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Case Notes

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veillance as reasonable.[117] In his dissent in *Berger*, Mr. Justice White asked the crucial question:

> If electronic surveillance is a 'general search', or if it must be circumscribed in the manner the Court now suggests, how can surreptitious electronic surveillance of a suspected Communist or a suspected saboteur escape the strictures of the Fourth Amendment?[118]

It is suggested that such surveillance can not escape the dictates of the Constitution unless the Court is prepared to create classifications of crimes for the purposes of the Fourth Amendment—a position apparently without legal precedent.[119]

As this comment has sought to emphasize the need for discriminating and narrowly circumscribed safeguards in any interception of wire and oral communications, it would appear that an even higher standard is necessary to conduct an electronic surveillance without an order in an emergency situation. There is good reason for this. The ability to intercept for forty eight hours without an order is overly permissive, for while any evidence obtained would be in violation of the Act and therefore excluded, its worth as an investigative tool for "leads" and corroborative information might justify misuse of this provision. It is difficult to envision situations in which such an "emergency" could exist without sufficient time to secure a court order.

[117] *Id.* at 363–64.

[118] 338 U.S. 116.

[119] In a case currently before the Supreme Court, Butenko v. United States, 4 Cr.L. 4053, the oral argument revealed the issues involved in national security cases. To the Solicitor General's explanation that the new law [1968 Safe Streets Act] is written in very general terms and provides that a wiretap, in national security cases, may issue whenever authorized by the Attorney General, Mr. Justice Black inquired "Are you relying on a Congressional rule, and not the constitution?"

Conclusion

The above examination of those parts of Section 2518 which relate to the Supreme Court decisions in *Berger* and *Katz* indicates that the validity of several provisions will depend on the restraint of investigative officials. The serious crime problem in this country demands that instruments necessary for law enforcement be fully employed. Nevertheless, the possible abuses inherent in such sophisticated practices as electronic surveillance require that specific limitations be imposed. Congress has sought to provide these standards by closely following the requirements set down by the Court in *Berger* and *Katz*. But serious constitutional questions are raised by those provisions allowing surveillance in emergency situations, issues about which the Court has given little direction.

Police abuse of the provisions of Section 2518, or irresponsibility in carrying out its procedural scheme, could lead the Court to establish more rigid and severe requirements for eavesdropping, a development that could spell the end of electronic surveillance as an effective law enforcement tool.

CASE NOTES

An editorial comment accompanying a Note represents the opinion of the student who prepared the Note and does not necessarily represent the viewpoint of any other member of the Editorial Board

Edited by

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Search and Seizure

Exclusionary Rule Held Applicable To Civil Commitment Procedures For Narcotic Addicts— *People v. Moore*, 446 P. 2d 800 (Calif. S.Ct. 1968). The defendant was arrested for possession of heroin. He was taken to a jail infirmary and examined by a doctor. As a result of this examination, a petition was filed to commit him as a narcotic addict or as a person who is in imminent danger of becoming addicted to narcotics. At the trial he was found to be in imminent danger of becoming a narcotic addict and committed to a

rehabilitation center. He appealed the order of commitment asserting the illegality of his arrest.

Before examining whether there was illegal conduct on the part of the arresting police officers, the court considered the applicability of the exclusionary rule to the civil commitment procedures. The court found that the trial closely approximated a criminal proceeding in that the state was the defendant's opponent, the proceeding was commenced on petition of the district attorney, the defendant was entitled to be present at the hearing and to be represented by counsel at all stages of the proceeding, and, finally, that the defendant's liberty was at stake. Since the purpose of the exclusionary rule is to deter unconstitutional methods of law enforcement so that the state will not profit from its own wrong, the rule was held to be applicable to a civil commitment proceeding.

The court rejected the argument that the narcotic addict proceedings, being for the benefit of the addict, does not benefit the state. It felt that while the proceedings were in part for the benefit of the individual, it also involves a loss of his liberty which is meant to benefit society as well. The close identity to the aims and objectives of criminal law enforcement was sufficient for the court to hold that the unconstitutionally obtained evidence of withdrawal symptoms while in custody, if admissible in these proceedings, would furnish an incentive to violate the Fourth and Fourteenth Amendments.

The court then examined the conduct of the arresting officers and found that their detention and questioning of the defendant was without justification. The evidence was then excluded, resulting in insufficient proof to sanction the commitment. Similarly, the testimony of the doctor regarding his examination of the defendant was held to be "fruit of the poisonous tree" and was also excluded. As a result, the commitment order was reversed.

Search Conducted By A Private Citizen In Conjunction With Police Without A Search Warrant Is Illegal—*Stapleton v. Superior Court of Los Angeles*, 73 Cal. Rptr. 575 (Calif. S.Ct. 1968). Petitioner sought a writ of prohibition to suppress certain evidence discovered in his automobile by a private agent and later seized by a police officer with whom the agent was working. Police and the agent, an employee of Carte Blanche, were in the process of arresting petitioner for credit card fraud pursuant to a valid arrest warrant when the private agent asked if anyone had searched petitioner's car which was known to be parked some distance down the street. Receiving a negative reply from someone he went to the car to look for evidence related to the credit card violations. While searching he discovered 60 tear gas cannisters in the trunk and notified police who seized the evidence. Petitioner was subsequently charged with possessing a tear gas cartridge in violation of the California Penal Code and sought to have the evidence excluded because of the illegal search.

The court admits that the Fourth Amendment exclusionary rule does not apply to searches by private individuals, but pointed out that the discovery here by a private agent was part of a joint operation by police and the credit card agents. In *Byars v. United States*, 273 U.S. 28 (1927), city police, then not subject to the Fourth Amendment, conducted an invalid search by federal standards, in conjunction with a federal prohibition agent. The court held it a joint operation and excluded the evidence because of the participation of a federal agent. In the case at bar, the court concluded that the participation of the police similarly infected the evidence uncovered by the private agent and required that it be suppressed. *See also United States v. Price*, 383 U.S. 787 (1966).

In addition, the court refers to *Moody v. United States*, 163 A.2d 337 (D. C. Mun. App., 1960), which held that a police officer standing silently by knowing that a private citizen was appropriating evidence of a criminal violation must be deemed to have participated in the seizure, rendering it illegal. Here the police failed to protect petitioner's constitutional rights by impliedly consenting to the private agent's action. The result from this approach also is that the evidence so obtained must be suppressed.

Affidavit Insufficient To Establish Probable Cause—*Wiles v. Commonwealth*, 163 S.E. 2d 595 (Va. S.Ct. 1968). On appeal the defendant, who was convicted of the illegal possession of narcotics, claimed that his motion to suppress the evidence of the narcotics found on his premises was improperly overruled. The court, three justices dissenting, found that the warrant authorizing the police to search the defendant's residence was issued without probable cause in violation of the Fourth Amendment to the Federal Constitution

and of a Virginia statute. Accordingly, the case was reversed and remanded.

The affidavit supporting the warrant recited the following as material facts constituting probable cause:

> 1. Information from informant who has given reliable information in the past that Henry Wiles residing at this address has narcotics in his possession at this time.
> 2. This Division has received several complaints that this man is a user of drugs.

Relying on *Aguilar v. Texas*, 378 U.S. 108 (1964), and other cases involving search and seizure, the Virginia court found that the affidavit was merely conclusory and did not inform the magistrate of the underlying circumstances on which the informant based his conclusions. There is no specification of what "information" was received or of whether it was based on personal knowledge of the informant or of when the past information was given by the informant. In addition there was no indication of when the "several complaints" were received or of whether any informant or complainant had ever seen the defendant using drugs.

CONFESSIONS

Retroactive Application of *Miranda* In State Court—*Commonwealth v. Leaming*, 247 A.2d 590 (Pa. 1968). A homicide was committed in Pennsylvania on February 4th, 1965. Defendant was arrested on February 11th in New Jersey on the pretext of a parole violation. Actually, he was suspected of committing the homicide. He was incarcerated until March 2nd, when he was removed to Pennsylvania where he was held until the preliminary hearing on March 10. During this entire period the defendant was interrogated by the police, was refused counsel, was encouraged to show the police the location of the decedent's body, and was persuaded to make a complete confession. His conviction was reversed by the court.

The court held that although the events complained of occurred prior to the decision in *Miranda v. United States*, 384 U.S. 436 (1966), its guidelines are nonetheless applicable to the instant case. Citing *Johnson v. New Jersey*, 384 U.S. 719 (1966), the court found that all trials which began subsequent to *Miranda* are bound by its decision. Thus, the New Jersey authorities had the duty to advise the defendant of all his Constitutional rights, and to permit him to secure counsel. Since this was not done, all evidence secured by the police prior to March 10, 1965, including the finding of the victim's remains and the written confession, was constitutionally inadmissible.

No Miranda Warnings Required For Refusal To Be Inducted Into The Army—*United States v. Kroll*, 402 F. 2d 221 (3rd Cir. 1968). Appellant reported to the United States Army induction center but refused to take the one step forward which symbolizes entrance into the armed forces. He was asked to leave the room while the other men finished their induction process. Upon the appellant's return to the room, the presiding officer read to him in front of two witnesses the Army penalties for refusing to be inducted. Appellant would not step forward. He also refused to sign a statement that he refused to be inducted. He contended at trial that all evidence which referred to the events after the first time he refused to step forward should not be admitted because the presiding officer did not at that time give him the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966).

The court upheld the conviction on two grounds. First, since the crime is not committed until the second time the registrant refuses to step forward, appellant was not in custody after his first refusal to step forward, and therefore, the *Miranda* rationale does not apply. The appellant did not confess while in custody to a crime previously committed.

Second, the facts of the case do not warrant the conclusion that the warnings should have been given either before or after the final refusal to submit. In *Noland v. United States*, 380 F.2d 1016 (10th Cir. 1967) the registrant was confronted at trial by his statement that "I refuse to be inducted. . . . " That court rejected his plea for Fifth Amendment protection because "a person is not entitled to counsel while he is committing a crime". The instant case was stronger against the defendant, since there was no statement being offered into evidence and, therefore, no problem of self-incrimination.

Confession Made In Solitary Confinement Held Inadmissible—*Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968). Defendants made an unsuccessful attempt to escape from Fort Pillow Prison Farm in Tennessee. One defendant, a 19 year old illiterate who had been imprisoned for two years, confessed while in solitary confinement and on the day after receiving a head wound

which had rendered him unconscious. The latter took the stand as a witness, but denied making the confession.

Defendants appealed from a denial of habeus corpus. The Sixth Circuit held the admission to be prejudicial error. The confession was involuntary because, following *Chambers v. Florida*, 309 U.S. 227 (1940), and *Brown v. Mississippi*, 297 U.S. 278 (1936), there existed at least a threat of punishment. Defendant lacked a free choice because, at least in his mind, the warden, who interrogated him, "... had complete power to cause his removal from the dark cell or to keep him there indefinitely". Answering the contention that maintenance of prison discipline required his placement in solitary confinement, the court stated that such was relevant only to the concerns of penologists and sociologists and did not affect the legal issue.

Evidence Obtained From Accused Rapist After He Expressed Desire To Remain Silent Is Admissible—*Commonwealth v. Marsh*, 242 N.E.2d 545 (Mass. 1968). On Aug. 23, 1965, one day after a reported rape, defendant, who was at a Boston police station on an unrelated matter, was asked by an officer if he was the operator of an automobile whose passengers included the victim. He replied in the affirmative. The officer then gave him the required constitutional warnings. After responding to several more questions the defendant expressed a desire to consult an attorney before answering further. On the way to a cell the officer asked whether the undershorts he had on were the ones he was wearing the night before. The defendant replied affirmatively, and upon request of the officer, gave them to him.

The question and response given before the warnings were admitted improperly but the court construed it as harmless error because the defendant repeated it on the stand.

At the *voir dire* the trial judge ruled that the conversation about the shorts after defendant invoked his right to remain silent was inadmissible and also ordered that the undershorts be suppressed.

At trial the judge modified his order by allowing prosecution, while cross-examining the defendant, to display the shorts and interrogate the defendant about them. Defendant did not identify them as his and prosecution was precluded from inquiring about the excluded conversation.

Defendant, on appeal contended, *inter alia*, that the display of the shorts to the jury was error, especially in light of the fact that the victim had previously testified that she had bled on the night of the rape. The court disagreed saying that any garment worn by defendant at the time of his arrest may be properly seized and admitted into evidence. While they conceded that the prosecution's interrogation did make indirect use of the excluded conservation, it was deemed not prejudicial because the defendant did not identify the item as his.

Confession Of 17 Year Old Given After *Miranda* Warnings Held Inadmissible—In Re Rambeau, 72 Cal. Rptr. 171 (1968). Defendant, a seventeen year old, was adjudged guilty of purchasing, possessing and smoking marijuana, and declared a ward of the juvenile court. The sole basis for the court's conviction was the confession of the defendant given while in detention after he had received the *Miranda* warnings. On appeal, the conviction was reversed on the grounds that the arrest itself having been illegal, the confession of guilt could not be separated from the unlawfulness of the detention and was therefore inadmissible. While noting that the illegal detention did not ipso facto render any confession obtained during such detention inadmissible, the court held that here the confession was "fruit of the poisonous tree".

The trial judge found that the defendant's statement was voluntary and satisfied the requirements of the *Escobedo-Dorado-Miranda* decisions. However, the court said "... compliance with the requirements of warning in the cited trilogy of cases is not enough to settle the matter, at least in a case involving a minor". The following factors were determinative of the court's holding that the *Miranda* warnings were not sufficient to justify the kind of interrogation which was undertaken: 1) no attempt was made to contact the boy's parent while he was being held; 2) no attempt was made to take the defendant before a probation officer before interrogation; 3) the generality of the questioning was offensive in its invitation to a confession of guilt of any sort.

Lineups and Other Identification Procedures

Guidelines Announced For In-Court Identifications Independent Of Tainted Pre-Trial Identification Procedures—*Clemons v. United States*, 4 Cr.L. Rptr. 2221 (D.C. Cir. 1968). The United States Court of Appeals for the District of Columbia has interpreted the standards announced in

United States v. Wade, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967) and *Stovall v. Denno*, 388 U.S. 293 (1967), and has reaffirmed the use of independent in-court identification made by witnesses who had viewed the defendant at improperly conducted lineups. The court held that as long as an in-court identification has sources independent of the tainted proceedings, it is not suppressible.

Clemons consisted of three companion cases. In the first, *Hines v. United States*, the defendant was convicted for the robbery of a beauty parlor. The identification testimony of three witnesses was questioned at trial. The first witness had talked to the robber when he entered the shop. Later, she examined photographs and identified the defendant; when she was taken to the defendant's cell two and one-half weeks after the robbery she again identified him as the robber. The second witness heard but did not see the robber. In the defendant's cell-block she was able to identify him after hearing his voice. The third witness had also seen the photographs but was unable to identify the defendant until she saw him at the preliminary hearing.

The district court held that the identification at the preliminary hearing did not violate due process, that the cell block identifications were a denial of due process, and that the first witness could be permitted to identify the defendant in court while the second could not.

The circuit court upheld the lower court on each of its holdings. With respect to the preliminary hearing identification, the court noted that the presentment occurred on the morning after the arrest, that there were over 100 people in the court room at the time of the identification, and that the witness' attention was in no way drawn to the defendant. However, the court said that such a practice is "fraught with peril to a degree suggesting its sparing use. . . ."

The court based its finding of a denial of due process in the cell block identification on the fact that the defendant was alone in custody and standing in a screened off section when the witness saw him. Furthermore, two other witnesses present at the confrontation indicated that the defendant was the robber at the time the witness in question was making her identification. The court said, ". . . in taking the situation in its totality the confrontations were unnecessarily suggestive".

In also affirming the district court's determination that the first witness could testify to the robber's identity while the second could not, the court relied on the following facts: (1) the first witness had seen the robber once prior to the robbery as well as during the robbery itself; (2) she testified that she paid particular attention to his appearance; (3) she had been able to pick out the defendant's photograph on the night of the robbery. The second witness, on the other hand, was unable to pick out the defendant's photograph on the night of the robbery and could not identify the defendant before going to the cellblock. Thus her testimony was "certainly the product of the illegal confrontation".

In *Clark v. United States*, the defendant was convicted of the armed robbery of a liquor store. The owner and an employee were in the store at the time. A few hours after the robbery the owner and employee were shown a number of photographs, at which time they both tentatively identified the defendant. A few weeks later the defendant was invited to the police station by a detective he knew. The owner was called to come in and identify a suspect, but was told nothing else. While the defendant was in the squad room, with his feet up on a desk and talking on the telephone, the owner entered and identified him as the robber. He was arrested and charged. The next day the employee identified the defendant at the detention area at which the defendant was held.

The circuit court affirmed the district court's holdings that the identification by the owner was admissible at trial, while the detention area identification by the employee was not. However, the in-court identification by the employee was held admissible. The court noted that the owner had observed the unmasked robber under good lighting conditions, had recalled the robber's distinctive physical characteristics, had picked out the defendant in photographs shown to him the night of the robbery, and had testified that his in-court identification was not influenced by the cell block confrontation. The court held this to be "clear and convincing evidence" that the in-court identification was independent of the cell block confrontation.

In *Clemons v. United States*, the defendant was convicted on four counts of robbery and four counts of assault with a dangerous weapon. Four months after the incident the prosecutor took three witnesses who had identified the defendant's photograph on the night of the robbery to the

cellblock where he was being held. The witnesses were shown only one man, the defendant, and they knew he was the man being held for the crime. At this time the witnesses again identified the defendant as the robber. The cellblock identifications were admitted at the trial, and the defendant was convicted.

In affirming the conviction, the court rejected the argument that the Supreme Court's per se rule in *Gilbert* excluding out of court identifications violative of the Sixth Amendment right to counsel also applies to due process violations, and that this requires a reversal in this case. It took into consideration the totality of the circumstances to determine whether the out of court identifications admitted into evidence were justified by other than the cell block confrontations.

An earlier district court case, *United States v. Washington*, 292 F. Supp. 284 (D.D.C. 1968), ruled that a pre-trial identification found violative of due process could not be the basis for a later in-court identification unless the prosecution could prove by clear and convincing evidence that the in-court identification was arrived at by means "sufficiently distinguishable to be purged of the primary taint". While this decision is consistent in theory with the later *Clemmons* approach, the severe burden of proof placed on the government in *Washington* was not in all respects applied in the latter opinion.

Assistance of Counsel

The following cases have recently been decided dealing with the effective assistance of counsel: *Arsenault v. Massachusetts*, 89 S.Ct. 35 (1968); *People v. McDowell*, 447 P.2d 97 (Calif. 1968); *Young v. State*, 247 A.2d 751 (Md. 1968); *Williams v. United States*, 402 F.2d 548 (8th Cir. 1968); *McConnel v. Rhay*, 89 S.Ct. 32 (1968).

In *Arsenault* the Supreme Court held that its previous decision in *White v. Maryland*, 373 U.S. 69 (1963), should be applied retroactively. Defendant, the day after his arrest, pleaded guilty to murder at a probable cause hearing without assistance by counsel. Six days later, still without counsel, the defendant changed his plea to not guilty at arraignment. When he came to trial defendant again pleaded not guilty, this time with the aid of counsel, but the state questioned him at trial about his prior statements and guilty plea to refresh his memory. The jury sentenced him to death.

In reversing the court said that *White*, which also involved an accused's plea of guilty at a preliminary hearing without the aid of counsel, was indistinguishable in principle, and that "the right to counsel at the trial, on appeal and at other 'critical' stages of the criminal proceeding have all been made retroactive, since the denial of the right must invariably deny a fair trial."

In the *McDowell* case the defendant, on appeal of a conviction of robbery, assault, burglary and murder, contended that his counsel did not understand the settled rule in California that evidence of mental abnormality, not amounting to insanity, is admissible at the guilt phase of a trial to negate the specific mental states put in issue by a plea of not guilty. The court held that defendant was denied his constitutional right to effective representation of counsel.

The court pointed to the California rule that on trial of the issues raised by a plea of not guilty to a charge of a crime, which requires proof of a specific mental state, competent evidence is admissible to show that because of mental abnormality not amounting to legal insanity the defendant did not possess that mental state at the time he committed the act. When considered with counsel's duty to investigate carefully all defenses of fact and of law that may be available to the defendant, the court concluded that the defendant did not have the assistance to which he was entitled. As a result, the trial was "fundamentally unfair" and constituted a denial of due process of law.

In the *Young* case, the defendant was tried for assault and battery before a jury. After retiring to deliberate the jury requested further instructions. Neither appellant nor his attorney were made aware of the request. The judge did deliver subsequent instructions, without the presence of appellant or his counsel. Defendant was thereafter found guilty.

The conviction was reversed on appeal because both the state and federal constitutions "guarantee that counsel be present at trial, and embrace representation throughout the entire trial in all its stages". Instruction to the jury out of the presence of appellant and his counsel was a violation of this guaranty.

Furthermore, the court asserted, the procedure violated Maryland rules which require that to assign error as to instructions on appeal the defendant must have objected to the instruction

before the jury retires. In the instant case the attorney had no opportunity to object, since he lacked any knowledge that the instructions were being given. Therefore, the defendant's power to appeal was denied because there was no effective representation by counsel at this stage of the proceeding.

Finally, the court noted reversible error because the appellant was involuntarily absent from the proceedings when the subsequent instructions were given. Maryland's Article 5, Declaration of Rights, in her Constitution, and Rule 775 preserve the common law right for the accused to be present at every stage of his trial. It is the defendant's absolute right, which cannot be waived by counsel, to be present when the jury is charged. If any other "communication" between judge and jury other than the judge's instructions takes place, the defendant must be present unless "the record affirmatively shows that such communication was not prejudicial or had no tendency to influence the verdict of the jury." Communication involves any intercourse between judge and jury not dealing with the facts, the law, or the form of the verdict.

In *Williams*, the Eight Circuit held that counsel's extraordinary inattention to an indigent's right to appeal was a denial of his right to the assistance of counsel. In this case defendant was found guilty of the unlawful purchase and sale of heroin. No timely notice of appeal was filed after this conviction.

Defendant testified that he last saw his court appointed counsel the day after the verdict was rendered. The attorney testified that he knew that appellant wanted to appeal and felt that he should have appealed. He could not recall any specific reason for the delay in appeal but did indicate some uncertainty at the time of the trial as to the required length of his services. Furthermore, the attorney testified, he told the court and the defendant that he would not represent the latter on appeal. Defendant claimed that he lacked assistance of counsel from the time of the verdict through the time in which an appeal could have been perfected.

The court vacated his sentence and remanded for resentencing; the time for an appeal will be allowed to run from the date of resentencing. The court believed that the lack of counsel at this critical stage of the trial deprived the defendant of his constitutional right to the appellate review of his conviction. The right to assistance of counsel includes all critical stages of the process from his initial appearance before the commissioner through the appellate process. Counsel's failure to file an appeal is an error of such magnitude that despite any nominal representation by counsel, the defendant in fact lacked the assistance of counsel.

The court went on to observe that while the Criminal Justice Act was not effective at the time of this appeal it would require court appointed counsel to continue to actively support the indigent unless and until relieved by the court. Another rule passed by the court in implementing the Criminal Justice Act obligates the court appointed counsel to inform his client of the right to appeal and to follow defendant's request in regard to that right.

Finally in the Supreme Court case of *McConnel v. Rhay* the court applied the case of *Mempa v. Rhay*, 389 U.S. 128 (1967), retroactively. In this case two defendants were placed on probation, one immediately after conviction for burglary and the other after serving a minimal sentence for grand larceny. Following their violation of probation terms both were given two hearings to fix the terms of their sentences. At none of the hearings were the defendants represented by counsel.

In applying the similar *Mempa* case retroactively the court said that the necessity of the presence of counsel to marshal and present facts in mitigation of the verdict makes the situation no different than *Gideon v. Wainwright*, 372 U.S. 335 (1963), or any other right to counsel case applied retroactively since "the right being asserted relates to the very integrity of the fact-finding process."

INDIGENTS

State Duty To Provide Technical Pretrial Assistance To Indigent Defendants—*Houghtaling v. Commonwealth*, 163 S.E.2d 560 (Va. 1968); *Foster v. Commonwealth*, 163 S.E.2d 565 (Va. 1968); *San Miguel v. McCarthy*, 446 P.2d 22 (Ariz. Ct. App. 1968). These three cases probe the scope of the implication in *Douglas v. California*, 372 U.S. 353 (1953), that the indigent is entitled to be furnished with various forms of aid other than counsel. In *Houghtaling*, the defendant on trial for first degree murder moved for the state to furnish funds for conducting an independent psychiatric examination. Two psychiatrists and

a psychologist from the state hospital where the defendant was committed for observation testified for the state. In *Foster*, a burglary suspect moved for the court to surrender clothing that had been chemically examined by the F.B.I. and to pay the cost of an independent chemical examination. And in *San Miguel*, the defendant moved for the court to appoint an investigator at state expense. All three motions were denied at the trial and on appeal.

The Virginia court in *Houghtaling* felt that the constitutional claim was disposed of by *United States v. Baldi*, 344 U.S. 561 (1953). However, the petitioner's claim in the latter case was not that the state must provide for an independent psychiatric examination but that the state must conduct its psychiatric examination before a hearing on whether the defendant committed the act.

The claim for an independent technical appraisal was faced in *Foster*, which was handed down the same day as *Houghtaling*. The court found that since there was no challenge to the validity of the F.B.I. tests and since the results of these tests, performed by an "expert, independent and impartial agency" were made available to the defendant's counsel, he was not deprived of adequate information to prepare the defense.

It is unfortunate that the court in *Houghtaling* misplaced its reliance on *Baldi*. The facts in *Houghtaling* may establish a stronger case of inequality between rich and poor than those in *Douglas v. California*. Most defendants would probably rather have a psychiatrist in their corner when the state must prove sanity beyond a reasonable doubt than have appointed counsel on appeal.

Public Defender's Determination Of Indigency Of Defendant Not Reviewable By Trial Court— *Ingram v. Justice Court For Lake Valley Judicial District*, 73 Cal. Rptr. 410 (1968). In 1959 petitioner Ingram pleaded guilty to a misdemeanor charge without the aid of counsel and did not appeal. On Aug. 21, 1967 the public defender, representing petitioner, filed notice of motion to set aside the prior conviction on the ground that petitioner was denied right to counsel. At the hearing the court asked the public defender to provide an affidavit establishing petitioner's indigence. Public defender refused, maintaining that he did not have one and was not required by law to provide such an affidavit. He stated that he was satisfied that petitioner was financially unable to employ private counsel. The court, however, ruled that it had the power and duty to make the final determination of indigence. Petitioner then filed application for writ of mandate contending that the court's ruling was in excess of its jurisdiction.

On appeal, the Supreme Court of California affirmed the El Dorado Superior Court granting the writ. The governing statute (Government Code §27706) provides that *"Upon request of the defendant or upon order of the court* the [public defender] *shall* defend . . . any person who is not financially able to employ counsel . . . ", and the court held that allowing the trial court to review the public defender's determination of indigency following a defendant's request for service would in effect, eliminate that alternative and defeat the legislative purpose.

In addition, the court pointed out that when a defendant appears in court with counsel it would be a violation of the attorney-client privilege for the court to intrude into the nature of their financial arrangement. The function of reviewing the public defender's rightful exercise of discretion in determining the indigence of a given defendant is political, not judicial, in nature.

Finally, the fact that this was not technically a defense but rather a motion to set aside a prior conviction was held to be immaterial. The court construed the statute (Government Code §27706) which provides for services " . . . at all stages of the proceeding . . . " to extend to petitioner's right to the public defender's assistance in this situation.

Juveniles and Juvenile Courts

Rights Of Juveniles After *Gault*— *State v. Steinhauer*, 216 So.2d 214 (Fla. 1968); *Neller v. State*, 445 P.2d 949 (N.M. 1968); *De Backer v. Brainard*, 161 N.W.2d 508 (Neb. 1968). Recent attempts of state courts to apply the dictates of the Supreme Court concerning the rights of juveniles—*In re Gault*, 387 U.S. 1 (1967) and *Kent v. United States*, 383 U.S. 541 (1966)—illustrate that there is no uniform interpretation by the states as to what those dictates are.

In both *Steinhauer* and *Neller* the issue before the court was the right of a juvenile to have counsel at the proceeding conducted for the purpose of transferring him from juvenile court to criminal court. Steinhauer voluntarily waived jurisdiction of the juvenile court during a waiver hearing at

which he was not represented by counsel, while Neller was transferred to criminal court by the juvenile court judge during a hearing at which he also had no counsel.

Even though in *Steinhauer* the state conceded that *Gault* required counsel at such proceedings—thus leaving only the issue of retroactive application (Steinhauer had been convicted after *Kent* but before *Gault*)—the court in dictim noted that *Gault* dictated such a result. The *Neller* court, however, did not view *Gault* as altering the *Kent* holding "so as to make the requirement one of constitutional dimensions". (*Kent* held that under the District of Columbia Juvenile Court Act and the requirements of due process, a juvenile was entitled to counsel at waiver proceedings.) It assumed without deciding that *Kent* (not *Gault*, as in the *Steinhauer* case) required counsel in waiver proceedings and then decided the case on the theory that even if Neller had the right, he had waived it by not objecting.

After examining Supreme Court cases which deal with the question of retroactive application, the court in *Steinhauer* held that *Gault* should not be applied retroactively since the waiver proceeding did not involve any fact-finding and thus did not "substantially affect the guilt or innocence of the juvenile".

The *Neller* decision may well confuse future cases in New Mexico as a result of the shotgun approach of its opinion. The basis of the decision would have been clear if the court had stopped with its finding that if Neller had a right to counsel, he waived it when he was represented by counsel in the criminal proceeding and at that time made no objection to his prior lack of counsel. The court went on, however, to examine the merits of Neller's contention. "Observing" that a juvenile was denied no rights accorded to an adult by being denied counsel at a waiver hearing, the court concluded that nothing "constitutionally requires that [a juvenile] receive anything more or better than is accorded an adult". In apparent contradiction to this statement the court went on to say that "if at the time of arraignment, complaint had been made that counsel had not been provided in juvenile court we consider it would possibly have been error for the district court to refuse to remand to the juvenile court for a proper hearing".

The implication is that a "proper hearing" would be one with the assistance of counsel. As a result of its confusing opinion, the New Mexico Supreme Court will have to decide in the future if *Gault* requires counsel at a waiver proceeding.

In the *De Backer* case, the issue before the Nebraska Supreme Court was whether a juvenile should be granted habeas corpus because he had been denied a jury trial in a juvenile court proceeding which resulted in his commitment to a training school. A majority of the court (four out of the seven justices) found the petitioner's constitutional challenge to be valid, but its holding was barred from taking effect by Article V, Sec. 2, of the Nebraska Constitution, which provides in part, that "no legislative act shall be held unconstitutional except by the concurrence of five judges".

The majority found *Gault* controlling in that an "implicit foundation" of the *Gault* decision is that juvenile proceedings are "sufficiently criminal in nature" so that due process constitutional rights must be applied. Acknowledging that the issue of the right to jury trial was not before the Court in *Gault*, the majority viewed *Duncan v. Louisiana*, 391 U.S. 145 (1968), which was decided after *Gault*, as requiring that a defendant be given the right to a jury trial in state courts in "serious criminal cases". Thus, by application of *Gault* and *Duncan*, the majority concluded that a juvenile has the same rights as an adult has and therefore De Backer had the right to a jury in the juvenile proceeding. The majority also upheld the further contention that the charges against De Backer had to be proved beyond a reasonable doubt, not merely by a preponderance of the evidence, as had been held in the juvenile proceeding.

The minority opinion is interesting but seriously questionable. Both *Gault* and *Duncan* were narrowly construed to support the minority's conclusion. Since *Gault* did not hold that the right of trial by jury is essential to due process (the Court could not so hold since that issue was not before the Court), and since *Duncan* dealt with a criminal case and not a juvenile proceeding, the minority reasoned that a juvenile in a juvenile court proceeding is not guaranteed the right to trial by jury.

Such a conclusion ignores, or attempts to ignore, the obvious import of the *Gault* and *Duncan* decisions. *Gault* strongly points out the Court's intention that whatever is required by due process should be applicable also in juvenile court proceedings. In the words of the court, "it would be extraordinary if our Constitution did not re-

quire procedural regularity and the exercise of care implied in the phrase 'due process'."

The concept of due process provides the link between the *Gault* and *Duncan* decisions, for *Duncan's* application of the right to a trial by jury in state courts was made within the context of the due process clause of the 14th Amendment. Thus it would appear obvious that the due process requirements, broadened by the right to trial by jury as a result of *Duncan*, are applicable to juvenile court proceedings on the basis of *Gault*.

The minority attempts to justify its conclusion by the questionable argument that:

> It is the function of this court to protect its own jurisdiction against encroachment. It is my firm opinion that this court ought not to yield up its own powers to the Supreme Court of the United States until such court has made a final and binding judgment that can be imposed on this court under the doctrine of judicial supremacy....
>
> ...The fact that a judge is a member of the highest court of the nation or state is not, of itself, proof of infallibility of decision. It might be well for members of such courts, on occasion, to step down from their ivory towers and recall with some humility that they were at the time of their appointment better than average lawyers with little judicial experience, of which there are many, who knew a President or Governor. In drafting the Constitution of the United States, our forefathers did not provide the states with a practical means of combating misconstruction of the Constitution or encroachment of federal authority upon the sovereign power of the states.... I shall neither bend the knee nor bow the head on mere inferences, speculations, or probabilities as to what that court will eventually do.

Trial Practice and Procedure

Court's Instructions Extolling Police Held To Be In Error—*State v. Jones*, 248 A.2d 554 (N.J. Super. Ct. 1968). Defendants LeRoi Jones, Charles McCray, and Barry Wynn, were arrested for unlawful possession of weapons during the Newark riots in June, 1967. The State's evidence was that the police had broadcast an alarm to look for a blue panel truck from which shots were being fired at police. Police stopped a green Volkswagen "camper" which Wynn was driving and in which Jones and McCray were riding. One officer looked into the camper from the passenger side and saw a revolver on a shelf below the dashboard and the three were ordered out of the camper. As Jones got out a gun fell from his tunic; bullets were found in Wynn's pockets and in a paper bag inside the camper.

The defendants contended that the police fabricated the charges. The defendants argued that they had no guns and were beaten by the police because the police mistook them for the people in a "blue panel truck", or because the police knew Jones as a militant. As a result of their beating, they had to be taken to a hospital.

After being convicted by a jury, the defendants appealed, arguing that the trial court's instructions were prejudicial in that they went beyond mere comment on the evidence. Some of the contested instructions were:

> You saw and heard each of these officers testify. The defendants would have you believe that they are prevaricators and that they committed the most flagrant kind of perjury when they stated under oath the manner in which they found and removed two loaded revolvers and the ammunition from the Volkswagen which the defendants occupied....
>
> Did they appear to you to be evilly disposed and wicked men who would resort to such calumny? Is it conceivable that these five men in blue would confer and agree together to commit such an unconscionable and outrageous act? In the final analysis, ladies and gentlemen, what interest did these officers have at the time of the arrest other than to restore law and order under extremely hazardous conditions?...
>
> In the final analysis, ladies and gentlemen, the police officer is the shield of the community against the use of violence and other lawless acts.

While admitting that a judge can express his opinion on the value and weight of evidence, the New Jersey Superior Court held the instructions to be beyond mere comment since "the import of the charge was not only that the judge believed the testimony given by the police, but that he thought the jury should do likewise". Further, the witnesses should not have been referred to as

"these five men in blue . . . for the jury may consider them to be expressions of admiration of the witnesses and certification of their credibility". Answering the state's contention that the contested charges were harmless when read in the context of the entire charge, the court concluded that "we have studied the entire charge carefully and find nothing in it which materially ameliorates the prejudice".

Questions About Prior Convictions Or Arrests Proper Once Defendant Puts His Character Or Credibility In Issue—*Commonwealth v. Smith*, 248 A.2d 24 (Pa. S.Ct. 1968).

Defendant was convicted of first degree murder. At his trial he testified to two prior convictions and mitigating circumstances surrounding those convictions. In cross-examination, the state questioned defendant about other arrests which his record revealed but which did not lead to conviction. Defendant appealed the conviction on the ground that the interrogation concerning the arrests was improper. The Supreme Court of Pennsylvania affirmed.

The Pennsylvania legislature had passed a statute in 1911 to curb prosecutorial abuse in the use of the defendant's prior criminal record for impeachment purposes. The defendant cannot be asked nor required to answer any question tending to show prior criminal activity unless he has advanced "evidence tending to prove his own character or reputation". The court here believed that the testimony offered by the defendant led to an inference that his character was of good repute. It affirmed the lower court's position that once defendant's character is in issue, questions about arrests not leading to conviction are proper.

In *Commonwealth v. Butler*, 247 A.2d 794 (1968), filed ten days before the *Smith* opinion, the Superior Court of Pennsylvania held that only questions about prior convictions are relevant for impeachment. Furthermore, only convictions for felonies, misdemeanors in the nature of crimen falsi, or crimes similar to those for which the defendant is presently charged are legally relevant to the issue of credibility. *Butler* reasoned that the risk of prejudice is so great in allowing examination into mere arrests that the practice should not be allowed. The dissent in *Butler* referred to *Smith* as being dispositive of the issue.

The *Butler* reasoning is compelling. First, the purpose of the statute encompasses the problem presented when a prosecutor cites a long line of arrests on the witnesses' records but fails to inform the jury as to the number of convictions involved. Second, the judge's instructions to the jury that they must use such evidence only in considering the credibility of the witness may be ineffective. This evidence could come to have substantial weight in the jury's determination of guilt and the evidence should be limited to the truly probative and relevant facts.

Defendant Should Be Fully Advised Of His Right To Appeal—*People v. Sanders*, 240 N.E. 2d 627 (Ill. S.Ct. 1968). Defendant was convicted of petty theft at a bench trial. Three weeks after sentencing he petitioned the court for a transcript of the trial proceedings, which was granted. Six weeks thereafter he filed a motion with the appellate court requesting leave to file a late appeal, which was denied. Then he moved to have his request for a transcript of record treated as a notice of appeal, which was also denied. The Illinois Supreme Court granted certiorari to hear defendant's claim that this treatment denied him due process.

The court was concerned with applying Supreme Court Rule 606 (a), Ill. Rev. Stat. 1967, c. 110A, sec. 606(a). It held that the rule, which provides that an appeal is perfected by filing a notice of appeal with the trial court, made defendant's claim that the request for transcript should be treated as a notice of appeal untenable. Rule 606(a) also provides, however, that if defendant so requests in open court, the clerk of the trial court will prepare, sign and file a notice of appeal. In this case, defendant, after sentencing and while still in open court, asked the court, "Your Honor, may I appeal this case from in?" and "May I have a transcript?" No answers were given by the court.

The Supreme Court held that where a defendant is convicted of a misdemeanor and indicates in some manner his desire to appeal his conviction, it is the duty of the trial judge to fully advise the defendant of any such rights he may have. The court also held that the trial court clerk's failure to file defendant's notice of appeal was reasonable excuse for defendant's not filing a timely notice of appeal. The appellate court's denial of defendant's request to file a late notice of appeal was reversed.

Uncontradicted Hearsay Testimony Held Sufficient To Establish Guilt—*People v. McCoy*, 242 N.E.2d 4 (Ill. App.Ct. 1968). Defendant was convicted of involuntary manslaughter at a bench

trial, was admitted to probation, with a one-year sentence at the Illinois State Farm as one of the probationary terms. Defendant appealed from the judgment of guilty, alleging that the evidence did not prove his guilt beyond a reasonable doubt because the only evidence heard by the court was hearsay.

At trial, the State's Attorney testified that he had heard witnesses testify at the coroner's inquest. He told the events as told to him, gave the names of all witnesses and stated that all these facts could be established by nonhearsay testimony. The facts, if true, warranted conviction. Defendant's counsel did not object to the State's Attorney's testimony, after which the prosecution rested. The State's Attorney's testimony was the only evidence the prosecution put forward, but defendant's counsel made no motion for a verdict of not guilty because of insufficiency. Both sides waived argument on the issue of guilt and the only disagreement concerned the length of the jail sentence.

The court framed the issue as whether uncontradicted hearsay testimony, received without objection and standing alone, may establish guilt beyond a reasonable doubt. The court answered the issue in the affirmative.

Hearsay evidence, the court said, can be of probative value, a fact from which its being hearsay does not detract. If no objection is made, the evidence is to be considered and weighed as if it were legally admissible. The trial court weighed the evidence, which was ample, and no argument was had on the issue of guilt. The court held that the defendant stipulated to the facts testified to by the State's Attorney and that once the facts were stipulated into the record, defendant cannot complain about them. The defendant could have objected, but did not. The conviction was affirmed.

One judge dissented, expressing the view that hearsay alone will not support a finding of guilty in a criminal case. Hearsay is excluded because it is unreliable. It is a rule of evidence and can be waived, but even if admitted, it is still unreliable. No case suggests that hearsay alone will support a criminal felony conviction, although it may be enough to sustain a civil judgment. As for defendant's stipulation, the dissent felt that he actually did not stipulate to anything. Failure to object to evidence is not a stipulation to its truth.

Testimony Adduced By Hypnosis Sufficient To Support Rape Conviction When Corroborated— *Harding v. State*, 246 A.2d 302 (Ct. Spec. App. Md. 1968). The defendant was convicted of assault with intent to rape, and of assault with intent to murder. His conviction on the rape charge was based almost exclusively on evidence received from the prosecutrix while under hypnosis. The defendant contended that this was inadmissible evidence.

The court affirmed the conviction. It found that the testimony of the prosecutrix was based upon her own recollections. The fact that she had related the knowledge after being hypnotized "concerns the question of the weight of the evidence which the trier of facts, in this case the jury, must decide". However, the court explicitly refused to go beyond the facts of the case in allowing the evidence to stand. It saw the other facts as vital to the question of admissibility. The instructions to the jury included a precaution not to place any greater weight on her testimony than on any other evidence. Furthermore, a full disclosure by the hypnotist of the theory of hypnosis and a complete description of the hypnosis procedure was brought out in testimony. In addition, the court found sufficient corroboration of the witness' testimony to support the evidence adduced by hypnosis.

MISCELLANEOUS

Application of Witherspoon with Different Results—*People v. Beivelman*, 447 P.2d 913 (Cal. 1968); *People v. Risenhoover*, 447 P.2d 925 (Cal. 1968); *State v. Spence*, 164 S.E.2d 593 (N.C. 1968). The defendants contended that the exclusion of jurors conscientiously opposed to the death penalty violated the holding of the Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

In *Beivelman* the court held the three excluded jurors were legally excluded according to the *Witherspoon* standards. The *voir dire* examination questions focused on the issue of whether the specific juror could not impose the death penalty no matter what the evidence might be. For example, the following questions were answered affirmatively by the first, second, and third prospective jurors, respectively:

> ...Now do you think that your state of mind is such that you could in no case vote the death penalty no matter how culpable or how bad you felt it was?
>
> ...No matter what the case or what the evidence, I take it...from your stated

opinion that you would not be able to assess the death penalty?

... [A]gain is that a feeling which would preclude from—in any case, despite the evidence and despite the circumstances, as a matter of conscience, from imposing the death penalty as a juror?

While eight jurors were excluded in *Risenhoover*, the court only cited the following voir dire examination of one prospective juror as one of the grounds for reversal:

The Court: ... Can you think of anything that would cause you to be ... other than a fair and impartial juror if you were to be selected? *Mrs. Friese:* Well, I don't know if I could possibly deal with the death sentence. *The Court:* ... Do you hold such a conscientious opinion on the death penalty as would preclude you from concurring in a verdict carrying the death penalty? ... *Mrs. Friese:* Well, probably. I don't feel I would have the ... *The Court:* Very well. Thank you, and you may be excused ...

The court reasoned that the trial judge's failure to allow the prospective juror to complete her answers meant it was not "... 'unmistakably clear' that she 'would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial.' " (citing *Witherspoon, supra*, at 522, n. 21).

The court in *Risenhoover* affirmed the verdict of guilty, finding that the evidence supported the verdict, and remanded for a new hearing limited to the issue of penalty.

In *State v. Spence*, the court found that the jurors selected did not meet the *Witherspoon* criteria. In reversing the decision, the court studied three suggestions: 1) the verdict should be set aside; 2) only the death penalty should be eliminated; and 3) the case should be remanded for life imprisonment. The court in setting aside both the penalty and the verdict, held that the defendant's plea of not guilty raised jury questions and only the jury, not the court, could return a verdict of guilty.

Failure Of Police Protection Not Grounds For Tort Liability—*Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860 (N.Y. App. 1968). Plaintiff was terrorized for more than six months by a rejected suitor, who threatened to have her killed or maimed if she did not yield to him. She went to the police, who gave little assistance. At a party celebrating her engagement to another man, she received a telephone call telling her that it was her "last chance". The police still refused to help. The next day, the ex-suitor had someone throw lye in her face, partially blinding her and permanently scarring her. Thereafter, the city gave her around-the-clock protection. Plaintiff sued the city, alleging that it negligently failed to protect her from harm. The Supreme Court dismissed the complaint and the Appellate Division affirmed.

The dismissal was affirmed by the Court of Appeals. The court, *per* Breitel, J., said that for the courts to proclaim a new and general duty of protection in tort law, even to those who specifically seek protection against specific dangers, would inevitably determine how the limited police resources of the community should be allocated and without predictable limits. This is different, the court said, from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems or even highways are provided. Extension of liability would result in grave consequences to the municipality and such extension should be made, if at all, by the legislature, not the courts.

Keating, J., dissented. He felt the municipality should be subject to liability for negligence in this case. Municipalities would neither go bankrupt nor would frivolous suits prevail, since the liability is not absolute. The police need only act as reasonable men would under the circumstances. At first there would be a duty to inquire. If the inquiry indicates nothing to substantiate the alleged threat, the matter may be put aside and other matters attended to. If, however, the claims prove to have some basis, appropriate steps would be necessary. To the argument that the police are understaffed, Keating's answer is that to the extent that the injury results from the failure to allocate sufficient funds and resources to meet a minimum standard of public administration, public officials are presented with two alternatives: either improve public administration or accept the cost of compensating injured persons.

Conviction For First Degree Murder Reduced To Second Degree In Absence Of Proof Of Premeditation Or Specific Intent In Felony-Murder—*People v. Anderson*, 447 P.2d 942 (Cal. S.Ct. 1968). Defendant was convicted of first degree murder for the homicide of a ten year old girl. Circum-

stantial evidence tended to show that the defendant chased the victim around a house, tearing her clothes off while slashing her with a knife. The court reduced the degree of the conviction to second degree murder.

The court held that the evidence was insufficient to support a conclusion of either a) premeditation, or b) felony-murder. To find premeditation, there must be evidence of (1) the defendant's action prior to the killing which clearly showed "planning" to kill, (2) a "motive" for the homicide, and (3) a manner of killing which showed beyond a reasonable doubt that the wounds were intentionally inflicted to cause death. The prosecution failed to meet this burden.

The felony-murder basis was also unfounded in convicting in the first degree. The felony relied upon by the prosecution was the performance or attempted performance of a lewd or lascivious act upon the body of a child. In order to establish that the defendant committed the killing during the perpetration of the felony, the prosecution must prove that the defendant harbored the specific intent to commit that felony. Also, the evidence must prove that the defendant had this specific intent either prior to or during the commission of the acts which resulted in death. In the present case, no evidence was presented which tended to prove that the defendant had ever formed any sexual feelings toward, or engaged in any kind of lewd conduct with, the victim or any other person.

Retarded 12-Year-Old Incapable Of Committing Sex Crime—*In Re G. M. R.*, 4 Cal. Rptr. 2276 (Calif. Ct. App. 1968). Defendant was a twelve-year-old girl with an I.Q. of 71 and the social comprehension of a seven year old. After being found molesting a two year old girl, she was declared a ward of the juvenile court pursuant to section 602 of the Welfare and Institution Code of California. Under that statute, a juvenile who commits any crime may be declared a ward of the court. This judgment was reversed by the Appellate Court.

The court read the juvenile act in conjunction with the state Penal Code. Under section 26 of the Penal Code, a child under fourteen years of age cannot be convicted of a sex crime without "clear proof" that a wrong was being committed. The court found no evidence that the defendant had knowledge of any wrongness in her act.

Although the child in this case might require the treatment and supervision provided by the state, she may not be committed by being stigmatized as a delinquent. The juvenile court is not precluded, however, from making the child a ward of the court under other provisions of the juvenile act, if there is evidence supporting such action.

Narcotics Conviction Requires Proof of Usable Amount—*State v. Urias*, 446 P.2d 18 (Ariz. Ct. App. 1968). The defendant was convicted for the illegal possession of a little over one gram of a substance containing 18% heroine. He appealed on the ground, *inter alia*, that the state must show that the amount in possession was a usable amount. The Court of Appeals relying on *State v. Moreno*, 374 P.2d 872 (Ariz. 1962), agreed. Although the conviction in *Moreno* was sustained on only .2 of one milligram, the Court of Appeals found that *Moreno* requires positive evidence as to the sufficiency of the narcotics to be usable under the known practices of narcotics addicts. The court, however, recognized that such a proof would be superfluous where the quantity was so large that its usability would be "patently obvious" to the uninformed laymen.

Carrying Broken Pistol Not Violative Of Statute Prohibiting Possession Of Concealed Firearms—*People v. Jackson*, 72 Cal. Rptr. 162 (Calif. S.Ct. 1968). Defendant was convicted of feloniously possessing a concealable firearm after suffering a prior felony conviction. On appeal the conviction was reversed on the grounds that the firearm, a pistol, was not in operating condition, and could not have been made operable without the procurement of a replacement part.

The court noted that the purpose of the statute prohibiting possession of concealable weapons by persons previously convicted of a felony is to make unlawful the carrying of guns that will shoot, and not merely objects that look like useable guns. A gun that is temporarily inefficient, or dismembered in such a way that it could be easily assembled, would fall within the prohibition of the statute. Here, however, in the absence of a showing that the necessary replacement part was in the possession of the defendant and that a simple substitution could have made the weapon operable, there was no violation of the statute.

Whipping Of Prisoners Is Cruel And Unusual Punishment—*Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968). The Eighth Circuit reversed a district court denial of an injunction, on appeal by an Arkansas penitentiary inmate, to enjoin the use of a whip for prison discipline. The whip in question consisted of a leather strap, 3½ to 5½ feet long,

4 inches wide, ¼ inch thick and mounted on a wooden handle 8 to 12 inches long. Newly effectuated prison regulations (January, 1966) restricted the whip's use to administrations by the warden upon the buttocks of a fully clothed inmate.

The court, finding that these supposedly restrictive regulations were subject to great abuse, did not limit itself to condemning that abuse but condemned the whole practice of corporal punishment as a means of enforcing prison discipline. The court considered irrelevant the state's argument that whipping was the only economically feasible punishment. Faced with evidence of whippings administered by prisoners on the bare buttocks of fellow inmates, the court noted that whenever corporal punishment is authorized it is subject to abuse. The court also noted that where authorization and administration are separated by several administrative levels, the difficulties of enforcement of the regulations become prohibitive.

The court stated that it was indisputable that the use of studded or spiked whips, great frequency of whipping, inappropriate methods and too long a duration of whipping were cruel and unusual punishments under the Eighth Amendment. Combining this and the administrative difficulties of preventing unauthorized whippings with the current status of public opinion on whipping (only two states permit its use) the court declared that whipping itself, and in any form, was a cruel and unusual punishment prohibited by the Eighth Amendment of the U. S. Constitution.

Threat Against Life Of The President Not Protected By First Amendment—*Watts v. United States*, 402 F.2d 676 (D.C. Cir. 1968). At a DuBois Club meeting dealing with police brutality the defendant said that he would refuse induction into the armed services and that "if they ever make me carry a rifle the first person I want... in my sights is LBJ." The meeting was a few hundred yards from the White House. Defendant was convicted for threatening the life of the President in violation of 18 U.S.C. § 871.

In affirming the conviction the court emphasized that it is the mere making of a threat and not the intent to carry it out that constitutes a violation of the law. The history behind the bill is ambiguous but it does indicate that it was not meant to create a specific intent crime. The bill was to deter both threat-making as well as the consequences of threat-making which would include the incitement of others. If the government shows that the declarant understood the meaning of his words and that he uttered them voluntarily and with an apparent intention to carry them into execution, then it has demonstrated a violation of the statute. There is no requirement that the person making the threat intend to carry it out; the court even indicates that saying the words in jest may not be a defense.

The threat in this case was conditional but that does not remove it from the scope of the statute. The appearance of present intent was not removed since the stated condition was fully within the defendant's control. Whether or not the words merely expressed a desire and not a threat is a jury question and calls for the consideration of all relevant circumstances surrounding the utterance. Yet, even though the defendant contended that his statement was met with laughter and applause, it is not unreasonable to still infer that they accepted his words as a threat.

Furthermore, the court stated that "the First Amendment does not prevent proscription of utterances that comprise knowing and willful threats to the life or safety of the President." The balance to be weighed is between the character of the individual activity to be regulated and the value to the public of the ends sought. These threats could restrict the President's ability to fulfill his duties. A threat of this nature may incite others to act. Threats against the life of a President are clearly distinguishable from those against a private citizen due to the man's position in the functioning of our country. These considerations present a "valid basis for reasonable limitation on speech."

The dissent argued that only a threat made with the specific intent to carry it out would be a violation of the statute. Threats are protected by the First Amendment if they carry "an idea" or an opinion on "how public affairs should be run." The dissent would have the jury decide whether or not the threat was made with the specific intent required. Then the judge should apply the clear and present danger test to the context in which the words were uttered. If the words in their context were not an "unambiguous threat" on the President's life, then the conviction must fall.

Tip About Known Gun Carriers Justifies Stop And Frisk—*Ballou v. Massachusetts*, 403 F.2d 982 (1st Cir. 1958). Police officers were informed by an anonymous and untested informer that the defendant and several other individuals, all known

to the police as gangsters with a propensity for carrying guns, were armed and in a local cafe. After receiving this information the police officers sought out the defendant and subjected him to a "limited, pat-down search".

The United States Court of Appeals for the First Circuit upheld the legality of the search under the test of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Silbron v. N. Y.*, 392 U.S. 41 (1968). The court said that the informer's failure to identify himself and his lack of proven reliability might have been significant had the information applied to individuals unknown to the police. However, the court held that what the police already knew about the gangsters, independent of what the informer told them, brought this case within a "narrowly drawn authority" to engage in a limited search for weapons ... when an officer, on the basis of "specific reasonable inferences which he is entitled to draw from the facts in light of his experience," has "reason to believe he is dealing with an armed and dangerous individual". *Terry v. Ohio, supra.*

BOOK REVIEWS

Edited by

C. R. Jeffery

THE TRIAL OF STEVEN TRUSCOTT. By *Isabel LeBourdais*. J. B. Lippincott Company, 1966. Pp. 257. $4.95.

There was a time when propaganda was respectable. Before it acquired its current disrepute, the term signified writings designed to arouse readers to action, without reference to the relative virtue of the cause. It served to distinguish this type of writing from that which was meant to entertain or to educate. Now the language lacks a name for it, but the phenomenon persists. Mrs. LeBourdais' book is a case in point. It is a first-class piece of responsible propaganda; remarkable in fact, because, up to a point, it was very effective.

The *Trial of Steven Truscott* was first published in 1965, six years after Truscott, aged 14, was sentenced at Goderich, Ontario, to death by hanging for the rape-murder of a 12-year-old girl. Isabel LeBourdais' feeling of horror about the fact that a Canadian court in the Twentieth century imposed the death penalty on a child, particularly in the face of a recommendation of mercy from the jury, led her to spend years in painstaking research into the case. She became acquainted with Truscott, whose sentence had been commuted to life imprisonment, and, along with his family, she became convinced of his innocence.

The results of Mrs. LeBourdais' interest and her efforts developed in stages. First, she found herself the author of a best-seller that was criticized in most quarters as being flawed by the current of emotionalism flowing through its pages. Newspapers and television fostered the growing clamor for something to be done. The problem was what to do, for Truscott had exhausted all remedies Canadian law afforded him. In an unprecedented action, the Governor-General, who represents the Queen in Canada, referred the case to the Supreme Court of Canada for a review of any question of law, fact, or mixed fact and law, on a consideration of the existing record and such further evidence as the court saw fit to receive.

Twelve year old Lynne Harper was last seen alive riding northward from the school grounds on the handlebars of Steven Truscott's bicycle on a busy county road near Clinton Air Force Base somewhere between 7:15 and 7:35 on the evening of June 9th, 1959. Two days later her body was found in a clump of trees locally known as the Bush which lies off the County Road at a point north of where she was seen with Steven. He claimed that he had taken her to the northern end of the Road well past the Bush and cycled back alone. Stopping on his return ride, he said, he had looked toward the place where he left her and had seen her getting into a grey car with yellow plates. The testimony of witnesses who saw him with her north of the Bush and alone on his way back was in dispute in the case. It was not disputed, however, that he was again in the schoolyard, normal in appear-