SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve University
School of Law Scholarly Commons

Faculty Publications

1978

The Ohio Bill of Rights

Paul C. Giannelli

Follow this and additional works at: https://scholarlycommons.law.case.edu/faculty_publications

 Part of the Constitutional Law Commons, and the State and Local Government Law Commons

Repository Citation

Giannelli, Paul C., "The Ohio Bill of Rights" (1978). *Faculty Publications*. 401.
https://scholarlycommons.law.case.edu/faculty_publications/401

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

P
P973
c.1

PUBLIC DEFENDER REPORTER

Vol. 1, No. 4 September, 1978

CWRU LAW LIBRARY

THE OHIO BILL OF RIGHTS

Paul C. Giannelli
Associate Professor of Law, Case Western Reserve University

The Ohio Bill of Rights is found in Article I of the Ohio Constitution. Many of the provisions in that Article relate to criminal practice. Section 5 provides for the right to jury trial. Section 9 prohibits excessive bail and the imposition of cruel and unusual punishment. Section 10 guarantees the right to grand jury indictment, the right to counsel, the right to confrontation, the right to compulsory process, the right to a speedy and public trial by an impartial jury, the privilege against self-incrimination, and the right not to be placed in jeopardy twice. Finally, section 14 prohibits unreasonable searches and seizures. Some of these provisions use language virtually identical to the language used in the federal Bill of Rights. For example, with the exception of one word ("possessions" in lieu of "effects"), the search and seizure provisions of the Fourth Amendment and section 14 are identical. Other provisions differ from their federal counterparts. For example, the Sixth Amendment guarantees in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .", whereas the analogous Ohio provision states: "In any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face . . ."

Prior to the 1960's the provisions of the Ohio Bill of Rights constituted the principal safeguards enjoyed by criminal defendants in this state. Federal law played but a small role in state criminal trials.

> Historically, the United States Supreme Court deferred to the states on matters of criminal procedure because "the problems of criminal law enforcement vary widely from state to state," because state courts generally have greater familiarity and expertise in criminal matters, and because criminal rules should be developed by those who bear the burden of enforcing them. Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather than Federal Law,* 15 Am. Crim. L. Rev. 339, 339 (1978).

THE PREDOMINANCE OF THE FEDERAL BILL OF RIGHTS

The Ohio Bill of Rights, like similar provisions in other state constitutions, was eclipsed during the so-called "Criminal Law Revolution" of the Warren Court era. The Warren Court "revolutionized" criminal practice in several ways. First, the Court expanded the substantive rights of the accused. The cases are now familiar. *E.g., Miranda v. Arizona,* 384 U.S. 436 (1966) (Fifth Amendment applicable to custodial interrogations); *U.S. v. Wade,* 388 U.S. 218 (1967) (right to counsel attaches to lineups); *Chimel v. California,* 395 U.S. 752 (1969) (scope of search incident to arrest limited to "grabbing" distance); *Barber v. Page,* 390 U.S. 719 (1968) (right to confrontation requires actual unavailability of a witness before prior testimony is admissible).

Second, from 1961 to 1969 the Court in a series of decisions held most of the criminal procedure provisions of the federal Bill of Rights applicable to the states through the due process clause of the Fourteenth Amendment. *See Mapp v. Ohio,* 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule); *Robinson v. California,* 370 U.S. 660 (1962) (cruel and unusual punishment clause); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (right to counsel); *Malloy v. Hogan,* 378 U.S. 1 (1964) (privilege against self-incrimination); *Pointer v. Texas,* 380 U.S. 400 (1965) (confrontation clause); *Klopfer v. North Carolina,* 386 U.S. 213 (1967) (right to speedy trial); *Parker v. Gladden,* 385 U.S. 363 (1966) (right to impartial jury); *Washington v. Texas,* 388 U.S. 14 (1967) (compulsory process clause); *Duncan v. Louisiana,* 391 U.S. 145 (1968) (right to jury trial); *Benton v. Maryland,* 395 U.S. 784 (1969) (double jeopardy clause). The only two provisions that were not "incorporated" through the Fourteenth Amendment were the right to a grand jury indictment and the prohibition against excessive bail. The Court, however, in *Schilb v. Kuebel,* 404 U.S. 357 (1971), has commented: "Bail, of course, is basic to our system of law . . . and the Eighth

Public Defender: Hyman Friedman
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113
Telephone: (216) 623-7223
Editor: Paul C. Giannelli, Associate Professor of Law, Case Western Reserve University
Associate Editors: Gloria Rice, William Rice

Publication of the Public Defender Reporter is made possible by a grant from the Cleveland Foundation. The views expressed herein are those of the author and do not necessarily reflect those of the Public Defender or the Cleveland Foundation.
Copyright © 1978 by Paul C. Giannelli

Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." *Id.* at 365. Thus, the application of federal constitutional law in state criminal cases became commonplace during this decade.

Third, the Warren Court expanded the availability of federal habeas corpus, making federal review of state criminal trials another common occurrence. *E.g., Fay v. Noia,* 372 U.S. 391 (1963) (exhaustion requirement applies only to state remedies existing at time habeas petition filed); *Jones v. Cunningham,* 371 U.S. 236 (1963) (parole status satisfies custody requirement). Since the Supreme Court could not possibly review all state criminal cases alleging violations of federal constitutional rights, habeas corpus was used as the enforcement mechanism for the new rights the Court had created and applied to the states.

The advent of the Burger Court has halted the "revolution." While few Warren Court decisions have been explicitly overruled, the Burger Court has embarked on a period of retrenchment; the present majority has either limited Warren Court decisions or refused to extend them. *See Kirby v. Illinois,* 406 U.S. 682 (1972) (limiting *Wade*); *U.S. v. Robinson,* 414 U.S. 219 (1973) (expanding search incident to arrest doctrine); *Adams v. Williams,* 407 U.S. 143 (1972) (expanding stop and frisk doctrine); *Harris v. New York,* 401 U.S. 222 (1971) (limiting *Miranda*). In addition, the Court has cut back on the availability of federal habeas relief. *E.g., Stone v. Powell,* 428 U.S. 465 (1976) (limiting the availability of habeas review of Fourth Amendment violations); *Francis v. Henderson,* 425 U.S. 536 (1976) (expanding the waiver doctrine to preclude habeas review).

THE EMERGENCE OF STATE CONSTITUTIONS

This period of retrenchment has resulted in the resurrection of state constitutions which were dormant during the Warren Court era. Through the interpretation of state constitutional provisions, many state courts have afforded criminal defendants greater protections than the present Supreme Court has afforded through its interpretations of the federal Constitution. Since state courts are the final arbiters of state constitutions, the U.S. Supreme Court cannot review state court determinations of state law. *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Supreme Court has no jurisdiction over the decision even if federal issues are present in the case. *See Fox Film Corp. v. Muller,* 296 U.S. 207 (1935); *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875). On a number of occasions the Supreme Court has stated that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." *Oregon v. Hass,* 420 U.S. 714, 719 (1975); *accord, Lakeside v. Oregon,* 98 S.Ct. 1091, 1095 (1978); *Lego v. Twomey,* 404 U.S. 477, 484 (1972); *Cooper v. California,* 386 U.S. 58, 62 (1967). Increasingly, state courts have accepted this invitation. The following is a summary of some of the areas in which state courts have gone beyond the Supreme Court in affording criminal defendants rights.

Search & Seizure

Inventory Searches. In *South Dakota v. Opperman,* 428 U.S. 364 (1976), the Supreme Court held a warrantless inventory search of an impounded automobile, including the glove compartment, did not violate Fourth Amendment guarantees. On remand, however, the Supreme Court of South Dakota held the inventory violated the state constitution. *State v. Opperman,* 247 N.W.2d 673 (S.D. 1976). In so holding, the state court found the arguments of the U.S. Supreme Court unpersuasive:

> Admittedly the language of Article VI, §11 is almost identical to that found in the Fourth Amendment; however, we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning. We find that logic and a sound regard for the purposes of the protection afforded by S.D. Const., Art. VI, §11 warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary under the Fourth Amendment. *Id.* at 675.

Other state courts have limited *Opperman* by holding that an arrestee should be given the opportunity to make private arrangements for the automobile's safekeeping, thus avoiding impoundment and the consequent inventory. *See State v. Goodrich,* 21 Crim. L. Rep. 2431 (Minn. S. Ct. 1977); *Chuze v. State,* 330 So.2d 166 (Fla. 1976).

Search Incident to Arrest. In *U.S. v. Robinson,* 414 U.S. 218 (1973), and its companion case, *Gustafson v. Florida,* 414 U.S. 260 (1973), the Supreme Court held that police officers could make a full body search incident to an arrest for traffic offenses and other minor violations which involve no physical evidence. Both the California and Hawaii Supreme Courts have rejected *Robinson* on state constitutional grounds. *See People v. Brisendine,* 13 Cal.3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); *State v. Kaluna,* 55 Haw. 361, 520 P.2d 51 (1974). In *Brisendine* the court stated:

> The foregoing cases illustrate the incontrovertible conclusion that the California Constitution is, and always has been, a document of independent force . . . It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: The Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. 531 P.2d at 1113.

Other state courts that have refused to permit full body searches incident to traffic arrests are: *People v. Garcia,* 23 Crim. L. Rptr. 2184 (Mich. Ct. App. 1978); *People v. Kelly,* 77 Misc.2d 264, 353 N.Y.S.2d 111 (Crim. Ct. N.Y.), *rev'd on other grounds,* 79 Misc.2d 534, 361 N.Y.S.2d 135 (App. Di· 1974). In addition, Massachusetts has limited *Robinson* by statute.

Mass. Gen. Laws. Ann. Ch. 276, § 1 (West).

The Washington Supreme Court in *State v. Hehman,* 23 Crim. L. Rep. 2205 (1978), limited *Robinson* in a different way. The court held that "as a matter of public policy [a] custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs the promise to appear . . ." *Id.* at 2205. According to the court, its holding "is in keeping with the clear spirit of [state] legislation and with the entire trend of the judicial and legislative philosophy in the field of traffic offenses." *Id.* "Since the custodial arrest was improper in this case, the search of defendant's person incident thereto was also improper . . ." *Id.* at 2206.

Consent Searches. In *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), the Supreme Court employed a totality of the circumstances test to judge the voluntariness of a defendant's consent to a search. In so holding, the Court rejected the argument that a person had to know of his right to refuse consent in order for the consent to be voluntary. In *State v. Johnson,* 68 N.J. 349, 346 A.2d 66 (1975), the New Jersey Supreme Court took a different view of a provision of the New Jersey Constitution which it acknowledged "is taken almost verbatim from the Fourth Amendment." 346 A.2d at 68 n.2. The court stated:

> Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful. One cannot be held to have waived a right if he was unaware of its existence. 346 A.2d at 68.

Participant Monitoring. In *U.S. v. White,* 401 U.S. 745 (1971), a plurality of the Supreme Court held the use of electronic eavesdropping devices where one of the parties to the monitored conversation has consented to the monitoring does not implicate the Fourth Amendment. Thus, neither a warrant nor probable cause is a necessary prerequisite for participant monitoring. In *People v. Beavers,* 393 Mich. 554, 227 N.W.2d 511 (1975), the Supreme Court of Michigan rejected the plurality view in favor of Justice Harlan's dissenting opinion, which the court considered "more consistent with the spirit of the state constitutional protection against unreasonable searches and seizures." 227 N.W.2d at 514. In Michigan, therefore, the warrant requirement, including probable cause, applies to participant monitoring.

Miranda

Impeachment Exception. In *Harris v. New York,* 401 U.S. 222 (1971), the Supreme Court limited the effect of *Miranda* by holding that a defendant's unwarned statement could be used for impeachment. The Supreme Courts of California, Hawaii, and Pennsylvania have rejected *Harris* as matter of state constitutional law. *See People v. Disbrow,* 16 Cal.3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); *State v. Santiago,* 53 Haw. 254, 492 P.2d 657 (1971); *Commonwealth v. Triplett,* 462 Pa. 244, 341 A.2d 62 (1975). Alaska has reached the same result by statute. Alaska R. Crim. P. 26(g). The Hawaii Supreme Court in *Santiago* explained its rejection of *Harris* as follows: "[We] believe that if the rationale underlying *Miranda* is sufficient to warrant the exclusion of prior statements from the prosecutor's cases in chief, then that same rationale precludes use of those statements for impeachment." 492 P.2d at 664.

Multiple Interrogations. In *Michigan v. Mosley,* 423 U.S. 96 (1975), the defendant refused to talk to the police after receiving *Miranda* warnings. Subsequently, a second interrogation conducted by a different police officer and concerning an unrelated offense resulted in an incriminating statement. *Miranda* warnings preceded this interrogation as well. The Court held the second interrogation did not violate *Miranda.* In dissent Justice Brennan noted that "no State is precluded by [this] decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution." *Id.* at 120. In a recent case, *People v. Pettingill,* 23 Crim. L. Rep. 2227 (1978), the California Supreme Court followed Justice Brennan's advice, holding that once a defendant refuses to waive his *Miranda* rights, he cannot be subsequently interrogated.

Right to Counsel

In *Kirby v. Illinois,* 406 U.S. 682 (1972), the Supreme Court limited *Wade* by holding the right to counsel did not automatically attach at corporeal identification procedures. According to the Court, the right attached only after the initiation of adversary judicial proceedings. *Id.* at 690. The Alaska Supreme Court rejected *Kirby* on state constitutional grounds, holding that the right to counsel attaches, in the absence of exigent circumstances, when a suspect is taken into custody. *Blue v. State,* 558 P.2d 636 (Alk. 1977). In so holding, the court remarked: "The Alaska Constitution may have broader safeguards than the minimum federal standards." *Id.* at 641. The Pennsylvania Supreme Court reached the same result in *Commonwealth v. Richman,* 458 Pa. 167, 320 A.2d 351 (1974), by holding that the right to counsel attached at the time of arrest. The Michigan Supreme Court has gone beyond these cases, holding in *People v. Jackson,* 391 Mich. 323, 217 N.W.2d 22 (1974), that a defendant in custody has the right to counsel at photographic as well as corporeal identification procedures. Thus, *Jackson* also rejects the Supreme Court's decision in *U.S. v. Ash,* 413 U.S. 300 (1973), which held the right to counsel did not attach at photographic identifications.

Double Jeopardy

Dual Sovereignty. In *Bartkus v. Illinois,* 359 U.S. 121 (1959), the Supreme Court held that an acquittal on federal bank robbery charges did not preclude a subsequent state prosecution for the same robbery. The double jeopardy clause was not violated, according to the Court, because the state and federal governments are separate sovereigns. The "dual sovereignty" rationale of *Bartkus* was rejected re-

cently by the New Hampshire Supreme Court. State v. *Hogg*, 23 Crim. L. Rep. 2161 (1978). After pointing out that "Bartkus is not binding on this court in construing our state constitutional double jeopardy provision . . . ." *Id.* at 2161), the court stated: "It is pure fiction to say they are different crimes because of dual sovereignty." *Id.* at 2162. Other state courts have reached the same result. *See People v. Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976); *Commonwealth v. Mills*, 447 Pa. 162, 286 A.2d 638 (1971); *People v. Abbamonte*, 43 N.Y.2d 74, 400 N.Y.S.2d 766, 371 N.W.2d 485 (1977).

Same Offense. The Supreme Court has adopted the "same evidence" test for defining the term "same offense" in the federal double jeopardy clause. *See Jeffers v. U.S.*, 432 U.S. 137 (1977). Several state courts, however, have adopted the more protective "same transaction" test. *See People v. White*, 390 Mich. 245, 212 N.W.2d 222 (1973); *Commonwealth v. Campana*, 455 Pa. 622, 314 A.2d 854 (1974). In *White* the Michigan Supreme Court commented: "[G]iven our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable." 212 N.W.2d at 225.

Right To Jury Trial

In *Baldwin v. New York*, 399 U.S. 66 (1970), the Supreme Court held the Sixth Amendment right to jury trial applied only to offenses in which imprisonment in excess of six months is authorized. A number of state courts, on the other hand, have interpreted analogous provisions of state constitutions as extending the jury trial right beyond the six month restriction. Vermont and Maine require jury trials in all criminal prosecutions. *See State v. Becker*, 130 Vt. 153, 287 A.2d 580 (1972); *State v. Sklar*, 317 A.2d 160 (Me. 1974). *See also City of Brookings v. Roberts*, 226 N.W.2d 380 (S.D. 1975); *Baker v. City of Fairbanks*, 471 P.2d 386 (Alk. 1970).

In addition, the Rhode Island Supreme Court has held the right to jury trial requires a twelve person jury, thereby rejecting the Supreme Court's position in *Williams v. Florida*, 399 U.S. 78 (1970). *See In re Advisory Opinion to the Senate*, 108 R.I. 628, 278 A.2d 852 (1971).

Ohio Cases

In *State v. Gallagher*, 38 Ohio St.2d 291, 313 N.E.2d 396 (1974), the Supreme Court of Ohio held that an in-custody parolee was entitled to *Miranda* warnings before being questioned by his parole officer. The U.S. Supreme Court granted certiorari but then remanded the case to the Ohio Supreme Court because it was "unable to determine whether the Ohio Supreme Court rested its decision upon the Fifth and Fourteenth Amendments to the Constitution of the United States, or Art I, § 10, of the Ohio Constitution, or both." *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976). On remand, the Ohio Supreme Court reinstated its prior decision, stating that it was "independently constrained to the result we reached by the Ohio Constitution." *State v. Gallagher*, 46 Ohio St.2d

demonstrates that the Ohio Constitution is also a document of independent force.

CONCLUSION

As the above cases indicate, defense counsel should challenge police practices and court procedures on state as well as federal constitutional grounds. Justice Brennan has written:

> [S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977).

In Ohio this means asserting the guarantees found in the Ohio Bill of Rights in addition to the analogous federal provisions.

REFERENCES

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L. J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 Ky. L.J. 873 (1975); Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather Than Federal Law*, 15 Am. Crim. L. Rev. 339 (1978); Note, *Expanding Criminal Procedure Rights Under State Constitutions*, 33 Wash. & Lee L. Rev. 909 (1976).

RECENT DEVELOPMENTS

Double Jeopardy — Juvenile Courts

Rules of procedure in Maryland allowed the state to file exceptions with a juvenile court to a master's nondelinquency finding. The Supreme Court held such a procedure did not violate the double jeopardy clause because the entire process was but a single proceeding. It began with the master's hearing and culminated with final adjudication by the juvenile court judge. *Swisher v. Brady*, 98 S. Ct. 2699 (1978).

Double Jeopardy

Where an appellate court vacates judgment on the grounds that the government failed to rebut an affirmative defense, double jeopardy attaches. A second trial is precluded and the only proper remedy is acquittal. This is true even though the defendant sought a second trial as a remedy; such an action does not waive his right to an acquittal. *Burks v. U.S.*, 98 S. Ct. 2141 (1978).

Double Jeopardy

The federal rule that jeopardy attaches when a jury is empaneled and sworn is applicable to the states as an integral part of the Fifth and Fourteenth Amendments. Therefore a Montana statute providing that jeopardy does not attach until the first witness is sworn is unconstitutional as to jury trial cases. *Crist v. Bretz,* 98 S. Ct. 2156 (1978).

Plain View Doctrine

The warrantless seizure of auto body parts based upon a detective's suspicion that they were stolen was not valid under the plain view doctrine. The requirement that "the incriminating nature of the evidence [be] immediately apparent" was not met. The detective neither knew nor had probable cause to believe that the defendant possessed stolen property. *State v. Williams,* 23 Crim. L. Rep. 2405 (Ohio Sup. Ct. 1978).

Right to Confrontation

An Ohio trial court refused to allow the defense to cross-examine witnesses as to their out-of-court identifications of the defendant. The court had earlier suppressed the identifications as being unduly suggestive. The Sixth Circuit upheld the granting of habeas relief on confrontation grounds. The Sixth Amendment guarantees defendants the right to impeach in-court identification with previous out-of-court identification. *Flowers v. Ohio,* 564 F.2d 748 (6th Cir. 1977).

Waiver of Counsel During Interrogation

The Sixth Circuit held that a youth's age and confusion about his rights may militate against finding a voluntary waiver of counsel. The Court stated that the sixteen-year-old defendant should have been provided counsel when he said "maybe I should have an attorney." Instead, the police continued to question him until he confessed. The Court concluded that the confession was fatally tainted and that habeas relief should have been granted. *Maglio v. Jago,* 23 Crim. L. Rep. 2354 (6th Cir. 1978).

Search Incident to Arrest

Although the Court assumed there was probable cause to arrest the defendant, it found no grounds for a warrantless airport search of his luggage. The arresting officer took the defendant off the airplane and then had the luggage brought to where he was holding the defendant. The Court held there was no justification for a "search of locked baggage as incident to arrest when the only possibility of the defendant gaining access to the luggage" was through the agent's own acts. *U.S. v. Wright,* 23 Crim. L. Rep. 2385 (6th Cir. 1978).

Inspection of Informant Files

District Courts have the inherent power to hold in camera proceedings. Further, a District Judge may permit opposing counsel, under a pledge of secrecy, to assist him in examining the documents produced. Therefore, the trial court did not abuse its discretion in ordering the government to disclose informant files for inspection. *In re U.S., Socialist Workers Party v. Attorney General,* 565 F.2d 19 (2d Cir. 1977).

Right to Public Trial

Without notice or explanation, the trial judge barred the public from part of the defendant's trial. This deprivation of the constitutional right to a public trial is per se reversible. The public can be excluded from a trial only under the most exceptional circumstances, and then the court must show "strict and inescapable necessity" for such action. When a defendant makes a timely objection to the exclusion order, he need not show actual prejudice in order to win a reversal. *Kleinbart v. U.S.,* 23 Crim. L. Rep. 2326 (D.C. Ct. App. 1978).

Photographic Evidence

The trial court abused its discretion by admitting into evidence in a manslaughter prosecution 11 photographs of the victim which were taken 25 days after the accident. Because of significant deterioration of the victim's appearance during that period and because medical procedures had been performed on the body, the photos were not representative of the condition of the victim on the day of the accident. Futhermore, defendant had offered to stipulate to the nature and location of the injuries, the cause of death, and the identity of the victim. The only issue was whether the defendant had pushed or attempted to restrain the victim. *State v. Powers.* 571 P.2d 1016 (Ariz. Sup. Ct. 1978).

Specific Performance of Plea Bargain

Defendant was indicted for delivery of marijuana. A plea bargain was made whereby the defendant agreed to plead guilty and undergo a sixty day evaluation and diagnostic study. The state agreed to recommend probation if defendant did not receive an unfavorable diagnostic report. After receiving the report, which was neither favorable nor unfavorable, the state opposed probation. Defendant's motion to withdraw his guilty plea in light of the prosecutor's decision was granted. However, the W. Va. Supreme Court held that withdrawal of the guilty plea was a coerced act caused by the state's breach of the plea bargain and defendant was entitled to reinstatement of the guilty plea and specific performance of the agreement. *Brooks v. Narick,* 23 Crim. L. Rep. 2191 (W. Va. S. Ct. App. 1978).

Pre-Arrest Delay

Police had verbally accused the defendant of felony — murder two weeks after it was committed, but did not formally charge him until he was paroled from another homicide conviction (almost four years later). The prosecution was ordered to establish good cause for such a protracted delay. The state was required to have more justification for the delay than that the police waited for the defendant to return from prison before arresting him. The Court held that "the defendant's incarceration is no excuse for putting off the prosecution, even though there is always the possibility that the delay may fortuitously yield additional evidence." *People v. Singer,* 23 Crim. L. Rep. 2104 (N.Y. Ct. App. 1978).

Clinical Psychologist as Insanity Expert

Prejudicial error occurred when a clinical

formed on the defendant, but was not allowed to express his opinion as to the defendant's mental condition. Once a proper foundation is laid, a clinical psychologist is competent to state his opinion as to an accused's mental state. *Burgess v. Commonwealth,* 564 S.W.2d 532 (Ky. 1978).

Search and Seizure — "Dropsy" Evidence

The arresting officer's testimony that the defendant threw away a bag of narcotics as the officer approached was held incredible as a matter of law. Because the state failed to submit credible evidence in the first instance to show that the police conduct was legal, defendant's motion to suppress was granted. *People v. Quinones,* 402 N.Y.S.2d 196 (N.Y App. 1978).

Conflict of Interest

An attorney was disqualified from representing a defendant due to a conflict of interest that arose when a former client was to testify as an important prosecution witness. The trial court stated that the attorney would be unable to effectively cross-examine his former client without intruding into matters protected by the attorney-client privilege. The former client had been indicted with the same charge as the defendant but had previously pled guilty. The Appeals Court affirmed the disqualification and held that when a trial court finds a serious conflict of interest, the court may order the attorney to withdraw notwithstanding a defendant's request to retain the particular attorney. *U.S. v. Dolan,* 570 F.2d 1177 (3d Cir. 1978).

Right to Confrontation

The trial court refused to allow defense counsel to question a key prosecution witness about a possible deal between the prosecution and the witness. On appeal, the Court held that the prosecution's failure to disclose information about a possible deal and the "reasonable likelihood" that the false testimony affected the determination of the defendant's guilt required the granting of a new trial. Refusing to allow cross-examination of the witness on these matters violated the defendant's right to confrontation as guaranteed by the Sixth and Fourteenth Amendments. *State v. Williams,* 23 Crim. L. Rep. 2405 (Ky. Sup. Ct. 1978).

Warrantless Entry for Arrest

Absent exigent circumstances, police cannot enter a person's dwelling to make an arrest without a warrant. The rule requiring a warrant to enter a dwelling for search and seizure also applies to an entry for the purpose of making an arrest. *Laasch v. State,* 23 Crim. L. Rep. 2404 (Wis. Sup. Ct. 1978).

Fruit of the Poisonous Tree

The complaining witness identified the defendant through photographs taken after the defendant's illegal arrest. The defense argued that the testimony of the complaining witness should have been suppressed as "fruit of the poisonous tree." The State countered with three arguments. The Court rejected the prosecution's "independent source" argument because that doctrine "is limited to an identification that has been acquired wholly apart from the illegal seizure." The Court also rejected the government's argument that the identification was "inevitable" because it would have been obtained through routine investigation. Such a decision, the Court concluded, would not only undermine the purpose of the exclusionary rule, but would also invite widespread abuse by law enforcement agencies. Finally, the Court found nothing in the case to support an attenuation exception. "The government cannot untaint identifications by conducting its own intervening events which themselves are flavored with the very same source of impropriety." *Crews v. U.S.,* 23 Crim. L. Rep. 2381 (D.C. Cir. 1978).

Removal of Court-Appointed Attorney

A trial judge may not remove a court-appointed attorney from a case over his objection and that of his client when no justifiable basis for the removal exists. Such a removal necessitates reversal of defendant's conviction. The Sixth Amendment entitles an accused to the assistance of chosen counsel, whether selected by himself or by the court. Removal of the attorney not only encroaches on the defendant's right to counsel, but also threatens the "independence of the bar which represents indigent defendants" by chilling "professional performance in defense advocacy." *Harling v. U.S.,* 23 Crim. L. Rep. 2327 (D.C. Cir. 1978).

Civil Rights Immunity for Public Defender

A public defender is entitled to the same absolute immunity from 42 U.S.C. § 1983 actions as a state prosecutor. Since public defenders act under color of state law, state action is present. However, policy considerations involving the nature of the public defender-defendant relationship weigh overwhelmingly in favor of immunity. *Robinson v. Bergstrom,* 23 Crim. L. Rep. 2325 (7th Cir. 1978).

Auto Stop

Police officers were justified in approaching a vehicle parked in an isolated area to investigate. After the driver made suspicious statements, the policemen were further justified in ordering the occupants out of the car. However, once the occupants were standing outside the car, the police were not justified in searching the vehicle for weapons. Any weapons hidden inside were beyond the suspects' reach and posed no danger to the officers. Therefore, the marijuana found inside the car during the search was improperly seized. *Canal Zone v. Bender,* 23 Crim. L. Rep. 2359 (5th Cir. 1978).