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ABSTRACTS OF RECENT CASES

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Search Incident to Traffic Arrest—*State v. Bell*, 215 A.2d 369 (N.J. App. Div. 1965). Defendant and five companions were riding in an automobile when stopped by two police officers of the Jersey City police department for traveling the wrong way on a one-way street. One officer remained in the patrol car while his partner checked the driver's license and car registration papers. While doing so the officer ordered all the men to get out of the car. When they did, he saw an eyedropper on the right side of the back seat. Suspecting a narcotics offense, he radioed for additional assistance and put the six men up against a wall. When two detectives reached the scene, they found a "kit" containing a needle, cap and a glassine envelope of heroin on the roadway beneath one of the car windows. The men were then placed under arrest. A search of the car revealed an an additional glassine package of heroin.

After defendant was taken to the police station, a search of his coat turned up another package of heroin in the lining. Convicted for possessing these narcotics, defendant appealed on the ground that the search which disclosed them was the product of an unconstitutional arrest (when he was ordered out of the car) and search of the automobile.

In affirming the conviction, the New Jersey appellate court laid heavy stress on the fact that the officer who ordered the men out of the car as he checked the driver's license and papers acted reasonably to protect himself from attack while carrying out routine traffic duties. The officer had testified that he had ordered the men out of the car because of:

> "Safety factors, sir. I had six men stopped. I'm by myself. I have my partner in the rear of me. I can't observe six men when they're in a confined place, so for safety practices so I don't get my fool head blown off, when I stop a vehicle loaded with six men, I request everybody to get out of the car so that I can watch them."

Though the court found that only the driver was under arrest (for the traffic violation) when the men were ordered out of the car, it held that the order to leave the car was a reasonable and proper action on the part of the officer. When the eyedropper was seen, the court said, "the continued detention of the six men until the arrival of the detectives was fully warranted by the suspicions aroused in a police officer familiar with equipment used by narcotics addicts. . . ."

Comment: This case illustrates the considerable latitude that courts are willing to give a police officer in detaining and confining traffic violators under circumstances where the traffic offense, by itself, would not call for a search or search-related practices, if the record contains evidence which shows that the officer's actions had a reasonable basis. Here the officer testified that the reason for ordering the men to get out of the car was to protect himself while he made the traffic arrest. Because it has long been the law that an officer, as an incident of a lawful arrest, may search the person arrested for weapons to protect himself from attack or to prevent escape, the lesser action involved here was certainly reasonable, even though it would have been unreasonable to attempt a search for *evidentiary purposes* since the violation, driving the wrong way on a one-way street, did not involve *evidence* for which a search could reasonably be made.

Joint Trials and Confessions Inculpating Co-defendants—*State v. Young*, 215 A.2d 352 (N.J. 1965). The defendant and Charles Williams were tried together for armed robbery. Williams had confessed and implicated Young. When Williams' confession was admitted into evidence against him, Young's counsel moved that all references to Young be deleted from the statement before it was heard by the jury. The trial court denied this motion, but did instruct the jury then, thereafter in the trial, and in the final charge, that the confession was admitted against Williams alone

and had no probative value insofar as Young was concerned. The defendant was convicted and appealed. The Supreme Court of New Jersey reversed, holding that this procedure was insufficient to protect Young from prejudice.

The court recognized that although defendant Young was entitled to be protected from hearsay evidence, the state had the right to insist on a joint trial. These rights were reconciled by holding that the procedure requested by defendant in the trial court—deletion of inculpatory references to him in Williams' confession—offered more hope of preventing prejudice than instructions to the jury to disregard the unedited confession. The court, in laying down a rule for the trial of future cases, said:

> "When two or more defendants are indicted for the same offense and the prosecution intends to use a confession of one defendant implicating his codefendants, the problems relating to the proper use of that confession should be resolved before trial. Accordingly, if the prosecutor plans to have the defendants tried jointly, he must move, on notice to the defendants, for a *judicial determination* of whether there can be an effective deletion of all references to the codefendants *without prejudice to the confessing defendant.* By effective deletion we mean the elimination of not only direct *and indirect* identification of codefendants but of *any statements that could be damaging to the codefendants once their identity is otherwise established.* ***
>
> If it appears that effective deletions are not feasible and the State still feels that the confession must be used against the declarant, the court should order separate trials." (Emphasis added.)

Multiple Defendants and Comment on Failure to Testify—*State v. McRae*, 211 N.E. 2d 875 (Ct.App.Ohio 1965). McRae and a codefendant were tried together for the crime of grand larceny. During the trial the codefendant testified in his own behalf; McRae did not. At the request of the codefendant, the trial court instructed the jury that they were to consider the testimony of the codefendant as they would that of any other witness, taking into account his interest in the case, and not disregarding any part of his testimony simply because he was a defendant. McRae objected to the giving of this instruction on the ground that it called attention to the fact that he did not testify and that the rule of *Griffin v. California*, 380 U.S. 609 (1965) was therefore violated. The Court of Appeals rejected this argument and affirmed the conviction.

In affirming, the court emphasized that the *Griffin* rule prohibited only *comment* by the court or prosecution on the failure of the defendant to testify and there was no comment in this case, only a complaint that the failure of one defendant to testify was *inferentially emphasized* by the giving of the instruction at the request of the codefendant. Moreover, the court said, failure to give the instruction would have violated the rights of the codefendant who was attempting to make more efficacious the exercise of his right to testify in his own behalf.

Probable Cause For Arrest—*People v. Brady*, 211 N.E. 2d 815 (N.Y. 1965).

Defendant was convicted of concealing stolen property, but the conviction was reversed by the appellate court on the ground that the evidence had been taken in a search incident to an unconstitutional arrest. The Court of Appeals found that there had been probable cause for the arrest and reversed and reinstated the judgment of conviction.

The arresting officers testified that they had been keeping a hotel under surveillance because a number of burglaries had been committed there recently. They saw defendant leave the hotel and repeatedly take "little white boxes" out of his pocket and examine their contents as he walked along the street. The officers knew that some months earlier the defendant had been found on one of the upper floors of the hotel with keys to five different rooms in his possession. When stopped, "defendant denied that his name was Brady and that he had been at the hotel that evening". In assessing these facts the court held:

> "The acts observed by the officers during their surveillance of the defendant, together with the information which they had concerning his prior activities, were sufficient to give them probable cause for believing that a crime had been committed and that the defendant had committed it. * * * Under the circumstances the interrogation was permissible. . . and the obvious falsehoods uttered by the defendant in reply to the officer's questions warranted his detention and arrest."

Husband Who Forces the Rape of His Wife by Another Properly Charged as Principal—*State v.*

Blackwell, 407 P.2d 617 (Ore. 1965). Defendant was found guilty of the rape of his wife by forcing her and another man to have sexual intercourse. He appealed on the ground that the indictment improperly charged him as a principal, i.e., that "Arnold Blackwell . . . did then and there unlawfully and feloniously forcibly ravish one Barbara Blackwell, a female", since it was the theory of the state, and the evidence showed, that defendant did not have forcible intercourse with his wife. The Supreme Court of Oregon rejected the argument and affirmed.

The court first noted that defendant did not claim that it was impossible for a man to be convicted of the rape of his wife under any circumstances, and the court assumed that the Oregon rape statute incorporated the common law, "i.e., a husband cannot be guilty of rape by personally forcing himself upon his wife . . . [but] he can be guilty of rape by forcing his wife to have sexual intercourse with another".

The defendant argued, however, that "it was necessary to allege *in the indictment* that the defendant committed the rape by forcing another to have intercourse with his wife". The court found that an earlier Oregon decision (*State v. Glenn*, 370 P.2d 550) had approved of the practice of indicting an *accessory* to a rape as a principal. Although the court recognized that the defendant Blackwell was not an accessory in this case because the "defendant was the only criminal actor as the other man was forced to do the act," that difference was not controlling since "the broad principle is that one can be indicted for an act and convicted upon proof that the defendant did not personally do the act but was the *prime mover* in having another, voluntarily *or involuntarily*, perform the actual act". (Emphasis added.)

Defendant Under Cross-Examination and the Right to Counsel—*Commonwealth v. Werner*, 214 A.2d 276 (Sup.Ct. Pa. 1965). The defendant was found guilty of robbery, burglary and conspiracy and he appealed on the ground that it was error for the trial court to have restricted his right to confer with his counsel during a recess called while the defendant was undergoing cross-examination by the prosecutor. The Superior Court of Pennsylvania agreed with this contention and reversed the conviction.

At the end of the third day of trial, the case was recessed until the following morning. At the time of the recess, the defendant was being cross-examined by the state and the cross-examination resumed the next morning. Before recessing, the court told the defendant:

> "Mr. Werner, you are under cross-examination, so do not discuss the case until your cross-examination is resumed tomorrow morning.
>
> Mr. Cirillo (defense counsel): If the court please, . . . can I ask him (the defendant) a question—I just wanted to ask him if there are any other witnesses he wants me to call.
>
> The Court: He certainly has a right to confer with you but I don't want him to discuss this testimony with you. He is under cross-examination. But you may ask him questions. There is no reason you cannot talk to him. I did not mean to cut off communication between you.
>
> Mr. Cirillo: All right, sir.'"

The conviction was reversed despite the fact that (1) there was no absolute severance of the defendant from the aid of his counsel, only an injunction not to discuss the testimony then being given, and to be given, under cross-examination; (2) defense counsel apparently did not object to this limitation; (3) no prejudice flowing from the order was demonstrated.

In commenting upon the first point the court held that "It is not the function of the trial judge to decide what a defendant's defense should be, nor when or how that defense should be planned, nor how much consultation between a defendant and his retained counsel is necessary to adequately cope with changing trial situations. That is the function of counsel. * * * The defendant has the right to discuss the entire case, including his own testimony, with his attorney, even [during a recess]. Discussion of this testimony might have been very important in determing the future course of his defense."

The court also held that there was, in the circumstances of this case, "no knowing and intelligent waiver" of the right to contest the order as error on appeal despite the failure to object in the trial court. And as to the question of prejudice, the court concluded that any attempt to demonstrate prejudice would probably require the disclosure of privileged communcations between attorney and client, and, further, that in cases involving the denial of such a fundamental right as the assistance of counsel, actual prejudice need not be shown.

Legislative Classification of Narcotics Upheld—*State ex rel Flores v. Tahash*, 138 N.W.2d 626

(Minn. 1965). The defendant, arrested with 85 bottles of various narcotic drugs on his person, was charged with the unlawful possession of empirin compound with codeine phosphate. He pleaded guilty and was sentenced to a term of 10 to 40 years in the penitentiary. He thereafter applied for a writ of habeas corpus on the ground that his right to equal protection of the laws was violated by the statute which made possession of empirin compound with codeine phosphate illegal when the possession of an exempt narcotic, *e.g.*, codeine cough syrup — which contained a higher percentage of codeine phosphate — was not illegal. Relief was denied in the trial court and the Supreme Court of Minnesota affirmed.

At the hearing on the writ a pharmaceutical expert called by the defense testified that exempt codeine cough syrup contained one grain of codeine phosphate per fluid ounce and that the amount of codeine contained in the average dose (one teaspoon) was 1/6 of a grain. The expert also testified that the amount of codeine phosphate in one of the tablets of empirin compound possessed by the defendant was only 1/8 of a grain.

From this testimony, defendant contended that it was arbitrary and unreasonable to permit the sale of a compound containing 1/6 of a grain of narcotic in the average dose, while making illegal the sale of 1/8 grain tablets.

The state, on the other hand, argued that the "classification is proper because (1) liquid cough syrup is more difficult to conceal than tablets; (2) its cost would be prohibitive if available only by prescription; and (3) the benefit and convenience to the public in securing cough syrup over the counter outweigh the potential dangers inherent in permitting its purchase without a prescription."

The court concluded that "for the reasons advanced by the state, we are of the opinion the classification is reasonable and the statute therefore valid", following an earlier decision involving legislative discretion in which it had said that "the fact that measures taken are not directed at all of the evils to be corrected does not invalidate the application of the statute if the problem is dealt with according to practical exigencies and experience in a manner which is germane to its solution."

See *Fabio v. City of St. Paul*, 126 N.W. 2d 259, 262.

Error To Charge Deadlocked Jury on Lesser Offense—*Rush v. State*, 395 S.W.2d 3 (Ark. 1965). The defendant was tried on an information charging him with the first degree murder of his stepfather. Following the evidence and arguments of counsel, the case was submitted to the jury at about 2:00 P.M. The jury was given two verdict forms—guilty or not guilty of first degree murder. The instructions of the court dealt only with this charge.

At about 8:00 P.M., the jury was recalled to the courtroom where the foreman announced that they were "hung", and that the division of opinion was ten to two. The jury then continued its deliberations for the evening, spent the night in a motel and resumed deliberating the next morning.

At about 11:30 A.M. the jury again reported that it was deadlocked and the court gave them a "get-together" instruction long used in cases where the jury had not been able to agree after a reasonable period of deliberation.

At 6:00 P.M., with the jury still divided, the trial judge recalled them to the courtroom and, over the objection of the defendant, instructed them on the offenses of second degree murder and manslaughter, thus allowing the jury the option of returning a verdict on either of those charges as an alternative to the charge of first degree murder upon which the case had been tried. One hour later, the jury returned a verdict of guilty of murder in the second degree and defendant was sentenced to twelve years in the penitentiary. He appealed alleging, *inter alia*, that it was error for the court to charge a deadlocked jury on lesser degrees of guilt. The Supreme Court of Arkansas agreed and remanded the case for a new trial.

"We cannot," the court said, "put the stamp of approval on the action of the [trial] court in first ascertaining that the jury was hopelessly deadlocked on first degree murder, and then offering a charge on second degree murder" since this "was almost the same as 'bargaining' with the jury. It is not a question of whether the court should have given the instruction on second degree murder *at the time the other instructions were given*: the question, here, is the challenge to the court's action, in waiting 28 hours and ascertaining that the jury was deadlocked, and then charging the jury on a lesser degree of the offense." (Emphasis added.)

In finding that error had been committed, the Arkansas court agreed with the rationale of the Supreme Court of California in *People v. Stouter*, 75 P. 780, that the vice of the procedure employed was that such a late charge was "'apparently

intended to help [the jury], not *generally* to arrive at a verdict, but to arrive at some sort of verdict of *guilty* . . . a most dangerous interference with the right of a defendant to a fair trial." (Emphasis added.)

Constitutional Rights in The Juvenile Court— *Application of Gault*, 407 P. 2d 760 (Ariz. 1965). Gerald Gault and a companion named Lewis, both juveniles, were arrested by the police for making an obscene phone call to a Mrs. C. The boys were taken to the detention home. The next day, Gault, his mother and brother, Lewis, his father and two probation officers appeared before the juvenile court judge in chambers. A hearing was held on the charge and though Mrs. C. was not present, Gerald, according to the testimony of the probation officer at a later hearing, admitted participating in the phone call. The judge recessed the hearing until a future date.

Several days later, Mrs. Gault received a note from one of the probation officers informing her that the judge had set a hearing in three days "on Gerald's delinquency." At this second hearing, according to the judge, Gerald again admitted participating in the phone call. Gerald was found to be delinquent and committed to the Arizona Industrial School. His parents then filed a petition for writ of habeas corpus alleging that the juvenile court hearing violated the constitutional rights of Gerald and that his detention at the school was, therefore, illegal. A writ was denied and the Supreme Court of Arizona affirmed.

The parents contended that the Juvenile Code of Arizona violated due process since it "fails to apprise parents and children of the specific charges, does not require timely, adequate and proper notice of a hearing" and that the hearing held in Gerald's case was unconstitutional since he was not advised of his right to counsel or his privilege against self-incrimination and hearsay evidence was admitted against him.

In its opinion, the Arizona court canvassed the broad range of cases defining the nature of a juvenile court hearing and the constitutional rights possessed by a youth accused of delinquency. "Our task", said the court, "is to determine the procedural due process elements to which an infant and his parents are entitled in a juvenile court hearing and decide whether our statute may be construed to include them."

The court acknowledged that the "parent or guardian must be notified of the hearing, and anyone whose rights may be affected by the court's determination must be notified . . . and such notice must be given a reasonable time prior to the hearing. Moreover, the child and parent must be informed of the alleged act of delinquency before an adjudication is made." However, the court said, since the policy behind the treatment of youthful offenses in special juvenile court proceedings—instead of in criminal trials—"is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past", due process does not require the same specificity in pleading required by the criminal law:

> "We think the proper balance between the infant's right to know the facts of the charge against him and the state's interest in avoiding or erasing the stigma of delinquency is best struck by the following rule: the infant and his parent or guardian will receive a petition only reciting *a conclusion* of delinquency. But no later than the initial hearing by the judge, they must be advised of the facts involved in the case. If the charges are denied, they must be given a reasonable period of time to prepare." (Emphasis added.)

In considering the right to counsel, the court noted a split among other state courts on the question of whether a juvenile is entitled to counsel or to a warning of the right to counsel. Though the court had previously held that "the parents of an infant in a juvenile proceeding cannot be denied representation by counsel of their choosing . . . a *child* has different rights and disabilities." (Emphasis added.) The court concluded that though the judge has the right, in his discretion, to allow representation, "we do not think due process requires that an infant have a right to counsel" since the "parent and the probation officer may be relied upon to protect the infant's interests."

"We think", said the court, "the necessary flexibility for individualized treatment will be enhanced by a rule which does not require the judge to advise the infant of a privilege against self-incrimination" and that the right to confront witnesses is only "relevant" where the charges are denied.

In considering whether the usual rules of evidence are to be applied to a delinquency hearing, the court held that:

> "We think the sounder rule allows the judge to consider hearsay though the hearing is contested, but sworn testimony must be required of all witnesses including police

officers, probation officers and others who are part of or officially related to the juvenile court structure. But the hearsay upon which the judge can rely must be of a kind on which reasonable men are accustomed to rely in serious affairs."

The court also noted that other jurisdictions required burdens of proof in juvenile cases ranging from a preponderance of the evidence to proof beyond a reasonable doubt. In taking a middle course, the court held that "acknowledging the non-criminal nature of the proceeding, yet mindful of the fact that a parent may be deprived of his child and the child of his liberty, we think the juvenile judge must be persuaded by *clear and convincing evidence* that the infant has committed the alleged delinquent act." (Emphasis added.)

Finally, the court decided, Gerald was properly committed since there "is substantial evidence in the record to support the finding that Gerald was a delinquent child" even though there was no evidence that his parents were "unfit" to retain custody. "We emphasize the fact", the court said, "that the child's welfare is the primary consideration before the juvenile court and the judge will make such order as the *child's welfare* and the interests of *the state* require. It is apparent that the best interest of a child and the fitness of his parent are not necessarily inter-dependent".

Grand Jury Testimony and Self-Incrimination—*State v. Griffin*, 409 P. 2d 326 (Ore. 1965). Convicted of contributing to the delinquency of a minor, defendant appealed on the ground that it was error to allow the state to introduce, in its case in chief, the transcript of defendant's testimony before the grand jury which indicted him. The Supreme Court of Oregon rejected this argument and affirmed the conviction.

The defendant did not question the propriety of his appearance before the jury and conceded that he had testified voluntarily. That being so, the court held, the "prevailing doctrine is that the privilege of a person not to testify against himself may be waived, and once waived the privilege as to the testimony given is gone *both in the initial and subsequent proceedings*". (Emphasis added.) Though the privilege cannot be asserted in subsequent proceedings, the court warned that this "means only that the *testimony* voluntarily given *before the grand jury* may be *used* in later proceedings, not that the witness may be compelled to *testify* again". (Emphasis added.)

Comment: Though the court in the *Griffin* case was concerned only with a witness-defendant, the language of the *dictum* is broad enough to apply to an ordinary witness. It is one thing to say that the grand jury testimony of a *defendant* may be used against him, but that he may not be compelled to testify at his trial concerning the same matter even though his privilege is gone. Encompassed within the protection of the privilege is not only freedom from compulsory inculpation, but the right of a defendant to keep his testimonial demeanor, and, perhaps, his prior criminal record affecting his credibility, out of the witness box. There would seem to be no reason, however, not to require an ordinary witness to repeat his grand jury testimony at the trial if the privilege waived in the grand jury "is gone both in the initial and subsequent proceedings." If the court meant its warning against *second* testimony to include both kinds of witnesses, the opinion seems unnecessarily restrictive.

The Law of Confessions Revisited—*Phillips v. State*, 139 N.W. 2d 41 (Wis. 1966). Defendant was convicted of robbery and appealed contending that his confession should not have been introduced in evidence against him. The Supreme Court of Wisconsin affirmed in an interesting opinion which reviews, in some detail, the law of confessions in the light of recent rulings of the Supreme Court of the United States.

Conceding that he knew of his right to have the *advice* of counsel, and was warned by the police of the privilege against self-incrimination, defendant argued that his request for counsel was denied by the police, or, if the court found that he had not made such a request, the confession was taken during an accusatorial stage of the investigation without a waiver of counsel.

Answering this argument, the court adhered to its prior interpretation of *Escobedo*—that absent a request for counsel no warning or waiver is required—and refused to follow such cases as *United States ex rel Russo v. New Jersey*, 351 F. 2d 429 (3rd Cir. 1965) "until the Supreme Court of the United States [makes] a further pronouncement on the problem which it now has under consideration". The court did hold, however, that whether a defendant in fact requested counsel in an "escobedo-type" case "is a mixed question of fact and constitutional law . . . [and] the subject of our independent determination on this review." Reviewing the record, the court found that the testimony of a police officer that defendant made no request for counsel until after he confessed, was

"sufficiently convincing although minimum on this important point".

The defendant then argued that his confession was involuntary, claiming that a detective had (1) confronted him with a cigarette package and told him that it had fingerprints which could be analyzed, and (2) threatened to arrest his girl friend on a charge of adultery unless he confessed. The court held that the fingerprint statement, "while accusatorial in nature did not constitute such a threat as to control and coerce the mind of the defendant and render the confession involuntary since [one must] distinguish between motivation and a compelling overpowering mental force". The court also concluded that the statement in reference to the girl friend was *motivation* more than coercion because the defendant in his testimony stated he considered it was a threat more to *her* than to him", and, while "dangerously close to the threats disapproved in Lynumn v. Illinois, 372 U.S. 528 . . . Rogers v. Richmond, 365 U. S. 534 . . . and in Haynes v. Washington, 373 U.S. 503 . . . [it was], standing in context with the other facts, insufficient to render the confession coerced". (Emphasis added.)

The defendant next claimed that his confession was inadmissible since it was taken during a period of detention which was illegal because of police failure to promptly bring him before a magistrate following his arrest. In essence, he argued that the federal *Mallory* rule has now acquired constitutional status and is therefore binding upon the states. In rejecting this argument the court found that the "rule rests upon the Supreme Court's superintending authority over the administration of federal criminal justice and in terms of 'without unnecessary delay' was adopted as Rule 5(a) of the federal criminal rules". Since the Supreme Court of the United States has no "superintending authority" over state courts or law enforcement officers, and since Rule 5(a) of the federal rules of criminal procedure is not binding upon the states, the court refused to adopt the federal rule.

In rejecting the defendant's *Mallory's* argument, however, the Wisconsin court did set forth a new test involving the problem of detention for interrogation following arrest. "If a voluntary confession", the court said, "is to be inadmissible in evidence because it was made under police detention it must be upon the ground that the *length of detention* was a deprivation of the person's liberty without *due process of law.*" The court then set forth its understanding of how the power of the police and the rights of an arrestee were to be balanced under the new "due process-detention" test:

> ". . . the due process clause does not foreclose completely the police from interrogating the person after arrest and before taking him before a magistrate. But, the right to interrogate after arrest is limited and must be for the *purpose of determining whether to release* the suspect *or* if he has been arrested without a warrant *to make a formal complaint.* An arrest upon warrant would seem to presuppose sufficient evidence and its purpose is to cause the arrested person to be brought before a magistrate . . . so that the criminal process of determining guilt or innocence can commence. A detention for a longer period than is reasonably necessary for such limited *purpose* violates due process and renders inadmissible any confession obtained during the *unreasonable period* of the detention. * * * While one may be detained by the police and interrogated to secure sufficient evidence to either charge him with a crime or to release him, the police cannot *continue to detain* an arrested person to 'sew up' the case by obtaining or extracting *a confession or culpable statements to support the arrest or the guilt.*" (Emphasis added.)

The court then noted that the detention for questioning in this case amounted to about three and a half hours and was not "so unreasonable as to violate the due-process clause of our constitution . . .."

Comment: Though the court has set out a new and interesting test of confession admissibility, there is some doubt about just what it means. For example, the defendant in the *Phillips* case was arrested for robbery, without a warrant, and was questioned for three and a half hours until he orally admitted the offense. He then wrote out a written confession which was signed by him and witnessed by three police officers.

The court holds this confession admissible. Seemingly, it falls within the permissible limits of the rule that if a defendant "has been arrested without a warrant" the "right to interrogate after arrest is limited and must be for the purpose of determining whether to release the suspect or . . . to make a formal complaint". The problem, however, is to determine when this point of decision has been reached. For example, could not the determination of whether to release or charge

Phillips have been made as soon as he made his oral statement? If so, did not his *continued detention* resulting in the written confession violate the other half of the rule that the "police cannot continue to detain an arrested person to 'sew up' the case by obtaining or extracting a confession or culpable statements to support the arrest or the guilt"?

Under the *Phillips* test, what is the difference between interrogation "for the purpose of determining whether to release . . . or . . . make a formal complaint" and interrogation "to 'sew up' the case by obtaining or extracting a confession or culpable statements to support the arrest or the guilt"? Is it the difference between admissions and confessions? Or is it the difference between the first confession and the second one? Or is it the difference between a confession of guilt and a subsequent inculpatory statement revealing the existence of physical evidence? Seemingly, under the *Phillips result*, whether or not a confession is admissible would depend almost exclusively upon the *length* of the detention, for this is the language in which the holding is cast. Yet the result test is completely contrary to the rationale of *Phillips* which looks only toward the *purpose* of the interrogation (whether to charge or release vs. the "sewing up" of the case) and the existence of other inculpatory or exculpatory evidence at the time the decision to charge or release is made.

Until these doubts about the real meaning of *Phillips* are dissipated, the opinion will remain both a rather novel and rather useless precedent in the confession area.

Qualifying Jury for Death Penalty is Constitutional—*People v. Nicolaus*, 409 P. 2d 193 (Cal. 1966) and *People v. Smith*, 409 P. 2d 222 (Cal. 1966). In these two cases the defendants were convicted of murder and sentenced to death. On appeal they contended that it was unconstitutional to allow the People to challenge for cause those jurors with conscientious scruples against imposing the death penalty on the grounds that (1) the interrogation of potential jurors to discover their views on capital punishment constitutes "a brainwashing technique" which overemphasizes "the freedom of the selected jurors to impose the death penalty"; (2) "a death-qualified jury does not constitute a jury of one's peers; . . . it cannot answer guilt-innocence questions as favorably to the defendant . . . it cannot be impartial on the nature of punishment in the event of a conviction . . . it does not take into the jury room a pattern of attitudes characteristic of the community at large . . . [and] such a jury is authoritarian in nature and not disposed to humanitarianism".

The Supreme Court of California, in rejecting these arguments, noted that it had considered the question in previous cases and that if the rule were otherwise "even one juror committed to a policy opposed to imposition of the death penalty in a proper case" could nullify "the rendition of justice in murder cases."

In *Smith*, the defendant argued additionally that a challenge for cause should not lie since the statute only allows a challenge when conscientious scruples against the imposition of the death penalty would preclude the juror from "finding the defendant guilty." Since California follows the bifurcated jury trial system—in which the jury first decides the question of guilt or innocence and then decides the question of penalty in a separate hearing—the defendant argued that a juror could not withhold a vote of guilt because of his opposition to a vote for the death penalty, especially when the trial judge has the power to empanel a new penalty jury "for good cause shown". In rejecting this argument the court held that the statute bifurcating the trial also provides that the same jury should serve in both hearings "for reasons of continuity and economy of effort".

Comment: Defendant's last argument would also appear to be unsound since the reasons given for the partiality of a death qualified jury would be just as applicable to a death qualified *penalty* jury ("that it cannot be impartial on the nature of punishment . . . authoritarian in nature and not disposed to humanitarianism".) The adoption of defendant's Smith's proposal (to refuse the prosecution challenges for cause in the selection of the trial jury, but to empanel a new jury for penalty purposes, allowing the prosecution such challenges) would therefore accomplish little.