Held, order affirmed. In light of his degree of involvement in the case, the agent was determined to be a de facto police officer. The agent had been expressly recruited and hired to assist the police in drug investigations as a professional agent, put to work on defendant's case in particular, and closely supervised by the police. His expenses were paid by the police and he was to receive a bonus or contingent fee if his services proved helpful. Franks v. Delaware, 98 S. Ct. 2674 (1978), requires a hearing be held at the defendant's request in the event that defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and if the allegedly false information was necessary to the finding of probable cause. Because defendants are not required to prove their charges by a preponderance of evidence before being entitled to a *Franks* hearing, the court remanded the case for further proceedings and ordered the state to produce the agent at the suppression hearing. State v. Thetford, 745 P.2d 496 (1987).

Washington Defendant was convicted of third-degree assault. On appeal, he argued that the search warrant for his car had been obtained on the basis of an affidavit setting forth information that he had provided after invoking his right to remain silent. Defendant argued that because the information had been illegally obtained, it should be suppressed.

Held, affirmed. The Washington Supreme Court stated that a search warrant is not invalid if its supporting affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information. The search warrant could be upheld despite the exclusion of defendant's statement, because the facts established in the warrant affidavit (i.e., that the victim was stabbed twice as a result of his contact with defendant, and after the stabbing defendant returned to his car, where he remained until his arrest) were sufficient to establish probable cause. Therefore, no illegal search and seizure had occurred, and the knife found in defendant's car was determined to have been properly submitted as evidence. State v. Coates, 735 P.2d 64 (1987).

§ 58.85 —Validity of warrant on its face

U.S. Supreme Court Baltimore police officers obtained and executed a warrant to search the "premises known as 2036 Park Avenue third floor apartment" for controlled substances. The police reasonably believed that there was only one apartment on the described premises, but there were in fact two apartments on the third floor. The officers entered the wrong apartment, seized controlled substances, and the defendant was convicted. The Maryland Court of Appeals reversed and remanded for a new trial.

Held, reversed and remanded. The validity of the warrant must be judged in light of the information available to the officers at the time, which suggests that there was no distinction between the apartment intended to be searched and that of defendant. The Court thus found that the discovery of facts showing that the warrant was unnecessarily broad does not retroactively invalidate a warrant. Maryland v. Garrison, 107 S. Ct. 1013 (1987), 23 CLB 388.

U.S. Supreme Court After discovering evidence pointing to defendant as a killer, a detective drafted an affidavit supporting a search warrant of defendant's residence. It described in detail the articles being sought. The affidavit was approved by personnel in the police department and the district attorney's office. The detective attached the affidavit to a search warrant for a controlled substance because no other warrant form was available. He made the changes he thought necessary, but neglected to change the reference to "controlled substance" in the portion of the form that, when signed, would constitute the warrant itself. He informed the judge that the warrant had been for a controlled substance and had been changed. The judge made some changes in the form, but did not change the authorization for a search for controlled substances. He dated and signed it, and the search was made, turning up some incriminating evidence. At the suppression hearing, the judge ruled against exclusion. Defendant was convicted.

Held, exclusion denied. This court has recognized a good-faith exception to the exclusionary rule in United States v. Leon, 104 S. Ct. 3405 (1984). In that case, it had already been decided that the exclusionary rule should not be applied where the officer conducting the search acts in objectively reasonable reliance on a warrant that is issued by a detached and neutral magistrate and that subsequently is determined to be invalid. Therefore, the sole issue before the Court in this case was whether the officers reasonably believed that the

search they conducted was authorized by a valid warrant. Not only was there the requisite good-faith belief in the validity of the warrant, there was, as well, an objectively reasonable basis for the officer's mistaken belief. The officer was told by the judge that the necessary changes would be made. He then observed the judge make some changes and received the warrant and the affidavit. It was reasonable for him to conclude that the warrant authorized a search for the materials outlined in the affidavit. The exclusionary rule was fashioned to deter police from unlawful searches. In this case, it was the judge, not the police, who made the crucial mistake, so that exclusion here would have no deterrent effect. Massachusetts v. Sheppard, 468 U.S. 981, 104 S. Ct. 3424 (1984), 21 CLB 77.

Nebraska Defendant was convicted of possession of a controlled substance. After receiving information from a reliable source concerning the drug activities of a party known only as "LNU, Steve," an affidavit for a search warrant was prepared by narcotics officers. The warrant authorized the search of the suspect's residence, LNU, Steve himself, his companion Edna Mohr, and a "John and/or Jane Doe, who resides or is in control of the afore described premises" where the suspect lived. When police officers went to execute the warrant, they observed a man who fit the description of LNU, Steve. They also discovered defendant, LNU, Steve's brother, on the front porch of the residence. Officers searched defendant and found forty milligrams of methamphetamine. Prior to trial, defendant moved to suppress the physical evidence obtained as a result of the search. Trial court rejected defendant's claim that the search of his person was outside the scope of the warrant, and defendant appealed.

Held, conviction reversed. In cases in which warrants are issued for individuals whom the police cannot identify by name in advance, what will amount to insufficient particularity in the warrant, requirements of probable cause, and the ultimate mandate of reasonableness, all depend on the facts and circumstances of the case.

In the present case, the premises to be searched was a residence at which both persons engaging in illegal and legal activities could be found. Defendant did not live on the premises, and there was no evidence to show that there would be persons other than LNU, Steve and Edna Mohr on the premises at the time of the search. The inclusion of the "John and/or Jane Doe" clause was not based on any probable cause; it was merely a catchall phrase whose use was prohibited by the Fourth Amendment and provisions of Section 29-814.04 of the Revised Statutes of Nebraska. State v. Pecha, 407 N.W.2d 769 (1987), 24 CLB 275.

§ 58.90 —Manner of execution

Arizona Defendant was convicted by a jury of sale of marijuana, unlawful possession of marijuana, and conspiracy, and was suspected of being a "wholesaler" of marijuana. His house was under surveillance and police officers had been reliably informed that defendant had supplied marijuana to an individual they had just arrested. The officers were preparing an affidavit to obtain a telephone search warrant for defendant's home when they were called by one of the agents who had the house under surveillance and were told that defendant had just left in a

pickup truck. The officer in charge ordered one detail of officers to stop the truck and another to "secure" the house until the warrant was obtained. This was done. The telephonic warrant arrived sometime after the truck had been stopped and the house "secured." Search was then made under the warrant and large quantities of marijuana were found in both truck and house. Defendant contended on trial that entries made under the guise of "securing the premises" were illegal and urged application of the exclusionary rule to deter such activity. On appeal, the question presented for review was whether the evidence should be suppressed that was seized from defendant's house pursuant to a warrant when, absent exigent circumstances, the police had entered and "secured" defendant's house prior to obtaining that warrant.

Held, conviction affirmed. The Arizona Supreme Court, en banc, found as a matter of state law that officers may not make a warrantless entry of a home in the absence of exigent circumstances or other necessity. Such entries are "per se unlawful" under the state constitution because they are violations of the guarantee of the right to privacy. The court then went on to adopt the "independent source" doctrine approved by the U.S. Supreme Court in Segura v. United States, 104 S. Ct. 3380 (1984), in deciding whether to apply the exclusionary rule where a Fourth Amendment violation has occurred. The majority indicated that it could refuse to recognize the doctrine as a matter of state law; however, it chose to recognize the doctrine because "one of the few things worse than a single exclusionary rule is two different exclusionary rules." Therefore, the majority held that the exclusionary rule to be applied as a matter of Arizona law is no broader than the federal rule. State v. Bolt, 689 P.2d 519 (1984).

Colorado Defendant Theo Griffin was arrested for burglary and theft after police learned, through a conversation they recorded between Griffin and a confidential informant, Jeff Morrow, that defendant was to meet Morrow for the purposes of selling him a stolen television and stereo. In the recorded conversation, Griffin also mentioned that he had four or five pounds of marijuana for sale at his home. Prior to Griffin's arrest, Deputy Sheriff Mike Stark prepared an affidavit for a search warrant to gain entry to Griffin's mobile home and he sent his deputies to observe the Griffin residence. After Griffin's arrest, the deputies entered the mobile home, informed defendant's wife, Margaret Griffin, about the arrest, and secured the premises until the search warrant arrived. While keeping Mrs. Griffin and her son under strict surveillance, the deputies observed two water pipes on the living room table, but they did not conduct a search of the mobile home until the search warrant arrived some two hours later, at which time they discovered and seized thirty-two pounds of marijuana, one and one-half pounds of hashish, and three-quarters of a pound of psilocybin mushrooms. Defendant Margaret Griffin was placed under arrest and charged, along with her husband, with possession of marijuana and marijuana concentrate with intent to distribute, and with possession of a controlled substance. The trial court granted defendants' motion to suppress all of the evidence seized from the mobile home, ruling that the initial entrance by the sheriff's depu-

ties was an unconstitutional and warrantless seizure; the prosecution made two interlocutory appeals.

Held, order of suppression affirmed and case remanded. The Colorado Supreme Court, en banc, found that although the warrantless police entry into defendants' mobile home was unlawful, narcotics obtained in subsequent execution of the valid search warrant were not to be suppressed because the seizure was based on information obtained before the deputies' illegal entry. Moreover, the deputies did not convey any of their observations of the mobile home while the affidavit and the warrant were being prepared. The order suppressing the two water pipes, which were in plain view and were later seized as evidence, is affirmed and the case is remanded for further proceedings. People v. Griffin, 727 P.2d 55 (1986), 23 CLB 292.

Michigan State appealed the dismissal of charges against defendant who was charged with possession with intent to deliver various controlled substances. Acting on information given by an informant and with a warrant, police raided a residence suspected of serving as a drug distribution center. During the search the police found a locked toolbox that they forced opened, discovering drugs. While conducting a search of the seven individuals in the house, the police found the key to the box. That person was arrested. Defendant claimed the search was beyond the scope of the warrant. Charges were dismissed by the lower courts.

Held, reversed and remanded. Because the residence was a site of illegal activities, it was within the jurisdiction of the police to arrest everyone in the house for loitering in a place of an illegal business. If all seven occupants had been arrested, the key would have been found during the arrest procedure. Since the police had probable cause to arrest everyone in the house, they had probable cause to search them. People v. Arterberry, 429 N.W.2d 574 (1988).

New York Defendant, convicted of criminal possession of cocaine and marijuana, contended on appeal that his motion to suppress should have been granted because police officers entered his residence without possessing a search warrant. A "no-knock" warrant authorizing a search of defendant's premises had been issued by a neutral magistrate. When the surveillance team was informed of this fact, they took defendant into custody. A detective arrived about five minutes later with the warrant and a search of the premises was conducted during which large quantities of cocaine and marijuana were discovered.

Held, order affirmed. Federal and state constitutional requirements that a search and seizure be authorized in advance by a neutral magistrate had been fully complied with. The officers' actions in no way violated defendant's "right to be free from unreasonable government intrusions" and accordingly it found no grounds for suppression. People v. Mahoney, 448 N.E.2d 1321 (1983), 20 CLB 65.

Washington Defendant was convicted of possession of heroin with intent to manufacture and deliver. A warrant directing a search for "controlled substances, including heroin" was signed by a Seattle judge. The investigating officers knew that the suspect's home was protected by two doors, a normal door on the inside and a wrought iron

door containing grill with very small openings on the outside. They had also been informed that defendant usually answered the door, either in possession of a handgun or with a handgun within reach. For these reasons, the officers decided that unless they used a "ruse" to get defendant to unlock and open the wrought iron door, they might be unable to execute the search warrant. The officers therefore prepared a fictitious traffic arrest warrant signed by a fictitious judge. They showed defendant the fictitious warrant, and he said it was a mistake. The officers asked to enter the house to make a phone call to clear things up. Defendant opened the outside door and invited the officers in. As soon as the gate was open and before the officers entered the house, a detective advised defendant that he had a search warrant. Defendant then told the officers to enter. The subsequent search produced heroin, drug paraphernalia, and a large amount of cash. Defendant was then arrested. On appeal, defendant contended that the police officers' use of the fictitious arrest warrant violated his due process rights.

Held, conviction affirmed. The Supreme Court of Washington en banc stated that the guiding factor in determining whether a ruse entry, to execuite a search warrant, constitutes a "breaking" under the Fourth Amendment should be whether the tactic frustrates the purposes of the "knock and announce" rule. That rule has three objectives: (1) to avoid violence to persons, (2) to prevent property damage, and (3) to protect the right of privacy of individuals. The employment of the ruse actually furthered the first two objectives, the court stated, and did not frustrate the third. Where the police have satisfied the warrant requirement, an individual's right of privacy, the court noted, has already been judicially curtailed. Since the officers had the right to enter the house regardless of defendant's wishes, the court found the argument that his consent was uninformed and therefore invalid was unpersuasive. The court concluded that imposing an informed consent requirement on all police entries would come near to a rule declaring all undercover police activity unconstitutional per se. State v. Myers, 689 P.2d 38 (1984), 21 CLB 267.

§ 58.95 —Items seizable

Pennsylvania The state appealed the vacated sentence of defendant, who was convicted for possession of brass knuckles. During a search of the residence of a third party, police found the brass knuckles in a leather jacket belonging to defendant; he was not wearing the jacket at the time. The police had a warrant to search the house and its contents. Defendant claimed the police are forbidden by Commonwealth v. Platou, 312 A.2d 29 (Pa. 1973) from searching the guests of a residence unless a warrant specifies that guests are subject to that search.

Held, reversed and remanded. The court determined the warrant allowed the officers to search the house and its contents. Because defendant was not wearing the jacket, it became part of the house's contents. The court believed if it forbade the police from searching property lying in the house, any guest could claim the property was his to prevent a search. The court, therefore, overruled *Platou* to prevent fraud among guests trying to hide contraband. Commonwealth v. Reese, 549 A.2d 909 (1988).

Utah Defendant was convicted of forgery and recording a false or forged instrument. On appeal, defendant contended that the search and seizure of his residence was unreasonable because the police seized items not listed in the original search warrant and searched in places where listed items were unlikely to be found, even after most of them had already been located. He argued that these violations made the entire search illegal, and that this required the suppression of all evidence, whether seized legally or not.

Held, appeal dismissed. The exclusionary rule does not require the suppression of legally seized evidence merely because it was obtained in the same search as evidence illegally seized. Only the evidence that was illegally seized should be suppressed. In this situation, the evidence not listed in the warrant was legally seized because it came in plain view while the officers were executing the search prescribed in the warrant. The officers properly searched places where the listed items (business documents) were unlikely to be found. If legal searches had to be limited to places where people would be most likely to place evidence, then they could be thwarted simply by the expedient of concealment in unusual locations. The officers only searched in those areas where it is reasonable to believe that the listed evidence could be located. Furthermore, they did not act unreasonably in continuing and expanding the search after most of the listed items were found. State v. Romero, 660 P.2d 715 (1983).

§ 58.100 —Necessity of obtaining a warrant

U.S. Supreme Court When several police officers arrived at defendant's house in response to a report of a homicide, they found defendant lying unconscious in a bedroom due to an apparent drug overdose and defendant's wife dead of a gunshot wound. Shortly thereafter, two homicide investigators entered the residence and commenced a two-hour "general exploratory search." Defendant was subsequently indicted for second-degree murder and moved to suppress three items of evidence discovered during the search. The trial court suppressed two items of evidence found during the search, but the Louisiana Supreme Court held all the evidence to be admissible.

Held, judgment reversed. The Supreme Court declared that although police officers may make warrantless entries on premises where they reasonably believe that the person within is in need of immediate aid, there is no "murder scene exception" to the warrant requirement, and a warrantless search is not permissible simply because a homicide has recently occurred there. Thompson v. Louisiana, 105 S. Ct. 409 (1984), 21 CLB 255.

Florida Defendants, convicted of conspiracy and delivery of cocaine, argued on appeal that the trial court erroneously refused to order suppression of the physical evidence. Defendants Lawrence and Griffin met with undercover police officers at Griffin's residence to conclude a previously arranged cocaine sale. During the transaction, one of the officers left, ostensibly to get a scale and money from his car; he returned with several other drug enforcement agents and all entered the house, arrested defendants, and seized the contraband. The officers had no arrest warrant or search warrant; defendants contended that the officer, having left the premises, could

not lawfully reenter with reinforcements for the purpose of arrest and seizure without a warrant and without complying with state "knock-and-announce" requirements.

Held, convictions affirmed. The Florida Supreme Court found that the officer had implied consent to reenter, with others if he chose, and that consent was not vitiated because it was obtained through deception. Defendants, it said, were "victims of their own misplaced trust." Since reentry was consensual and, in any event, a felony had been committed in the officer's presence, no warrant was required, the court held. However, it did caution:

> In holding that the agent had permission to reenter the home, we do not mean to suggest that once the authorities have been admitted to a residence they have carte blanche to return and enter at their own will. What we are saying is that under the facts of this particular case, the authority to reenter was implicit. The agent left the house for a very short period of time, his return was expected and encouraged, and his return was a necessary part of the uncompleted, ongoing transaction pursuant to which he had first been invited.

Griffin v. State, 419 So. 2d 320 (1982), 19 CLB 270.

Idaho Defendants were convicted, on the basis of conditional guilty pleas, of manufacturing marijuana. The marijuana was discovered after one of defendants, the homeowner, reported an intruder in her house to a neighbor, who called the police. A police officer responded to the neighbor's call and searched defendant's home, not finding any intruder. A second police officer thereupon responded to the call. One of defendants, according to testimony, told him to "Just forget it, there is nobody in there, just forget it." Nonetheless, the second police officer entered the home. He and the first police officer then searched the house again and found marijuana plants growing in the basement. Defendants moved unsuccessfully to suppress the evidence, on the ground that the search and seizure were unconstitutional.

Held, vacated and remanded. The Idaho Court of Appeals ruled that the warrantless and nonconsensual search of defendants' home in response to the neighbor's report of an intruder in their home was impermissible, in the absence of probable cause to believe that an intruder existed and a reasonable appearance that persons or property were in imminent danger. The initial report of an intruder made by the neighbor, uncorroborated by other facts, was insufficient to overcome defendants' right to preclude the police officers' second entry into their home. State v. Rusho, 716 P.2d 1328 (App. 1986).

Illinois Defendant, convicted of possessing LSD, argued on appeal that suppression of the contraband was proper because it was seized pursuant to an unlawful, warrantless search of his hotel room. At the suppression hearing, it had been established that police received information that defendant was selling drugs from his hotel room. An informant was sent to the room to make a "buy"; the informant and defendant had a conversation, overheard through the partially open door by officers stationed in the hall-

way. When defendant confirmed that he had drugs for sale, police entered the room, effected defendant's arrest, and seized the LSD from his person. The trial court denied defendant's motion to suppress. That ruling was reversed, following defendant's conviction after jury trial, by the intermediate appellate court. The state then appealed.

Held, conviction sustained and motion to suppress denied. The Supreme Court of Illinois recognized that, as a matter of state constitutional law, hotel residents enjoy the same protection against unreasonable intrusion as residents of private homes. It followed, said the court, that the holding of Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980), "that a warrantless nonconsensual entry into a suspect's home to make a routine felony arrest is violative of the fourth amendment absent exigent circumstances" applies equally to an hotel room occupant. The court proceeded to find exigent circumstances of justifying the warrantless entry, stating: "[T]he fact that the officers reasonably believed that a felony was being committed in their presence demanded prompt police action and constituted an exigent circumstance which justified the warrantless entry into the hotel room and the arrest." People v. Eichelberger, 438 N.E.2d 140, 19 CLB 182, cert. denied, 459 U.S. 1019, 103 S. Ct. 383 (1982).

Kansas Defendant, convicted of murder, argued on appeal that the trial court erred in refusing to suppress a ring which was taken from his person at the time of arrest and subsequently introduced into evidence at his trial. The ring was worn by defendant when arrested and was among the items of personal property taken and inventoried for safekeeping at the jail prior to his incarceration. Two and one-half months later, police removed the ring from the property envelope for examination. At trial, a pathologist testified that certain bruises on the deceased's face could have been caused by the ring. Defendant argued that the failure by police to obtain a search warrant prior to removing the ring from the property envelope amounted to an illegal search and seizure.

Held, affirmed. The Supreme Court of Kansas, while noting a division of authority on the point, held that

> [W]hen an accused has been lawfully arrested and is being held in custody, the personal effects in his possession at the time and place of his arrest may lawfully be searched, inventoried, and placed in safekeeping by the police without a search warrant when the search and seizure is incidental to the arrest. Thereafter, although a substantial period of time may have elapsed since the administrative processing, a "second look" at the inventoried personal effects may be obtained without a search warrant, and any property which is relevant for use as evidence in the accused's trial may be removed from the place of safekeeping.

State v. Costello, 644 P.2d 447 (1982), 19 CLB 84.

North Carolina Defendant was convicted of rape in the first degree, kidnapping in the first degree, and assault inflicting serious bodily injury. After his arrest, the state bureau of investigations made application for a nontestimonial identification order requesting, inter alia, that a blood sample be taken from defendant. De-

fendant contended that the sample of his blood taken without a search warrant violated his rights under the federal and state constitutions.

Held, ruling of the lower court that admitted the blood evidence reversed, and defendant granted a new trial. The court said that the invasion of defendant's body and the withdrawal of his blood is the most intrusive search and requires a search warrant. It maintained that courts could not condone or participate in the protection of those who violated the constitutional rights of others. It determined that the nontestimonial identification order did not fulfill the requirement of a search warrant because a nontestimonial identification order can be issued without a finding of probable cause as is required for the issuance of a search warrant. The court stated that the clearly mandated public policy of the state is to exclude evidence obtained in violation of the state constitution. If a good faith exception is to be applied to this public policy, let it be established not by the court but by the legislature, the political body responsible for the formation and expression of matters of public policy. The court, therefore, refused to engraft a good faith exception to the exclusionary rule under the state constitution. State v. Carter, 370 S.E.2d 553 (1988).

Pennsylvania Defendant was convicted of possession of marijuana with intent to deliver and one count of simple possession. Defendant was observed by a special agent with seventeen years' experience carrying a package that appeared to be marijuana from a storage facility to a parked car. The agent told local authorities that he believed drugs were being stored in the facility and obtained permission from the facility representative to search closed and locked doors of individual storage lockers with a police dog trained to sniff narcotics. After the dog alerted the agent that a locker contained drugs and the agent recognized the name of the locker owner as a narcotics violator, a search warrant was applied for and granted. The search revealed thirty-four pounds of marijuana. Plaintiff appealed on the grounds that warrantless use of the drug-trained dog was an illegal search under the Pennsylvania and U.S. Constitutions.

Held, conviction affirmed. The court held that whereas the use of the canines in the present case would not constitute a search under the Federal Constitution, a search was present under Pennsylvania law. However, a balancing inquiry was necessary to determine whether a search under these circumstances necessitated use of warrant requirements. The court determined that a narcotics detection dog may be used to detect the presence of drugs if the police can articulate reasonable grounds for believing drugs to be present and the police are lawfully present in the place where the sniff occurred. Since the police had the permission to search from the facility's management, the management had authority to inspect the premises, and the search was based on a reasonable, articulated suspicion that illegal narcotics were stored in the building, use of the narcotics dog was justified. Commonwealth v. Johnston, 530 A.2d 74 (1987), 24 CLB 268.

§ 58.105 Search incident to a valid arrest

U.S. Supreme Court Respondent was arrested for disturbing the peace and was taken to the police station. Re-

spondent carried a purse-type shoulder bag which was inventoried along with his other possessions by the police without obtaining a warrant in the process of booking him. In it were found amphetamine pills. Respondent was subsequently charged with violating the Illinois Controlled Substances Act, and at a pretrial hearing the trial court ordered suppression of the pills. The Illinois Appellate Court affirmed, holding that the shoulder bag search did not constitute a valid search incident to a lawful arrest or a valid inventory search of respondent's belongings.

Held, reversed and remanded. The search of respondent's shoulder bag was a valid inventory search, and the fact that the protection of the public and arrestee's property could be achieved by less intrusive means did not render the search unreasonable. Illinois v. Lafayette, 462 U.S. 640, 103 S. Ct. 2605 (1983), 20 CLB 61.

Arkansas Defendant was convicted of possession of seven pounds of marijuana with intent to deliver. He appealed on the ground that the arresting officer was not a certified law enforcement officer, so that his arrest and search were illegal. An Arkansas statute enacted in 1975 provides for the certification of law enforcement officers and recites that official action taken by an uncertified officer is invalid.

Held, affirmed. The officer was exempted by the statute's "grandfather clause," providing that full-time officers serving on the effective date of the act may continue in their employment. The officer, who had been employed as a police officer for some years before 1975, was authorized to make the search and arrest. Furthermore, all the facts were available to the defense counsel before the trial, so that the motion for a mistrial was not supported by the necessary showing of diligence. Smith v. State, 648 S.W.2d 792, cert. denied, 464 U.S. 890, 104 S. Ct. 232 (1983).

Massachusetts Defendant was found guilty of assault and battery with a dangerous weapon and breaking and entering a building at night. During the investigation at the crime scene, the police found bootprints, apparently left by defendant. The prints were photographed and introduced at the trial. In the subsequent hearing on the motion to suppress, Officer Shoemaker testified that pursuant to official policy in the warranted arrest of defendant, defendant was booked, his boots and other belongings were taken, and he was placed in a cell. After the boots were in police possession, Officer Shoemaker noticed that the soles on them had a similar tread to the photographed bootprints from the crime scene, and they also appeared to have bloodstains. After making these observations, the officer seized the boots, tagged them as evidence, and sent them to state police headquarters for examination. Defendant appealed judge's denial of his motion to suppress as evidence the pair of boots taken from him upon his arrest, arguing that warrantless seizure of his boots violated his Fourth Amendment rights.

Held, affirmed. The Massachusetts Supreme Judicial Court held that warrantless seizure of defendant's boots following his arrest and while he was in custody was not unconstitutional, since, after incarceration, clothing that constitutes evidence may be taken from defendant. Moreover, citing Commonwealth v. Mason (439 N.E.2d 251 (1982)), which upheld an inventory

search conducted without a warrant and in accordance with standard police procedure, the court in this case found that seizure of defendant's boots did not violate his Fourth Amendment rights. Therefore, denial of the motion to suppress the boots was not error. Commonwealth v. Gliniewicz, 500 N.E.2d 1324 (1986), 23 CLB 396.

Missouri Defendant was convicted of forcible rape and armed criminal action. After the attack took place, one of the victims discovered her stolen car parked on the street and reported it to the police. Approximately fifteen minutes after the police placed the stolen car under surveillance, defendant approached it with an attaché case under his arm. When defendant got into the car and started it, the officers (who confirmed their suspicions of theft through a computer license registration check) arrested defendant for automobile theft and handcuffed him. They picked up the attaché case and could feel the contours of a rifle inside. Without first obtaining a search warrant, the officers opened the attaché case and found a sawed-off .22-caliber rifle and some shells. One of the victims was then able to link the weapon and defendant to the attack. Defendant appealed, contending that evidence of the rifle and ammunition should have been suppressed as the products of a constitutionally invalid search.

Held, affirmed. The search into the attaché case was valid as one made incident to a lawful custodial arrest. The court held that New York v. Belton, 453 U.S. 434, 101 S. Ct. 2860 (1981) was applicable even though the police officers were in no danger of being overpowered by defendant's rifle since defendant had been handcuffed. It held that *Belton* permitted searches after any arrest that was valid, and should not be confined to its specific facts. State v. Harvey, 648 S.W.2d 87 (1983) (en banc).

New York Defendant was convicted of murder in the second degree and criminal possession of a weapon in the second and third degrees. The convictions were reversed after defendant's motion to suppress evidence seized in a warrantless search of her apartment was granted. The state appealed, claiming that defendant's consent to the initial entry by the police extended to later entries because of the emergency doctrine.

Held, affirmed. In granting defendant's motion to suppress, the county court expressly found not only that her consent to the initial entry did not extend to the later entries, but that the emergency doctrine did not justify reentry just because a homicide was being investigated. These findings had support in the record, and so the motion to suppress was properly granted. For this reason, the court chose not to discuss another finding of the county court, that is, that once the police had knowledge that defendant had retained counsel, she no longer could "waive further her rights without the presence of counsel to permit the continuing search." People v. Cohen, 446 N.E.2d 774, cert. denied, 461 U.S. 930, 103 S. Ct. 2092 (1983).

§ 58.110 —Probable cause

"Social Sciences and the Criminal Law: The Fourth Amendment, Probable Cause, and Reasonable Suspicion," by James R. Acker, 23 CLB 49 (1987).

U.S. Supreme Court After an Erie County, New York investigator viewed

videocassette movies rented from respondents' store, he executed affidavits summarizing the theme and conduct depicted in each movie, and he attached the affidavits to search warrant applications. The warrants were executed and the movies seized, and respondents were charged under a New York obscenity statute. The suppression motion was granted by a local judge, and the county court and the New York Court of Appeals affirmed.

Held, suppression motion reversed. The Court ruled that no higher probable cause standard was required by the First Amendment for issuance of the warrant in question. Applying a "fair probability" standard, the Court found that the warrant was supported by probable cause to believe that the movies were obscene under New York law. New York v. P.J. Video, Inc., 106 S. Ct. 1610 (1986), cert. denied, 107 S. Ct. 1301 (1987).

U.S. Supreme Court U.S. Customs officers observed two pickup trucks on a remote private airstrip in Arizona and the arrival and departure of two small airplanes. After arresting defendants, the officers took the trucks back to the Drug Enforcement Administration (DEA) headquarters, and the packages were then placed in a DEA warehouse. Three days later, government agents, without obtaining a warrant, opened some of the packages and took samples that later proved to be marijuana. The district court granted defendants' motion to suppress the marijuana, and the court of appeals affirmed.

Held, reversed and remanded. The Supreme Court stated that the warrantless search of the packages three days after they were removed from the trucks was proper, since the officers had probable cause to believe that not only the packages but also the trucks themselves contained contraband. The Court reasoned that the officers could have lawfully searched the packages when they were first discovered on the trucks at the airstrip, and there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. United States v. Johns, 105 S. Ct. 881 (1985).

U.S. Supreme Court After police investigation based on a drug tip from an informant of unproved reliability, a facially valid search warrant was issued for defendants' cars and residences. After incriminating evidence was found in the search, and after a grand jury indictment, defendants sought suppression of the evidence found under the warrant search. The judge partially granted the motions, finding insufficient probable cause. The informant's reliability and credibility had not been established, and the transaction he had described had occurred five months earlier.

Held, suppression denied. The court had not previously recognized any exception to the Fourth Amendment exclusionary rule. It reexamined whether there should be an exception, as the government urged, to permit the introduction of evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate, even where the warrant is later found to be defective. Its decision was to allow such "good-faith" modification of the rule because the social costs of its application had been high; the benefit conferred thereby on guilty defendants offended basic concepts of the criminal justice system. To the extent that proponents of exclusion relied on its behavioral effects

on judges and magistrates in these areas, their reliance was misplaced. First, the exclusionary rule was designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, no evidence existed to suggest that judges and magistrates were inclined to ignore or subvert the Fourth Amendment or that their lawlessness required application of the extreme sanction of exclusion. Judges and magistrates are not part of the government law enforcement process and have no stake in the outcome of particular criminal prosecutions. The exclusionary rule is aimed at the policy and behavior of law enforcement officers and departments. It should not be used where a police officer acts in reasonable reliance on a magistrate's probable cause determination and on the technical sufficiency of that warrant. United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984), 21 CLB 77.

Court of Appeals, 1st Cir. After defendant was convicted of possession and conspiracy to possess heroin with intent to distribute, he appealed on the ground that the court had improperly denied his motion to suppress evidence.

Held, affirmed. Defendant's silent acquiescence to his co-defendant's introduction to an undercover officer in a restaurant as a drug distributor was sufficient to imply defendant's complicity in the drug transaction and thereby provide the undercover officer with probable cause to arrest. The court further found that the evidence of the introduction could be used against defendant as an adoptive admission. United States v. Wiseman, 814 F.2d 826 (1987).

Court of Appeals, 2d Cir. Defendant was arrested by Drug Enforcement Administration (DEA) agents under a search warrant based on his identification as another person, who was a major drug trafficker. He protested the misidentification and produced a Columbian driver's license and a Columbian military identification in his name. A search of his apartment yielded drugs, and he and another person were convicted of possession with intent to distribute and conspiracy to distribute. Prior to trial, appellants moved to suppress the evidence seized during the search of the apartment, claiming that the failure of the DEA agents to apprise the issuing magistrate of the uncertainty of defendant's identity rendered the warrant defective. Their motion was denied.

Held, affirmed. The appellate court agreed with the reasoning of the district court, which had denied the defendant's motion, stating that, although the agents had a duty to report the supplemental information to the magistrate, they were excused because they negligently, but in good faith, believed that the identity information was not material to the magistrate's finding of probable cause. United States v. Marin-Buitrago, 734 F.2d 889 (1984).

Colorado The people appealed the trial court's decision to suppress the evidence (a handgun) found in defendant's car by an officer. Defendant was stopped for driving erratically and was found to be drunk. His car was secured and left at the scene. Later, defendant, a convicted felon, made statements about having a weapon. The arresting officer returned to the car, shined a flashlight in the car window, and saw the butt of a gun. She entered the car, searched it, but did

not remove the weapon until she obtained a warrant. Defendant's motion to suppress the evidence as a product of an illegal search in violation of the Fourth Amendment was granted.

Held, reversed and remanded. The court cited United States v. Johns, 469 U.S. 478, 105 S. Ct. 881 (1985) in which the U.S. Supreme Court ruled that a vehicle in police custody may be searched if there is probable cause to believe it contains contraband. The car in this case was kept by the officer at the scene of the crime. The officer had a reasonable suspicion to suspect defendant had a gun. Once she saw the handle, the court held she had probable cause to enter the car without a warrant. People v. Romero, 767 P.2d 1225 (1989).

Connecticut The affidavits of a police officer reported events that transpired in a night club lounge on the evenings of December 19, 1979 and January 9, 1980. The affidavits indicated that, on each date, the police officer, accompanied by another police officer, had entered a lounge in East Hartford. In the lounge, the officers observed performances, specifically described, involving dancers who, while scantily clad, engaged in repeated physical encounters with customers in exchange for gratuities. The affidavit concerning the first set of incidents identified defendant as the permittee of the lounge. The accompanying affidavit concerning the second set of incidents did not expressly identify defendant as the permittee but stated that "the permittee . . . was not seen" by the officers. Defendant was present during the performance on the first evening described, but not on the second. On the basis of those affidavits and an arrest warrant that did not recite probable cause, defendant was arrested and tried. Defendant was convicted on four counts of promoting an obscene performance in violation of Conn. Gen. Stat. § 53a-194, the statute governing obscene performances. The Appellate Session of the Supreme Court set judgment aside and remanded with direction to dismiss three of the four counts and for a new trial on count one. Both the state and defendant appealed, defendant arguing that there was no probable cause for his arrest on that count.

Held, affirmed by the court of appeals. Although the arrest warrant had failed to recite probable cause, that was not considered to be error. The court considered this issue on its merits. A commonsense reading of the affidavits attested to probable cause for the arrest of defendant for the crime that he was charged with on the first count—violation, on December 19, 1979, of Conn. Gen. Stat. § 53a-194. From the representations concerning defendant's presence and his status as permittee, the judicial authority could reasonably infer that defendant had knowledge of, and was promoting, the performances that had taken place. It is permissible to rely on circumstantial evidence of these elements to establish probable cause. The description of the performances was sufficiently detailed to establish probable cause determination in the context of arrest warrants requires inquiries that are less complex constitutionally than those that pertain to search warrants. State v. Heinz, 480 A.2d 452 (1984).

Delaware Defendant was convicted of rape in the first degree, kidnapping in the first degree, and assault in the first degree. During the police investi-

gation of a rape and kidnapping of a young girl, the police found hair samples at the rape site. Just over a month later, a similar crime was attemped but was thwarted when the victim awoke, and defendant fled. The police shortly thereafter spotted defendant jogging near the scene of the attempted crime. Defendant was eventually questioned and voluntarily gave hair samples. Based upon the analysis of the samples, the police concluded that defendant's hair and the hair found at the aforementioned rape site exhibited the same characteristics. Defendant appealed his conviction, which was based solely upon hair comparisons that do not have sufficient probative value to constitute probable cause for warrantless arrest. The state claimed that probable cause existed because the police of the district in which the rape was committed were continuing to investigate the rape when the attempted attack occurred in another district. As a result of police cooperation, the police from the former district suspected that there might be a connection between the two cases.

Held, affirmed. The court said that it is universally recognized that although fingerprint comparisons can result in the positive identification of an individual, hair comparisons are not as precise. However, the court held that when the fact that defendant was a suspect in an unrelated but similar incident was considered with the evidence of the hair sample, it permitted the police to draw a conclusion that probable cause existed for the arrest. The court said that identification by virtue of the hair analysis alone would have been insufficient to establish probable cause, but the analysis in this case only served as the missing link that was necessary to transform the police suspicion that defendant was connected with the rape into the quantum of information that would lead a man of reasonable caution to conclude that there was probable cause to arrest defendant. Thompson v. State, 539 A.2d 1052 (1988).

Illinois Defendant was convicted of possession of a controlled substance. The arresting police officer had received a detailed telephone tip from an informant known by him to be reliable. On the basis of that tip, one officer approached defendant's car, saw a small plastic bag with pills (later identified as LSD) in defendant's hands, and took it away from him. The trial court viewed this as a warrantless arrest accompanied by a search incident to arrest. The state, successful at trial, had argued that the detailed tip was sufficient to justify a finding of probable cause for the arrest and seizure. After a reversal by the intermediate court, the state appealed.

Held, reversed; probable cause found. The court followed the test of the totality of circumstances that was used in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983). On the basis of that test, the trial court was correct in admitting the evidence. Although *Gates* and its reasoning applied to the standard used by a magistrate in issuing a warrant, it provided the trial court with standards to assess probable cause in a warrantless arrest. The *Gates* court, in discussing the totality of circumstances test, stated that the task of the appraiser was

> [S]imply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay in-

formation, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

It restated the principle that a tip containing a wide range of detail—which would have been difficult to obtain or predict—may support an inference of reliability. In the instant case, not only had the informant proved reliable in previous cases, but nearly every aspect of the information he supplied in the instant case was corroborated. The tip, in conjunction with the evasive conduct of defendant when confronted by the officer, furnished probable cause to believe that he was engaged in unlawful conduct. People v. Tisler, 469 N.E.2d 147 (1984).

Michigan Defendant, charged with breaking and entering with intent to commit larcency, moved to suppress evidence he claimed was obtained by an illegal arrest and seizure of property. The trial court denied the suppression motion, and the court of appeals reversed, holding that the arrest and seizure were illegal for lack of probable cause. At 4:50 A.M., a police officer observed defendant pulling out of a closed fuel supply company. The officer then stopped and questioned defendant. When the officer asked about a box of X-rated movies in the car, defendant refused to give a substantive answer. Defendant was then placed in the patrol car and driven about the area to determine if various establishments that sold such objects had been broken into. At one such establishment, the doors had been broken into and the display case was empty. The store manager was notified of this by the officers and he confirmed that merchandise was missing. Defendant was then arrested and charged with breaking and entering. The state appealed the reversal by the court of appeals, arguing that detaining defendant during the investigation by the officer was proper.

Held, affirmed. The officer was justified in stopping defendant's vehicle and looking in defendant's car after he observed the box of X-rated movies. However, his subsequent actions constituted an unlawful arrest without a warrant or probable cause. An arrest occurred because defendant was not free to leave once he was forced to ride in the patrol car. Probable cause was lacking because there was no established link of defendant or the seized items to any particular crime. People v. Bloyd, 331 N.W.2d 447 (1982).

Minnesota Defendant was charged with possession of controlled substances. His right to a jury trial was waived and, on stipulated facts, defendant was convicted. Based on citizens' complaints about "afterhours activity" and reports of liquor being sold at a house during hours when bars were required to be closed, illegal gambling, and narcotics use, the police obtained a search warrant and arrested defendant. The trial court denied defendant's motion to suppress evidence seized in a search of his person, and defendant was convicted. The court of appeals overturned defendant's conviction on the ground that nothing in the warrant affidavit gave probable cause, the court said, to believe "that all persons who might be found on the premises were engaged in criminal activities at all times."

Held, reversed, conviction upheld. The Supreme Court of Minnesota reversed by upholding the search warrant because the police were dealing

with illegal afterhours activity in a house; they executed the warrant late at night and found illegal activity carried on throughout the house. "There was little likelihood that anyone would be in the house but to participate in the afterhours revelry," the court stated. The court also deemed it "unreasonable to expect the officers to name in the warrant the people to be searched in such a place because the customers could vary from day to day or, indeed, from hour to hour." Given the nature of the suspected illegality and the late hour at which the warrant was executed, the necessary nexus between the criminal activity, the place of activity, and the persons in the place to show probable cause was established. State v. Hinkel, 365 N.W.2d 774 (1985).

Missouri Defendant was convicted of second-degree burglary and of stealing property valued at $150 or more. He was arrested as the result of a search of his dwelling conducted by a sheriff investigating another burglary in which defendant was a suspect. While in defendant's residence investigating the other crime, the sheriff saw items that he recognized as having been reported as stolen. The sheriff left defendant's home, prepared a complaint for a search warrant, and presented the complaint to the circuit judge, who issued a warrant authorizing a search of defendant's dwelling and outbuildings and the seizure of any of the items listed on eight exhibits attached to the warrant. The sheriff executed the warrant, seized the items reported stolen, and arrested defendant. Defendant moved to suppress the evidence, on the ground that the search warrant was issued without probable cause and failed to identify the items to be seized with sufficient particularity; but the trial court denied defendant's motion. In the course of the proceedings, defendant attempted to obtain the originals or any copies of the application or the supporting affidavits for the search warrant, but was unable to do so. Apparently, the clerk's office of the circuit court failed to retain those documents or copies thereof. A copy of the warrant, which even defendant admitted was a valid copy, was on file before the court. Defendant conceded that this must mean that a written application, duly verified under oath, had been filed with the issuing judge. Nonetheless, defendant pointed out that a state statute required that the application and any supporting affidavits and a copy of the warrant be retained in the records of the court in which the warrant was issued. On appeal, defendant argued that since probable cause for the issuance of the search warrant was to be determined from the application and any affidavits, and since the clerk's office could not locate those documents, the trial court's finding of probable cause should be declared erroneous and his conviction reversed.

Held, affirmed. The Missouri Supreme Court declared that the trial court did not err in finding that the search warrant was issued upon probable cause, even though the clerk's office was unable to locate the application for the warrant. It was clear from the record that the sheriff prepared, signed, and presented to the issuing court a verified, written application, and that the search warrant was issued only after the sheriff, who had a detailed inventory of the missing items, personally observed several of the listed items on defendant's premises, establishing probable cause. The court stated that even if the search warrant

had been issued without a verified application, and should have been declared invalid, the items seized should still not be excluded. The court cited United States v. Leon, 104 S. Ct. 3405 (1984), in which the United States Supreme Court provided for a good-faith exception to the exclusionary rule. In *Leon*, the Supreme Court held that evidence obtained pursuant to a warrant issued by a detached and neutral magistrate should not be excluded, regardless of the validity of the warrant, as long as the officer executing the warrant acted in objectively reasonable, or "good-faith," reliance on that warrant. In the instant case, even if the warrant were invalid, it was proper to admit the items seized by the sheriff in the search, who acted in good-faith reliance upon the search warrant. State v. Brown, 708 S.W.2d 140 (1986).

North Dakota Defendant was stopped for a speeding violation by a police officer who asked defendant to produce his driver's license. Defendant got out of his car and opened the trunk and unzipped a suitcase from which he produced his license. The officer then ordered defendant to sit in the patrol car, and defendant complied. The officer testified that he recognized defendant as the individual he had seen stumbling off a sidewalk near a bar earlier that evening. While they were sitting in the car the officer issued the speeding citation and observed that defendant's complexion was flushed, that his eyes were bloodshot, and that he had an odor of alcohol. Because of these observations the officer administered field sobriety tests, which defendant failed. Thereupon, defendant was placed under arrest for driving while under the influence of alcohol (D.U.I.). Thereafter, defendant was given a blood-alcohol test after the implied-consent advisory on the request and notice form had been read and explained to him. The breathalyzer test established a reading of .17 percent of alcohol in defendant's blood. On appeal, defendant contended that the officer effected a custodial arrest without probable cause by ordering him into the patrol car and that the officer then conducted an illegal search of defendant's person in order to establish probable cause for D.U.I. Defendant further argued that all the state's evidence that was discovered after he was illegally seized should have been suppressed by the trial court. Defendant was convicted and appealed.

Held, conviction affirmed. The Supreme Court of North Dakota focused on whether or not the officer's order to defendant to sit in the patrol car was a reasonable seizure under the Fourth Amendment and therefore a reasonable invasion of defendant's personal security. The court concluded that this additional intrusion can only be described as de minimis, and what was a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's and driver's safety. Thus the court extended the reasoning of the U.S. Supreme Court in Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330 (1977), to this case. State v. Mertz, 362 N.W.2d 410 (1985), 21 CLB 471.

§ 58.120 —Manner of making arrest or entering premises as affecting validity of subsequent arrest or search

U.S. Supreme Court Defendants, suspected of illegal drug activities, were observed by federal agents, who noted

defendants exiting from a warehouse with a tractor trailer rig bearing a long container. Agents forced their way into the warehouse and observed burlap-wrapped bales. When applying for the warrant, they did not mention the entry into the warehouse, and upon the reentry into the warehouse, they seized 270 bales of marijuana. Defendants were convicted in the U.S. District Court for the District of Massachusetts on charges of conspiracy to possess and distribute illegal drugs. They appealed, arguing that the warrant was invalid because the agents did not inform the magistrate about the prior warrantless entry. The Court of Appeals for the First Circuit affirmed. The Supreme Court vacated and remanded for reconsideration. Upon remand, the court of appeals affirmed, and defendants' petitions for certiorari were granted and consolidated.

Held, conviction vacated and remanded. The Supreme Court decided that remand was required to determine whether government agents would have sought a warrant if they had not earlier entered the warehouse. Murray v. United States, 108 S. Ct. 2529 (1988).

U.S. Supreme Court Following a car accident, a witness told the police that the driver might have been drunk. After checking the car's registration, the police, without obtaining a warrant, went to the owner's house at about 9 P.M. and arrested him for driving under the influence of an intoxicant in violation of Wisconsin state law. When his license was suspended, the Wisconsin Court of Appeals vacated the order on Fourth Amendment grounds, but the Wisconsin Supreme Court reversed and reinstated the order.

Held, vacated and remanded. Warrantless nighttime entry into an individual's home to arrest him for violation of a civil nonjailable traffic offense violates the Fourth Amendment. The Court explained that before government agents may invade the sanctity of the home, they must demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. Welsh v. Wisconsin, 466 U.S. 740, 104 S. Ct. 2091 (1984), 21 CLB 69.

U.S. Supreme Court Defendant was arrested on a federal charge by Secret Service agents who had entered his home without an arrest warrant. Subsequently, this Court, in Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980), held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. After the district court denied his motion to suppress the evidence, he was convicted at trial. When his case was on direct appeal, *Payton* was decided and the Ninth Circuit reversed the conviction, holding that *Payton* applied retroactively.

Held, affirmed. A decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered, except where a case would be clearly controlled by existing retroactivity precedents. The Court found that this case did not fall within this exception since *Payton* did not apply already settled precedent to a new set of facts or announce an entirely new and unanticipated principle of law. United States v. Johnson, 454 U.S. 537, 102 S. Ct. 2579 (1982), 10 CLB 68.

Court of Appeals, 5th Cir. After defendants pled guilty to marijuana conspiracy charges and were convicted, they appealed on the ground that evidence obtained pursuant to a search warrant had been improperly admitted into evidence.

Held, affirmed. The Fifth Circuit ruled that since the search warrant was based on sufficient probable cause even without evidence supplied by a Drug Enforcement Administration agent's illegal entry into defendant's house, the trial court's redaction of the search warrant and admission of the evidence obtained in the search was correct. The court observed that search warrants should be viewed in a realistic and commonsense manner, and that the search warrant here was based only in small part on the agent's observations. United States v. Antone, 753 F.2d 1301 (1985).

Court of Appeals, 5th Cir. The government appealed from an order of the district court suppressing defendant's post-arrest confession as a fruit of an unlawful arrest.

Held, reversed. Even if the arrest warrant, which was issued after an unchallenged finding of probable cause, was invalid on the ground that it did not identify the defendant with sufficient particularity, the exclusionary rule was inapplicable pursuant to the "good faith" exception where the actions of the state law enforcement agents were taken in a reasonable and good faith belief that they were legal. United States v. Mahoney, 712 F.2d 956 (1983), 20 CLB 64, cert. denied, 104 S. Ct. 3590 (1984).

California Defendant was convicted of burglary of a television set stolen from an automobile dealership where he was formerly employed. On appeal, defendant argued that the police failed to comply with the knock-notice statute and that his eleven-year-old stepdaughter did not give valid consent to their entry of his house, and he moved to suppress the evidence seized in the search. In the incident at issue, the arresting officer Sergeant Hasser and Detectives Keller and Boyd, pursuant to a valid warrant, went to defendant's home to arrest him in connection with two burglaries at the dealership. While Boyd observed the back of the house, Hasser and Keller knocked on the front door, where they were greeted by Gretchaen, defendant's stepdaughter. Hasser testified that he identified himself, asked to see defendant, and inquired if he could enter the house. He did not present the warrant or explain his intent to arrest defendant. Gretchaen admitted both officers and told them defendant would return home in about an hour. Hasser asked for a quick tour of the house to confirm defendant's absence. On their way out, the officers noticed in plain view a television set matching the description of the one stolen, and Hasser seized the set as evidence of burglary. He then left his card and requested that defendant call him. Gretchaen's testimony was similar, except that she testified that Hasser did not identify himself until he was in the house and that he did not ask permission to enter but stated that the officers would have to come in and check if defendant was there.

Held, reversed. The California Supreme Court, en banc, reversed the court of appeals decision and held that the police lacked reasonable cause for believing that defendant was inside his house and, despite having an arrest warrant, violated state and federal

statutes with their nonconsensual entry. Although Hasser testified that he had believed defendant was home because police had obtained defendant's address from an application for employment and defendant was not employed at a daytime job, the court cited People v. Bennetto, 517 P.2d 1163 (Cal. 1974), which held: "Section 844 of the Penal Code requires more than a reasonable belief that the person to be arrested owns or leases the dwelling which is entered; there must be a reasonable belief that the person is inside at the time of entry."

If the officers had a hunch that defendant would be home, the evidence indicates it was dispelled before they entered the house. They arrived in plain clothes and an unmarked car, and there was no suggestion that defendant had perceived their arrival and had fled or had hidden. In fact, defendant's car was nowhere in sight, and his stepdaughter told them he was gone and would return within an hour. Nothing in the record supported belief by police that defendant was home, and thus it amounted to no more than speculation. Although Hasser had a duty to locate the suspect named in the arrest warrant he had no authority to enter defendant's home to execute the warrant when defendant was not there and there were no reasonable grounds to believe he was inside. Moreover, noncompliance with Section 844 renders any search and seizure following entry unreasonable within the meaning of the Fourth Amendment, and thus admission of the stolen television set was prejudicial error. People v. Jacobs, 729 P.2d 757 (1977), 23 CLB 402.

Illinois State appealed from circuit court decision to suppress evidence obtained by police, including defendants' confessions, and to quash their arrests. Police surveillance team, acting on a tip from an informant that implicated car used by defendants in a series of Fotomat robberies, followed the car and observed a passenger, one of the defendants, enter a restaurant and run back. They followed the car back to an apartment complex, learning en route that the restaurant had been robbed. The team then went to the door of an apartment where they had "information" that they would find defendants. Having overheard talk about splitting up money and saving some for bond, they knocked and got one of the defendants to open the door on a chain by asking, "Mark, why weren't you at work today?" The police team broke the chain, entered with their guns drawn, and handcuffed the defendants. They obtained written consent to a police search of the car and apartment and obtained confessions that were later put in writing at the police station. In the course of their search, they pried open a metal box without asking for the key. The circuit court was extremely critical of police attitude, and noted that the six-to-ten-man surveillance team should have been able to keep subjects under surveillance while applying for a warrant.

Held, reversed and remanded. The court found that the police had probable cause to proceed to the apartment, since events up to that point tended to corroborate informant's tip. The fact that police had reason to believe that defendants were armed and had just committed a robbery was sufficient to justify police entry into the apartment without a warrant and without identifying themselves, under the "exigent circumstances" exception applicable in emergencies. Search of rooms in

which defendants were apprehended was lawful as a search incident to arrest and, since there was no testimony that consent form was obtained under duress, search of remainder of apartment was also valid. People v. Winters, 454 N.E.2d 299 (1983).

New York Defendant pled guilty and was convicted of driving while intoxicated and leaving the scene of a property-damage accident. Defendant was observed by another motorist leaving the roadway after striking two fences and a utility pole and damaging his vehicle. The motorist followed defendant to a house and called the police. Investigating the report, an officer walked up the driveway and onto an open-ended porch, where he opened the screen door and knocked loudly. After coming to the door, defendant explained that he had been drinking, lost control of his car, hit the fences and pole, and left the scene. The officer arrested him, apparently entering the house in the process. On appeal, defendant moved to suppress all incriminating evidence seized in the arrest, particularly his statements, arguing that the officer violated defendant's constitutional rights by entering his property without a warrant.

Held, affirmed. The Court of Appeals of New York held that incriminating evidence had been obtained before the arrest in the course of the officer's investigation. Defendant's constitutional rights had not been violated because the officer reached defendant's front door by the means defendant made available for public access to his property, which did not intrude into any area where the defendant had a legitimate expectation of privacy, and thereby did not require a search warrant. Furthermore, the officer knocked on defendant's front door and asked defendant questions he chose to answer. People v. Kozlowski, 505 N.E.2d 611 (1987).

§ 58.125 Permissible scope of incidental search

U.S. Supreme Court After a bullet was fired through the floor of the defendant's apartment, injuring a man on the floor below, police entered the apartment to search for the shooter. While there, an officer read and recorded the serial number of stereo equipment that he suspected was stolen. When he learned, by calling headquarters, that a turntable had been taken in an armed robbery, he seized it. Defendant was indicted, but the Arizona state trial court granted his motion to suppress and the Arizona Court of Appeals affirmed.

Held, affirmed. While the mere recording of the serial numbers was not a "seizure," the moving of the equipment was a "search" separate and apart from the search that was the lawful objective of the entrance into the apartment. The Court noted that the officer only had a reasonable suspicion that the stereo equipment was stolen, which is less than the "probable cause" standard that must be met for searches and seizures. Arizona v. Hicks, 107 S. Ct. 1147 (1987), 23 CLB 484.

California Defendant was convicted of robbery. When he was arrested, in his vehicle, the police asked defendant if they could search his car's trunk. Although disputed by the state, it was established at trial that defendant refused. Nonetheless, the police searched a briefcase and two tote bags found in the locked trunk of defendant's vehi-

cle, absent a warrant. In these articles, the police found evidence linking defendant to the crime. Although defendant moved to suppress this evidence at trial, his motion was denied, and the evidence was used to convict him of robbery. On appeal, defendant argued that the search of the briefcase and tote bags without a warrant violated the California constitution, and the evidence obtained through the search should have been suppressed.

Held, conviction reversed and case remanded. The California Supreme Court stated that although the arresting officers had probable cause to search defendant's vehicle, they did not have probable cause to search the bags found in the locked trunk, and thus could not lawfully conduct such a search absent a warrant. The warrantless search of the briefcase and tote bags violated Article I, Section 13 of the California constitution, and the evidence obtained thereby should have been suppressed. The requirement to obtain a warrant would not have imposed an undue burden on the police, because they could have merely impounded the items until a warrant was obtained. Since the illegally obtained evidence helped convict defendant, the verdict was reversed and the case remanded. People v. Ruggles, 702 P.2d 170 (1985).

Colorado Defendant was arrested and thereafter charged with driving under the influence of intoxicating liquor. Defendant filed a motion to suppress all evidence obtained from him, including visual observations of the arresting officer, chemical testing, and a custodial statement to the police on the ground that such evidence was the fruit of an unconstitutional search and seizure in violation of the Fourth Amendment as well as the Colorado constitution. The trial court ruled that the officer had reasonable suspicion initially to stop defendant for driving on the wrong side of the road and, as part of that stop, could properly order defendant to get out of his car. The court, however, held that officer's order to walk to the rear of the vehicle constituted an unlawful search unsupported by probable cause. Under derivative evidence principles, the trial court suppressed all the evidence specified in defendant's motion.

Held, remanded. The Supreme Court of Colorado granted certiorari, and ruled that to satisfy constitutional guarantees against unlawful searches and seizures, a roadside sobriety test can be administered only when there is probable cause to arrest the driver for driving under the influence of, or while his ability is impaired by, intoxicating liquor or other chemical substance, or when the driver voluntarily consents to perform the test. Since the People did not contend that there was probable cause, the only basis relied upon by the officer in administering the roadside test was defendant's alleged consent. Because the issue of consent essentially is a factual question, the court said that the appropriate procedure was to remand the case to the trial court to resolve the consent issue. People v. Carlson, 677 P.2d 310 (1984), 21 CLB 82.

§ 58.130 Investigative stops

"[The] Drunk-Driving Roadblock: Random Seizure or Minimal Intrusion," by Lance J. Rogers, 21 CLB 197 (1985).

"Roving Roadblocks and the Fourth Amendment: *People v. John BB.*," by Lawrence D. Kerr and Steven W. Feldman, 20 CLB 124 (1984).

U.S. Supreme Court After respondent began to run at the approach of a police car, police followed him for a short distance and observed him discarding a number of packets. The police arrested him, surmising that the pills discovered in the packets contained codeine. After a search of his person, the police discovered other drugs and a hypodermic needle. A magistrate dismissed the charges on the basis that respondent had been unlawfully seized during the police pursuit preceding his disposal of the packets. He later appealed. The state trial court upheld the dismissal, and the Michigan Court of Appeals affirmed. Certiorari was granted.

Held, reversed and remanded. The Supreme Court declared that the officers' pursuit of respondent did not constitute a "seizure" triggering Fourth Amendment protections. Thus, the charges against him were improperly dismissed. Michigan v. Chesternut, 108 S. Ct. 1895 (1988).

U.S. Supreme Court While patrolling a highway for suspected drug trafficking, a state officer stopped an overloaded pickup truck and told the driver that he would be held until a DEA agent arrived. The DEA agent arrived about 15 minutes later, and after seeing that the truck was overloaded and upon smelling marijuana, the agent searched the truck and found bales of marijuana. The defendant was tried and convicted on federal drug charges, but the Court of Appeals reversed.

Held, judgment reversed and case remanded. The Supreme Court concluded that the twenty-minute detention of the defendant clearly met the Fourth Amendment's standard of reasonableness. The Court explained that the investigative stop was reasonable since the DEA agent had diligently pursued his investigation, and no delay unnecessary to the investigation was involved. The Court thus rejected the per se rule articulated by the court of appeals that a twenty-minute detention is too long for an investigative stop. United States v. Sharpe, 105 S. Ct. 1568 (1985), 21 CLB 464.

U.S. Supreme Court Following an armed robbery in Ohio, a "wanted flier" was issued on the basis of information obtained from an informant about the driver of the getaway car. Subsequently, a police officer stopped the vehicle that defendant was driving based on information contained in the flier, and a passenger in the car was arrested when a gun was observed protruding from under the passenger seat. Defendant was also arrested and charged with a federal crime of being a convicted felon in possession of firearms after a search of the car uncovered more handguns. Defendant was convicted in the district court, but the court of appeals reversed, finding that the wanted flier was insufficient to create a reasonable suspicion that defendant had committed a crime.

Held, reversed and remanded. The Supreme Court ruled that a wanted flier issued on the basis of articulable facts supporting a reasonable suspicion that the person had committed an offense is a sufficient basis to support an investigatory stop. The Court reasoned that restraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee and remain at large. Where police have been unable to locate a person suspected of involvement in a

past crime, the ability briefly to stop that person, ask questions, or check identification in the absence of probable cause promotes the strong governmental interest in solving crimes and bringing offenders to justice. United States v. Hensley, 105 S. Ct. 675 (1985).

Court of Appeals, 4th Cir. After defendants were convicted in district court of conspiracy to distribute heroin and related charges, the defendants appealed.

Held, conviction affirmed. The Fourth Circuit held that law enforcement officers had sufficient cause to justify an investigative stop of defendants' automobile, where they possessed a search warrant for defendants' residence based on probable cause to believe that the defendants were engaged in drug trafficking. The court further found that the manner in which the law enforcement agents carried out the *Terry* investigative stop of defendants' automobile did not constitue an impermissible show of force, even though the law enforcement agents arrived on the scene in approximately six police vehicles, used those vehicles to block the progress of defendants' automobile, and the officers emerged with weapons drawn and ordered the occupants to get out of the automobile. The court noted that these precautions were justified, because the agents were aware that the defendants had been convicted of assault, assault with intent to murder, robbery, narcotics violations, and escape. The court further found that reasonable suspicion justifying the investigative stop of defendants' automobile ripened into probable cause to arrest the defendants; twenty-eight bags of heroin were discovered on one of the defendants during a search of the occupants of the automobile. United States v. Taylor, 857 F.2d 210 (1988).

Court of Appeals, 11th Cir. A police officer noticed defendant holding a vial to his nose in a car parked in an airport parking lot. After asking for identification, defendant handed the officer his driver's license. The officer retaining the valid driver's license then asked defendant for the vial which turned out to contain cocaine. The officer then asked defendant permission to search the car on-the-spot, and advised defendant of his *Miranda* rights. The officer found a semiautomatic rifle in the trunk. This was the basis for defendant's conviction of possession of an unregistered firearm in violation of 26 U.S.C. §§ 5861(d), 5871 (1976). On appeal, defendant contended that the evidence had been obtained as a result of an illegal search.

Held, reversed. The search was illegal, since at the time the officer requested a vial in the defendant-driver's possession, a reasonable person whose license had been retained by the officer would have believed he was not free to leave and therefore the encounter had matured into an investigative stop protected by the Fourth Amendment. United States v. Thompson, 712 F.2d 1356 (1983), 20 CLB 64.

California Petitioners were taxpayers who sought to prohibit the operation of sobriety checkpoints in their state. In their petition for a writ of mandate, taxpayers contended that the sobriety checkpoints were unconstitutional. The trial court denied the writ and taxpayers appealed.

Held, affirmed. Taxpayers contended that the validity of a sobriety checkpoint stop must be determined by a

standard requiring an individualized suspicion of wrongdoing as set forth in In re Tony C., 148 Cal. Rptr. 366 (1978). The court in *In re Tony C.* pointed out that for purposes of analysis under the Fourth Amendment and under California constitutional law, if an individual is stopped or detained because an officer suspects he may be personally involved in some criminal activity, his Fourth Amendment rights are implicated and he is entitled to the safeguard rules of the amendment. In this case, however, the court held the propriety of the sobriety checkpoint stops was not to be determined by the standard pertinent to traditional criminal investigative stops. Rather than to make arrests of drunk drivers and to gather evidence, the primary purpose of the checkpoint stops was to promote public safety by deterring intoxicated persons from driving on the public streets and highways; thus, the propriety of the stops should be determined by the standard applicable to investigative detentions and inspections conducted as part of a regulatory scheme in furtherance of an administrative purpose. Because such stops may be operated in a manner consistent with the federal and state Constitutions, the court found that within certain limitations, the sobriety checkpoint stops were permissible. Ingersoll v. Palmer, 743 P.2d 1299 (1987).

Colorado Defendants were charged with burglary and moved to suppress evidence discovered in their automobile during an investigatory stop. Denver police officer Gerald Whitman, responding to a dispatch call about a burglary at 648 York Street, drove south on Gaylord to check for suspects leaving the scene of the crime. At the corner of Center and Gaylord, a block and a half from the reported burglary, a 1974 Oldsmobile Cutlass in poor condition drove through the intersection. Whitman testified that a young Hispanic male occupied the passenger seat and, along with the driver, looked in the officer's direction as they went through the intersection. Whitman immediately followed the Cutlass, which turned left at the next corner, accelerated to the end of the block, and turned left again. At the next corner it turned right, and as the car was about to turn right again, Whitman turned and stopped the car. When Whitman approached the car, he observed a flashlight, a bent screwdriver, gloves, and a tire iron in the backseat. Whitman asked the driver for his license, which he could not produce, and when the defendant got out of the car upon Whitman's request, the officer noticed a woman's gold wristwatch on the floor of the Cutlass. The district court granted the motion to suppress, concluding that the circumstances did not give Whitman a reasonable and articulable suspicion to make an investigatory stop. The People filed an interlocutory appeal, claiming that the evasive acts of defendants, who did not appear to be residents of the neighborhood, coupled with the recent report of a burglary there, established a sufficient basis for the investigatory stop.

Held, suppression ruling reversed. The Supreme Court of Colorado, en banc, found that, given the defendants' evasive actions and their proximity to the location of the reported burglary, the officer's suspicion that they were connected to the criminal activity was reasonable, especially since the area where Whitman first saw the defendants was residential with minimal traffic, and the nature of the crime made it likely that the perpetrators

were not residents. The officer's three years' experience patrolling Washington Park, a predominantly white middle-class neighborhood, allowed him to identify defendants, whom he did not know, as unlikely residents. Defendants' evasive driving tactics in response to the officer's turning to follow them amounted to flight from the immediate area of the reported burglary. People v. Mascarenas, 726 P.2d 644 (1986), 23 CLB 295.

Connecticut Defendant was convicted of first-degree robbery. After commission of the crime, defendant was stopped while walking by a police officer searching the area in the vicinity of the robbery site. Defendant's location, general physical description, and demeanor aroused the police officer's suspicion. The police officer, who was alone at the time, decided to await the arrival of a detective called to investigate the robbery, and of a witness to the crime, for possible identification of defendant. The police officer frisked defendant and placed him in the back seat of his patrol car. The police officer told defendant that he would be taken home when the detective completed his interrogation. The police officer then made radio contact with headquarters, to report that he had a suspect. He found out that a car used in the robbery belonged to defendant, who the police officer thereupon arrested. On appeal, defendant charged that his detention by the police officer was unreasonably intrusive, and, thus, unconstitutional.

Held, conviction affirmed. The Connecticut Supreme Court found that defendant's detention was constitutionally permissible under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), because the police officer had sufficient articulable grounds to suspect that defendant had committed the robbery. The court stated that "a police officer who has articulable grounds to believe that a crime has been committed and to detain someone who may be implicated in that crime must be permitted to make reasonable use of the resources at his disposal at the site of the investigatory stop." Even defendant conceded that there were sufficient grounds to suspect him of the crime, and, since his detention was not unreasonably lengthy or intrusive, the conviction was upheld. State v. Braxton, 495 A.2d 273 (1985).

Florida After being arrested for possession of 1,000 pounds of marijuana, defendant moved to have the evidence suppressed. Defendant had been observed for several hours by various police officers. His appearance at an unusually early hour at a boat ramp, his long wait for a boat, the absence of registration numbers on the boat, the heavy items in the back of defendant's truck, and the suspicious manner in which the boat was loaded onto the truck's trailer and driven away without draining or securing it cumulatively raised a suspicion of criminal activity. Under these circumstances, the police stopped defendant's truck and discovered the marijuana. Defendant contended that the officers had no justification for stopping him.

Held, for the state. The court stated that police may stop and investigate a motor vehicle when the police officer has a "founded" suspicion that is factually grounded in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge. The court noted that in this case the various actions of defendant were ade-

quate to raise a founded suspicion. They continued that although each act in itself could evince an alternative explanation, when viewed collectively they suggest that defendant was engaged in illegal activity. Thus, it was permissible to stop the truck, look into the boat, and seize the marijuana. However, the court refused to allow officers to get around the Fourth Amendment's mandate by basing a detention on a purely pretextual traffic stop as permitted in State v. Ogburn, 483 So. 2d 500 (Fla. Dist. Ct. App. 1986). Kehoe v. State, 521 So. 2d 1094 (1988).

Idaho On an appeal of his conviction for driving while under the influence (DUI) of alcohol, defendant contended that the roadblock at which he had been stopped and subsequently arrested was a warrantless search and seizure in violation of both the U.S. Constitution and the Idaho constitution which state that the right of people to be secure against unreasonable searches and seizures shall not be violated and that no warrant shall issue without probable cause shown.

Held, reversed. The evidence used to convict defendant was unconstitutionally obtained pursuant to a warrantless search, and the trial court should have granted defendant's motion to suppress because the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. The roadblock in this case was not conducted pursuant to authority granted by the court or the legislature, and the police lacked such authority to establish roadblocks. No amount of control or limited discretion can justify the "seizure" that takes place in the complete absence of probable cause or individualized suspicion that a motor vehicle violation has occurred. While the court found such activities by law-enforcement authorities commendable in their ultimate goal of removing DUI offenders from the public highways, their actions drew dangerously close to what might be referred to as a police state. State v. Henderson, 756 P.2d 1057 (1988).

Illinois Defendant was charged with driving under the influence of alcohol. He had been arrested as the result of a temporary roadblock, ostensibly erected to check drivers' licenses, but in reality to deter and detect drunken drivers, as admitted to by the state. Before trial, defendant moved to suppress his arrest and all evidence obtained as a result of it on the ground that the roadblock violated the Fourth Amendment prohibition against unreasonable searches and seizures. The trial court granted defendant's motion to suppress, and the state appealed.

Held, reversed and remanded. The Illinois Supreme Court found that the temporary roadblock erected to identify drunken drivers did not violate the Fourth Amendment. A roadblock is not per se violative of the Fourth and Fourteenth Amendment requirement that a stop, or search and seizure, be based on probable cause. The question of whether a roadblock violates the Fourth Amendment is one of reasonableness, determined by balancing the state's need for intrusion against an individual's legitimate expectation of privacy. The public interest here, the prevention of drunken driving and its attendant dangers, was compelling, and outweighed the minimal intrusion (whether objectively or subjectively determined) caused by the roadblock stop. People v. Bartley,

486 N.E.2d 880 (1985), 22 CLB 298, cert. denied, 106 S. Ct. 1384 (1985).

Kansas After being charged with various drug offenses that included possession with intent to sell various controlled substances, defendants moved to have the evidence against them suppressed because the police found the evidence in defendants' car without having justified reason to search it. The officers admitted that although they thought defendants were suspicious, they had witnessed no criminal activity until defendants' car began driving at an excessive speed.

Held, for the state. The court found that at the time defendants turned onto the interstate highway, the pursuing officers did not have knowledge of facts giving rise to a reasonable and articulate suspicion that defendants had committed, were committing, or were about to commit a crime. The critical time that the officers must have knowledge of such facts, however, is at the time of the actual stop. Here, when the stop was made, an officer had observed defendants' car being driven much faster than the speed limit on the interstate. When the car exceeded the speed limit, the law-enforcement officer who observed the conduct had a lawful basis upon which to stop the vehicle and to search defendants. The observation by the officer of speed grossly exceeding the lawful limit was sufficient to cause him to reasonably conclude that the driver of the car was committing a traffic offense, and thus the stop was lawful. State v. Guy, 752 P.2d 119 (1988).

Maine Defendant appealed his conviction for operating an automobile under the influence of liquor. Defendant was stopped at a roadblock where officers, detecting alcohol on his breath, gave him field sobriety tests and a pre-arrest breath test. These tests showed defendant was intoxicated, and he was arrested. Defendant claimed that the roadblock was in violation of the U.S. Constitution Fourth Amendment prohibition against illegal searches and seizures.

Held, conviction affirmed. The Supreme Judicial Court of Maine stated that the prevention of drunk driving was a legitimate governmental interest that was aided by roadblocks. The court noted that recent legislative history showed that the legislature had passed harsher laws against drunk driving. In this case the roadblocks were not capricious: all motorists were stopped and the roadblock was explained to them. The time that a car was forced to stop was minimal except in cases where officers suspected the driver was under the influence. The court ruled that the prevention of drunk driving and the harm it causes others outweighed the individual's Fourth Amendment rights. State v. Leighton, 551 A.2d 116 (1988).

Minnesota A driver had his license revoked for driving while under the influence. A chemical test administered to the driver after his arrest indicated that he had a blood-alcohol concentration of .10 or more. The driver was given the test at a police station, after he was stopped by officers on patrol. The police had been tipped off by an anonymous caller that the driver of the indicated car was possibly drunk, and a radio dispatch to a patrol car on the given route led to the stop and subsequent arrest. Before the police officers stopped the driver, though, they followed his car for a short while, but they did not observe

any erratic driving. Nonetheless, based on the anonymous tip, they pulled the driver over. They smelled alcohol on the driver's breath, noted that his speech was slurred, his eyes were bloodshot, and his gait was unsteady. They thereupon arrested him, took him to the station, and administered the chemical test, which showed he had a blood-alcohol concentration of .155. On appeal, the driver argued that the police officers who pulled him over did not have sufficient reliable information to justify the stop, thus violating the Fourth Amendment.

Held, affirmed. The Minnesota Supreme Court found that the police did not have the requisite reliable indicia to justify the stop, and thus violated the driver's constitutional rights. An anonymous tip received by the police, not confirmed by erratic driving while the police followed the drunken driver, did not constitute the minimal indicia necessary to justify an investigatory stop. Olson v. Comm'r of Pub. Safety, 371 N.W.2d 552 (1985).

Nebraska Defendant appealed his conviction for driving under the influence of alcohol. Defendant claimed the arresting officer's investigatory stop was in violation of his Fourth Amendment right prohibiting warrantless searches. On a foggy night at 1:20 A.M., defendant left his place of business. He was followed by the police who, after two minutes, decided to stop defendant. The police made the stop because there had been numerous incidents of robbery and vandalism along the stretch of road where defendant's business was located.

Held, conviction affirmed. The court cited United States v. Cortez, 449 U.S. 411, 101 S. Ct. 690 (1981), where the U.S. Supreme Court held an investigatory stop must be justified by some proof that the person stopped is, or is about to be, engaged in criminal activity. In this case, the court could think of no legitimate reason why a stranger would have entered defendant's premises at 1:20 A.M. on a foggy night when the visibility was poor. Viewing the totality of circumstances, the court decided that the stop was justified. State v. Kavanaugh, 434 N.W.2d 36 (1989).

Nebraska Defendant was convicted in municipal court of driving while under the influence of alcohol. On appeal, the district court reversed the conviction on the ground that the evidence of defendant's intoxication had been obtained as the result of an unconstitutional seizure of the person.

Held, affirmed. The Nebraska Supreme Court ruled that a checkpoint devised by field level officers insufficiently limited their discretion and hence violated the Fourth Amendment. In this case the checkpoint was planned and carried out by an Omaha police unit consisting of a six- or seven-person unit commanded by a field sergeant. A marked police car, with red lights flashing, was placed on a highway near a bar just prior to closing time. The officers stopped every fourth southbound vehicle in order to determine whether the driver appeared to have been drinking. The checkpoint was not executed pursuant to any departmental standards, guidelines, or procedures which considered, weighed, and balanced the factors enumerated by the U.S. Supreme Court in Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391 (1979) and Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637 (1979). The checkpoint was therefore found to be subject to the constitu-

tional infirmity found to exist in both *Delaware* and *Brown*; that is, a driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field. State v. Crom, 383 N.W.2d 461 (1986).

New Mexico Defendants were indicted for possession of cocaine and trafficking in a controlled substance. They were arrested as the result of a stop for speeding by a New Mexico state police officer. After the stop, the police officer made a routine check with the National Crime Information Computer (NCIC) to determine if the two occupants of the car were wanted or if the car was stolen. The check took a few minutes and the results were negative on both counts. During the time of the stop, however, the police officer noticed that the car and its occupants fit the profile of narcotics trafficking in their state, namely: (1) Two persons appearing to be foreigners (2) were driving a rented car with Florida license plates (3) across the country (4) with a small amount of luggage and (5) with a one way car rental paid for in cash. Based on these observations, the police officer decided that he had a reasonable suspicion to investigate further. He called for a backup and, while waiting for assistance, filled out a consent to search form. After the other officers arrived on the scene, defendants were advised of their rights, and were presented with the consent to search form. Defendants signed the form. Due to the logistics of the situation, though, namely the cold, darkness, and their location on the side of a busy highway, the responding officers accompanied defendants to a service station in close proximity to the highway to conduct the search. There the officers searched the car and found the cocaine. After a hearing on a motion to suppress evidence, the trial court found that the detention of defendants before the consent to search was obtained and after the police officer received a negative response to his NCIC inquiry constituted an "illegal seizure." The state appealed.

Held, reversed and indictment reinstated. The New Mexico Supreme Court found that the detention of defendants was proper, because it was based on reasonable suspicion. The court cited United States v. Sharpe, 105 S. Ct. 1568 (1985), as a recent case dealing with the question of what is reasonable detention. The court in *Sharpe* stated that "In assessing whether a detention is too long in duration . . . we consider . . . whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendants." In this case, the police officer detained defendants for only a short time, that is, several minutes after the negative NCIC response. Considering the factors that the police officer relied on to detain defendants, the detention was based on reasonable suspicion. These factors were (1) the drug courier profile previously referred to; (2) that during the period of the initial stop, defendants appeared more nervous than would the average person stopped for speeding; and (3) defendants appeared to want to get away from the police officers as quickly as possible. The last factor was demonstrated by the fact that they asked the police just to issue them a ticket and allow them to proceed. State v. Cohen, 711 P.2d 3 (1985), cert. denied, 106 S. Ct. 2276 (1986).

New York Defendant was convicted of robbery in the first degree. On the night of the arrest, the police responded to a dispatch concerning a holdup at a nearby factory in which the robbers were identified as two black men, both about 5 feet, 5 inches tall, driving in a green Pontiac with black trim. About a quarter mile from the factory, the police pulled over two suspicious men who seemed to fit the description. When asked where they had been, the men responded that they were coming from work at American Brass, which was miles away in the opposite direction. After ordering the men out of the car and frisking them for weapons, the presiding police officer told them about the robbery and about his intention of taking them to the scene of the crime for possible identification by three witnesses. Neither man was handcuffed and both men accompanied the officers without objection. When the patrol car arrived at the factory less than a minute later, the suspects were identified and arrested; a search of the men and their car revealed weapons and other evidence from the robbery. On appeal, defendant argued that among other things the detention and transportation to the crime scene violated his constitutional right to freedom from unreasonable governmental intrusion.

Held, conviction affirmed. The New York Court of Appeals held that the nonarrest, detention, and transportation of defendant to the crime scene were within the bounds of a lawful investigatory stop. The police officer diligently pursued a minimally intrusive means of investigation to confirm or dispel suspicion, a guideline set forth in United States v. Sharpe, 470 U.S. 675 (1985), by asking defendant where he was coming from, to which the latter gave an unsatisfactory response that did not allay officer's suspicion that defendant may have committed the crime. The police action was reasonable not only for the purpose of confirming or dispelling suspicion quickly but also for the following factors: The authorities knew that a crime actually had been committed; the total period of detention was less than ten minutes, the crime scene was very close and eyewitnesses were there; and there was no proof of a significantly less intrusive means available to accomplish the same purpose. The transportation did not unduly prolong the detention and a speedy on-the-scene viewing was of value both to law enforcement authorities and to defendant. People v. Hicks, 500 N.E.2d 861 (1986), 23 CLB 293.

New York Defendant was convicted of operating a motor vehicle while impaired. Defendant, while driving at about 2:00 A.M. on Saturday, came up to a roadblack established pursuant to a directive from the county sheriff. An officer requested defendant to produce his license, registration, and insurance card. Observing that defendant fumbled for his wallet, had bloodshot eyes, and smelled of alcohol, the officer asked whether defendant had been drinking. After defendant responded that he had just left a bar, he was asked to step out of his car. As he did so he was unstable on his feet and was unable successfully to perform heel-to-toe and finger-to-nose tests. Based on those facts and an alcosensor breath screening test, which defendant agreed to take, the officer concluded that defendant was intoxicated and placed him under arrest. The roadblocks were conducted pursuant to a detailed memorandum outlining pro-

cedures for site selection, lighting and signs, avoidance of discrimination, location of screening areas, and the nature of inquiries to be made. The memorandum also directed that two to four checkpoint locations should be used during a four-hour period. Defendant's motion to suppress the evidence obtained at the roadblock was denied. On appeal, defendant argued that a temporary roadblock is constitutionally impermissible, and that it had not been shown that less intrusive means of enforcement would not be effective.

Held, conviction affirmed. The court of appeals found that a roadblock was a sufficiently productive mechanism in relation to both its detection and deterrence effect to justify the minimal Fourth Amendment intrusion involved. These checkpoints met the constitutional requirement that they be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers as set forth in Brown v. Texas, 443 U.S. 47 (1979). The governmental interest here was found to outweigh sufficiently the intrusion on individual liberties to justify such limited stops. People v. Scott, 483 N.Y.S.2d 649 (1984).

South Dakota Defendant appealed his conviction on grand theft and petty theft charges. A day after purchasing stolen goods, defendant was stopped by police for driving under the influence (DUI), and the stolen goods were subsequently found. Defendant claimed that because he was improperly stopped, the goods should not be admitted as evidence.

Held, remanded for resentencing. The court held that there was probable cause for the stop. Two officers encountered defendant at a fight. His eyes were bloodshot and red, and his breath had a strong smell of alcohol. When they saw defendant drive away, they had reasonable suspicion that defendant was driving under the influence of an alcoholic beverage. State v. Flittie, 425 N.W.2d 1 (1988).

Washington Defendant was convicted of second-degree burglary. Police received information that a burglary might be taking place, and this information and a description of two suspects was given over the police radio. When officers arrived at the scene, a witness told them where to locate one of the suspects. The officers drove the indicated distance and saw defendant, sweating and out of breath, as if he had been running. Defendant was wearing clothing described by one of the witnesses to the burglary. The officers stopped defendant and informed him that he was being held in custody on suspicion of burglary. They then frisked defendant, handcuffed him, and drove him two blocks to the scene where a witness identified him as one of the two men she had seen earlier. The time from detention to identification was approximately ten minutes. Defendant was arrested and informed of his rights when the detaining officers learned upon the return to the scene that a burglary had, indeed, taken place. On appeal, defendant argued that evidence obtained after his detention was improperly admitted because the investigation methods used by the police exceeded the scope of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), and thereby violated his rights under the Fourth Amendment.

Held, conviction affirmed. The court found that whereas the amount of physical intrusion in the case was "significant," it was not excessive and was

permissible under a *Terry* stop. The purpose of stopping defendant was to detain a person whose description specifically matched that of a witness to several suspicious activities. Frisking and handcuffing defendant for the two-block ride back to the scene of the burglary was held not to be impermissibly intrusive because such actions are standard when a suspect is confined to a police car, especially a police car that has no screen separating front and back seats. Whereas transporting a suspect even a short distance is more intrusive than a mere stop, the transportation did not transform the stop into an arrest. Given the circumstances of the case (i.e., a crime reported, the stopped suspect matching several witness descriptions, the lack of a screen in the car, the total detention lasting from five to ten minutes, and a short transportation), the court determined it was not unreasonable for the officers to transport defendant so that a witness could make an identification. State v. Wheeler, 737 P.2d 1005 (1987), 24 CLB 270.

Washington Defendant, Kennedy, was convicted of possession of over forty grams of marijuana and appealed, arguing that the initial police stop of his car was an unreasonable violation of the Fourth Amendment of the U.S. Constitution and an intrusion into his "private affairs" as provided in an article to the state constitution. Defendant petitioned to have the discovery of marijuana suppressed and his conviction reversed. At about 2:30 P.M. on September 17, 1982, police officer Adams drove by Smith's house in Walla Walla to investigate complaints from neighborhood residents that there was heavy pedestrian traffic in and out of Smith's house and that the visitors involved stayed very briefly. Officer Adams had received previous information from an informant that defendant regularly purchased marijuana from Smith, that he only went to Smith's house to buy drugs, and that he usually drove either a light green pickup truck or a maroon Oldsmobile owned by Sison. As he drove by Smith's house, Adams saw a maroon car parked outside with a person seated in the passenger side, and he made a license check that traced the car to Sison. Adams then observed Kennedy leave Smith's house, get into the car, and drive off. Although he saw nothing in Kennedy's hands, he stopped him to investigate because he believed Kennedy had purchased marijuana. After pulling defendant over, Adams observed him lean forward and put something under the seat, and, in the subsequent search, he found a plastic bag containing marijuana and arrested defendant.

Held, conviction affirmed. The Supreme Court of Washington, en banc, held that the police stop, although intrusive, was limited and was warranted by the facts known to Officer Adams and the reasonable conclusions he drew from them. The court cited Adams v. Williams, 407 U.S. 143 (1972), wherein a police officer who, acting upon an informant's tip, approached a suspect sitting in a car, asked him to open the door, and, when the suspect instead rolled down the window, reached to where the informant had said a gun would be, withdrew the gun and arrested the suspect. In upholding this arrest as lawful, the Supreme Court made it permissible for police to detain a suspect only if the officer has a well-founded suspicion, based on objective facts, that the person is connected to potential or actual criminal activity. Officer Adams, who

had served the Walla Walla Police Department for twenty years and had been involved in over 100 drug-related investigations over the previous five years, testified that he had received tips from a reliable police informant for several months, and one of these tips had resulted in the issuance of a warrant and subsequent conviction. In addition, Adams had first-hand corroboration for two of the informant's facts, observing Kennedy leave Smith's house and enter a car described by the informant. Moreover, the police had another source of information in the neighbor's complaints. On the basis of the two tips, the officer's experience with drug investigations, and his own eyewitness corroboration of some of the information, Officer Adams had sufficient and reasonable suspicion to stop Kennedy. State v. Kennedy, 726 P.2d 445 (1986), 23 CLB 298.

Wisconsin Defendant appealed his conviction of attempted robbery as party to a crime and burglary as party to a crime. Defendant claimed that his motion to suppress his identification and all evidence arising from that stop should be granted because the officer stopped him without a warrant, thereby violating the Fourth Amendment prohibition barring illegal search and seizure. An officer had reason to believe a stabbing had occurred and at 2:00 A.M. saw defendant at the site of the alleged stabbing. Defendant fled and eluded the pursuing officer. After the stabbing was proved false, the officer, who was mistakenly informed that defendant had outstanding warrants, saw defendant, stopped him, identified him, learned there were no warrants, and released him. Because of this stop, police later matched defendant with description of a person involved in a robbery.

Held, conviction affirmed. The court cited Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), in which the U.S. Supreme Court determined that a police officer may, in appropriate circumstances, detain a person for purposes of investigating possible criminal behavior, even though there is no probable cause to make an arrest. The court held that the flight from the officer, under the totality of circumstances present, justified a warrantless investigatory stop. Considering the officer thought there might be warrants for defendant, and given his suspicious flight from him, was justified to make a warrantless stop when he later met defendant. State v. Jackson, 434 N.W.2d 386 (1989).

§ 58.131 Search as result of informant's tip (New)

Arizona Defendant was convicted of unlawful transportation of marijuana, a felony, and was sentenced to a mitigated imprisonment term. Defendant appealed, and the court of appeals reversed, holding that the warrantless search of defendant's car, based in part on information from an informer, did not satisfy the requirements of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). These two cases had controlled the constitutionality of a search conducted as a result of information obtained through an informant until they were abandoned by the U.S. Supreme Court. The state supreme court concluded that the search could be upheld only if Illinois v. Gates, 103 S. Ct. 2317 (1983), and United States v. Ross, 455 U.S. 798 (1982), received retroactive application.

Held, affirmed. The Arizona Supreme Court found that the U.S. Supreme Court did not consider *Gates* and *Ross* to be a sharp break with the past and that it receded from the strict application of *Aguilar* and *Spinelli* but did not wholly disregard the old standard. Instead, "the *Aguilar/Spinelli* test was incorporated into the *Gates*' 'totality of circumstances' test . . ." and therefore, the *Gates* and *Ross* cases could fairly be applied retroactively. Since one of the stated purposes of the exclusionary rule is to deter police misconduct by excluding material evidence of guilt, the courts have been reluctant to apply it retroactively, because there is little deterrent effect in "punishing the constable" for violation of a rule that he did not know about at the time he seized the evidence. However, the court said, the situation is different when, as here, evidence previously excludable by operation of the exclusionary rule is now admissible because of the reversal of a previous rule excluding such evidence. State v. Espinosa-Gomez, 678 P.2d 1379 (1984), 21 CLB 188.

ELECTRONIC EAVESDROPPING

§ 58.135 In general

"Enforcement Workshop: Detective McFadden Goes Electronic," by James J. Fyfe, 19 CLB 162 (1983).

U.S. Supreme Court After an owner of a private cabin moved to suppress evidence based on the warrantless monitoring of a beeper was denied, the cabin owner was convicted in the district court of conspiring to manufacture controlled substances. The Eighth Circuit Court of Appeals reversed the conviction.

Held, reversed. The Supreme Court concluded that the monitoring of the signal of a beeper placed in a container of chemicals that was being transported to the owner's cabin did not invade any legitimate expectation of privacy and, therefore, was neither a "search" nor a "seizure" within the scope of the Fourth Amendment. The Court reasoned that since the beeper surveillance amounted principally to following an automobile on public streets, a person travelling in the automobile has no reasonable expectation Court further observed that while the of privacy as to his movements. The respondent had the traditional expectation of privacy within his dwelling, such expectation of privacy did not extend to visual observation from public places of the automobile arriving at his premises or the movement of the container outside the cabin. United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081 (1983), 19 CLB 476.

Court of Appeals, 1st Cir. Defendants were convicted of conspiracy to distribute heroin. Crucial evidence, indicating defendants' participation in this conspiracy, was collected by electronic surveillance of specific telephone numbers. Recordings of the intercepted conversations, along with the results of visual surveillance, were presented to a federal grand jury which indicted defendants. They were found guilty in district court which denied their motions to suppress wiretap evidence and to dismiss the indictments.

Held, reversed and remanded. The Massachusetts wiretap statute authorizing application for a warrant order to be made by an assistant district attorney does not conform with the minimum requirements under Title 3 of the Federal Electronic Surveillance Law. The court reasoned that state wiretap

laws are preempted by the federal statute and under Title 3, the principal prosecuting attorney of a state or political subdivision cannot delegate his responsibility under Title 3 to make an independent judgment as to the need for electronic surveillance. United States v. Smith, 712 F.2d 702 (1983), 20 CLB 62.

Court of Appeals, 2d Cir. After defendants were charged with conspiracy to possess cocaine with intent to distribute, the district court granted their motion to suppress intercepted wire and oral communications and evidence derived from them on the grounds that the government failed to comply with the requirement of presenting tape recordings immediately to the authorizing judge for sealing upon expiration of the period of authorized surveillance.

Held, motion vacated and remanded. The Second Circuit found that the explanation offered by the government for its failure to immediately present the tapes for sealing was adequate. The court noted that the prosecution was engaged in other urgent business and that there was no danger that the tapes had been tampered with. United States v. Rodriguez, 786 F.2d 472 (1986).

Court of Appeals, 11th Cir. Defendants were convicted of various fraud and conspiracy charges in connection with a scheme that involved the fixing of horse races. Two years after the scheme was terminated, one of the participants told federal authorities about it. He actively cooperated in the subsequent investigation, and engaged each of the defendants in conversations about the scheme while wearing an electronic tape-recording device. On appeal, defendants argued that the warrantless taping violated the Fourth Amendment.

Held, convictions affirmed. The court found that the applicable authorities supported the admissibility of the tapes in question, and that it was immaterial that in this case the investigation occurred years after the conspiracy ended. The court also disagreed with defendants' argument that the government, which would have needed a warrant to place the listening device in the restaurant where the conversations occurred, should be so bound when using the informant to gather evidence it could not have gathered directly. The court pointed out that the informant was not an agent of the government, and that he gave his consent before recording each of the conversations, thereby freeing them from the warrant requirement. Furthermore, since the statements were made directly to the informant, he could not be deemed a surreptitious eavesdropper, and the Fifth Amendment does not prohibit the playing of recorded statements to the jury merely because the government delayed arrest while it secured incriminating statements. United States v. Davanzo. 699 F.2d 1097 (1983).

Nebraska Defendant, charged with dealing in dangerous drugs, moved to suppress evidence obtained through the interception of his telephone conversations pursuant to a court authorized wiretap order covering telephones at his residence and a number of bars he frequented; he argued, inter alia, that the warrant application was defective because it did not establish that "other investigative methods had been tried and failed or that other procedures were unlikely

to succeed or were too dangerous" to employ. The application recited facts showing that defendant had been under investigation for a period of months; that reliable informants had supplied information that defendant was a supplier of cocaine; that surveillance of defendant had been unproductive and would not likely be fruitful since law enforcement officers were seldom able to gather sufficient evidence to arrest drug dealers based upon surveillance, given the clandestine nature of such activities; and that it was unlikely that undercover agents would be able to infiltrate defendant's operation. Defendant's motion was granted and the State appealed.

Held, motion to suppress reversed. The Supreme Court of Nebraska recognized that defendant was correct in arguing that eavesdropping devices "may not be the initial step in a criminal investigation" and that the use of such investigatory methods cannot be indiscriminate; an application for an eavesdropping warrant, it noted, must satisfy the issuing judge that other methods have been tried and failed or that such methods are unlikely to succeed or too dangerous to use. However, it continued, the telecommunications statute does not require an exhaustion of all other possible, or even all other reasonable, avenues of investigation prior to the interception of telephonic communications. Here, it found, the application was sufficient because it established that surveillance was unworkable, infiltration of defendant's group would be difficult, and that defendant conducted his operation from different locations. Accordingly, it held that suppression had been ordered erroneously. State v. Brennen, 336 N.W.2d 79 (1983), 20 CLB 181.

Washington Defendants were charged with bribery. The information presented as evidence was obtained by electronic surveillance, specifically eavesdropping conducted by federal agents and transmitted to state authorities. The state's case ultimately was based on evidence obtained by the Pierce County Sheriff. An informant was used first, then a deputy sheriff, working undercover, conducted an investigation, both for the benefit of the sheriff's office. After this initial investigation, the sheriff contacted the Federal Bureau of Investigation, who joined the investigation. Initially, the informant was wired by federal authorities and reported directly to them. Later, the informant and the undercover agent conducted additional electronic surveillance for the sheriff's office, and it is these recordings that are in dispute in the case. At trial, defendants charged that the information obtained by the electronic eavesdropping should not be allowed as evidence, because it was illegally collected by federal officials without prior court approval. Such evidence, although admissible in federal court under federal law, is inadmissible in state court under Washington law. Defendants also claimed that probable cause for issuance of the trial court order authorizing the eavesdropping could not be based upon the federal tape recordings. At trial, defendants tried to suppress the tape recordings of alleged transactions, but the trial court declined to do so.

Held, denial of motion affirmed and case remanded. The Supreme Court of Washington, en banc, ruled:

> Information obtained by federal officers from electronic eavesdropping conducted by them in accordance

with federal law can legally be furnished to state officers; and such information may, in turn, properly be used by state officers for the purpose of establishing probable cause to obtain the issuance of an order from a state court authorizing electronic eavesdropping in accordance with state statutes.

The court relied upon The National Wiretapping Commission Report, whose text reads in relevant part, "Once federal officers have made their eavesdropping evidence available to state officers whose jurisdiction prohibits law enforcement electronic surveillance, the state officers probably [sic] can use such evidence. . . . Where the state officers were not involved in the original interception, they, . . . do not violate the state prohibition by using the surveillance information obtained from the federal authorities." The court also stated that the federally conducted wiretap was acceptable as evidence to establish probable cause. "When the sheriff's deputies were provided information by the FBI which had been derived from FBI one party consent [the deputy sheriff] recordings, the sheriff's deputies were justified in using it for the purpose of establishing probable cause to procure a state court order authorizing electronic eavesdropping in accordance with state statutes." State v. O'Neill, 700 P.2d 711 (1985).

§ 58.140 —Consent of one of parties to telephone conversation

Court of Appeals, 1st Cir. After defendant was convicted in the district court of possession and passing of counterfeit money, he appealed on the ground that his conversations had been illegally intercepted.

Held, conviction affirmed. The First Circuit ruled that the listening in to a telephone conversation on an extension, with the consent of one party, does not violate the rights of the other party under either the Fourth Amendment or the eavesdropping control law. The court explained that the conversation was overheard by an accomplice who, in cooperation with the police, recorded a three-way conference call on the telephone and was known by the defendant to have had an accomplice "on the other line" during a conversation about counterfeit bills. United States v. Miller, 720 F.2d 227 (1983), cert. denied, 464 U.S. 1073, 104 S. Ct. 984 (1984).

Massachusetts Defendants were found guilty of conspiracy to break and enter a building and to commit larceny. During trial, information gathered through a warrantless electronic surveillance of a private home was admitted into evidence. One of the co-conspirators was a police informant who had consented to wear a concealed transmitter during meetings with others involved in the conspiracy. No warrant was ever sought for the recording. On appeal, defendants argued that article 14 of the Massachusetts Declaration of Rights mandated suppression of the evidence.

Held, reversed. The Supreme Judicial Court of Massachusetts noted that article 14 was broader in scope than the Fourth Amendment to the U.S. Constitution. The court recognized that because the conversations took place in private homes and were not intended to be made public, the conversation participants had a subjective expectation of privacy to which

article 14 applied. The court held that one-party consent did not obviate the need to obtain a warrant to record a private conversation, stating that a sense of security "is essential to liberty of thought, speech and association." It was "unreasonably intrusive to impose the risk of electronic surveillance on every act of speaking aloud to another person." Without the safeguards provided by a warrant, less than consent of all participants in a conversation was insufficient to waive any of the participants' rights under article 14 not to have the conversation recorded. Massachusetts General Law c. 272 § 99 (1984) prohibited the fruits of unlawfully intercepted wire or oral communication from being admitted into evidence. A warrantless electronic surveillance was permitted if performed by an officer who was a party or had the consent of a party to the conversation. The court noted that most electronic surveillance in the state was done pursuant to the exception to the rule without court supervision; thus, the exception had swallowed the rule. Because no exigency was shown to prevent procurement of a warrant and all conversations took place in a private home, a violation of article 14 requiring exclusion of the evidence had occurred. Because the recordings were products of an illegal search and seizure, the convictions were reversed. However, testimony of the police informant regarding the conversations in which he took part would be allowed. Commonwealth v. Blood, 507 N.E.2d 1029 (1987).

§ 58.145 —Recording devices

U.S. Supreme Court Drug Enforcement Administration officials had been notified by an ether distributor that defendants had ordered ether to be used in extracting cocaine from garments imported into the United States. The officials installed a beeper in one of the cans of ether and, through electronic surveillance of the beeper can, they were able to follow the shipment to an isolated house. They then secured a warrant for search of the house, arrested the defendants, and seized cocaine and laboratory equipment. After indictment, defendants moved to suppress the evidence on the grounds that the initial warrant to install the beeper was invalid and that the seizure was the tainted fruit of an unauthorized installation and monitoring of that beeper. The district court granted the motion and the court of appeals affirmed.

Held, affirmed. Installation of the beeper itself did not violate Fourth Amendment rights. However, the electronic monitoring of the beeper effected such violation. The beeper was used to locate the ether in a specific house in Taos, New Mexico, and that information, in turn, was used to secure a warrant for the search of the house. The affidavit for the search warrant described the continuing surveillance of the house and thus presented the question whether monitoring a beeper in a private residence, which is a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence. The Court concluded that it did. It is a basic Fourth Amendment principle that private residences are places in which an individual normally expects privacy free from governmental intrusion not authorized by a warrant, and that expectation plainly is one that society is prepared to recognize as justifiable. Although monitoring an electronic device such as a beeper is less intrusive

than a full-scale search, it nevertheless reveals a critical fact about the interior of the premises that the government is extremely interested in knowing and that it could not otherwise have obtained without a warrant. United States v. Karo, 418 U.S. 705, 104 S. Ct. 3296, reh'g denied, 105 S. Ct. 51 (1984), 21 CLB 68.

Court of Appeals, 11th Cir. After defendant was found guilty of conspiracy to possess marijuana with intent to distribute, he appealed on the grounds that a tape recording was improperly admitted into evidence.

Held, conviction affirmed. The Eleventh Circuit stated that a recording made with a device placed in a room where one of the parties to the conversation has consented to the recording does not constitute an illegal search and seizure. In so ruling, the court found it immaterial that the person with whom the defendant has a conversation did not have a recording device implanted on his person, but rather, such device was concealed in the room. The court observed that in either case the defendant does not have a reasonable expectation of privacy, and that a constitutionally protected expectation of privacy does not attach to a wrongdoer's misplaced belief that the person to whom he voluntarily confides his wrongdoing will not reveal it. United States v. Yonn, 702 F.2d 1341, 19 CLB 481, cert. denied, 464 U.S. 917, 104 S. Ct. 283 (1983).

Colorado Defendants were charged with violating Colorado controlled substances statutes. The evidence against them was obtained as a result of wiretaps placed on defendants' telephone. The wiretap was authorized on the basis of an application supported by "lengthy, comprehensive, and factual affidavits. . . ." One of the affidavits specified that a pen register, which reveals the numbers dialed on a telephone, would be installed on defendants' telephone along with the wiretap. The application and affidavits formed the basis of a wiretap order, which did not specify that the pen register would be used along with the wiretap. The district court signed the order nonetheless, and a wiretap and pen register were installed on defendants' telephone. Defendants were subsequently indicted, partly as a result of telephone conversations recorded by the wiretap. Defendants moved to suppress the contents of the intercepted conversations obtained as a result of the wiretap, on the ground that the use of the pen register without a search warrant violated the Colorado constitution. The district court granted the motion to suppress, and the state appealed.

Held, reversed and remanded. The Colorado Supreme Court ruled that the installation of the pen register did not violate defendants' state constitutional rights. The wiretap order, ruled the court, which did not specify that the pen register would be used in the operation, nevertheless included authorization for the use of a pen register. A pen register records the numbers dialed on a telephone but does not monitor the actual contents of the conversations. A wiretap, however, can serve both functions. A pen register, then, is merely a mechanical device that records information already available by means of a wiretap. The court held that pen registers do not intercept conversations because they do not acquire the contents of those conversations. The court cited United States v. New York Telephone Co., 434 U.S. 159, 98 S. Ct. 364 (1977),

in which the United States Supreme Court held that the use of pen registers is not subject to the restrictions of the federal wiretapping statute, which is concerned only with the interception of the contents of communications. In the instant case, the court noted that the Colorado statute governing electronic surveillance was modeled after the federal statute and was designed to implement its policies. Construing the Colorado statute according to the federal statute, then, as interpreted by the United States Supreme Court, the use of the pen register was not governed by the state wiretapping statute, and no specific order authorizing its installation on defendants' telephone was required. People v. Wahl, 716 P.2d 123 (1986).

Florida Defendant was charged with unlawful sale/delivery of cocaine, trafficking in cocaine, and unlawful possession of marijuana with intent to distribute. A police undercover agent, equipped with a "body bug," a device designed to record and transmit his conversations to fellow officers, had gone to defendant's apartment to purchase a large amount of cocaine. Defendant escorted the officer to his bedroom where large plastic bags containing marijuana and cocaine were displayed. The police agent indicated to officers waiting outside that contraband was present and defendant was subsequently arrested. The trial court refused to suppress the statements transmitted by the electronic eavesdropping device and defendant appealed his conviction.

Held, conviction affirmed. In United States v. White, 91 S. Ct. 1122 (1971), the United States Supreme Court stated that for constitutional purposes, an agent may, instead of immediately reporting and transcribing his conversations with a defendant, either simultaneously record them with electronic equipment that he carries on his person or simultaneously transmit them to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. The decision in *White* established a clear precedent that the Fourth Amendment of the U.S. Constitution is not violated when conversations between a defendant and an undercover agent in the defendant's home are recorded. Accordingly, the court determined that the electronic transmission in this case violated neither the Federal Constitution nor the right of privacy provision of the Florida constitution. State v. Hume, 512 So. 2d 185 (1987).

Georgia Defendants were convicted of violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act based on predicate offenses of commercial gambling. Evidence was obtained pursuant to twelve surveillance (wiretap) warrants issued by a local judge upon application by the Fulton County district attorney. Defendants contended that the warrants were invalid because the Fulton County district attorney and judge were without authority to apply for and issue surveillance warrants as to telephones located outside Fulton County in seven neighboring counties, in furthering a multicounty gambling investigation that was centralized in Fulton County. To avoid detection of the tapes, the district attorney decided to use an inductor coil instead of jumper wires to tap into defendants' telephone lines. The coils had to be installed in the terminal box closest to the tapped phone. However, the conversations were then transmitted back to the investigators' Fulton County

listening post where they were tape-recorded.

Held, affirmed. The Georgia Supreme Court found that the federal Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 et seq., authorized issuance of these warrants by the Fulton County judge as well as the Georgia RICO Act. The court ruled that there was no jurisdictional problem here and emphasized the fact that the listening post was located in the county where the warrants were issued. The Georgia RICO Act looks to the physical placement of the device used for "overhearing, recording, intercepting, or transmitting sounds." Here the court concluded that the "device" is not the coil but the tape recorder. Thus, the district attorney and local judge were authorized to apply for and issue the warrants in question, and the trial court did not err in denying defendants' motions to suppress. Evans v. State, 314 S.E.2d 421 (1984), 21 CLB 83.

Montana Defendant was convicted of the criminal sale of dangerous drugs. After meeting with an undercover police officer on two occasions to arrange and execute the sale of drugs, defendant was arrested. Although the police did not have a warrant, the conversations at these meetings were recorded by a body wire transmitting device that was attached to the undercover officer. Defendant argued that the right to privacy section of the Montana constitution prohibited the use of body wire recordings as evidence under the facts of this case.

Held, affirmed. The court held that warrantless consensual electronic monitoring of face-to-face conversations by the use of a body wire transmitting device, performed by law-enforcement officers while pursuing their official duties, does not violate the right to be free of unreasonable searches and seizures or the privacy section of the Montana constitution, as long as freely given consent was clearly obtained from at least one party to the conversation. In determining that there was no Fourth Amendment violation concerning search and seizure, the court relied on U.S. v. White, 401 U.S. 745, 91 S. Ct. 1122 (1971), which stated that monitoring does not violate defendant's right to be free of unreasonable searches and seizures, nor does the U.S. Constitution or any act of Congress require that official approval be secured before conversations are overheard or recorded by government agents when the consent of one of the conversants has been given. The court also considered whether the area to be searched or the object to be seized was owned or possessed by defendant and whether the government activity in this case was excessively intrusive. The court concluded that both participants had an equal interest in the conversation, that it was not the sole "property" of defendant, and that either could consent to the monitoring. Defendant's statements were freely spoken to the undercover officer as she attempted to coordinate the sale. She simply mistakenly placed her trust in the officer and had no reasonably justified expectation of privacy. The court, therefore, refused to conclude that the recording of her words was excessively intrusive. Finally, there was no question that the undercover officer could testify as to the oral incriminating statements made to him by defendant; therefore, the court said that it would seem logical that the recorded statements would be more re-

liable than the recall of the witness as to what had been said to him. State v. Brown, 755 P.2d 1364 (1988).

§ 58.155 Procedure for suppressing fruits of eavesdropping

Court of Appeals, D.C. Cir. After defendants were convicted in the district court for narcotics violations, they appealed on the ground that the electronically obtained evidence should have been suppressed.

Held, affirmed. The District of Columbia Circuit concluded that failure of the Assistant U.S. Attorney to obtain written authorization of the U.S. Attorney did not require suppression of the fruits of the wiretap even though the statute called for such written authorization. The court observed that it was conceded by defendants that the U.S. Attorney had actually authorized the wiretap applications and that the Assistant U.S. Attorney had sought and received authorization of two Assistant Attorneys General who had been specifically designated to approve federal wiretap applications. The court thus rejected the contention that oral authorization by the U.S. Attorney amounts to no authorization at all; instead, the court concluded that the written requirement was no more than a reporting requirement. United States v. Johnson, 696 F.2d 115 (1982), 19 CLB 378.

§ 58.160 Disclosure of conversations overheard

Court of Appeals, 1st Cir. After a motion for disclosure of certain documents involving electronic interceptions at a law office were denied, movants appealed on the grounds that such documents were needed to determine whether their representation of clients had been interfered with.

Held, affirmed. The First Circuit found that the district court did not abuse its discretion in denying the motion because a grand jury investigation was pending and the district court, after careful in camera inspection of the material, found that there had been no interference with movants' representation of their clients and that the need for secrecy continued. The court further observed that movants had important remedies if the district court's findings proved to be incorrect, and none of the movants had been indicted or even subpoenaed to appear before the grand jury. Application of the United States for an Order, 723 F.2d 1022 (1983).

Rhode Island A private citizen reported to the Woonsacket police what appeared to be a man discussing the sale of drugs on her AM radio. The police department monitored its "standard every day AM radio" and recorded similar conversations from defendant's "cordless telephone," which operates by means of radio waves. Defendant spoke into a hand-held mobile unit that converted his voice into radio waves and transmitted them to a basement in his home, which in turn transmitted his voice over standard telephone lines. Incoming callers' voices were transmitted through ordinary lines to defendant's base unit, which transmitted those voices to the hand-held unit by means of radio waves. These radio waves were picked up by the police department's AM radio. Defendant was arrested and charged with drug violations and having violated bail-bond conditions set in pending cases. A bail-revocation hearing was held, and

the hearing justice found defendant to be in violation of his bail conditions and ordered him to be held without bail. On appeal, the question before the court was whether defendant's communications were protected "wire" or "oral" communications, i.e., communications that may not lawfully be "intercepted" without prior judicial authorization pursuant to Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–2520.

Held, decision affirmed. The Supreme Court of Rhode Island concluded that the police officers did not violate Title III when, acting without a court order, they tuned in a common AM radio to the telephone conversations unwittingly broadcast by a defendant over his cordless telephone. Defendant's unintentional broadcasts were not "wire communications" within the purview of the eavesdropping statute, the court stated, emphasizing that the police in no way interferred with the telephone transmission lines. The court pointed out that listening to the calls over a standard radio was not the sort of governmental conduct that Title III was intended to guard against. To hold otherwise would require the police to seek a court order to listen to an ordinary radio, and perhaps more absurdly, the failure to obtain such an order could conceivably subject the police to both civil and criminal sanctions. State v. Delaurier, 488 A.2d 688 (1985), 21 CLB 475.

CONSENT AND WAIVER

§ 58.170 In general

Court of Appeals, 11th Cir. Defendant was convicted of possessing and distributing counterfeit currency in violation of 18 U.S.C. §§ 472 and 473. After defendant told his employee that he had counterfeit bills for sale, the employee reported this information to the U.S. Secret Service. An agent directed the employee to secure a sample of the counterfeit bills and to tell defendant he had a buyer. Defendant invited the employee to his apartment, showed him where the sample was located, and gave the employee his apartment keys. The employee handed the keys over to the agent who then entered the apartment and retrieved the sample bills. The Secret Service then arranged another sale between defendant and the employee. After the transaction took place, the Secret Service searched defendant's apartment for evidence of the sale. On the basis of the evidence from both searches, the Secret Service arrested defendant. At the trial defendant moved to suppress the evidence, arguing that the initial search was invalid because it was warrantless and conducted without defendant's consent. The federal district court held the warrantless search to be invalid because defendant, who did not know of the government's involvement, could not have voluntarily consented to the search.

Held, reversed and remanded. Defendant's consent to the search was not invalid just because he was unaware of his employee's connection with the Secret Service. The Eleventh Circuit, citing Lewis v. United States, 385 U.S. 206, 87 S. Ct. 424 (1966), expressed its concern that a contrary ruling would, in effect, prohibit the use of undercover agents in criminal investigations. When defendant revealed the location of the sample bills to his employee and gave him direct access to the bills, he took the risk that his confidence might be misplaced and his conduct reported to federal authorities. United States v. Schuster, 684 F.2d

744 (1982), cert. denied, 465 U.S. 1010, 104 S. Ct. 1008 (1983).

Wyoming Defendant was convicted of aggravated assault with a deadly weapon. He appealed, contending that the trial court committed reversible error in admitting into evidence a pair of his boots that were seized at the time of his arrest. Before the trial, defendant moved to suppress the boots from evidence. At the suppression hearing, defendant contended that they were obtained in violation of the rights guaranteed him by the Fourth and Fifth Amendments to the U.S. Constitution. The state claimed that officers had seized the boots only after defendant had freely and voluntarily consented. The trial judge held that the seizure was constitutional and was therefore not subject to suppression. It was, however, further ordered that any statements elicited from defendant respecting the boots were not admissible since they were obtained in violation of defendant's *Miranda* rights. At the trial, the state was permitted to introduce the boots into evidence but the witnesses were not permitted to testify about the circumstances surrounding their acquisition. Defense counsel objected, claiming that there was a lack of foundation for the introduction of the boots into evidence. The trial judge overruled the objection, stating that the jury could reasonably assume that defendant had been wearing the boots on the night of the offense.

Held, reversed and remanded. The Supreme Court of Wyoming upheld the trial court's first finding that defendant voluntarily permitted the officers to enter his house for the purpose of acquiring his boots. Even though defendant was under arrest and had not been informed of his *Miranda* rights, no weapons were drawn, defendant was physically restrained, and he freely and unequivocally agreed to get the boots. The circumstances surrounding the acquisition of the boots were properly suppressed from evidence because defendant had not been informed of his *Miranda* rights. Once defendant had not only been asked to get a pair of boots, but to get the pair of boots he wore on the night of the offense, he had been arrested without being informed of his rights. Thus, the boots were inadmissible on foundational grounds. In the absence of the statements surrounding the acquisition, the state was unable to connect the boots to defendant and the incident in question. Stamper v. State, 662 P.2d 82 (1983).

§ 58.180 —Voluntariness of consent

Court of Appeals, 5th Cir. After defendant was convicted in the district court of knowingly and intentionally possessing cocaine with intent to distribute, she appealed the denial of her motion to suppress evidence. The declarant had been seized at the time a DEA agent informed her that he was "working narcotics" and requested to look in her gym bag. The district court found that the gym bag had been searched with defendant's consent even though she had not been informed of her right to refuse to consent to a search, had only a sixth grade education, was of Hispanic descent, and was certainly aware that incriminating evidence would be disclosed by the search.

Held, conviction affirmed. The Fifth Circuit concluded that the finding that defendant voluntarily consented to the search of a bag was not clearly

erroneous. The court noted that factors to be considered in determining whether consent to search was voluntary are defendant's custodial status, the presence of coercive police procedure, extensive defendant's cooperation with the police, and defendant's awareness of his right to refuse to consent. In this case, the court found that there was no evidence that defendant had been coerced, threatened, or tricked, and defendant had no problem communicating with the DEA agent. United States v. Gonzales, 842 F.2d 748 (1988).

Connecticut Defendant was convicted of burglary in the third degree, theft of a firearm, and larceny in the third degree. On appeal, defendant contended that the trial court should have granted his motion to suppress evidence obtained by police who searched his car without a warrant. He challenged the legality of the search, claiming it was done without his voluntary consent.

Held, affirmed. The state sustained its burden of proof on the issue of voluntariness of consent to the search. Its determination must be upheld because it was not clearly erroneous. Defendant was only asked once to open his trunk and was told that he was under no obligation to do so. He was not in custody or under arrest. Defendant was not intoxicated, under the influence of drugs, or under duress. Furthermore, defendant stated that he had nothing to hide and then opened the trunk with his own key. On the basis of these facts, the trial court's finding of voluntary consent was not clearly erroneous. State v. Reddick, 456 A.2d 1191 (1983).

§ 58.185 —Third-party consent

Louisiana Based on information from the victim of a rape and stabbing, police sought defendant at the trailer of a friend. When police arrived after 2:30 A.M., someone in the trailer looked out the window and turned out the lights. After knocking several times, police entered the unlocked front door. The owner of the trailer and defendant, as well as a second defendant whom the victim had not identified, were among those sleeping in the trailer. The trailer owner, on being told that defendant was the focus of an investigation of a stabbing and armed robbery, gave written consent to a search of the trailer. The search was not conducted until forty-five minutes after the illegal entry, when a senior police officer arrived, at which time the owner reiterated his consent. The search turned up articles stolen from the victim. Defendants brought a pretrial motion to suppress the evidence on the ground that the search violated the constitutional rights of the trailer's owner.

Held, affirmed. The Supreme Court of Louisiana held that the evidence was admissible. Defendants had standing to raise the issue of a violation of the third-party owner's constitutional rights, since, under Louisiana law, any person adversely affected by a search or seizure has standing to question its legality. As to the search itself, however, the court found that the owner gave free and voluntary consent, not significantly influenced by the arguable illegality of the police entry into the trailer. It noted that the entry was made in an "innocuous" manner, with no doors broken nor guns drawn, and that the owner was informed twice that he was not a suspect. State v. Owen, 453 So. 2d 1202 (1984).

SUPPRESSION OF EVIDENCE IN GENERAL

§ 58.200 Standing

"Enforcement Workshop: The NIJ Study of the Exclusionary Rule," by James J. Fyfe, 19 CLB 253 (1983).

Court of Appeals, 2d Cir. Defendants were convicted of possession, with intent to distribute, a controlled substance on board a vessel subject to the jurisdiction of the United States on the high seas. On appeal, defendants contended that the Coast Guard's boarding, search, and seizure of the vessel violated defendants' rights under the Fourth Amendment.

Held, the constitutional challenge to stopping and boarding the vessel was properly rejected. The Second Circuit found that defendants have no Fourth Amendment right to challenge only the seizure. Since the crew members of the vessel had no proprietary interest in the vessel's cargo and had no legitimate expectation of privacy in it, they had no standing to challenge the seizure of marijuana from the cargo hold. The court further found that there was a reasonable basis for suspecting that the vessel was engaged in smuggling of narcotics and there was a minimal show of force in connection with the stopping and boarding. United States v. Pinto-Mejia, 720 F.2d 248 (1983), modified, 728 F.2d 142 (1984).

Court of Appeals, 8th Cir. After defendant was convicted in the district court of being a felon in possession of a firearm, he appealed on the grounds that a weapon seized during a search of the premises where he was residing had been improperly introduced as evidence at trial.

Held, conviction reversed and remanded. The Eighth Circuit ruled that defendant had standing to assert a Fourth Amendment objection in connection with the seizure of a weapon from the residence where he was staying as a guest for several days. The court explained that the search warrant permitted officers to search for a third party named in the arrest warrant, who did not live at the premises, so the warrant did not give the officers authority to enter defendant's temporary residence and seize the handgun. United States v. McIntosh, 857 F.2d 466 (1988).

California Plainclothes officers observed defendant, who was then 16 years of age, approach several vehicles in a park in which drug sales were believed to be occurring. He appeared to transfer something between himself and the drivers of two of the vehicles. He removed something from his waistband and handed it to the occupant of a third vehicle and received something in exchange. When defendant approached the officers' vehicle, one officer asked him if he knew where to get some "smoke." Defendant, who appeared to be nervous, replied "no" and then walked to a pickup truck where he dropped a plastic baggie into the open window on the driver's side. The two officers walked to the truck, opened the doors, and removed the baggie, which was found to contain marijuana. The truck was occupied by two persons, neither of whom gave permission to open the baggie. Defendant was arrested. A search of his person revealed a second baggie of marijuana and $35. At the hearing on defendant's motion to suppress the physical evidence as products of a warrantless search undertaken without probable cause, the trial court concluded that the officers' observations of

the exchange of baggies between defendant and the occupants of the vehicles did not establish probable cause for a search of the pickup truck or for an arrest and search of defendant. Therefore, the court reasoned, suppression of the evidence was required unless Section 28(d), which was added to the California constitution by Proposition 8-a 1982 voters' initiative, abrogated the rule under which defendant had standing to object to the unlawful search of the pickup truck. Concluding that Section 28(d) eliminated any independent state ground for suppression of the evidence, and that defendant lacked standing to object to a violation of the Fourth Amendment rights of the occupants of the pickup truck, the trial court denied the motion to suppress.

Held, judgment (order for camp-community placement) affirmed. The Supreme Court of California en banc found that under Section 28(d), as added to the state constitution, "relevant evidence shall not be excluded in any criminal proceeding" except by statute enacted by a two-thirds vote of each house of the legislature. A majority of the court held that the amendment leaves intact Article I, § 13 of the California constitution, which had been construed to provide broader protection against search and seizure than the Fourth Amendment; however, courts in the state would no longer be able to exclude evidence on state grounds alone. The majority stated that the amendment's meaning was unambiguous in that it implicitly restricted the ability of state courts to create remedies for unlawful searches except to the extent that they also violate the Federal Constitution. This interpretation, the majority indicated, is clear from both the language of Section 28(d) and from the ballot pamphlet that explained it to the voters. Thus, the court read out of existence the vicarous exclusicnary rule, a judicially created remedy that had no federal counterpart. Thus, the court, after analyzing the leading search and seizure cases, concluded that invasion of personal rights of defendant is necessary to accord standing to invoke the Fourth Amendment exclusionary rule. In re Lance W., 694 P.2d 744 (1985), 21 CLB 473.

Idaho Defendant was convicted of burglary and grand larceny and of the use of a firearm in the commission of both offenses. On appeal, defendant contended that the trial court erred in refusing to suppress a safe, tools, and photographs, in that defendant, although he had no proprietary interest in the automobile searched, had standing to raise the question of the legality of the search under the state and federal constitutional provisions prohibiting unreasonable searches and seizures.

Held, conviction affirmed. The Supreme Court of Idaho stated that a suppression motion must be predicated on a defendant's personal legitimate Fourth Amendment interest and cannot merely be a vicarious claim that the government has invaded some other third person's privacy rights. Hence, there was no error in the trial court's refusal to suppress the safe, the tools, and the photographs at the trial since suppression may be obtained only by those whose rights are infringed. States v. Cowen, 662 P.2d 230 (1983).

Illinois Defendants were charged with the theft of motor vehicles and related charges; they moved to suppress the physical evidence on the

ground that police officers unlawfully entered the garage where the vehicles were located without probable cause and in the absence of exigent circumstances justifying a warrantless search and seizure. At a consolidated suppression hearing and bench trial it was established that police officers saw defendants exit the garage, which the officers believed to be vacant. When the officers approached, defendants fled. They were apprehended a short distance away and brought back to the garage for investigation. Police then inspected the premises for additional persons and observed a number of cars, later determined to be stolen, and in the process of being dismantled. Defendant's motion was denied summarily, without argument from the state, and they appealed from their subsequent convictions, raising the same Fourth Amendment issues. The state argued, for the first time, that defendants lacked standing to object to the search because they had claimed no propriety or possessory interest in the garage and hence had no legitimate expectation of privacy in the premises. The intermediate appellate court found for defendants and reversed, holding that by not raising the standing issue before the hearing court, the state had waived the issue for purposes of appeal.

Held, reversed. The Supreme Court of Illinois found that defendants had no standing to challenge the search of the garage and that the state had not waived its right to raise the issue. Defendants, said the court, did not own or lease the garage and presented no evidence that they were legitimately on the premises; accordingly, they could assert no Fourth Amendment rights or claim that they had any legitimate expectation of privacy in the garage. The state had not waived the issue, explained the court, because defendants had not claimed an expectation of privacy in the premises at the hearing; thus, there had been no standing issue to address. Rather, it continued, the state had prevailed without argument, on the Fourth Amendment issues raised by defendants. As the state had not asserted or acquiesced in a contrary position below and, indeed, had no need to address the issue below, the court concluded that the state should not have been precluded from arguing on appeal that defendants lacked standing. People v. Keller, 444 N.E. 2d 118 (1983), 19 CLB 483.

Montana Defendant was convicted of escape for walking away from the Montana State Prison laundry. He was recaptured three days after his escape in the residence of his girlfriend, who had offered him sanctuary. The officers who rearrested defendant had an arrest warrant for him, but did not have a search warrant for the girlfriend's residence where defendant permanently resided. Discovery of defendant resulting from the warrantless search of the residence resulted in his conviction. On appeal, defendant argued that such evidence should not have been admitted, as it was the product of an illegal search. In turn, the state argued that defendant did not have the standing to challenge the search's constitutionality because he did not have a legitimate expectation of privacy in the residence of his girlfriend.

Held, conviction reversed and case remanded for further proceedings. The Montana Supreme Court ruled that it was reversible error to admit evidence obtained as a result of an unconstitutional, i.e., warrantless search. In ad-

dition, defendant had the necessary standing to challenge the legitimacy of the search of the girlfriend's residence. At the time of the search, the girlfriend was carrying defendant's child, and the couple subsequently married. Thus, defendant had a reasonable expectation of privacy in her home. State v. Kao, 698 P.2d 403 (1985).

New Hampshire Defendant was charged with receiving stolen property and with possession of a motor vehicle with knowledge that the identification number had been removed with the intent to conceal its identity. Defendant moved to suppress the evidence that was obtained as follows: A state title investigator and a state trooper went to an automotive repair shop, based on information from an unidentified informant that a stolen Lincoln Continental could be found there. They observed a Lincoln Continental at the shop and asked permission to check out the car, which was granted. It turned out that the confidential vehicle identification number (CVIN) belonged to a Lincoln car that was reported stolen from a Massachusetts company. Based on these facts, a search warrant was issued by a local court. Upon executing the warrant, police seized the stolen Lincoln. Defendant moved to suppress all evidence seized by police pursuant to the warrant on the grounds that the evidence was seized illegally and in contravention of the Fourth Amendment and the New Hampshire constitution. The state contended that this was a valid administrative search conducted under a warrant and pursuant to statutory authority. The state further argued that under United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547 (1980), a defendant charged with a possessory offense lacked the legitimate or reasonable "expectation of privacy" in the vehicle necessary to confer on him standing to challenge an alleged search of the vehicle conducted in violation of his state and federal constitutional rights.

Held, remanded. The Supreme Court of New Hampshire ruled that, under the state constitution, a defendant need not establish, as required for standing under the U.S. Constitution, an "expectation of privacy" in the vehicle. The state constitution provision guarantees that a citizen is secure in all his possessions. Thus, the court stated that it "requires that 'automatic standing' be afforded to all persons within the State who are charged with crimes in which possession of an article or a thing is an element." State v. Sidebotham, 474 A.2d 1377 (1984), 21 CLB 82.

§ 58.210 Hearing procedures

U.S. Supreme Court After defendants were convicted in Georgia state court on gambling charges in violation of the Racketeer Influenced and Corrupt Practices Act, they appealed on the ground that the pretrial suppression hearing had been improperly closed to the public. The prosecution alleged that the unnecessary "publication" of information obtained under the wiretaps would make it inadmissible as evidence and that the wiretap evidence would involve the privacy interests of some persons who were not on trial. The trial court granted the state's request, and the Georgia Supreme Court affirmed.

Held, reversed and remanded. The closure of the entire suppression hearing here was plainly unjustified, since the state offered nothing specific on the issue of whose privacy interests might be infringed if the hearing were

open to the public, what portions of the wiretap tapes might infringe those interests, and what portion of the evidence consisted of the tapes. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210 (1984), 21 CLB 73.

FRUITS OF THE POISONOUS TREE

§ 58.225 Evidence held inadmissible

U.S. Supreme Court The police went to the home of a suspect in a burglary-rape case to obtain his fingerprints. Upon being told that he would be arrested unless he accompanied the officers to the station house, defendant replied that he would rather go to the station than be arrested. He was then taken to the station and fingerprinted. When his fingerprints were found to match those taken at the scene of the crime, he was arrested and convicted. The Florida District Court of Appeals affirmed.

Held, judgment reversed. The Supreme Court declared that where there is no probable cause to arrest a defendant, no consent to the journey to the police station, and no warrant, the investigative detention at the station for fingerprinting purposes violates the Fourth Amendment, and any resulting fingerprints are the inadmissible fruits of an illegal detention. The Court reasoned that the forcible taking of a person from his home to a police station is sufficiently like an arrest so as to require that it be done only on probable cause. Hayes v. Florida, 105 S. Ct. 1643 (1985).

Court of Appeals, 5th Cir. After defendant was found guilty on narcotics charges, he appealed on the ground, among others, that evidence had been illegally obtained by officers trespassing on his ranch without a warrant. The court of appeals reversed, and the Supreme Court remanded.

Held, reversed and remanded for further proceedings. The Fifth Circuit found that the officers were not privileged, absent exigent circumstances, to seek the source of a chemical odor on defendant's ranch without a warrant. The court explained that the law enforcement officers had already crossed the perimeter fence prior to detecting the suspicious odor, and the odor was not contraband but, rather, was the odor of a legal chemical. United States v. Dunn, 766 F.2d 880 (1985).

Colorado Defendant was stopped by police while driving in an erratic manner on an isolated mountain road. The officers determined that defendant's personal safety might be jeopardized if he were left at the scene; thus, they decided to take him into custody and transport him to an alcohol detoxification facility pursuant to provisions of the Colorado Alcoholism and Intoxication Treatment Act. Prior to placing defendant in the police vehicle, the officers conducted a pat-down search of defendant. The thickness of his jacket made it impossible to ascertain the nature of the items in his pockets, thus the officer conducting the search removed the contents of defendant's pockets and found a small packet of heavy folding paper. Believing the packet to contain a razor blade, the officer opened it and discovered a white powdery substance later identified as cocaine. Defendant's motion to suppress the evidence obtained by the search was upheld by trial court. Although the police had probable cause to take defendant into civil protective custody under Section 25-1-301 of the Colorado Revised Statutes (Supp. 1982), and the statute permits the

pat-down search of individuals, trial court determined that the search of the packet found in defendant's possession violated constitutional prohibitions against unreasonable searches. The state appealed.

Held, suppression order affirmed. The primary justifications for permitting warrantless searches or seizures incident to custodial arrests are preserving evidence of a crime and protecting the safety of arresting officers. In this civil protective custody case, there was no evidence to be preserved; however, there was a degree of potential danger to the officers. The court determined that an initial pat-down search for weapons is deemed sufficient to achieve the goal of protecting officer safety, and the discovery of an item believed to be or to contain a weapon would in most circumstances require nothing more than the isolation of that item at the scene of detention. Thus, although the officer's confiscation of the packet containing cocaine was permissible, once he opened that packet, the prohibition against warrantless searches was violated. People v. Dandrea, 736 P.2d 1211 (1987), 24 CLB 277.

Hawaii Defendant was convicted of promoting a dangerous drug in the first degree. He was arrested in an airport bathroom by a detective [illegible] had been called to the airport by an airline ticket agent who was suspicious of a ticket purchase made by defendant. Defendant had paid cash for two one-way tickets from Vancouver, Canada to Honolulu for two friends. A check with Canadian police revealed that defendant had an arrest record for narcotics violation, and that one of the friends for whom defendant had purchased the tickets had been denied entry into the United States earlier that same day. When the detective arrived at the airport, he told defendant that his friends were being detained because of their illegal entry. Defendant denied involvement in their illegal entry, but asked to speak to them. He agreed to accompany the detective to the airline counter where the tickets were purchased, to identify himself. On the way there, defendant asked the detective to use the bathroom. The detective, according to testimony, became suspicious of the request but acceded to it nonetheless. The detective followed defendant into the bathroom and told him not to flush the toilet. Defendant went into a stall and shut the door, which did not close completely. According to the detective's testimony, defendant then stood near the toilet but did not appear to use it. The detective then went into an adjacent stall, climbed on the toilet seat and peered over the partition into defendant's stall. He saw defendant remove his hand from a disposable seat cover dispenser. When defendant left the stall, the detective reached into the dispenser, where he found a packet of cocaine. The detective thereupon arrested defendant. Defendant moved to suppress the cocaine as evidence, but the trial judge refused. On appeal, defendant argued that the trial court erred in refusing to suppress. Defendant argued that he had a reasonable expectation of privacy inside the toilet stall and that the detective violated that expectation by standing on the adjacent toilet seat and looking over the partition.

Held, reversed and remanded. The Hawaii Supreme Court found that defendant had a reasonable expectation of privacy which was violated by the detective's warrantless surveil-

lance, which was not based on the requisite probable cause. When defendant closed the toilet stall door as much as possible he exhibited an actual, subjective expectation of privacy, which society would recognize as objectively reasonable. The fact that the toilet stall did not close completely did not remove defendant's expectation of privacy. Although he testified as to his suspicions of defendant's actions, the detective did not have probable cause to believe that defendant was destroying evidence when he climbed on the adjacent toilet seat to observe defendant. As the fruit of an illegal surveillance, the cocaine should not have been admitted into evidence. State v. Biggar, 716 P.2d 493 (1986).

§ 58.230 Evidence held admissible

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of making false statements on a passport application, he appealed on the ground that evidence obtained during a search of his residence and his person conducted by the British police should have been excluded.

Held, conviction affirmed. The District of Columbia Circuit stated that the exclusionary rule does not apply to foreign searches conducted by foreign officials unless there is some participation by American officials or officers. The court noted that U.S. courts cannot be expected to police law enforcement practices around the world and that American authorities did not know about the first search of defendant's residence until after it had taken place. United States v. Mount, 757 F.2d 1315 (1985), 21 CLB 471.

Court of Appeals, 2d Cir. Defendant was convicted for illegal possession of narcotics on the basis of evidence seized from his home pursuant to a search by the Federal Bureau of Narcotics. The IRS subsequently used the evidence to secure a tax deficiency judgment against defendant. Defendant, believing that the evidence was illegally seized, argued that the exclusionary rule barred use of the evidence in the federal tax proceeding.

Held, the exclusionary rule did not bar use of the evidence by the IRS. The exclusionary rule is applied only if it is likely to have a deterrent effect on the challenged use of evidence. Because the evidence was not seized in contemplation of the tax proceedings, it was unlikely that use of the exclusionary sanction would achieve even marginal deterrence. Thus, the court chose not to address the issue of the legality of the seizure. Tirado v. Commissioner, 689 F.2d 307 (1982), cert. denied, 460 U.S. 1014, 103 S. Ct. 1256 (1983).

Kansas State appealed the decision to suppress evidence discovered in a warrantless search of defendants' property. While on the job, a park trash collector heard spraying water coming from the inside of defendants' trailer home, which was connected to their park shop. The trash collector noticed that the door to the residence was forced open. He entered, turned off the water, went to fix the door, and then noticed marijuana and drug paraphernalia. He later contacted two park rangers who called the sheriff. After obtaining a warrant, the trailer home was searched, and defendants were charged with numerous drug-related crimes, including possession of marijuana with intent to sell. Defendants' motion to suppress the evidence found as a result of an illegal search in vio-

lation of the Fourth Amendment of the U.S. Constitution was granted.

Held, reversed and remanded. The court noted that all of the cases cited by defendant concerned government employees conducting illegal searches as part of their jobs. In this case, the government employee (the trash collector) was not performing his official duty when he entered the residence. He was acting as a good neighbor trying to stop a leaky pipe and fix a door. The court said neighborly concern is to be encouraged, not condemned. The court concluded that it just was chance that this neighborly act was performed by a government employee, and the evidence resulting from the search should not be disallowed because of that fact. State v. Smith, 763 P.2d 632 (1988).

New Jersey Defendants were confederates in a pyramid swindle scheme. The scheme was operated in New Jersey and as it unfolded, it came to the attention of the New Jersey Bureau of Securities. The principals in the scheme initiated litigation to qualify their plan for governmental approval and during the course of that litigation, the state requested production of many of the scheme's business records. While the civil litigation was pending, the defendants absconded to California, then to Illinois. New Jersey law enforcement authorities followed them to Illinois, but before they could obtain the business records by interstate subpoena or other means, the Illinois authorities arrested defendants and took possession of their records. The Illinois officers, however, were found to have gained unlawful access to certain of the records. The trial court suppressed any use of the Illinois evidence against defendants in New Jersey criminal proceedings and the state appealed.

Held, reversed and remanded. The court determined the key question in the case to be whether the state learned of the evidence from an untainted source, not whether it gained possession of the evidence from one. State authorities had already discovered the evidence in the hands of Illinois police and had requested it prior to defendants' flight to Illinois; thus, despite the illegal seizure of defendants' records of the pyramid gambling scheme by the Illinois police, the evidence was held admissible in the state's prosecution. State v. Curry, 532 A.2d 721 (1987).

New York Defendants were accused of scheming to circumvent regulations that establish the requirements for valid automobile licenses and vehicle inspections. They were indicted for forgery, larceny, and related crimes, as a result of evidence obtained through electronic eavesdropping. Defendants claimed that the evidence should be suppressed, because the crimes charged were not included in the Omnibus Crime Control and Safe Streets Act of 1968, and were therefore outside of the scope of surveillance allowed. The trial court suppressed the evidence obtained through the court-ordered wiretaps, and the People appealed.

Held, reversed. The court of appeals ruled that the evidence could not be suppressed, because the crimes charged were "dangerous to life, limb or property," and punishable by imprisonment for more than one year, and, as such, are within the ambit of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2516[2]), which provides that electronic eavesdropping may be author-

ized by state statute. The standards and procedures for court-authorized eavesdropping in New York State are set forth in CPL Article 700. The court found that defendant's scheme to circumvent the regulations that established the requirements for valid operators' licenses and vehicle inspections clearly endangers people and property. The criminal possession of stolen property, specifically automobiles, and the forgery of automobile operators' licenses and vehicle inspection documents could possibly lead to unsafe drivers or cars on the roads, and were, therefore, within the province of crimes dangerous to life and property. People v. Principe, 478 N.E.2d 979 (1985).

§ 58.235 —Lack of "primary taint"

U.S. Supreme Court During a narcotics investigation, Drug Enforcement Agency agents arrested one defendant in the lobby of his apartment building, took him to an apartment, knocked on the door, and when it was opened by second defendant, the agents entered the apartment without requesting or receiving permission. The agents then conducted a limited check of the apartment and observed various drug paraphernalia in plain view. A search warrant was not issued until nineteen hours later, and, in the meantime, the agents discovered cocaine and other evidence. The district court granted defendants' motion to suppress all the seized evidence, and the court of appeals held that only the evidence discovered in plain view seized after the initial entry was admissible.

Held, affirmed. The exclusionary rule did not apply here, since there was an independent source for the challenged evidence. The Court explained that the evidence was discovered during a search of the apartment pursuant to a valid search warrant, since the information on which the warrant was based came from sources wholly unconnected with the initial entry. Segura v. United States, 468 U.S. 796, 104 S. Ct. 3380 (1984), 21 CLB 77.

New Jersey After reporting the disappearance of his wife, defendant consented to a search of his house and ground by the police. Though this initial search proved fruitless, a second search, made while defendant was away from his home on a trip, unearthed a shallow grave containing the wife's body. Defendant was arrested as a material witness to the homicide and later convicted of second-degree murder. The trial court reversed the conviction because most of the evidence of defendant's implied consent to the second search of his home came from the testimony of a police officer who had eavesdropped on conversations held between defendant and his attorneys at the police station. The trial court suppressed evidence derived from the second search of defendant's property, namely the victim's body, rejecting the state's claim that the body would have inevitably been discovered. The state appealed.

Held, reversed and evidence admissible. In Nix v. Williams, 104 S. Ct. 2501 (1984), the Supreme Court held the product of an illegal search admissible "when . . . the evidence in question would inevitably have been discovered without reference to the police error or misconduct, [for] there is no sufficient nexus to provide a taint." In the present case, the victim's body was loosely and unevenly buried in shallow ground close to defendant's house; a

number of weeks after burial, the body would have become conspicuous and readily visible even to a casual observer. Defendant had agreed to sell the house and property to buyers; these buyers testified that if they were on the property, they would have come across the body during the course of working in the yard. Because defendant was a suspect in his wife's murder even before the police misconduct, his actions and property would undoubtedly have continued to be the subject of scrutiny. Moreover, defendant had friends who were not restricted in their access to the property and such persons could have found the body. Because the state need not demonstrate the exact circumstances of the evidence's discovery nor establish the exclusive path leading to discovery, these facts were sufficient to persuade the court by clear and convincing standard that the body would have eventually been discovered. Thus, the victim's body and the derivative forensic test results were held to be admissible as evidence under the inevitable discovery exception to the exclusionary rule. State v. Sugar, 527 A.2d 1377 (1987).

59. PROHIBITION AGAINST SELF-INCRIMINATION

SCOPE AND EXTENT OF RIGHT IN GENERAL

TESTIMONY AND RECORDS

NONTESTIMONIAL ASPECTS

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 59.05 Witness' assertion of privilege

"Self-Incrimination in American and French Law," by Wallace Mendelson, 19 CLB 34 (1983).

§ 59.10 —Basis for asserting privilege

U.S. Supreme Court In a civil antitrust case in the district court, a nonparty deponent was held in contempt for asserting his Fifth Amendment privilege against self-incrimination in response to questions read verbatim from, or closely tracking, transcripts of his previously immunized testimony before the grand jury. The Seventh Circuit reversed, holding that deponent was entitled to assert his Fifth Amendment privilege, since his deposition testimony was not protected under 18 U.S.C. § 6002, but could be used against him in a subsequent criminal action.

Held, affirmed. The Supreme Court found that a deponent's civil deposition testimony tracking his prior immunized grand jury testimony is not, without duly authorized assurance of immunity at the time, "immunized testimony" within the meaning of the use immunity statute, and therefore may not be compelled over a valid assertion of the Fifth Amendment

privilege. The Court reasoned that user immunity was intended to immunize and exclude from a subsequent criminal trial only that information to which the government expressly has surrendered future use. Pillsbury Co. v. Conboy, 459 U.S. 248, 103 S. Ct. 608 (1983), 19 CLB 373.

Court of Appeals, 1st Cir. After defendant was convicted in district court of aiding and abetting the robbery of a federally insured bank, he appealed on the ground, among others, that the trial court had erred in permitting a proposed defense witness to invoke his Fifth Amendment privilege to refuse to testify on defendant's behalf. The proposed witness was a co-defendant who had already pled guilty to the bank robbery and been sentenced.

Held, conviction affirmed. The First Circuit stated that the co-defendent was entitled to invoke his Fifth Amendment privilege against self-incrimination and refuse to testify as a defense witness where the co-defendant's testimony would have differed substantially from statements he had made at the time he was sentenced and, thus, would have tended to incriminate him for perjury. Moreover, the court noted that the testimony would have tended to link the co-defendant to involvement in unindicted state crimes, which would have exposed him to prosecution in state courts. United States v. Albert, 773 F.2d 386 (1985), 22 CLB 164.

Court of Appeals, 2d Cir. Defendant, a grand jury witness who had been convicted of various fraud counts and subsequently granted immunity, was adjudged to be in civil contempt after refusing to testify about his activities on Fifth Amendment grounds. Defendant's scheme had also involved his fraudulent conduct in several foreign countries, and he based his refusal to testify on a claimed fear of foreign prosecution.

Held, judgment affirmed. Although it is an open question whether the Fifth Amendment privilege against self-incrimination may be invoked in a U.S. proceeding when the witness's fear is of a foreign incrimination, the court held that the witness asserting the privilege must demonstrate a real and substantial risk, as distinguished from a mere possibility, that his testimony might provide a link that would lead to his incrimination in a foreign country. In resolving that issue, the relevant questions include (1) whether there is an existing or potential foreign prosecution, (2) the likelihood of defendant's extradition from the United States, and (3) the likelihood that the testimony would be disclosed to a foreign government. The court could find no apparent present or prospective foreign prosecution, and held that extradition was unlikely in any event because it would be impossible until defendant completed his U.S. sentence. Furthermore, held the court, in light of the restrictions imposed by Rule 6(e) of the Federal Rules of Criminal Procedure on the use of grand jury testimony, it was highly unlikely that defendant's testimony could have come to the attention of foreign governments. The court parenthetically noted that even in the event of defendant's prosecution elsewhere, the evidence of his guilt was overwhelming without regard to any testimony he might give. In re Gilboe, 699 F.2d 71 (1983).

California Defendant was convicted of first-degree burglary. During closing arguments of the trial, the prosecu-

tion noted that defendant did not call his co-defendants as witnesses, although they would have corroborated defendant's testimony as to his whereabouts during the burglary. Defendant appealed his conviction contending that no comment should have been made by the prosecutor because his co-defendants were unavailable as witnesses, owing to their Fifth Amendment privilege against self-incrimination.

Held, affirmed. The court rejected defendant's claims that his co-defendants were unavailable because the assumption that any testimony of a co-defendant would necessarily be self-incriminating was baseless and failed to recognize well-established principles governing exercise of the privilege. The court said that defendant had no right to invoke the privilege against self-incrimination by a co-defendant or other witness because it is an exercise of the privilege by the holder, not defendant. The court concluded the witnesses in this case were literally "available" because their whereabouts were known and they were subject to subpoena. The court could not accept the proposition that a witness is unavailable because he might claim the Fifth Amendment privilege. Such a ruling would justify a person's refusal to be sworn in, would make the person and not the court the final judge, and would exclude the court from any consideration of the matter whatever. When the privilege has been asserted, the court determines whether its exercise is proper considering the context and circumstances in which it is claimed. Before a claim of privilege can be sustained, however, the witness should be put under oath and the party calling him be permitted to begin his interrogation. Then the witness could invoke his privilege with regard to the specific question, and the court would then be in a position to make the decision as to whether the answer might tend to incriminate the witness. People v. Ford, 754 P.2d 168 (1988).

§ 59.12 Waiver of privilege (New)

Montana Defendant appealed his conviction of felony theft. In defendant's first trial, which ended with a hung jury, defendant waived his Fifth Amendment right not to testify. In the retrial, defendant exercised his Fifth Amendment right not to testify, but his testimony from his first trial was used as rebuttal evidence, and defendant was convicted. On appeal defendant contended his testimony was improperly admitted at the second trial because he claimed the second trial was a "new trial."

Held, conviction affirmed. The Supreme Court of Montana found that the testimony of defendant in the first trial was properly admitted according to the state rules of evidence as well as federal and state precedent. The court ruled that the second trial was not a new one because a trial is defined as a proceeding in which there is a verdict of guilty. When there is a hung jury, there is no verdict; therefore, barring a statutory or constitutional ban, the defendant's testimony is admissible in the second trial. Since defendant knowingly waived his constitutional privilege by testifying at the first trial, his testimony was admissible at the retrial. At his first trial he had the advice of counsel and should have been informed by counsel of the possible consequences of his testifying. State v. Hall, 761 P.2d 1283 (1988).

§ 59.20 Silence as an admission

Pennsylvania Defendant was convicted of manslaughter for shooting the victim, Hilton, to death during a barroom fight. He claimed that the shooting was in self-defense. At trial, defendant testified that he had wrested the gun away from Hilton and began to run from the scene when a third party shot at him; defendant stated that he then fired the gun, over his shoulder, at the third party but the bullet struck Hilton. No other defense witness offered an exculpatory account of the shooting. Defendant had made no statement to police at the time of his arrest and, on cross-examination, was questioned about his failure to inform police of his self-defense claim. Defense counsel objected and moved for a mistrial; the objection was sustained and the jury instructed to disregard the question, but a mistrial was denied. Defendant contended on appeal that it was reversible error to deny his motion for a mistrial.

Held, sentence vacated and remanded for a new trial. The Supreme Court of Pennsylvania while noting that, under Fletcher v. Weir, 455 U.S. 603, 1025 Ct. 1309 (1982), it is constitutionally permissible to cross-examine a defendant about his post-arrest silence when the silence occurred prior to the giving of *Miranda* warnings, it declined to follow that decision as a matter of state law. The court remarked that "there exists a strong disposition on the part of lay jurors to view the exercise of the Fifth Amendment privilege as an admission of guilt." Accordingly, it decided:

> the Commonwealth must seek to impeach a defendant's relation of events by reference only to inconsistencies as they factually exist, not to the purported inconsistency between silence at arrest and testimony at trial. Silence at the time of arrest may become a factual inconsistency in the face of an assertion by the accused while testifying at trial that he related this version to the police at the time of arrest when in fact he remained silent. . . . Absent such an assertion, the reference by the prosecutor to previous silence is impermissible and reversible error.

Refusing to find the error harmless, the court remanded for a new trial. Commonwealth v. Turner, 454 A.2d 537 (1982), 19 CLB 489.

TESTIMONY AND RECORDS

§ 59.25 Testimony before grand jury

U.S. Supreme Court Pursuant to a subpoena, petitioner produced records as to accounts at foreign banks as a result of a federal grand jury investigation. He then invoked his Fifth Amendment privilege against self-incrimination when questioned about the existence or location of additional bank records. After failed attempts to obtain copies of such records, the government filed a motion with the federal district court for an order directing petitioner to sign a consent directive. The court denied the motion, concluding that compelling petitioner to sign the form was prohibited by the Fifth Amendment. The court of appeals disagreed and reversed. On remand, the district court ordered petitioner to execute the consent directive and, after he refused, found him in civil contempt. The court of appeals affirmed.

Held, affirmed. The Supreme Court concluded that the court order compelling petitioner to authorize foreign banks to disclose records of his ac-

count, without identifying the documents or acknowledging their existence, would not violate the target's Fifth Amendment privilege against self-incrimination. Doe v. United States, 108 S. Ct. 2341 (1988).

Court of Appeals, 1st Cir. A grand jury witness was held in contempt by the district court after refusing to sign a consent form authorizing a bank to release records.

Held, reversed. Bank records of an individual were protected by the Fifth Amendment and refusal to provide a signed form was not a basis for holding the individual in contempt when the consent was potentially incriminating. The First Circuit reasoned that any consent was potentially incriminating, because it could be used to prove the ultimate fact that accounts in the individual's name existed or that the individual controlled those accounts. *In re* Grand Jury Proceedings, 814 F.2d 791 (1987), 23 CLB 488.

Court of Appeals, 1st Cir. A grand jury witness was held in contempt by the district court after refusing to sign a consent form authorizing a bank to release records.

Held, reversed. The First Circuit stated that bank records of an individual are protected by the Fifth Amendment and that refusal to provide a signed form was not a basis for holding the individual in contempt when the consent was potentially incriminating. The court reasoned that any consent was potentially incriminating because it could be used to prove the ultimate fact that accounts in the individual's name existed or that the individual controlled those accounts. In the Grand Jury Proceedings, 814 F.2d 791 (1987), 23 CLB 488.

Court of Appeals, 2d Cir. After defendant was convicted of criminal contempt and sentenced to a five-year prison term, defendant appealed on the ground that the government's attempts to compel his testimony in the grand jury violated his Fifth Amendment rights. Defendant contended that he was subpoenaed not to aid the grand jury's continuing investigation but rather to make trouble for him because of his acquittal at a prior trial.

Held, conviction affirmed. The Second Circuit found that defendant's realistic fear that he would be indicted for perjury despite a grant of immunity was not sufficient ground to refuse to testify. The court observed that the Fifth Amendment does not shield witnesses from the adverse consequences following from their untruthful statements. United States v. Papadakis, 802 F.2d 618 (1986), cert. denied, 107 S. Ct. 1304 (1987).

§ 59.30 Right to refuse examination by state psychiatrist

Court of Appeals, 2d Cir. After the defendant was convicted in the district court on a five-count indictment for bank robbery and related offenses, he appealed on the ground that the prosecutor misused psychiatric material from a court-ordered interview of him.

Held, conviction affirmed. The Second Circuit concluded that the prosecutor remained within the bounds of a legitimate attempt to challenge the insanity defense and did not misuse material from a psychiatric examination. The court commented that while the prosecutor may have learned of the defendant's use of bad checks from the psychiatric examination, the information was only used on cross-examination to counter the defense theory that the defendant's writing of

bad checks supported his insanity claim. The court, however, noted that it frowned on the practice whereby the prosecutor was either present at the psychiatric examination or heard a tape recording of it, although such was not a per se violation of the Fifth Amendment. United States v. Stockwell, 743 F.2d 123 (1984), 21 CLB 179.

§ 59.45 Duty to pay tax as self-incrimination

South Dakota Defendant was convicted of possession of an untaxed controlled substance and possession of a controlled substance without a license. He was convicted of violating a chapter of a statute enacted in 1984 entitled "Luxury Tax on Controlled Substances and Marijuana," which provided for the licensing and taxing of marijuana and controlled substances. Specifically, he was convicted of possessing as a dealer a controlled substance without having paid a tax as evidenced by a stamp or other official indicia and possessing as a dealer a controlled substance without a license to sell. On appeal, defendant argued that the relevant statutory chapter violated his constitutional right against self-incrimination, because if he filed a tax return or obtained a license to sell these illegal substances, he would leave himself subject to prosecution for those offenses.

Held, reversed. The South Dakota Supreme Court stated that filing a tax return under the chapter providing for a luxury tax on controlled substances and marijuana created a real and appreciable risk of self-incrimination. The court cited Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532 (1969), which established guidelines for determining whether a regulatory or taxation system violates a defendant's right against self-incrimination. In *Leary,* the United States Supreme Court reversed a defendant's conviction for being a transferee of marijuana without having paid the tax thereon. In *Leary,* the Court noted that by registering and paying the tax, the defendant in that case could have subjected himself to self-incrimination, because the tax records could have been supplied to other law enforcement agencies for possible criminal prosecution. In this case, the statute under review purported to eliminate the possibility of self-incrimination, but it did not. The statute provides that prosecution cannot be initiated or facilitated by the disclosure of confidential information in the tax return; but the statute also permits the disclosure of such information under certain circumstances. The relevant chapter allows for tax information to be released by the secretary of revenue to the head of a criminal law enforcement agency, for example, pursuant to a written request by such agency head for particular information stating the reason the information is desired. The statute does not, however, provide for immunity from criminal prosecution based upon such information, and thus, can lead to self-incrimination. The court stated that "the clear import of [the chapter] is to incriminate, and thus the chapter is unconstitutional." State v. Roberts, 384 N.W.2d 688 (1986).

§ 59.50 —Tax returns

Court of Appeals, 6th Cir. After the taxpayer was convicted in the district court of willful failure to file federal income tax returns, he appealed on the ground that he had been improp-

erly denied the opportunity to assert his Fifth Amendment rights.

Held, affirmed. The Sixth Circuit ruled that the Fifth Amendment may not be asserted to protect a person from revealing information that may be harmful but not incriminating. The court thus determined that defendant could not properly avoid filing the required income tax returns by claiming his privilege against self-incrimination unless the disclosure of such information would subject him to incrimination and possible prosecution for violation of criminal laws. United States v. Saussy, 802 F.2d 849 (1986), cert. denied, 107 S. Ct. 1352 (1987).

NONTESTIMONIAL ASPECTS

§ 59.70 Identifying physical characteristics

Louisiana Defendant was convicted of aggravated rape, aggravated crime against nature, and aggravated battery. At his trial, the primary issue was whether defendant was the rapist. The rape victim described a tattoo she said decorated the right arm of her attacker. The defense countered with testimony from relations and acquaintances of defendant; it also sought to have defendant show his arms to the jury. The trial court ruled that if defendant displayed his arms, the prosecutor could cross-examine him concerning the origin of the tattoos. Cross-examination would have revealed that defendant had a jail record, so defense counsel opted not to have his client display his arms to the jury.

Held, conviction reversed and remanded. The Supreme Court of Louisiana declared that defendant was entitled to demonstrate to the jury any tattoos he had or lack of them, since the presence of tattoos was material to the victim's testimony. The court noted that a tattoo display by defendant would constitute demonstrative, rather than testimonial, evidence. Therefore, a nontestifying defendant would not waive the Fifth Amendment privilege against self-incrimination, citing Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966), by voluntarily showing tattoos on his body to the jury. State v. Martin, 519 So. 2d 87 (1988).

§ 59.75 Drunk-driving tests

"Blood-Alcohol Tests: *Neville* and Its Progeny," by Robert J. Craddick, 20 CLB 493 (1984).

U.S. Supreme Court After motions to suppress evidence obtained from breath analysis tests were denied in various California state court cases, the California Court of Appeals granted new trials and ordered that the test results not be admitted as evidence.

Held, reversed and remanded. The due process clause does not require that law enforcement agencies preserve breath analysis samples of suspected drunk drivers in order for the test results to be admissible in criminal prosecutions. The Court reasoned that the evidence to be presented at trial was not the breath itself but rather the test results obtained from the samples. California v. Trombetta, 104 S. Ct. 2528 (1984), 21 CLB 70.

U.S. Supreme Court When defendant was arrested by police officers in South Dakota for driving while intoxicated, he refused to submit to a blood-alcohol test even though he was warned that such refusal would lead to the automatic revocation of his license. The South Dakota trial court granted re-

spondent's motion to suppress all evidence of his refusal to take the test, and the South Dakota Supreme Court affirmed.

Held, reversed and remanded. The Supreme Court stated that admission into evidence of defendant's refusal to submit to a blood-alcohol test does not offend his privilege against self-incrimination. In so finding, the Court observed that it would not be fundamentally unfair in violation of due process to use defendant's refusal to take a blood-alcohol test as evidence of guilt, even though the police failed to warn him that refusal could be used against him at trial. South Dakota v. Neville, 103 S. Ct. 916 (1983), 19 CLB 476.

Colorado Defendant in one case was convicted of driving while ability-impaired. Defendant in a companion case was convicted of driving under the influence of intoxicating liquor, careless driving, and operating a vehicle without insurance. Both defendants refused to take blood or breath tests at the times of arrests. Neither was advised that his refusal to take either a blood or breath test could be introduced as part of the evidence against him at trial pursuant to C.R.S. 42-4-1202(3)(e). On appeal, defendants argued that the statute violated their privileges against self-incrimination as guaranteed by article II, section 18 of the Colorado constitution.

Held, affirmed. The U.S. Supreme Court, in South Dakota v. Neville, 103 S. Ct. 916 (1983), held that it was not a violation of the Fifth Amendment privilege against self-incrimination to use a defendant's refusal to take a chemical test as evidence against him at trial. In the absence of any evidence to the contrary, the Colorado Supreme Court saw no reason to interpret the state constitution as affording defendants greater protection against self-incrimination than the Fifth Amendment. The court also rejected defendants' claims that the refusal to take blood or breath tests when a police officer had lawfully requested was compelled testimony entitled to protection under the Colorado constitution. Cox v. People, 735 P.2d 153 (1987).

Utah Defendant was convicted of driving while under the influence of alcohol, driving with a suspended license, and interference with an arrest by a police officer. Following the arrest, defendant was asked to take a breathalyzer test to determine the amount of alcohol in his blood. The police explained that a refusal to do so would result in a one-year revocation of defendant's driver's license but did not warn defendant that a refusal could also be used against him in a consequent prosecution. Defendant, on appeal, argued that the refusal to take the breathalyzer test was impermissibly introduced into evidence and thus violated his right against self-incrimination guaranteed by the state and federal Constitutions.

Held, affirmed. The Supreme Court of Utah held that defendant's refusal to take the breathalyzer test was not an act compelled by the state and was not protected by the privilege against self-incrimination. Applying South Dakota v. Neville, 459 U.S. 553 (1983), in which the U.S. Supreme Court held that "a refusal to take a blood-alcohol test, after a public officer has lawfully requested it, is not an act coerced by the officer and thus is not protected by the privilege against self-incrimination," the court here found that under the

statutory scheme set forth in the implied statute, legal compulsion was on the driver to take the test and to provide noncommunicative evidence. However, the statute gave the arrested driver a choice of refusing the test, with the consequence that his license would be revoked for one year and the refusal might be used in any prosecution arising out of the incident. Moreover, although defendant was not properly warned that his refusal to take the test would be admissible at trial, the blood-alcohol test was simply a matter of grace afforded by statute and, as held in *Neville,* was "not an interrogation within the meaning of *Miranda,*" because it did not constitute communicative or testimonial evidence. Sandy City v. Larson, 733 P.2d 137 (1987).

§ 59.90 Handwriting Specimens

Court of Appeals, 3d Cir. After a grand jury witness refused to comply with a court order to provide handwriting exemplars in a backward slant, he was held in civil contempt.

Held, affirmed. The Third Circuit ruled that compelling a witness to provide handwriting exemplars that were not his normal writing style was not a testimonial communication for purposes of the Fifth Amendment. The court reasoned that the witness could not avoid a contempt citation because he had failed to show that the subpoena would compel a testimonial communication that was incriminating. In re Special Federal Grand Jury, 809 F.2d 1023 (1987), 23 CLB 392.

60. RIGHT TO SPEEDY TRIAL

§ 60.00 In general

"The Speedy-Trial Dilemma: A Handbook on Reform," by Paul B. Wice, 23 CLB 323 (1987).

New Hampshire Defendant, convicted of robbery and assault, argued on appeal that his constitutional right to a speedy trial had been violated by the nineteen-month delay between his arrest and trial. A three-month portion of the delay was the direct result of the complaining witness' departure from the country. The prosecutor, in anticipation of the complainant's absence for that period, had unsuccessfully attempted to bring the case to trial earlier. Trial did not commence until six months after the complainant returned, immediately upon defendant's first assertion of his speedy-trial rights before the trial court.

Held, conviction affirmed. The Supreme Court of New Hampshire stated that the right to a speedy trial "is necessarily relative and must be considered with regard to the practical administration of justice." In determining whether a defendant's speedy-trial rights are violated by a delay between arrest and trial, said the court, the factors for consideration are "the length of the delay, whether the defendant asserted his right, and any prejudice to the defendant." Here, it found, the state had attempted to move the case for trial in a reasonably prompt fashion; thereafter, the case could not be tried because of the complainant's voluntary absence and not

because of a deliberate prosecution effort to delay. Further, defendant did not diligently pursue his rights, waiting nineteen months before making any claim, and failed to cite any specific prejudice resulting from the delay. Under all of the circumstances, it concluded, there had been no denial of defendant's speedy-trial rights. State v. Perron, 454 A.2d 422 (1982), 19 CLB 489.

New York Defendant was convicted, in 1975, of multiple counts of possession and sale of a controlled substance. He appealed on the ground that his right to a public trial had been violated when, without a hearing, the courtroom was cleared of spectators and closed prior to the testimony of the undercover investigator to whom he had allegedly sold drugs. In 1980 the intermediate appellate court reversed and ordered a new trial. On remand to the trial court, he contended inter alia that the five-year delay between his conviction and the appellate court's decision violated his constitutional rights to a speedy trial. The trial court denied his motion and he entered a plea of guilty to one count of the indictment in satisfaction of all pending charges. Defendant again appealed, arguing in substance that because his right to a public trial had been violated initially, he would not have received the trial guaranteed him by the Constitution, i.e., his "first fair trial," until more than five years after his arrest; a trial scheduled five years after the inception of the criminal proceeding, he asserted, could not be a "speedy trial" in the constitutional sense.

Held, conviction affirmed. The New York Court of Appeals concluded that

> [T]he underlying rationale of the Sixth Amendment's right to a speedy trial extends that right only until the accused is brought to trial. The fact that, on appeal, the defendant may successfully challenge the propriety of that trial does not extend the Sixth Amendment's guarantee of a speedy trial throughout the appellate process. When the accused is found guilty and incarcerated even as a result of a procedurally flawed trial, he can no longer be said to be in the "legal limbo" the Sixth Amendment is designed to protect against. The accusations raised against him have been supported and the anxiety of an unknown fate has been resolved. The fact that a State has chosen statutorily to provide the accused with additional protection in the form of appellate review does not serve to expand the scope of an accused's speedy trial right. Nor does it mean that the purposes behind the speedy trial right will not be served properly. The accused will have been afforded the protections envisioned in assuring that he will be promptly brought to trial.

Here, stated the court, defendant was afforded a prompt initial trial which resulted in his conviction; "at that point, the concerns addressed by the Sixth Amendment were served." Accordingly, it found no violation of defendant's constitutional right to a speedy trial. People v. Cousart, 444 N.E.2d 971 (1982).

§ 60.05 Length of delay

Court of Appeals, 2d Cir. Following his transfer to Vermont, a California prisoner was convicted by the District Court for the District of Vermont. He appealed on the grounds that his speedy trial rights had been violated.

Held, affirmed. The second circuit held that a 249-day delay in bringing a prisoner to trial did not violate speedy trial provisions where the delays were chargeable to defendant. The court noted that defendant requested additional time to procure an attorney, to suppress evidence, to procure a transcript of his state trial, and to subpoena available witnesses. United States v. Scheer, 729 F.2d 164 (1984), 20 CLB 466.

§ 60.10 —Computation of delay

Court of Appeals, 11th Cir. Defendants were convicted of narcotics charges. They appealed, contending that the trial did not commence within the seventy-day period mandated by the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3168 (as amended in 1979). Defendants were arraigned on March 2, 1981, and the trial commenced 156 days later on August 5. They disputed much of the district court's finding that ninety-seven days were properly excludable. The ninety-seven days covered two discrete periods: forty-one days (March 13 to April 22) for motions to practice before the magistrate (Section 3161(h)(1)(F)); twenty-six days (April 22 to May 18) during which the magistrate had the motions under advisement (Section 3161(h)(1)(J)). Defendants challenged some of the categories of exclusion. First, they argued that Section 3161(c)(2), which provides that trials cannot begin sooner than thirty days from defendant's first appearance through counsel, prohibited exclusion of first eight days of the forty-one-day period. Second, they argued that Section 3161(h)(1)(J) permitted only a total of thirty days under advisement for both the magistrate and the district court. The Section allows for reasonable delay ". . . not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." Finally, they argued that because the parties did not object to the magistrate's report and recommendation, the district court was not entitled to the thirty-day period under advisement because there was nothing for it to take under advisement.

Held, conviction affirmed. The district court properly excluded all ninety-seven days. Defendants' first argument lacks support in the language, legislative history, and policy of Section 3161(c)(2). The Section is not addressed to the computation of the overall time period during which the trial must commence. Its sole purpose is to prevent trials from being held so quickly that defendants would not have time to prepare. The second argument fails because it contradicts the Judicial Guidelines to the Act, which expressly permit two thirty-day periods of advisement when the same matter is being considered by both a magistrate and a judge. The Eleventh Circuit decided to follow the Judicial Guidelines, expressing concern that restricting advisement by a magistrate and judge to a thirty-day total would unfairly limit full consideration of important and complex pretrial motions. Defendants' final argument, that a magistrate's report becomes the order of the court absent objections by the parties, is based on a misunderstanding of the role of a magistrate under the Federal Magistrates Act. The Act provides that the findings of magistrates, who are not Article III judges, may be rejected in whole or in part by a federal judge. It does not limit the court's power to reject only those reports to which objections are made.

United States v. Mers, 701 F.2d 1321, cert. denied, 464 U.S. 991, 104 S. Ct. 481 (1983).

Court of Appeals, 11th Cir. Defendant participated in a plan to purchase 1500 pounds of marijuana. After a number of meetings and phone conversations with federal undercover agents, he was arrested. At that time, he was taken into custody, fingerprinted, and photographed but was not taken before a magistrate and no complaint was filed. Forty-two days later, defendant was indicted. He was convicted of conspiracy to possess marijuana and appealed, arguing that his indictment should have been dismissed because it was not timely under the Speedy Trial Act.

Held, conviction affirmed. The court found that the language of the Speedy Trial Act indicated congressional intent that the applicable time period should begin to run only after an individual is "accused," either by an arrest and charge or by indictment. Unless the government has made a charge or placed a restraint on a defendant, either by releasing him on bail or by filing a complaint, there is nothing which the Act logically has an interest in speeding along. United States v. Sayers, 698 F.2d 1128 (1983).

Montana Defendants were convicted of escape from prison and were sentenced to four additional years in prison, to be served consecutively. On appeal, they claimed they were denied the right to a speedy trial. Defendants escaped from jail on February 15, 1982, and were apprehended on February 20, 1982. On March 11, 1982, the state filed an information charging defendants with escape, and defendants pled "not guilty" on March 18. On defendants' motion to substitute the judge, a new judge assumed jurisdiction of April 5. After defendants moved for a change of venue on April 30, their motion was denied on July 29. On September 13, 1982, defendants' motion to dismiss for lack of a speedy trial was denied. Defendants were found guilty of escape on September 15.

Held, affirmed. A pretrial delay of 207 days was sufficiently long to trigger a speedy-trial inquiry and shift to the state the burden of explaining the delay. The state explained that 108 days of delay were attributable to defendants' motions for substitution of judge and change of venue. At most, ninety-nine days of delay could be attributable to the state, and such a delay was reasonable and did not prejudice defendants. State v. Kelly, 661 P.2d 26 (1983).

§ 60.20 Reason for delay

U.S. Supreme Court After petitioners were convicted in the district court of charges arising from the manufacture, possession, and distribution of controlled substances, they appealed on the grounds that the Speedy Trial Act had been violated. The court of appeals affirmed the convictions.

Held, convictions affirmed. The Court ruled that Congress intended to exclude from the Speedy Trial Act's seventy-day limitation all time between the filing of a pretrial motion and the conclusion of the hearing on that motion, whether or not a delay in the holding of that hearing is "reasonably necessary." The Court reasoned that the plain terms of the statute exclude all time between the filing of and the hearing on a motion, whether that hearing was prompt or not. Henderson v. United States, 106 S. Ct. 1871 (1986).

Colorado Defendant was arrested for menacing and attempted kidnapping on April 24, 1981 and arraigned on those charges on April 28. Trial was set for July 7, then reset to September 8 on the state's motion. On July 23, defense counsel was permitted to withdraw because he had been unable to obtain defendant's cooperation; a public defender was appointed and because of his unavailability on September 8, the trial was rescheduled to begin on October 13. Defendant failed to appear on October 13 and a bench warrant was issued. Defendant appeared on November 13; the warrant was vacated and a trial date of December 1 was set. On December 1, defendant moved for dismissal, arguing that failure to bring him to trial within six months of his arraignment violated statutory speedy-trial requirements. The trial judge granted defendant's motion, stating that only the one-month period of delay resulting from defendant's actual absence could be excluded from the speedy-trial period; the speedy-trial period began to run again on November 13 and expired on November 28, the judge found, in holding that defendant was entitled to dismissal.

Held, ruling of district court dismissing charges against defendant reversed and remanded. The Supreme Court of Colorado ruled that the trial judge should have excluded from the speedy trial period "not only [the] time of the defendant's actual absence or unavailability but also [any] additional period of delay that may be fairly attributable to the defendant as a result of his voluntary unavailability." It was defendant's failure to appear on October 13 that precipitated the delay, said the court, and there was no suggestion in the record that a trial date earlier than December 7 could have been set "consistent with sound principles of judicial administration." The court also noted that defendant alleged no prejudice or disadvantage resulting from the period of delay; under the circumstances, it concluded, dismissal would "undermine the general societal interest in effective enforcement of the laws and would be inconsistent with the intent of the speedy trial provisions that a just result be accomplished." Accordingly, the court reversed and reinstated the charges against defendant. People v. Sanchez, 649 P.2d 1049 (1982).

§ 60.25 —Interpretations by state courts

Kansas Defendant was arrested September 7 for misdemeanor possession of marijuana and released on bond. The district attorney waited to file a complaint until a chemical analysis of the marijuana was received. As a result of a backlog at the government laboratory, no complaint was filed until April 2 of the following year. A new bond was issued, and arraignment took place April 22. Trial was set for June 30. Defendant moved for a dismissal on the basis of his right to a speedy trial. The trial court granted the dismissal. It found that for purposes of the Kansas statutory limit of 180 days between arraignment and trial, arraignment took place on November 5, the appearance date set on the bond issued the day defendant was arrested.

Held, judgment of conviction affirmed; judgment of dismissal reversed with directions to reinstate conviction. The court considered both defendant's statutory and constitutional rights to a speedy trial. It found that arraignment took place April 22, well within the state limit of 180 days before trial. A

court appearance made before a complaint is filed is not an arraignment. Defendant's constitutional rights were not violated either, since the delay did not result in any prejudice to defendant. State v. Rosine, 664 P.2d 852 (1983).

Missouri Defendant was convicted of capital murder. On appeal, he argued that he was denied his statutory right to a speedy trial. The trial did not begin until several months after the statutory 180-day period had expired. On November 21, 1980, the date of defendant's arraignment, the parties consented that the case be continued until December for the setting of various motions. In January 1981, defendant made motions to dismiss, to compel the state to elect to proceed on one of the alternative charges, and to change venue. Those motions, and subsequent ones made by the parties, moved the date of the trial to August 11, 1981.

Held, affirmed. Missouri law expressly excludes periods of delay resulting from hearings on pretrial motions, changes of venue, and continuances based upon findings by the trial court that the ends of justice served by taking such action outweigh the benefits of a speedy trial. Defendant failed to sustain his burden of proof that the failure to bring him to trial within the statutory period was occasioned by the state. State v. LaRette, 648 S.W.2d 96 (en banc), reh'g denied, 104 S. Ct. 515, cert. denied. 464 U.S. 1004. 104 S. Ct. 262 (1983).

Tennessee In January 1980, defendant was convicted of first-degree murder and was sentenced to death. Defendant's motion for a new hearing was granted, and the death penalty was reversed and remanded for a new resentencing hearing in October 1984, when the jury again assessed the death penalty. Defendant's second motion for a new sentencing hearing was granted on grounds that the trial judge erred in advising the second jury that the first jury had imposed the death penalty. The third sentencing hearing, held in June 1985, also resulted in a death sentence. On appeal, defendant argued, among other things, that errors attributable to the state, which led to a five-year delay between the first trial and the third sentencing hearing, violated his right to a speedy trial.

Held, affirmed. The Tennessee Supreme Court held that defendant's right to a speedy trial was inapplicable to state appellate proceedings and thereby was not violated by a delay in that process. No mandate from the U.S. Supreme Court stated that delay in the appellate process or delay caused by one or more retrials must be subjected to the tests of Barker v. Wingo, 407 U.S. 514 (1972); that case identified some interests of the accused as prevention of oppressive pretrial incarceration, minimization of the anxiety and concern accompanying public accusation, and limitation of possibility that delay may impair accused's ability to defend himself. These tests had no application when defendant had already been convicted of an offense, as in this case. Moreover, defendant here cited no authority to the effect that retrials were attributable to errors committed by trial judges or prosecuting attorneys, and there was no basis that the resulting delay provided for a valid speedy-trial claim. Rather, the retrials were sought by defendant and granted by the courts in order to assure a careful review and a fair trial, and there was no evidence that the actions of the

trial judge or prosecutor under these circumstances gave rise to a delay that entitled defendant to claim a speedy-trial violation. State v. Adkins, 725 S.W.2d 660 (1987), 23 CLB 498.

§ 60.35 Requirement of prejudice

Court of Appeals, 5th Cir. Petitioner, who had been convicted of attempted murder, brought a habeas corpus petition based on an alleged violation of his speedy trial rights, which was denied in the district court.

Held, affirmed. The Fifth Circuit concluded that petitioner's Sixth Amendment right to a speedy trial was not violated. The court explained that the gravity of the alleged crime is a consideration in resolving speedy trial claims, and that while a ten-month delay between arrest and time of trial would be excessive where the alleged offense could result in only brief imprisonment, such a delay was not excessive in this case in view of the seriousness of the crime, as evidenced by a sentence of thirty years of hard labor. Gray v. King, 724 F.2d 1199, cert. denied, 105 S. Ct. 381 (1984).

Alabama Defendant was convicted of sexual abuse of his sixteen-year-old sister-in-law. On certiorari to the Alabama Supreme Court, defendant contended that he was denied a speedy trial and unjustly prejudiced by the delay. The gist of his argument was that his trial was postponed at least twice upon the state's motion. During this delay, a change in the law became effective, and the two-for-one peremptory strike was abolished and replaced with a one-to-one jury strike.

Held, conviction affirmed. The Supreme Court of Alabama ruled that the granting or withholding of peremptory challenges is solely a matter of procedure even though peremptory challenges are an inherent part of the jury trial. The court concluded that it has not been elevated to the status of a constitutionally guaranteed right, citing United States v. Morris, 623 F.2d 145 (1980). Ex parte Cofer, 440 So. 2d 1121 (1983).

§ 60.45 Right to re-prosecute following dismissal

Court of Appeals, 2d Cir. After the district court found that the Speedy Trial Act, 18 U.S.C. §§ 3161–3174, had not been violated by delay in processing defendant's suppression motion, defendant appealed.

Held, reversed and remanded. The Second Circuit ruled that while the Speedy Trial Act was violated, the dismissal should be without prejudice to refiling of the charges. The court noted that where, as here, the crime charged is serious, the sanction of dismissal with prejudice for a speedy trial violation should be imposed only for serious delay involving intentional noncompliance with the Act. United States v. Simmons, 786 F.2d 479 (1986).

Cumulative Table of Cases

[References are to sections (§); references to the supplement are preceded by an "S."]

A

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

B

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

C

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

D

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

E

[References are to sections (§); references to the supplement are preceded by an "S."]

F

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

G

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

H

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

I

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

J

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

K

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

L

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

N

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

O

[References are to sections (§); references to the supplement are preceded by an "S."]

P

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

Q

R

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

S

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the Supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S".]

[References are to sections (§); references to the supplement are preceded by an "S".]

T

[References are to sections (§); references to the supplement are preceded by an "S".]

[References are to sections (§); references to the supplement are preceded by an "S".]

[References are to sections (§); references to the supplement are preceded by an "S".]

U

V

[References are to sections (§); references to the supplement are preceded by an "S".]

W

[References are to sections (§); references to the supplement are preceded by an "S".]

[References are to sections (§); references to the supplement are preceded by an "S".]

[References are to sections (§); references to the supplement are preceded by an "S".]

[References are to sections (§); references to the supplement are preceded by an "S".]

[References are to sections (§); references to the supplement are preceded by an "S".]

Y

[References are to sections (§); references to the supplement are preceded by an "S".]

Z

Table of Updated Case Citations

Page No. Main Vol.	*Case Name*	*Citation*	*Updated Citation*
1	Constantino v. State	255 S.E.2d 710 (1979)	cert. denied, 444 U.S. 940, 100 S. Ct. 293 (1979)
3	People v. Posner	261 N.W.2d 209 (App. 1977)	appeal dismissed, 297 N.W.2d 578 (1980); modified, 300 N.W.2d 171 (1980)
12	Riddle v. State	243 S.E.2d 607 (1978)	overruled, 282 S.E.2d 308 (1981)
23, 849	Commonwealth v. Luddy	422 A.2d 601 (Super. 1980)	cert. denied, 454 U.S. 825, 102 S. Ct. 114 (1981)
36	State v. Cherry	275 S.E.2d 266 (App. 1981)	aff'd, 283 S.E.2d 494 (App. 1981)
44	Stanley v. State	241 S.E.2d 173 (1977)	cert. denied, 439 U.S. 881 99 S. Ct. 218 (1978)
45	Whalen v. United States	379 A.2d 1152 (1977)	rev'd, 445 U.S. 684, 100 S. Ct. 1432 (1980); vacated, 446 U.S. 903, 100 S. Ct. 1826 (1980)
58	State v. Smith	609 P.2d 696 (1980)	overruled, 685 P.2d 922 (1984)
81	Cook v. State	381 A.2d 671 (App. 1978)	cert. denied, 439 U.S. 839, 99 S. Ct. 126 (1978)
123	Shields v. State	374 A.2d 816 (1977)	cert. denied, 434 U.S. 893, 98 S. Ct. 271 (1977)
127	Deason v. State	562 S.W.2d 79 (1978)	cert. denied, 439 U.S. 839, 99 S. Ct. 126 (1978)
155	State v. Jones	558 S.W.2d 233 (App. 1977)	cert. denied, 435 U.S. 970, 98 S. Ct. 1609 (1978)
171	Hansen v. Owens	619 P.2d 315 (1980)	overruled, 701 P.2d 1075 (1985)
177, 207	Wells v. Commonwealth	562 S.W.2d 622 (1978)	cert. denied, 439 U.S. 861, 99 S. Ct. 181 (1978)
188	Strickland v. United States	389 A.2d 1325 (1978)	cert. denied, 440 U.S. 926, 99 S. Ct. 1258 (1979)
209	State v. Cruz	627 P.2d 689 (1981)	limited, 665 P.2d 1333 (1982)
237	Delay v. Commonwealth	560 S.W.2d 823 (App. 1977)	cert. denied, 436 U.S. 922, 98 S. Ct. 2273 (1978)

Page No. Main Vol.	*Case Name*	*Citation*	*Updated Citation*
238	Johnson v. State	564 S.W.2d 707 (Crim. App. 1978)	overruled, 663 S.W.2d 834 (Crim. App. 1984)
250	Commonwealth v. Richardson	383 A.2d 510 (1978)	cert. denied, 436 U.S. 910, 98 S. Ct. 2248 (1978)
270	State v. Plath	284 S.E.2d 221 (1981)	reh'g denied, 467 U.S. 1265, 105 S. Ct. 28 (1984)
276	Jones v. State	256 S.E.2d 907 (1979)	cert. denied, 444 U.S. 957, 100 S. Ct. 437 (1979); reh'g denied, 444 U.S. 1027, 100 S. Ct. 694 (1980)
308	Magwood v. State	420 A.2d 1253 (1980)	rev'd, 432 A.2d 446 (1981)
311	Roberts v. State	274 S.E.2d 772 (App. 1980)	rev'd, 277 S.E.2d 644 (1981); vacated, 281 S.E.2d 648 (App. 1981)
335	Westfall v. Mason	594 S.W.2d 908 (1980), rev'd sub nom.	rev'd, 618 S.W.2d 671 (1981)
389, 404, 606	Lewis v. United States	445 U.S. 55, 100 S. Ct. 915 (1980)	limited, 763 F.2d 1090 (1985)
500	United States v. Costanzo	625 F.2d 465 (1980)	cert. denied, 472 U.S. 1017, 105 S. Ct. 3477 (1985)
573	United States v. Nelson	451 F. Supp. 117 (1978)	aff'd, 593 F.2d 543, cert. denied, 444 U.S. 847, 100 S. Ct. 95 (1979)
685	State v. Menne	380 So. 2d 14 (1980)	cert. denied, 449 U.S. 833, 101 S. Ct. 104 (1980)
711	White v. Finkbeiner	611 F.2d 186 (1979)	aff'd, 753 F.2d 540 (1985)
726	Perez v. Wainwright	640 F.2d 596 (1981)	cert. denied, 456 U.S. 910, 102 S. Ct. 1759 (1982); reh'g denied, 456 U.S. 985, 102 S. Ct. 2260 (1982)
730	Maxwell v. Superior Court	161 Cal. Rptr. 849 (App. 1980)	vacated, 180 Cal. Rptr. 177 (1982), 639 P.2d 248 (1982)
730	Foster v. State	387 So. 2d 344 (1980)	cert. denied, 464 U.S. 1052, 104 S. Ct. 734 (1984)
734	Davis v. Davis	585 F.2d 1226 (1978)	reh'g denied, 455 U.S. 1038, 102 S. Ct. 1742 (1982)
738	Evans v. Britton	628 F.2d 400 (1980)	rev'd, 456 U.S. 605, 102 S. Ct. 2049 (1982)
738	Presnell v. State	252 S.E.2d 625 (1979)	reh'g denied, 444 U.S. 957, 100 S. Ct. 439 (1979)
741	Patrick v. State	274 S.E.2d 570 (1981)	cert. denied, 459 U.S. 1089, 103 S. Ct. 575 (1982)

Page No. Main Vol.	*Case Name*	*Citation*	*Updated Citation*
742	Greene v. Massey	437 U.S. 19, 98 S. Ct. 2151 (1978)	cert. denied, 104 S.Ct. 718 (1984); reh'g denied, 465 U.S. 1074, 104 S. Ct. 1431 (1984)
748	People v. Anderson	295 N.W.2d 482 (1980)	cert. denied, 449 U.S. 1101, 101 S. Ct. 896 (1981)
748	State v. Wood	596 S.W.2d 394 (1980)	cert. denied, 449 U.S. 876, 101 S. Ct. 221 (1980)
760	State v. Widner	429 N.E.2d 1065 (1981)	cert. denied, 431 N.E.2d 1025 (1982)
774	State v. Vernon	283 N.W.2d 516 (1979)	appeal dismissed, 444 U.S. 1062, 100 S. Ct. 1002 (1980)
787	Gillette v. U.S., Negre v. Larsen	401 U.S. 437, 915 S. Ct. 828 (1970)	reh'g denied, 91 S. Ct. 1521 (1971)
793	Duncan v. Louisiana	391 U.S. 145, 88 S. Ct. 1444 (1967)	reh'g denied, 391 U.S. 194, 88 S. Ct. 2270 (1968)
796	Johnson v. City of Opelousas	488 F. Supp. 433 (1980)	rev'd, 658 F.2d 1065 (1981)
798	State v. Howery	404 A.2d 632 (1979)	cert. denied, 444 U.S. 994, 100 S. Ct. 527 (1979)
807	People v. Bayles	411 N.E.2d 1346 (1980)	cert. denied, 453 U.S. 923, 101 S. Ct. 3160 (1981)
822, 838	People v. Long	288 N.W.2d 629 (App. 1980)	rev'd, 359 N.W.2d 194 (1984)
824	Fore v. Commonwealth	265 S.E.2d 729 (1980)	cert. denied, 449 U.S. 1017, 101 S. Ct. 579 (1980)
834	People v. Moody	423 N.E.2d 566 (App. 1981)	rev'd, 445 N.E.2d 275 (1983)
840	State v. Broadnax	612 P.2d 391 (App. 1980), aff'd, 628 P.2d 1332 (1981)	rev'd, 654 P.2d 96 (1982)
848	In re Search Warrant	667 F.2d 117 (1981)	cert. denied, 455 U.S. 926, 102 S. Ct. 1971 (1982)
853	United States v. Segura	663 F.2d 411 (1981)	aff'd, 468 U.S. 796, 104 S. Ct. 3380 (1984)
861	State v. Whitehead	257 S.E.2d 131 (1979)	dismissed, 261 S.E.2d 127 (1979)
871	Odom v. State	403 So. 2d 936 (1981)	cert. denied, 492 So. 2d 355 (1986)
874	Khaalis v. United States	408 A.2d 313 (1979)	cert. denied, 444 U.S. 1092, 100 S. Ct. 1059 (1980)
875	United States v. Scherer	673 F.2d 176 (1982)	cert. denied, 457 U.S. 1120, 102 S. Ct. 2935 (1982)
879	State v. Packard	389 So. 2d 56 (1980)	cert. denied, 450 U.S. 928, 101 S. Ct. 1385 (1981)

Page No. Main Vol.	*Case Name*	*Citation*	*Updated Citation*
881	Kohr v. State	388 A.2d 1242 (Spec. App. 1978)	aff'd, 397 A.2d 328 (1978)
885	Commonwealth v. DeJohn	403 A.2d 1283 (1979)	cert. denied, 502 A.2d 121 (1985)
889	People v. Pleasant	430 N.E.2d 905 (1981)	cert. denied, 455 U.S. 924, 102 S. Ct. 1285 (1982)
889	People v. Rogers	421 N.E.2d 491 (1981)	cert. denied, 454 U.S. 898, 102 S. Ct. 397 (1981)
898	United States v. Freed	401 U.S. 601, 91 S. Ct. 1112 (1971)	reh'g denied, 91 S. Ct. 2201 (1972)
902	People v. Serra	223 N.W.2d 28 (App. 1974)	overruled, 241 N.W.2d 762 (1976); 273 N.W.2d 443 (1978)
905	People v. Woodruff	412 N.E.2d 1171 (App. 1980)	rev'd, 430 N.E.2d 1120 (1981)
906	United States v. MacDonald	632 F.2d 258 (1980)	rev'd, 456 U.S. 1, 102 S. Ct. 1497 (1982); cert. denied, 459 U.S. 1103, 103 S. Ct. 726 (1983)

Cumulative Index

[References are to sections (§); references to the supplement are preceded by an "S."]

A

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

D

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

G

H

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

J

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

K

[References are to sections (§); references to the supplement are preceded by an "S."]

L

M

[References are to sections (§); references to the supplement are preceded by an "S."]

N

O

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

Q

R

[*References are to sections (§); references to the supplement are preceded by an "S."*]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the supplement are preceded by an "S."]

T

[References are to sections (§); references to the supplement are preceded by an "S."]

U

V

[References are to sections (§); references to the supplement are preceded by an "S."]

[References are to sections (§); references to the Supplement are preceded by an "S."]

Y