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Abstracts of Recent Cases

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ABSTRACTS OF RECENT CASES

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Contempt by Newspaper—*State v. Morris*, 406 P.2d 349(N.M.1965). Following the entry of a guilty plea by a former assistant prosecutor to a charge of involuntary manslaughter (arising out of an automobile accident in which five people died), the respondent, a newspaper columnist, wrote and published a series of articles severely critical of the judge's actions in the criminal case. The articles reported that the punishment imposed upon the former prosecutor had been a twelve months deferral of sentence, and a $500 fine, suspended upon the payment of $500 in court costs. The respondent also reported that in a case arising in another county, a "humble" 20 year old man, who had killed three "prominent" people under similar circumstances, had received a sentence of 1 to 5 years in the penitentiary. "The only thing the two cases seem to prove," the respondent wrote, "is that mass killing by drunk drivers is not a very serious offense in New Mexico, with killing prominent people being slightly more serious than killing humble ones. Kill a cow, drunk or sober, and see what you get." In a subsequent column, the respondent reported that "There has been widespread comment about the no fine, no jail judgment of the court in handling the fellow lawyer. Among the most critical are lawyers themselves who fear that the profession is being made to appear as a favored group in court."

The attorney for the former prosecutor thereafter filed an affidavit charging the respondent with criminal contempt. The trial judge found that the articles by respondent "occurred during the pendency of the [criminal] case, and that the defendant in that case will not be sentenced and the case concluded until the month of November, 1964, or thereafter," found the respondent guilty of contempt and imposed a sentence of 10 days in the county jail and a fine of $250.

On appeal, the respondent contended that the contempt conviction should be reversed because his comments were made after the conclusion, not during the pendency, of the criminal case, and, in any event, did not present a "clear and present danger" to the impartial administration of justice in that case.

The New Mexico Supreme Court, noting that its decision was controlled by prior opinions of the Supreme Court of the United States, assumed that the comments were made while the case was pending, but held that a "clear and present danger" to the administration of justice had not been proved.

The New Mexico court held that it was "limited by the United States Supreme Court's interpretation of the extent of protection afforded by the First Amendment" and that in *Bridges v. California*, 314 U.S. 252, that court had said that "the substantive evil must be 'extremely serious and the degree of imminence extremely high before utterances can be punished,'" and in *Craig v. Harney*, 331 U.S. 367, had held that "the danger sought to be guarded against 'must not be remote or even probable; it must immediately imperil.'" The court concluded, therefore, that prior New Mexico cases which had upheld the imposition of the contempt power in cases where conduct had only tended to interfere with or obstruct the administration of justice in a pending case could "no longer serve as precedents in view of the principles laid down by the Supreme Court of the United States."

In refusing to find that a clear and present danger had been proved, the court held that "The only substantive evil upon which the contempt charges possibly could be based, or seek to avert, would be the direct intereference with or influence on the court of the articles when, at the expiration of the deferment period, [the defendant] would again appear for sentencing or other disposition of the charge against him." However, the court said, "no reference to, or speculation regarding future action by the court was made in the articles." And to presume that the articles would, in fact, influence future action by the trial judge, the court said, would be to "fail to accord him

that strength of character and judicial fortitude so common to the judiciary and so vividly exemplified by the long record of his judicial acts."

Comment: Compare the language cited by the court from the *Bridges* and *Craig* cases with the recent comments of Mr. Justice Goldberg in *Cox v. Louisiana*, 379 U.S. 559, 562–565(1965):

> "Since we are committed to a government of laws and not of men it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundations of our constitutional democracy. * * * The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceedings, starting with arrest and culminating with a trial 'in a courtroom presided over by a judge.' * * * A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. * * * It is, of course, true that most judges, will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. A State may also properly protect the judicial process from being misjudged in the minds of the public. * * * A State may protect against the possibility of a conclusion by the public . . . that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process."

For an excellent and detailed examination of the law concerning the problems engendered by the conflicts of "free press-fair trial", see Jaffe, *The Press And The Oppressed—A Study Of Prejudicial News Reporting In Criminal Cases* (pts.1–2), 56 J. CRIM. L., C. & P.S. 1, 158(1965).

Convictions Pending on Appeal and Impeachment—*State v. Johnson*, 406 P.2d 403(Ariz.1965). Defendant was convicted of selling narcotics and appealed, *inter alia*, on the ground that it was error for the prosecutor to ask, on cross-examination, whether he had previously been convicted of a felony. The felony conviction referred to by the prosecutor was then on appeal.

While noting a conflict in the cases, the Arizona Supreme Court found that the majority rule, in force in ten state and four federal jurisdictions, is that "a conviction is a verity until set aside, and thus permissible to be considered by the trier of facts as destructive of the witness' credibility. We believe the majority rule is sound. Therefore it was not error for the County Attorney to inquire about the conviction."

Comment: Of course, the rule which allows a witness to be impeached by a prior conviction of felony pending on appeal at the time of the trial in which the witness testifies poses some problems. It is clear enough that a witness may not be impeached by showing a prior conviction which has been, at the time of the trial in which the witness testifies, reversed on appeal or set aside on motion, whether the prior conviction is for a separate offense, *People v. Van Zile*, 141 N.Y.S. 168(S.C. 1913), but see *Manning v. State*, 123 P. 1029 (Okla.Ct.App.1912)(dictum), or for the offense then on trial, *Richardson v. State*, 27 S.W. 139 (Tex.Ct.Cr.App.1894); *Martin v. State*, 189 S.W. 262(Tex.Ct.Cr.App.1916).

What is the rule to be, however, in those cases where the prior conviction used to impeach is pending on appeal at the time of the trial in which the witness testifies, but the prior conviction has been reversed by the time the case at which the witness has testified reaches the appellate court? Must the second conviction be reversed because the witness was improperly impeached for the reason that the debilitating conviction, having been reversed, no longer "exists" or is a legal nullity? Those courts ruling on the question have said "No."

In *State v. Crawford*, 206 P. 717(Utah1922), the defendant, on trial for robbery, was impeached on cross-examination when the prosecutor elicited the admission that he had previously been convicted of robbery, over the objection of defendant's counsel that the prior conviction was then on appeal. When the supreme court reviewed the conviction in the second trial, it noted that defendant's first conviction for robbery had been reversed and remanded by that same court with directions to grant a judgment of acquittal, but held that since the prior conviction was final and existent at the time it was used to impeach defendant

in the second trial there was no error and the second conviction was affirmed. And see *Latikos v. State*, 88 So. 47(Ct.App.Ala.1921)(dictum).

Peremptory Challenges and Multiple Defendants—*Anderson v. State*, 406 P.2d 532(Nev.1965). Defendants were tried for possession of narcotics with two co-defendants. Although Nevada law allows a single defendant on trial the right to four peremptory challenges, the statute also provides that when defendants are joined for trial all peremptory challenges must be exercised jointly and only a total of four are allowed *between* the defendants. After a motion to sever one defendant, on the ground that he could not agree to the exercise of a particular challenge, was denied, the defendants "reluctantly" exercised their four challenges, proceeded to trial and were convicted. On appeal, defendants contended that it violated their "constitutional rights" to force them to pool peremptory challenges. The Nevada Supreme Court affirmed the convictions.

"There is nothing in either the Constitution of the United States or the Nevada Constitution," said the court, "which requires Congress or the state legislature to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." Because the ability to exercise a peremptory challenge was deemed by the court to be a privilege and not a right, and since the Nevada legislature "has seen fit to treat several defendants, for this purpose, as one party", multiple defendants, to "avail themselves of this privilege . . . must act accordingly . . . . [since] the privilege must be taken with the limitations placed upon the manner of its exercise."

Defendants also contended that the "one man-one vote" rationale of the reapportionment cases (*Baker v. Carr*, 369 U.S. 186; *Reynolds v. Sims*, 377 U.S. 533) compelled the conclusion that each of them ought to be accorded four peremptory challenges, but this contention was summarily rejected as "without merit."

Injunctive Relief and Federal Criminal Procedings—*Ivy v. Katzenbach*, 351 F.2d 32(7th Cir. 1965). The plaintiff, a well known physician and medical researcher, was indicted for mail fraud and violations of the Federal Food, Drug and Cosmetic Act in connection with his use and promotion of the alleged anti-cancer drug, krebiozen.

After his indictment, but prior to trial, he sought injunctive relief in the federal district court alleging, *inter alia*, that he was a scientist of outstanding reputation, that krebiozen was an efficacious cancer treatment, that the federal government had never conducted a fair test of the drug's worth and had arbitrarily interfered with the use of the drug by cancer patients, that only a court of equity (supervising a clinical test of the drug) and not a lay jury could determine the merits of the "krebiozen controversy" and that to put him to a criminal trial without a prior court supervised clinical test of the drug would deprive him of due process. The district court denied relief and the Court of Appeals for the Seventh Circuit affirmed.

The appellate court noted that Dr. Ivy had not challenged the validity of the statutes upon which the indictment was based and had not challenged the fact that the officials sought to be enjoined (the Attorney General of the United States and the United States Attorney for the Northern District of Illinois) were acting within their discretion as prosecutors in proceeding with a criminal trial. The court also held that there was no merit to the claim that the matters involved in the criminal trial (e.g., the worth of krebiozen as a cancer retarding agent) were "beyond the intelligence and comprehension of a jury." " 'The mere fact that the issues of a case may be complex or confusing to a jury,' " the court said, " 'does not mean that they must remain so—the prosecution must clarify the facts in order to present its charges properly.' " In such a case, the court said, the jury in the criminal trial would undoubtedly be aided by the testimony of expert witnesses.

Double Jeopardy, Multiple Counts, and the Hung Jury—*Forsberg v. United States*, 351 F.2d 242(9th Cir.1965). The defendant was charged in a two count indictment with assault with intent to commit murder and assault with intent to do bodily harm. Both counts, arising out of the same act, were submitted to a jury which returned a verdict acquitting defendant of the greater offense, but was unable to reach a verdict on the count charging assault with intent to do bodily harm. Without objection from defendant, the court entered a judgment of acquittal on the first count, declared a mistrial on the second count and discharged the jury.

The defendant was later retried on the second count and appealed on the ground that the second trial "was in violation of his constitutional right

against being placed twice in jeopardy since he had already been acquitted on Count One, which included the lesser offense set forth in Count Two." The Court of Appeals for the Ninth Circuit rejected the jeopardy argument and affirmed.

The appellate court noted that at least three principles were clear: (1) ordinarily, where a mistrial is declared because of a failure of the jury to agree upon a verdict, the double jeopardy clause is not violated by a retrial; (2) "an acquittal or conviction of a greater offense is a bar to a subsequent trial of a lesser offense, necessarily included in, and a part of the greater, if under the indictment for the greater offense the defendant could have been convicted of the lesser offense, and (3) if the indictment in this case had contained but a single count charging the defendant with assault with intent to kill (a) a verdict could have been rendered on the lesser offense, and (b) therefore a verdict of acquittal on that count would have barred a second trial for the lesser offense.

The question the court faced was whether the result set forth in (3) above ought to apply when the government, instead of charging the defendant in one count (naming the greater offense), charged the defendant in two counts (naming the greater and lesser offenses)?

The court found that it was proper for the government to have charged the separate offenses arising out of the same act in *separate counts*, but also noted that if the defendant had been convicted of both offenses only one sentence could have been imposed, and a *conviction* on either count would have been a bar to a subsequent prosecution on the other count. Though neither counsel nor the court had found a case directly in point, the court reasoned that if defendant had been acquitted on count one and convicted on count two, and the conviction was later reversed, there was "no good reason" why he could not have been retried on that count. "Nor should the fact that there was a hung jury instead of a verdict of conviction bar his retrial on Count Two. Obviously, he could not in either event be retried on the charge set forth in Count One."

Defective Weapon May Be Firearm—*United States v. Cosey*, 244 F. Supp. 100(E.D.La.1965). The defendant was indicted for the unlawful possession of a "firearm" in violation of 26 U.S.C. §5848(1). The weapon in issue was a "14⅞ barrel, single barrel 28-gauge shotgun with overall length 25½" from which the firing pin was missing at the time of seizure by federal agents. "A test firing was successfully made later by a government agent who substituted a small wire nail for the missing pin . . . ." Prior to trial, defendant moved to dismiss the indictment on the ground that the shotgun was not a "firearm" possessed in violation of the law on the ground that it lacked the capability of discharging a projectile by an explosion because the firing pin was missing.

In denying defendant's motion, the court distinguished *United States v. Thompson*, 202 F. Supp. 503(N.D.Cal.1962), which had held that "a sawed-off shotgun from which a firing pin was missing is not a firearm under the National Firearms Act." "In *Thompson*," the court said, "there is no evidence that the court or the agent who fire tested the weapon was aware than an ordinary wire nail, accessible and available to almost anyone, could be effectively substituted for the firing pin." The court held that the fact that the firing pin was missing was "immaterial" since the "temporarily inoperable instrument can . . . with minimum effort, time and ingenuity be made to fire a shotgun shell. We feel that the purpose of the statute would be frustrated or defeated if we accepted defendant's contention that in the absence of the firing pin, a shotgun is not a firearm under the statute."

Provocation and Retaliation in Closing Arguments—*State v. Flores*, 405 P.2d 901(Ct.App. Ariz.1965). Defendant was convicted of possession of marijuana and he appealed on the ground that the remarks of the prosecutor in closing argument had been inflammatory and prejudicial. The prosecutor had said "We are not trying me. We are not trying Mr. MacDonald [defense counsel]. We are trying that [pointing at defendant] . . . that punk over there with tattoos on his arm."

In rejecting defendant's argument, the court noted that defense counsel, in his argument, had said that he believed in his client's case and that he had known the defendant "since he was a baby." The prosecutor justified his remarks on the basis that they were "fair comment and retaliatory to those remarks which counsel made in his own argument . . .I had a right to retort and retaliate in my own argument. The court, finding the rule to be that "improper remarks of the county attorney when provoked by defendant's arguments

are not generally speaking, grounds for reversal," held that this "statement is applicable to the case now under consideration."

Expert May Testify to Character of Wound—*State v. Campbell*, 405 P.2d 978(Mont.1965). Convicted of murder and sentenced to life imprisonment, the defendant appealed on the ground, *inter alia*, that it was error to allow an "expert in forensic medicine" to testify that it was his opinion, based upon examination of the bullet wounds in defendant's body, that the defendant had attempted to commit suicide. The Supreme Court of Montana decided that the evidence was admissible.

The court stated the question to be "Can opinion evidence on the subject of whether a wound was or was not self-inflicted be admitted?" Looking to the law of other jurisdictions, the court found that "fourteen states and England have answered this question yes" and "seven jurisdictions [including Montana] have held in the negative."

Deciding that the majority rule "is supported by the better reasoning", the court concluded that "the subject of self-inflicted wounds is not one of such common experience that laymen may not be assisted by the opinion of a doctor, who has special knowledge regarding anatomy and injuries in the human body . . . and it matters not that such an opinion involves an ultimate issue of fact." The prior Montana case, *State v. Ratkovich*, 105 P.2d 679, which had held to the contrary, was overruled.

Self-Incrimination and Bodily Extractions—The Montana court, in the *Campbell* case, also rejected defendant's contentions that the admission into evidence of a bullet extracted from his body by a surgeon, and "X-ray photographs taken of the appellant while he was in the hospital undergoing treatment for his wounds" violated the privilege against self-incrimination or constituted a bodily invasion so "shocking to the conscience" that it would violate the due process rationale of *Rochin v. California*, 342 U.S. 165.

Probable Cause for Arrest of Known Criminal—*United States v. Myers*, 245 F.Supp. 746(E.D.Pa. 1965). Defendant was convicted of burglary in a Pennsylvania trial court and sentenced to prison. After exhausting his state remedies, he sought discharge on federal habeas corpus on the ground that the evidence leading to his conviction had been obtained in a search violative of the fourth amendment. The district court so found and discharged defendant from further custody.

The defendant had been arrested when two police officers on patrol in a section of Philadelphia where "there has been a large number of burglaries" stopped the automobile in which defendant and his two companions had been riding at about 8:20 P.M. "for a routine check". After stopping the car, the officers recognized defendant and his companions as "reputed professional burglars". Removing defendant from the car, the officers searched the vehicle and found fifteen silver dollars. An hour and a half after the arrest a burglary was reported to the police and "it was learned that the silver dollars found in the search had come from that source."

"The question presented therefore," the court said, "is whether the police had probable cause to stop and search the vehicle which the relator was driving when the basis for the police action was the reputation of the occupants as burglars and the vehicle's presence in a neighborhood which was presently experiencing a high incidence of burglaries."

In *Beck v. Ohio*, 379 U.S. 89(1964), the court noted, the Supreme Court of the United States had held unlawful an arrest and search which was based, so far as the record revealed, solely upon the officer's knowledge of the defendant's reputation of being involved in gambling offenses. The "added element of a high incidence of crime in the neighborhood", the court decided, was not significant enough to take the instant case out of the *Beck* rationale. The court also considered *Carroll v. United States*, 267 U.S. 132(1925) and *Brinegar v. United States*, 338 U.S. (160(1949), where "the police had personal knowledge of the defendants' activities," but found that in the present case "the officers only knew of their reputations as burglars and nothing further. Here they did not even have a reliable report or trustworthy information that the relator here was engaged in illegal activity.

Comment: Compare the decision of the Supreme Court of Illinois in *People v. Faginkrantz*, 171 N.E.2d 5(1960).

***Wong Sun, Escobedo* and Voluntary Confessions in the State Courts**—*Collins v. Beto*, 348 F.2d 823(5th Cir. 1965). Defendant was convicted

of murder and sentenced to 99 years in the penitentiary. The conviction rested, almost if not entirely, upon several confessions given by defendant to Texas authorities following his arrest and interrogation under the following circumstances.

On November 16, 1959 a woman named Wilma Selby was murdered in her home in Houston, Texas. Several days later, her husband admitted to police that he had been attempting to hire someone to kill her, but he insisted that he did not know who committed the crime. He implicated a woman named Maggie Morgan. Questioned by police, Maggie Morgan admitted taking money from Mr. Selby but denied any knowledge of the killing. Thereafter, the police began questioning friends and associates of Maggie Morgan, among them, the defendant Collins. Arrested at the Morgan home, without probable cause, Collins was questioned at police headquarters and, the next day, gave a statement admitting that Maggie Morgan had once asked him to kill somebody for a thousand dollars, but that he thought the request was a joke and ignored it. Collins was released without charge after taking a polygraph test.

On January 19, 1960, Houston police were told by an informant, a private detective and bail bondsman by the name of E. T. Morgan, that he had information that Collins was the killer of Mrs. Selby. He could not, or would not, tell the police the source of his information. At around 7:30 P.M. on that date, Collins was re-arrested without warrant. He was taken to Ranger Headquarters in Houston for the express purpose of isolating him while the investigation proceeded. Around midnight he was taken to an office of a justice of the peace where a sheriff's officer swore out a complaint charging him, under the name of Joe Smith, with the crime of vagrancy. The charge of vagrancy was without any basis in fact and the officer knew that Collins' name was not "Joe Smith." He was thereafter confined in a small municipal jail for the night.

The next afternoon, January 20, 1960, the officers took Collins out of the jail and returned him to Ranger Headquarters. Around 7:00 P.M. Collins was questioned for several hours by different police, ranger and sheriff's officers. He then gave an oral statement concerning the crime, and was left alone with an officer who questioned him for an additional forty five minutes. Thereafter a written statement was taken during the next two hours. The written statement included a warning of the privilege against self incrimination.

When the written statement was concluded at about midnight, the officers suggested to Collins that he was not telling the whole truth. At his request, Collins was given a polygraph test at about 1:30 A.M. on January 21, 1960. A second polygraph test was given thirty minutes later. The police then began requestioning defendant at about 3:15 A.M. and shortly thereafter Collins gave a full oral confession. After this statement was transcribed, and signed, at about 7 A.M., Collins was taken to the Houston police headquarters and booked. He was formally charged with the murder around 9:00 A.M. before a justice of the peace.

On appeal from a denial of a writ of habeas corpus, the confession was found to be involuntary by Chief Judge Tuttle of the Fifth Circuit and Judge Friendly of the Second Circuit (sitting by designation in the Fifth Circuit) in an opinion by Judge Friendly. This conclusion followed from a recitation of the factors found by the court to be critical in coerced confession cases.

The first step of the police, the court found, was to isolate Collins immediately after his arrest.

Second, the "unwarranted isolation of Collins was compounded, for during the 36-hour period ending in his second confession he saw no relatives, no friends, and no lawyer. Indeed, since he had not been booked at the city police station nor taken before a judicial officer, he might quite reasonably have believed that no one would be able to locate him until the police chose to make his arrest public; and it is not hard to realize the corrosive effect of such fears upon the will of one entirely within the police's power."

Third, Collins was not told that he had the right to consult with a lawyer, family or friends before making any statement. Whether *Escobedo* be read broadly or narrowly, the court said, this factor is important in determining the *voluntariness* of a confession since "such advice offers a prisoner a link with the outside world and a chance to seek guidance other than from those who want him to confess."

Fourth, psychiatric and psychological testimony showed that Collins' "mental and emotional makeup indicates that his capacity to resist pressure was strikingly low." His I.Q. was found to be in the lowest ten percent of the population; he would respond "abnormally" in any attempt to avoid "stress"; his judgment was extremely poor, and his character, when judged with reference to

ability to withstand situations of stress, was "more like that found in children between the ages of three and six."

Fifth, the questioning took place "not during normal hours but late at night after Collins had been up during the day."

Sixth, Collins was "questioned by changing teams of officers, who presumably had an opportunity to refresh themselves which he lacked."

Seventh, because of the failure to book or release him after preliminary statements, "Collins could well have believed that there would be no end until he told the police what they wanted to hear."

Eighth, he was warned of the privilege against self-incrimination only "*after* he had made the oral confession and before he began to reiterate it for a formal transcription."

Summarizing, the court held:

> "A concluding word is called for regarding the admitted, delieberate violations of law by the police. The 36-hour detention of Collins on the uncorroborated and conclusory charge of a private bounty hunter was a gross violation of the Fourth Amendment. The police swore to a false charge to obtain a warrant under a false name, failed to take Collins before a magistrate as Texas requires after arrests without warrant, and avoiding having a magistrate inform Collins of his right not to incriminate himself. * * * The law relating to arrest and detection does not always provide bright lines, and minor errors by the police are hardly to be avoided. But when the police operate in calculated and substantial disregard of the applicable rules, they cannot expect the benefit of any doubts as to undue pressure in a truly close case."

In a concurring opinion, Chief Judge Tuttle advanced two additional reasons why the confessions should be held inadmissible. They were obtained, he held, in violation of *Escobedo v. Illinois*, 378 U.S. 478(1964) and *Wong Sun v United States*, 371 U.S. 471.

As to the *Escobedo* ground, Judge Tuttle agreed with those courts which have read *Escobedo* broadly, i.e., as requiring the police to warn a defendant, who is a focal suspect, of his right to counsel and of the privilege against self-incrimination, before any interrogation designed to elicit a confession is begun.

The Tuttle opinion also held the confessions to be squarely within the prohibition of the *Wong Sun* rule:

(1) "Wong Sun's exclusionary rule is equally applicable in both the state and federal courts" [For a contrary view see the discussion in Abstracts of Recent Cases, 56 J. CRIM. L., C. & P.S. 506 (1965)]; (2) "A threshold question for the applicability of the Wong Sun rule in this case is whether there was an unlawful arrest . . . [and since] . . . the only information offered as supporting Collins' arrest in this case, [the] E. T. Morgan 'tip', clearly does not meet the test, and the State law enforcement officers knew it . . . the necessary predicate for the application of the exclusionary rule of Wong Sun is indisputedly present in this case"; (3) since the arrest was unlawful, it was the burden of the state to show that Collins' confessions did flow from the illegality; this burden was not carried.

Judge Tuttle also suggested that "the best and perhaps the only way to [purge the taint of the unlawful arrest] . . . would be to afford the suspect an effective opportunity to obtain the assistance of counsel" but that course was not followed. Nor would it make any difference, as suggested in the *Journal* reference above, if Collins' confessions were held to be voluntary, said Judge Tuttle. "[I]f a mere showing that a confession during a period of unlawful detention was 'voluntary' were sufficient to establish its admissibility, Wong Sun would be an empty promise, for the inadmissibility of 'involuntary' confessions has . . . been fully recognized . . . [since] Brown v. Mississippi, 297 U.S. 278(1936)."

In his concurring opinion, Judge Friendly declined to rest the decision to hold the confession inadmissible on a *Wong Sun* ground. He agreed with Judge Tuttle that there was no real basis to believe that the Supreme Court meant its *Wong Sun* opinion to apply only to *federal* trials and he also noted that while *Wong Sun* involved an unlawful arrest *and search*, and the Collins case involved only an unlawful arrest, that should make no difference (But see *People v. Bilderbach*, 401 P.2d 921).

"I thus follow Chief Judge Tuttle," said Judge Friendly, "on the general proposition that Wong Sun prohibits the introduction in a state criminal trial of a confession that is the *result* of an arrest violating the Fourth Amendment, just as Mapp prohibits the reception of an object obtained through an unconstitutional search. Where the problems become different is the less clear causal *relation* between the unconstitutional act and the 'fruit'."

When the police seize "real" evidence in a search "the connection between the unconstitutional intrusion and the booty offered at trial is so automatic and inevitable that the latter is readily seen as the 'fruit' of the unconstitutional act. But when the object improperly seized is a person and the alleged 'fruit' is a statement by him, *there intervenes the individual's own decision to speak.*" In *Wong Sun*, Judge Friendly said, the arrest and search which produced the confession was coercive in nature and almost immediately preceded it.

Concluding, Judge Friendly conceded that if the purpose of the *Wong Sun* rule was to provide "maximum deterrence" to illegal arrests by state officers, then the rationale of the Tuttle opinion would be more persuasive. Judge Friendly, however, was unwilling to concede that an otherwise voluntary confession should be voided simply because it followed an unlawful arrest, especially in cases where only "those errors of judgment inevitable when the Fourth Amendment is being interpreted 'on the run' " by the police are present.

***M'Naghten* and the Scope of Psychiatric Testimony**—*State v. Griffin*, 406 P.2d 397(Ariz.1965). The defendant was indicted for murder and at his trial he raised the issue of insanity. During the testimony of a psychiatrist (who gave the jury his opinion that the defendant did not know right from wrong at the time of the commission of the offense), defendant sought to elicit further testimony "with regard to the facts and circumstances in the defendant's background and the defendant's mental defects or abnormalities upon which the psychiatrist based his ultimate opinion." The trial judge refused to allow such explanatory testimony and also refused to allow defendant to testify concerning "his personal history during the nine years of his marriage, holding that such testimony was too remote." Following conviction, defendant appealed and the Supreme Court of Arizona reversed, holding that such testimony should have been admitted in support of the psychiatrist's opinion.

In considering the issue, the court noted that Wigmore had said [of this kind of case] that "The first and fundamental rule then, will be that *any and all conduct* of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity." (2 Wigmore, Evidence §228). The court then laid down a broad rule to govern the conduct of future cases in which the insanity defense is raised:

> "To resolve this vital issue of criminal responsibility it is necessary that the jury have the entire picture of the defendant. Insanity resulting in criminal acts is not a sudden growth even if the prohibited conduct seems to be of a sudden explosive nature. * * * The condition of the defendant must be explained to the jury in understandable terms. * * * To allow a psychiatrist as an expert witness to answer without any explanation the question of whether the accused knew the difference between right and wrong at the time he committed the act would impart a meaningless conclusion to the jury. The jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it. Therefore the psychiatrist should be allowed to relate what matters he necessarily considered as a 'case history' not as to indicate the ultimate truth thereof, but as one of the bases for reaching his conclusion, according to accepted medical practice."

Double Jeopardy Restrictions and State Trials—*United States ex rel Hetenyi v. Wilkins*, 348 F.2d 844(2d Cir.1965). The defendant Hetenyi was indicted and tried in a New York state court for the murder of his wife. The indictment charged first degree murder. At the trial, the jury was given verdicts finding the defendant guilty of first degree murder, guilty of second degree murder, guilty of first degree manslaughter, or not guilty. The jury returned a verdict of guilty of second degree murder.

Hentenyi appealed his conviction and it was reversed by the appellate court on the grounds that evidence had been improperly admitted and that the jury had been erroneously charged on the issue of venue. Hentenyi was thereafter tried again under the old indictment charging first degree murder. At the second trial, with the same verdicts offered to the jury, he was convicted of first degree murder and sentenced to death. Upon appeal from the second judgment of conviction, the case was reversed by the Court of Appeals for inflammatory and prejudicial argument by the prosecutor to the jury.

Hentenyi was then tried a third time under the original indictment. Again the same alternative

verdicts were available to the jury. He was convicted of second degree murder and sentenced to a term of forty years to life. The conviction was affirmed by the appellate court and leave to appeal was denied by the Court of Appeals.

Thereafter, Hentenyi filed a peittion for writ of habeas corpus in the federal district court alleging that his third conviction violated the due process clause. The District Court dismissed the petition and the Court of Appeals for the Second Circuit reversed.

Speaking for the court, Judge [now Solicitor General] Marshall held that "The Due Process Clause of the Fourteenth Amendment imposes *some* limitations on a state's power to reprosecute an individual for the same crime." This conclusion was reached, in spite of the fact that the Supreme Court had never so *held*, because the court found that "Abhorrence to successive reprosecutions is deeply rooted in our common law traditions, and the Bill of Rights' curb on the power of the *federal government* to reprosecute is ample recognition of how central this abhorrence is to our constitutional concept of justice" (emphasis added) and the fact that every state has a provision in either its constitution or statutes equivalent to the double jeopardy clause of the federal constitution revealed "a societal understanding" that the exercise of such power by any government was offensive. The Due Process clause, the court held, thus "spann[ed] the gap" between the fifth amendment's double jeopardy prohibition and a similar prohibition derived from state laws "to preserve this societal understanding."

The court decided that it could reach this result without having to choose between conflicting theories of how the specific protections of the federal Bill of Rights are read into the Due Process Clause. Whether the theory is the simple *federal standard* (in which the specific guarantees of the Bill of Rights are literally held to be incorporated into due process) or the *basic core standard* (in which only the fundamental or "core" protections of the Bill of Rights' clauses are read into due process) or the *fundamental fairness* test, makes no difference, the court held, since the conduct under scrutiny would violate all three standards.

If the first test were to be employed, it is clear that application of the federal standard would void Hentenyi's conviction under the rationale of *Green v. United States*, 355. U.S. 184(1957). If the basic core standard were to be employed, the court was prepared to hold that the *Green* rationale went to the heart of the fifth amendment. If the last test were to be used, the court would find that "in these circumstances a reprosecution for first degree murder is fundamentally unfair." Because the Supreme Court was sharply divided between the first two tests, however, the court of appeals chose to rest its decision on the third.

The constitutional violation which infected the third trial, the court found, was the action of the state in retrying Hentenyi for *first degree murder* when the jury at the first trial had failed to find him guilty of that offense. The court disclaimed, however, the notion that it reached this conclusion on the theory that the failure of the jury to find a verdict on first degree murder in the first trial (by returning only a verdict of second degree murder) worked an *implied acquittal* for that offense.

The failure to return the first degree verdict, the court reasoned, could be explained on several alternative grounds: (1) the jury unanimously believed him innocent of first degree murder and unanimously believed him guilty of second degree murder, and so found (an implied acquittal of the greater charge); (2) the jury could not unanimously agree upon the greater charge, but unanimously agreed upon the lesser offense and therefore found him guilty of the charge they could all agree upon; (3) the jury could have believed him guilty of first degree murder but chose to find him guilty of the lesser offense out of sympathy and a desire to see him receive a lesser punishment; or (4) the jury simply did not "understand the difference between the various degrees of homicide or the jury made a choice between the various degrees on the basis of some method of random selection."

The court found that the evils of repeated prosecutions, e.g., "The insecurity and anxiety, the opportunity of harassment, and the marginal increase in the probability of convicting the accused of a crime he did not commit by simply trying him again" were present in the subsequent prosecution regardless of *why* the jury returned no verdict on the charge of first degree murder in the first trial. In addition, the court held that the evils of reprosecution were *enlarged* in this case for, under New York law, the defendant had subjected himself to the dangers of reprosecution for the greater offense only because he had successfully appealed from a conviction for the lesser offense. If he had not appealed his first conviction for second degree murder, he could not thereafter have been prosecuted for first degree murder. This

"incredible dilemma", the court said, placed an "unconscionable premium upon a successful appeal by an accused" and thus threatened "a vital societal interest"—the assurance "that liberty shall not be deprived without a trial free from legal error prejudicing the accused's substantial rights."

The court also refused to accept the rationale that subsequent prosecutions upon the greater charge served another societal interest, i.e., "that the case against the accused 'go on until there shall be a trial free from the corrosion of substantial legal error' ". That theory, which underlies the decision in *Palko v. Connecticut*, 302 U.S. 319, merely guarantees to the *state* the right to have a trial free from error prejudicial to the presentation of *its* case. Allowing the state to appeal from a verdict of acquittal brought about in a trial in which error was committed *against the state* does, indeed, the court said, "provide the state with an opportunity 'to do better a second time' " but only because "it had been *prejudiced* by substantial legal error the first time, not because it simply *failed to succeed* the first time." This, the court thought, and the Supreme Court had so held, "could hardly be classified as fundamentally unfair." To permit reprosecution for the greater offense in the circumstances of the present case, however, "is to provide the prosecution with an opportunity 'to do better a second time,' not because it had been prejudiced by substantial legal error the first time, but because the *accused* had been prejudiced by substantial legal error and because these errors had been perceived on appeal." (Emphasis added.)

The court recognized, however, that society did have a legitimate interest in reprosecuting an accused for an offense in those situations where the first conviction (for the same offense) had simply been reversed on appeal or on collateral attack. This interest could be served in this case, the court said, by reprosecuting Hentenyi only for the lesser offense of which he had been convicted at the first trial—second degree murder.

The court recognized that the evils of repeated prosecutions, i.e., harrassment and anxiety, mentioned above could not now be remedied by the writ of habeas corpus for they had accompanied the third conviction and were history. The court concluded, however, that since "there was a reasonable possibility that the conduct of the trial and the deliberations of the jury were affected by the fact that Hentenyi was indicted, prosecuted and charged with first degree murder," and since "the State was constitutionally forbidden to prosecute him for first degree murder following the completion of the first trial", Hentenyi was now "held in custody in violation of the Due Process Clause. . . ."

Comment: The opinion of the court does not forbid the state from retrying the defendant for second degree murder. But if the rule is "fundamental fairness", as the court found, and if it is "cruel and inhuman" and a "hardship so acute and shocking that our polity will not endure it" to retry Hentenyi for first degree murder after a jury has failed to find him guilty of that offense but has instead found him guilty of a lesser offense, as the court also found, then why is it not just as cruel, or shocking or fundamentally unfair to allow the State of New York to now try Hentenyi for the *fourth time*—for *any* offense? Why must he endure four trials for murder only because the errors *of the state* voided three previous trials? And if this does not offend any technical notions of jeopardy, why does it not, at least, violate due process? Surely the considerations (anxiety, harassment and the greater chance of conviction) which led the court to conclude that repeated prosecutions for the same offense violate due process will be present—perhaps to a greater degree than in any of the previous three trials—at the fourth trial. Surely the simple fact that Hentenyi will only be *charged with* second degree murder at the fourth trial, while he was *charged with* first degree murder at the third trial, is not so fundamental that it will countenance a fourth prosecution in the first instance but not a third prosecution in the second instance.

In fact, why is it not just as much a violation of due process (to the extent that the evils of repeated prosecutions are present) to allow a state ever to retry a man when a jury has simply failed to agree upon *any* verdict in the first trial or when a verdict of conviction has been reversed on appeal for error?

Right to Counsel During Psychiatric Examination—*In re Spencer*, 406 P.2d 33 (Cal. 1965). The defendant was convicted of murder and sentenced to death. After direct appeals were unavailing, he filed a petition for writ of habeas corpus in the Supreme Court of California alleging, *inter alia*, that it was a violation of his federal constitutional right to counsel to allow a psychiatrist to testify to admissions made by him during the

course of a psychiatric examination at which his counsel was not present.

In *Massiah v. United States*, 377 U.S. 201(1964), the Supreme Court held that it was a violation of the right to counsel for agents of the government to elicit incriminating statements from a defendant in the absence of counsel once the defendant had been indicted and counsel had been employed. The California court determined, therefore, that the rationale of *Massiah* governed the present case. Defendant had been indicted, had counsel and an agent of the government (the court-appointed psychiatrist) testified to incriminating admissions secured from the accused in a psychiatric examination conducted without the presence of his counsel. The fact that it was not the *function* of the psychiatrist to elicit incriminating statements for use as evidence of guilt (the function of the federal agents in *Massiah*) was irrelevant, the court said, and, in fact, posed a greater danger to the uncounseled defendant since "an agent of the court in reality lulls a defendant into making incriminatory statements. . . ." The court also held that the "psychiatric examination occurs during a 'critical period of the proceedings' " since "if defendant's statements to the psychiatrist may be introduced at the guilt trial, defendant's need of counsel is as acute during the psychiatric interview as during the police interrogation."

"Accordingly," said the court, "we hold that if the court-appointed psychiatrist's testimony as to petitioner's incriminating statements was to be admissible, petitioner was entitled to the presence of counsel during the psychiatric examination."

The court also recognized, however, that the presence of counsel "may largely negate the value of the examination. Surely the presence and participation of counsel would hinder the establishment of the rapport that is so necessary in a psychiatric examination." In view of this, the court held that the presence of counsel would not be constitutionally required if the following procedural steps were taken:

(1) Before submitting to a psychiatric examination, the defendant must be represented by counsel or waive the right of counsel;

(2) Counsel must be informed of the proposed examination;

(3) If the defendant, upon the advice of his counsel, submits to the examination but does not place his mental condition in issue at the trial, the psychiatrist cannot testify at the trial, and, consequently, will not testify to any incriminating statements made during the examination;

(4) If the defendant, upon the advise of his counsel, submits to the examination and does place his mental condition in issue at the trial, the psychiatrist may testify to any incriminating statements made during the examination, but the court must instruct the jury that the statements are not to be taken as proof of the truth of the matters disclosed by the statements and may be considered by the jury "only for the limited purpose of showing the information upon which the psychiatrist based his opinion" concerning defendant's mental condition.

The court held that the compromise position represented in (4) was fair to the defendant who placed his mental condition into issue at the trial since after "voluntarily submitting to the examination, defendant cannot properly preclude expert testimony on a subject that he has himself injected into the trial." "The procedures outlined above, the court held, "are sufficient to justify the exclusion of counsel from the psychiatric examination and at the same time avoid a deprivation of defendant's constitutional rights."

The court also held that the trial court, in the exercise of its discretion, could, "depending on the attitude of the psychiatrists involved", allow counsel to be present during the examination, and, moreover, might "allow a defense psychiatrist to be present during the examination by a court-appointed psychiatrist."

The Psychiatric Examination and the Privilege Against Self-Incrimination—*State v. Whitlow*, 210 A.2d 763(N.J.). In the *Whitlow* case, the Supreme Court of New Jersey came to the same conclusion that was reached by the California Supreme Court in *Spencer*, discussed above, namely, that it was within the discretion of the trial court to allow counsel to be present during an examination by a state or court-appointed psychiatrist and that defendant had no absolute constitutional right to counsel's presence. In *Whitlow*, however, the New Jersey court considered at length the problems created by the privilege against self-incrimination when intertwined with the request of the state to have its doctors examine a defendant, especially when the doctors sought to question the defendant concerning the circumstances of the offense and/or the defendant refused to cooperate with the psychiatrists in submitting to, or answering questions