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Case Notes

retribution, deterrence nor rehabilitation will accomplish these goals in all cases. There is no one reason why a person commits a crime, and no one type of punishment fits all criminals. What is punishment for one person may be of no effect to others. Some criminals are sensitive to pain, others to humiliation, others to confinement, and another may require guidance for the results of the punishment to be successful.

One may become discouraged with rehabilitation or deterrence when he sees a high rate of recidivism, but this does not necessarily mean that the theories are invalid. This may be the result of inadequate facilities and methods of use to accomplish the goals or the lack of total commitment to any one goal.

There is also the distinction between intellectual and emotional acceptance of the aims of punishment. While one may find retribution intellectually unacceptable, there still may exist an emotional need to strike back at the wrongdoer, just as one kicks the chair which he stumbles over in the dark. One may approve of rehabilitation, but when an abhorrent or heinous crime is committed, he demands swift and merciless infliction of punishment.

Society should have an understanding of each of the goals of punishment and methods of achieving them. It should recognize the limitations. Society should acknowledge the justification used in each particular case, so that it can commit itself to those methods which will help achieve, not impede, the attainment of the desired goal.

CASE NOTES

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Edited by

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Miranda Applies To Routine Tax Investigation—*Mathis v. United States*, 88 S. Ct. 1503 (1968). Defendant was convicted on two counts charging that he knowingly filed false income tax refund claims against the government. Part of the evidence on which the conviction was based consisted of documents and oral statments obtained from defendant by a government agent while defendant was in jail serving a state sentence. Before eliciting this information the government agent did not give any *Miranda* warning to defendant. The district court rejected defendants contention that the incriminating statements should have been inadmissible because such warnings were not given and the court of appeals affirmed.

The United States Supreme Count reversed and remanded the case holding *Miranda* does apply to a "routine tax investigation". The court stated that, although "routine tax investigations" differ from other criminal investigations in that they may be initiated for the purpose of a civil action rather than criminal, tax investigations frequently lead to criminal prosecutions as did the one in this case. The court also rejected the government's position that *Miranda* warnings were appliable only to questioning one who is "in custody" in connection with the very case under investigation stating there was no substance to such a distinction.

Justice White joined by Justices Harlan and Stewart dissented. He stated that he would not join the unexplained extension which the court is giving the *Miranda* decision into those civil investigations which are frequently followed by criminal inquiries. The dissent also argued that the defendant was not "in custody" when the statements were made as that term was used in *Miranda*. Although defendant was confined in jail he was at the time of interrogation in familiar surroundings.

Involuntary Consent To A Search: Exclusionary Rule V. Harmless Error—*Bumper v. North Carolina*, 88 S. Ct. 1788 (1968). Petitioner, convicted

of rape, contended that the rifle introduced in evidence against him was obtained in a search and seizure violative of the Fourth and Fourteenth Amendments. Several days after the crime, law officers visited the home of petitioner's grandmother. When one of them announced that he had a search warrant, the grandmother admitted the officers. The record in the case casts much doubt on the actual existence of a valid search warrant, but the prosecutor informed the court that he relied on the consent of the petitioner's grandmother, rather than a warrant to justify the search.

The issue before the Court was whether a search can be justified on the basis of consent when that 'consent' has been given only after the police have asserted that they have a warrant. The Court held that the prosecution failed to prove that the consent was freely and voluntarily given. When an officer announced that he has a warrant, the situation was instinct with coercion. Where there is coercion, even legal coercion, there cannot be consent.

In his dissent Justice Black argued that deterrence of illegal searches did not require blind adherence to a mechanical formula requiring automatic reversal where the exclusionary rule had been invoked, especially when the evidence overwhelmingly indicated that the petitioner was guilty. The majority, however, indicated that even though the Court's duty was not to find guilt or innocence, but uphold the Constitution, there was sufficient doubt as to the guilt of the petitioner to justify reversal and remand.

Comment: The dialogue between Justice Black and the majority is another small indication of the Court's reaction to continuing criticism evidenced in its opinions during the 1967–68 term.

Supreme Court Formulates Stop-and-Frisk Rules—*Terry v. State of Ohio*, 88 S. Ct. 1868 (1968); *Sibron v. State of New York*, 88 S. Ct. 1889 (1968). In *Terry*, the defendant, convicted for carrying a concealed weapon, claimed that the guns were inadmissible since a police officer siezed them without a warrant and thus violated the Fourth Amendment. The plain clothes policeman testified that he noticed the defendant and another standing on a corner in Cleveland's shopping district. The officer felt that "they didn't look right" after ". . . he had developed routine habits of observation over the years. . . ." He followed the pair as they walked and stopped at various stores, met with a third man for a short time and then continued their pace. At this point, the officer suspected the men of casing a store for a stick-up; he feared that they were armed. Thus, he walked up to them, identified himself and asked their names. When the men mumbled something in reply to a question, the policeman grabbed the defendant and patted down the outside of his clothing; he felt a gun. He removed it, frisked the other man and found another gun.

The lower court rejected the prosecution's theory that the siezure of the guns was a search incident to an arrest. The officer did not have probable cause for an arrest. The United States Supreme Court agreed, yet took the situation out of the ambit of the traditional arrest cases. The Court, after a careful consideration of the countervailing interests of the individual's freedom from unauthorized searches and the policeman's duty to prevent and detect crime and his right to self-protection, enunciated special rules governing on-the-street confrontations. It is understandable, the Court noted, to excuse the police from the duty of securing a warrant when he suspects possible criminal behavior while on the beat. A warrant is not the *sine qua non* with regard to Fourth Amendment standards. Rather, the test as stated by the Court is a flexible, objective one: ". . . would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Applying that blanket rule to the facts in *Terry*, the Court said that "[i]t would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further". Further, a policeman must, for his own safety, have the right to disarm people he meets on the street. Thus, when an officer believes a suspicious individual is armed and dangerous, he is justified to conduct a limited search for a gun.

Justice Harlan, concurring, points out that the frisk for the weapon is incident and automatic to the right to stop. It is the right to stop the individual—not the right to frisk him—which is the crux of the controversy. This issue, Justice Harlan asserts, was ignored by the majority. Justice Douglas dissented. He argued that "probable cause" is still the test for search and seizure; any change of the standard should be accomplished by a constitutional amendment only.

In the companion case, *Sibron v. State of New*

York, supra, the Court had an opportunity to apply the *Terry* rule to two fact situations. Justice Harlan, concurring, believed that the majority neglected to apply *Terry* even though it was mentioned in the case.

The defendant had been arrested for possession of heroin after a police officer had grabbed the packets from him while detaining him on the street. The only evidence upon which the officer believed the defendant dangerous was that he spent eight hours talking with persons known to be narcotics addicts. The Court reversed the conviction because the officer never showed that he feared the defendant armed; the officer wanted narcotics, not weapons. The Court explained: "The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man."

In a case joined with *Sibron*, a police officer noticed two unfamiliar men tiptoeing in the hall of his apartment building. He caught up with them after a chase down a flight of stairs. He frisked them at that point and found burglar's tools for the possession of which the men were convicted. The Court explained that while the *Terry* rule might be applicable since the officer reasonably suspected that he was in danger, the search would be better justified as a search incident to an arrest since there was probable cause. The seizure of the men after the chase was the arrest, since it was a curtailment of freedom; the following search and seizure of the tools was incident to that arrest.

Justice Harlan concurred, arguing that *Terry* allowed the officer to stop in the latter mentioned case; the frisk was merely incidental to the right to stop. This gives significant leeway to police and, even though the test is stated to be an objective one, "... it seems ... proper to take into account a police officer's trained instinctive judgement operating on a multitude of small gestures and actions impossible to reconstruct."

Comment: *Terry* and *Sibron* leave unclear the Fourth Amendment requirements with regard to those convicted of possession of a weapon. These cases give the police the right to seize weapons based upon less than objective grounds. Only reasonable suspicion that the suspect may be armed and dangerous is needed. No longer must the policeman prove "probable" or "reasonable" cause which was necessary for the issuance of a warrant or an arrest with an incidental search. These rules apply regardless of what crime is charged if the suspect is arrested.

If the charge is possession of a weapon, the evidence, which is the basis for conviction, can be seized as part of the policeman's right to stop-and frisk. Thus, none of the usual Fourth Amendment guarantees are needed in possession of weapons cases. A warrant is now irrelevant since reasonable cause is no longer important; the law of arrest on probable cause is now inapplicable with regard to convictions of possession of weapons. The Court should state the precise effects of *Terry* and *Sibron* upon the crimes of possession of weapons and clear up potential confusion in this area.

Failure To Give Notice Of Authority And Purpose Before Opening Unlocked Door Vitiated Arrest—*Sabbath v. United States*, 88 S. Ct. 1755 (1968). Defendant was convicted of knowingly importing cocaine into the United States and concealing it in violation of federal statutes. The narcotics admitted into evidence, over objection, were seized at defendant's apartment after custom agents had knocked on the apartment door, waited a few seconds, and, receiving no response, opened the unlocked door and entered. The Court of Appeals, on appeal, ruled that the officers in effecting entry in this manner did not "break open" the door within the meaning of 18 U.S.C. §3109 and therefore were not required by that statute to make a prior announcement of "authority and purpose."

The Supreme Court reversed and remanded the case holding that the method of entry vitiated the arrest and therefore the narcotics seized should not have been admitted in evidence. The Court stated that it would be a "grudging application" to hold that the use of "force" is an indispensable element of the statute. It has been held, the Court continued, that §3109 applied to entries effected by the use of a passkey which requires no more force than does the turning of a doorknob. "An unannounced intrusion into a dwelling—what §3109 basically proscribes—is no less an intrusion whether officers break down a door, force open a chain-lock on a partially open door, open a locked door by use of a passkey, or, as here, open a closed but unlocked door."

Right To Jury Trial In State Courts When Right To Jury Trial Would Be Available If Case Were Tried In Federal Court—*Duncan v. Louisiana*, 88 S. Ct. 1444 (1966). Defendant Duncan,

a Negro, was convicted of simple battery when 19 years old. The incident arose when he saw his two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing of racial incidents in a formerly all-white high school to which his cousins had recently transferred, Duncan approached the six boys. Duncan and the white boys spoke to each other. Duncan encouraged his cousins to break off the encounter and get into his car, and he was about to enter the car himself and drive away. The white boys and a white onlooker testified Duncan slapped one of the white boys on the elbow before getting in the car. The Negroes testified Duncan merely touched one boy. Defendant requested a jury trial, but the request was refused and the Supreme Court of Louisiana affirmed Duncan's conviction for simple battery.

The United States Supreme Court reversed, holding:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

The majority opinion, written by Mr. Justice White, indicated that the question of which provisions of the first eight amendments should be applied to the states should be decided on the basis of which particular procedures are fundamental and necessary to the American regime of ordered liberty rather than on the basis of whether a civilized system could be imagined without these particular protections. It was on this basis that the majority reached its conclusion. While a fair and equitable criminal process which used no juries could be imagined, no American state has constructed such a system. The majority noted that the laws of every state guarantee a jury trial in serious cases and looked into history to emphasize how fundamental the jury trial is to the American scheme of justice. The court overruled dicta in *Maxwell v. Dow*, 176 U.S. 581 (1900), *Palko v. Connecticut*, 302 U.S. 319 (1937), and *Snyder v. Massachusetts*, 291 U.S. 97 (1934), to the effect that the right to a jury trial is not essential to ordered liberty and may be dispensed with by the states.

Mr. Justice White indicated he did not feel this decision would cause widespread changes in state criminal procedures. There is a category of petty crimes or offenses which is not subject to the jury trial requirement of the Fourteenth Amendment. He recognized, however, that the boundaries of this category are ill-defined. He drew the line on the basis of existing laws and practices in the country, referring to the definition of petty offenses in the federal system—those punishable by no more than six months in prison and a $500 fine. While Duncan was sentenced to serve 60 days in prison and pay a $150 fine, the Louisiana law of simple battery provides for a punishment of up to two years in prison and a $300 fine. The majority felt that in this situation it is the length of the sentence authorized rather than the penalty actually imposed which is significant. The legislative authorization of a heavy penalty indicates a legislative judgment on the seriousness of the crime.

Mr. Justice Black, joined by Mr. Justice Douglas, concurred. He restated his position that the Fourteenth Amendment was intended to incorporate totally and apply totally the Bill of Rights to the states. He noted that the selective incorporation doctrine of the majority could be supported as an alternative, even though less historically supportable. He also noted that the selective incorporation process has now worked to make most of the protections of the Bill of Rights applicable to the states.

Mr. Justice Harlan, joined by Mr. Justice Stewart, dissented. He criticized both the selective incorporation position of Mr. Justice White and the total incorporation position of Mr. Justice Black as not historically supportable. But he found the total incorporation view less objectionable since this theory is at least internally consistent. He interpreted "due process of law" to mean that criminal trials must be fundamentally fair and concluded that this fundamental fairness does not require a jury trial in the present case. Even if he were persuaded that trial by jury is a fundamental right in some criminal cases, he could find no historical basis for deciding that Duncan's trial for simple battery fell into this category.

Alcoholic Defendant Fails To Prove That His Conviction For Public Drunkenness Violated The Eighth Amendment—*Powell v. Texas*, 88 S. Ct. 2145 (1968). Leroy Powell was arrested in December of 1966 and charged with the offense of being

found in a state of intoxication in a public place. The statutory penalty consisted of a fine up to one-hundred dollars. The trial judge in the county court ruled that as a matter of law chronic alcoholism is not a defense to the charge. The Texas appellate process being exhausted, the defendant appealed to the Supreme Court.

At his trial the defendant's chief witness was Dr. Davis Wade, a fellow of the American Medical Association, certified in psychiatry. His testimony consisted of 12 pages of transcript relevant to the present constitutional issue. The witness testified that alcoholism is presently considered a disease in the medical profession, but, however, there is no universally accepted definition of it at the present time. He concluded that a "chronic alcoholic" is an "involuntary drinker" who is "powerless not to drink" and who "looses his self-control over his drinking." He testified that the appellant was a "chronic alcoholic" who has a compulsion to drink and who cannot control his behavior by the time he has become intoxicated. He stated that the defendant did not have the will power to resist the constant excessive consumption of alcohol.

On cross-examination Dr. Wade admitted that when the appellant was sober he knew right from wrong and then said that the appellant's conduct in taking a first drink in any given instance was a "voluntary excercise of his will." He said that such persons as the defendant have a compulsion to drink and that while it may not be completely overpowering, it is a very strong influence.

The defendant testified to his history of drinking. He had been arrested over 100 times for drunkenness, and he testified that he was unable to stop drinking, and that when he was drunk he lost control. He admitted having one drink that morning, but the evidence is contradictory whether he had only one because he had no more money or because he knew he had to go to court that day. The state made no effort to get expert testimony for itself.

Following this short testimony the trial judge indicated that he would not allow the defendant's defense of chronic alcoholism. He did enter the following "findings of fact."

1) Chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

2) A chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

3) Leroy Powell is a chronic alcoholic who is afflicted with the disease of chronic alcoholism.

Mr. Justice Marshall, writing the majority opinion, said that whatever these are they are not "findings of fact" in the traditional sense, but rather more like the premises of a syllogism, designed to bring the case within the scope of the Court's opinion in *Robinson v. California*, 370 U.S. 660 (1962). The Court said that this trial did not reflect the full exposition of the facts traditional in major constitutional cases. The court observed that in the present state of knowledge about alcoholism several types of alcoholics have been defined. According to one of the leading experts in the field, E. M. Jellinek, only two types of alcoholics attain the degree of physiological dependence to be said to be suffering from alcoholism as a disease. These persons, labeled *gamma* or *delta* alcoholics exhibit: a) increased tissue tolerance to alcohol, b) adaptive cell metabolism, c) withdrawal symptoms and craving, i.e. physical dependence and, d) loss of control. The Court notes that no attempt was made to show that the present defendant exhibited all of these symptoms. Especially, the Court was not convinced that the defendant was powerless to keep from taking the first drink. The Court holds that it is unable to conclude on the state of this record or on the current state of medical knowledge that chronic alcoholics in general and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their compulsion to begin drinking and their compulsion to drink to the point of stupor, so that they cannot be deterred at all from public drunkenness.

This is not only a matter of lack of evidence however. The Court states clearly its hesitancy to announce a doctrine forbidding the incarceration of persons for public drunkenness while the medical profession has little more to offer, either in knowledge or facilities, to treat these persons.

The Court envisions the prospect that the only change that will take place is that a new sign reading "Hospital" will be erected over a wing of the jail. With the present system of penal sanctions at least there is a maximum time of permissible incarceration, which might not be true if civil commitment acts were passed to replace the criminal statutes struck down.

Finally, even if it were shown that both chronic alcoholics in general and a specific defendant in

particular were unable to control their appearance in public in a state of intoxication, because of the disease of "chronic alcoholism"; and if there were shown to be adequate alternative procedures to handle the alcoholic, the four men in the majority opinion (Justices Marshall, Black, Harlan and the Chief Justice) still are not convinced that being a chronic alcoholic is a defense to a charge of public drunkenness on Eighth Amendment grounds. The Court points out that the main thrust of the Cruel and Unusual Punishment Clause has been directed at the method or kind of punishment imposed and that the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed. *Robinson v. California, supra*, is an exception to this general thrust. In that case a California statute making it a crime to be a narcotic addict was struck down. The majority in the present case say that the result in *Robinson* was reached because the California statute was attempting to punish a person for a status. The present case, according to Mr. Justice Marshall, on its face does not concern a status crime. The defendant is not being punished for chronic alcoholism but for the act of appearing in public while intoxicated. *Robinson* only prohibits criminal sanctions where there is no *actus reus*, not where there is no *mens rea*. If such were the case the majority fears that the Court would inevitably be lead into the role of ultimate arbitrator of the standards of criminal responsibility in many areas of the criminal law.

Mr. Justice Marshall leaves some room for maneuvering in the future by repeatedly referring to the facts of the present case and hinting that at some future time when alcoholism is better understood and the facts of the case clearer, the Court might find a violation of the Eighth Amendment. Not so Mr. Justice Black (Justice Harlan joining). In his concurring opinion he states that while he agrees with the origional holding in *Robinson*, that a status could not be a crime, that to extend that doctrine now to permit the court to decide what constitutes criminal responsibility would be to invade the legislative province and destroy much experimentation and local control in the name of constitutional morality.

Mr. Justice White, whose concurrence in the result gave the court its majority, held the way he did solely on the facts. He argues that there may be an Eighth Amendment prohibition against applying criminal sanctions against a person who is a chronic alcoholic. If an alcoholic proves that for him resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible, this would provide him with a defense to a public drunkenness charge. The present defendant did not, in Mr. Justice White's eyes, prove these facts. In his view the defendant proved only that he was to some degree compelled to drink and he was drunk when arrested.

The dissent (Mr. Justice Fortas speaking for himself and Justices Douglas, Brennan and Stewart) disagrees with the majority in both its interpretation of the facts and the scope of the Eighth Amendment. The dissent observes that the Supreme Court does not generally sit as a trial court. The Court should accept the findings of the trier of fact as they were made and not as the Court would have made them. The finding of the trial court that Mr. Powell was a "chronic alcoholic," that this constituted a disease which so destroyed his volition that he could not avoid appearing in public intoxicated, and that these appearances were under a compulsion symptomatic of his disease, should be conclusive.

The dissent also sees as irrelevant the fact that the state of medical knowledge in the field of alcoholism is woefully lacking. What is known, the dissent says, is sufficient to support the findings in the present case. Thus, if the findings are not actually true of the present defendant, there are such persons, concerning whom these findings would be proper and true.

Finally, the dissent sees being drunk in public as a condition. The question presented to Mr. Justice Fortas is whether a criminal penalty may be imposed upon a person who is a "chronic alcoholic" for being publicly intoxicated, when this is a characteristic part of the pattern of his disease; and is not a consequence of his volition but rather a compulsion symptomatic of the disease. If so then public intoxication is a condition of the disease, and, the dissent says, the Cruel and Unusual Punishment Clause prohibits criminal penalities for this condition. It believes that *Robinson v. California* stands for the simple but subtle proposition that criminal penalities may not be inflicted upon a person for being in a condition he is powerless to change. The gravamen of both this case and *Robinson* is this inability to avoid the condition through the exercise of one's volition. In such cases prosecution violates the Constitution.

Court Distinguishes Legal Rights From Strategic Advice—*People v. Ianniello*, 235 N.E.2d 439 (N.Y. 1968). The defendant was indicted for contempt for evasive testimony before a New York Grand Jury. He was called to testify concerning a bribery conspiracy involving the police and state liquor authority. He at first refused to testify and was told by the assistant district attorney that he was being called solely in the role of a witness. He was told by the prosecutor, before the grand jury, that the grand jury was ready to confer immunity upon him if he considered any answers he might have to give to be incriminatory. The defendant said that he understood and consented to being sworn.

Mr. Ianniello then was questioned concerning certain conversations about police payoffs. He stated he could not recall these conversations and was reminded of the offer of immunity. So pressed, the defendant asked if he could excuse himself to see his attorney. He stated that he wished to ask his attorney if this was a proper question. This request was denied. The defendant persisted in his request until the prosecutor suggested that they go into open court and make an application for a ruling. This was not done and the grand jury foreman directed the witness to answer. He replied that he did not recall the alleged conversations.

The questioning then turned to an alleged meeting between the defendant and a police sergeant, where the two discussed a confidential investigation pending against a friend of the defendant. Once again Mr. Ianniello stated that he did not recall the conversation and could not confirm or deny that it had ever occurred. This testimony was the basis for the relevent contempt charge.

The Supreme Court, New York County, dismissed the indictment on the grounds that the defendant was denied the right to counsel when he was refused permission to leave the grand jury room to discuss the propriety of a question with his counsel. The Appellate Division affirmed with two judges dissenting. It did not reach the counsel issue. Rather, it held that the defendant was immune from prosecution for contempt since he was a "target" of the inquiry.

The Court of Appeals reversed and reinstated the indictment. First, discussing the "target" issue, the court held that its recent holding in the case of *People v. Tomasello*, 234 N.E.2d 190 (N.Y. 1967), made the defendant subject to prosecution for criminal contempt for evasive testimony before the grand jury whether or not he was a possible defendant. In the *Tomasello* case the court held that a witness before a grand jury who is a possible target and has not received a statutory transactional immunity for a previously committed substantive offense could nevertheless be prosecuted for perjury on the basis of his present testimony. The court reasoned that such a witness enjoys the benefits of a state exclusionary rule forbidding the use of his statements and any "fruits" in a prosecution for a previously committed crime, and therefore, he should not also be given the right to commit perjury. The court in the present case said the same principle applies where, as here, the contempt involves answers so false and evasive as to be equivalent to no answer at all.

Turning to the Supreme Court's ground for dismissal, the refusal to permit the defendant to consult with his lawyer, the Court of Appeals first observed that a witness is not entitled to have counsel present in the grand jury room. The issue is when and to what extent the witness ought to have the right to consult outside the grand jury room. The court said that since the grand jury proceeding is an investigation rather than a prosecution, the witness has no right to be "represented" by counsel in the technical sense. It recognised, however, that as a matter of fairness the government should not compel the individual to make important and binding decisions concerning their legal rights in the enforced absence of counsel.

The court listed three important legal rights that it considered could be critically affected in a grand jury proceeding. The first was whether to assert or waive constitutional and statutory privileges against self incrimination. The second was the witness' right to refuse to answer questions having no bearing on the subject of the investigation. The last was the right to envoke any special testimonial privilege belonging to the witness, such as a lawyer-client relationship.

The court distinguished this type of legal right from mere strategic advice. In the latter case the court held the witness has no right to see a lawyer. If such a practice were established, the court feared, it could be used as a delaying tactic to disrupt grand jury proceedings. Since the present defendant had already been given immunity and since there was no question as to the propriety

of the question and since the defendant could apparently invoke no special privilege, he had no right to counsel. Thus, to refuse him the right to see a lawyer did not give rise to grounds for a dismissal.

The court addressed itself in general to a witness' demand for counsel. When a witness demands to see his lawyer for counselling concerning his legal rights he should be permitted to do so. If his right is denied, however, the witness has no license to commit perjury or contempt. His only recourse is to persist in his refusal to answer, thus forcing the prosecutor to take the matter into open court for a ruling. In this way the court felt that the proceedings could be expedited and the danger of stalling tactics lessened. Where the witness persists in frivolous objections the court could order him to desist or stand in contempt. If the witness undertakes to answer questions in an evasive manner rather than refuse to answer he is subject to contempt proceedings.

Comment: The Court of Appeals is rightly concerned with the possibility of delaying tactics being employed by witnesses if an unabridged right to counsel were to be recognised. It seems to believe that the rule that is laid down in the present case will shorten delays. Such a result is at best speculative. In establishing this rule, however, the court has created a situation where the witness' privilege against self incrimination may be eroded by prosecutorial abuse. Under the present ruling the prosecutor can not loose. When the witness requests a conference with his attorney the prosecutor can always refuse it. If the witness has no such right the denial is irrelevent. If he does have this right then apparently unless he persists in demanding it his testimony may still be used in contempt or perjury proceedings. If the state's attorney permits a conference and to answer the question would be damaging then surely the attorney will advise his client to claim the privilege. Thus, if the prosecutor can badger the witness into either giving helpful and perhaps incriminating evidence or perjuring himself he gains. If the witness steadfastly refuses to reply then the state is in no worse position that if it had permitted a conference. It is to be hoped that the Court of Appeals and other New York courts will be alert against excessive badgering by a prosecutor after a refusal of counsel, and will dismiss indictments returned for contempt or perjury where the witness testifies after excessive practices.

State Must Prove Defendant's Sanity—*People v. District Court for County of Jefferson*, 439 P.2d 741 (Colo. 1968). Defendant was accused of murder, and he entered a plea of not guilty by reason of insanity at the time of the crime. This original proceeding was commenced by the District Attorney to determine the constitutionality of a statute which provides in part:

> The burden shall be on the defendant to prove by a preponderance of the evidence that he was insane at the time of the alleged commission of the crime. COLO. REV. STAT. ANN. §39 8-1 (1967).

The statute also provided for a separate trial of the insanity issue prior to the determination of guilt or innocence. The trial court found that this statute violated the state constitution in placing the burden of proof on the accused.

The Supreme Court of Colorado affirmed. It held that the statute violated the due process clause of the Colorado Constitution, which is identical to the one found in the United States Constitution. It stated that the mental capacity to commit a crime is a necessary ingredient of any offense. Hence, due process demands that the state prove the accused's sanity beyond a reasonable doubt as it must establish any essential element of the charge against him. It is not incumbent upon the defendant to prove anything to the satisfaction of the jury; rather, it is sufficient if he succeeds in raising a reasonable doubt in the minds of the jury of any aspect of the case against him.

The court stated that the fact there is a separate proceeding to determine sanity cannot change this long established principle. It noted that placing the burden of proof on the defendant would not violate the federal concept of due process, as was decided in *Leland v. Oregon*, 343 U.S. 790 (1952). But it held that there is no requirement that due process of law shall operate as a "straight jacket" forcing every sovereign state to give no more, as well as no less, protection than that which would be recognized at the federal level.

In a strong dissent Justice McWilliams argued that the sanity trial does not involve guilt or innocence, but only the defendant's mental condition. Therefore, in this proceeding there is no presumption of innocence by reason of insanity, rather it is one of sanity. It is entirely proper for the legislature to place the burden of disproving this normal presumption on the defendant, as the Supreme Court of the United States recognized

in *Leland*. The fact that a contrary practice has prevailed for many years does not necessarily mean that it has become a part of due process that cannot be changed by the legislature. This is especially true in this area since many states continue to put the burden of proof on the defendant.

Police Interrogation Must Cease As Soon As Defendant Once Asserts *Miranda* Rights—*People v. Fioritto*, 441 P.2d 625 (Cal. 1968). After the defendant, a nineteen year old boy, was arrested for the burglary of a grocery store, he was taken to the police station for interrogation. He was given the standard warnings regarding his constitutional right to silence and to an attorney as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), and he initially refused to sign a waiver. Almost immediately thereafter the officers confronted the defendant with his two accomplices, who told him that they had confessed and implicated him in the crime. An officer again advised the accused of his constitutional rights, inquiring anew if he would like to sign the waiver and confess. Defendant then signed the waiver and confessed to the crime. The confession was admitted into evidence, and the defendant was convicted of burglary.

On appeal, the sole issue was whether the police had violated the defendant's rights under *Miranda* by continuing the interrogation after he had initially refused to waive his constitutionally rights. The court held that such conduct violated his rights and reversed the conviction. The court focused on language of the *Miranda* opinion which specified:

> Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment privilege; *any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966).

The court emphasized that its holding forbade continued questioning only after an individual has once asserted his constitutional rights. It pointed out that statements initiated by the defendant himself in a similar situation would be acceptable.

In a strong dissent Justice Burke insisted that the majority went beyond the requirements of the *Miranda* decision. He would not require the police to remain mute upon the defendant's refusal to sign a waiver. He regarded the confrontation of the accused with his accomplices as valid police work. This, he maintained, introduced a new factor into the questioning, which prompted the defendant's change of mind. This resulted in a voluntary statement, free of any pressure or trickery. He also rejected the majority's mandate that a voluntary statement must be initiated by the defendant after a waiver is once refused.

Evidence Suppressed Due To Technical Violation Of Statute—*State v. Jasso*, 439 P.2d 844 (Utah 1968). Defendant was convicted of possession of marijuana. Prior to the defendant's arrest, a police officer applied to a judge for a search warrant at the jurist's residence late at night. The affidavit supplied by the officer stated insufficient grounds for its issuance. The judge then swore the officer as a witness and on the basis of his oral testimony, issued the search warrant.

The Supreme Court of Utah reversed the conviction. It held that this procedure did not satisfy the applicable statute which provides:

> *Examination of complainant and witnesses.*—The magistrate must, before issuing the warrant, examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. U. C. A. §77-54-4 (1953).

The court stated that the language of the statutes is clear and cannot be construed as meaning that a warrant may issue from an oral deposition of the complainant or other witnesses.

In a strong dissent Justice Ellett decried the reversal of this conviction on such technical grounds. He failed to see how the defendant could be harmed by the delay in signing the affidavit as long as no question was raised as to the actual facts testified to by the officer. Also, he condemned the exclusionary rule in general:

> However, the majority of this court seems to be running scared, and instead of recognizing that the *Mapp* [*Mapp v. Ohio* 367 U.S. 643 (1967)] case was erroneously decided, they extend the concept to an unnecessary length in order to free a guilty dope peddler from a deserved conviction.

Search By Hotel Maid Does Not Violate Right Of Privacy—*State v. Purvis*, 438 P.2d 1002 (Ore. 1968). Defendant was convicted of the possession of narcotics. Prior to his arrest, police officers

had enlisted the help of two maids who were employed by the hotel at which the defendant was staying. They instructed the maids to keep all trash collected from the defendant's room separate so that the officers could inspect it. When a search of this material did not reveal any contraband, they instructed the maids to look further for homemade cigarettes or cigarette butts. One of the maids found such a cigarette butt on the floor by the bed and brought it to an officer. He tentatively identified it as a marijuana cigarette. He later arrested the accused who was carrying a quantity of the drug. The defendant contended that the recruitment of the maids for the search of his room constituted an unlawful invasion of his constitutional right to privacy.

The Supreme Court of Oregon disagreed and upheld the conviction. It reasoned that the maids did not invade the defendant's privacy since they were privileged to enter the room and did so in the normal course of their activities. Also, they showed to the police only those items which they would normally take from the room. These items, such as cigarette butts, which the defendant placed in the waste baskets could be regarded as abandoned property. Even though the cigarette butt on the floor was not abandoned in this sense, it was not distinguishable from any other trash which the maids would usually remove from the room. And the defendant had implicitly authorized them to do so.

The police were not entitled to seize them, not because the defendant claimed a right of privacy therein, but because the privacy of the room itself would be invaded by a police search. This, however, was not true in the case of the maids' entrance.

There was a strong dissent. The dissentor argued that it was an invasion of the right to privacy for the police to employ an agent to accomplish what they themselves could not do. He emphasized that they were directed to look and search, not just to perform the mechanical task of emptying waste baskets. This, he contended, was merely an application of the long discredited "silver-platter" doctrine, that is, the authorities are handed evidence they could not otherwise seize.

He also found this conduct forbidden by the recent decision in *Katz v. United States*, 389 U.S. 347 (1967). He argued that the Supreme Court in this case emphasized that the right to privacy followed the person. He then said:

> It would be a mistake to assume that *Katz* is limited to the use of a mechanical agency (i.e. wiretapping devices), not a human one. *Katz* prevents any invasion, no matter how limited, without constitutional safeguards.

Experiment Improperly Admitted Into Evidence—*Miller v. State*, 226 N.E.2d 585 (Ind. 1968). Defendant was convicted of murder at a jury trial. He contended in his defense that the rifle had accidentally discharged when the deceased attempted to grab it from him. The state, however, maintained that he shot at the deceased before he grabbed at the rifle. Hence, the distance between the two men at the time the gun discharged was a critical issue. If the victim was standing several feet away when he was shot, he could not have grabbed the rifle, causing it to fire. To help resolve this question, the trial judge admitted an experiment performed by a firearms expert which demonstrated that the deceased was at least five feet from the accused at the time of the shot. The experiment purported to establish that powder residue would have been left on the deceased if he had been standing within five feet of the defendant.

The Supreme Court of Indiana held that admission of this experiment was reversible error. It noted that there were significant differences between the conditions under which the experiment was conducted and those at the time of the actual shooting. The weapon used in the experiment was not the same rifle as the defendant used. It was a similar type, but there was no showing that it was in the same condition as the defendant's rifle which was never found. A different type of cartridge was utilized in the experiment. These cartridges were hand-packed, while the bullets found in the defendant's auto were commercially packed. Finally, there was no showing that other variables, such as atmospheric conditions and weight of the bullets were the same as at the time of the homicide. The court found that these differences rendered the experiment inconclusive since all of the above factors can influence the distance at which powder residue will remain on the victim. Hence, the experiment was improperly admitted into evidence.

***Jackson v. Denno* Applied Retroactively**—*Duguay v. State*, 240 A.2d 738 (Me. 1968). Defendant was convicted of murder. His trial took place prior to the Supreme Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964). This case held that due process of law requires that the trial