1978

Polygraph Evidence

Paul C. Giannelli

PUBLIC DEFENDER REPORTER

Vol. 1, No. 1 March, 1978

POLYGRAPH EVIDENCE

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

In *State v. Sims,* 52 Ohio Misc. 31 (C.P. Cuyahoga Cty. 1977), Judge Hitchcock, in granting a petition for post-conviction relief, held that a criminal defendant had a right to have polygraph evidence admitted under certain circumstances. The *Sims* court rested its decision on two grounds: First, the court found the polygraph had attained a sufficient measure of reliability to warrant the introduction into evidence of the results of an examination conducted by a competent examiner. Second, the court held that the defendant had a constitutional right to have polygraph evidence amittted in his behalf. This article examines the constitutional and evidentiary issues surrounding the admissibility of polygraph evidence.

Admissibility of Scientific Evidence

Ohio has adopted the majority view with respect to the admissibility of scientific evidence. Before such evidence may be admitted, the proponent must establish that the forensic technique has "gained general acceptance in the particular field in which it belongs." This "general acceptance" test is derived from *Frye v. United States,* 54 U.S. App. D.C. 46, 293 F. 1013 (1923), the first reported case on the polygraph. The *Frye* court stated:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 1014. The court went on to hold that the polygraph had "not yet gained such standing and scientific recognition among physiological and psychological authorities . . ." to warrant admission into evidence. *Id. See generally* C. McCORMICK, EVIDENCE § 203 (2d ed. 1972).

The "general acceptance" test has been used in Ohio as the standard for determining the admissibility of a variety of scientific techniques. *State v. Olderman,* 44 Ohio App. 2d 130, 336 N.E.2d 442 (Cuyahoga Cty. 1975) (voiceprints); *State v. Holt,* 17 Ohio St.2d 81, 85, 246 N.E.2d 365,367, (1969) ("Neutron Activation Analysis has not yet reached the point of generally proven reliability . . . .") The "general acceptance" test has also been employed in a number of polygraph cases. *State v. Towns,* 35 Ohio App.2d 237, 64 Ohio Ops.2d 371, 301 N.E.2d 700 (Franklin Cty. 1973) ("lie detector test has not yet attained scientific acceptance."); *State v. Hill,* 40 Ohio App.2d 16, 69 Ohio Ops.2d 9, 317 N.E.2d 233 (Montgomery Cty. 1963) (polygraph has not received "scientific recognition"); *State v. Smith,* 113 Ohio App. 461, 463, 18 Ohio Ops.2d 19, 178 N.E.2d 605 (Lucas Cty. 1960) ("lie detector has not yet attained scientific acceptance"); *Parker v. Friendt,* 99 Ohio App. 329, 338, 59 Ohio Ops. 112, 118 N.E.2d 216 (Cuyahoga Cty. 1954) (polygraph inadmissible because of lack of "general scientific recognition and public acceptance.")

The general prohibition of polygraph evidence also extends to references at trial concerning the fact that a witness has taken a polygraph examination and to a witness' willingness or refusal to take an examination. *State v. Hegel,* 9 Ohio App.2d 12, 38 Ohio Aps Ops.2d 25, 222 N.E.2d 666 (Montgomery Cty. 1964) ("Neither a professed willingness nor a refusal to submit to such a test should be admitted"); *State v. Smith,* 113 Ohio App. 461, 18 Ohio Ops.2d 19, 178 N.E.2d 605 (Lucas Cty. 1960). *See generally,* Annotation, Propriety and Prejudical Effect of Comment or Evidence as to Accused's Willingness to Take Lie Detector Test, 95 A.L.R.2d 818 (1964).

Admissibility by Stipulation

The total exclusion of polygraph evidence has come under attack in recent years. The most significant inroads have occurred in cases in which the parties have stipulated to the admission of the results of a polygraph examination. In *State v. Valdez,* 91 Ariz.

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

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.

274, 371 P.2d 894 (1962), the leading stipulation case, the Arizona Supreme Court found the polygraph had "developed to a state in which its results are probative enough to warrant admissibility upon stipulation." 371 P.2d at 900. The same result was reached in *State v. Stanislawski,* 62 Wis.2d 730, 216 N.W.2d 8 (1974), in which the Wisconsin Supreme Court held the polygraph had attained "such degree of standing and scientific recognition that unconditional rejection of expert testimony based on polygraph testing is no longer indicated." 216 N.W.2d at 13. *See generally,* Annotation, Admissibility of Lie Detector Test Taken Upon Stipulation that the Result be Admissible in Evidence, 53 A.L.R.3d 1005 (1973).

Ohio case law on this point is sparse. In *State v. Hill,* 40 Ohio App.2d 16, 69 Ohio Ops. 9, 317 N.E.2d 233 (Montgomery Cty. 1963), the court rejected the admissibility of polygraph evidence upon stipulation. In a later case, *State v. Towns,* 35 Ohio App.2d 237, 64 Ohio Ops.2d 371, 301 N.E.2d 700 (Franklin Cty. 1973), the court took the opposite position: "(W)here the parties stipulate in writing to take such tests and be bound, thereby, and where, pursuant to such stipulation, such test is properly given, the results of such tests are admissible at trial." 35 Ohio App.2d at 246. Dictum in *In re Collins,* 20 Ohio App.2d 319, 49 Ohio Ops.2d 448, 253 N.E.2d 824 (Cuyahoga Cty. 1969), supports the *Towns* decision. In *Collins* the court stated: "(L)ie detector tests are ordinarily inadmissible absent knowing agreement as to admitting the test by both sides." 20 Ohio App.2d at 322.

The Trend Toward Full Admissibility

Some courts have gone beyond the stipulation cases and admitted the results of polygraph examinations in the absence of a pretrial agreement. In *United States v. Ridling,* 350 F. Supp. 90 (E.D. Mich. 1972), for example, a federal district court found the theory of the polygraph "sound" and the results of an examination admissible under certain conditions. Similarly, in *People v. Cutter,* 12 Crim. L. Rep. 2133 (Cal. Super. Ct. 1972), the court admitted polygraph evidence during a suppression hearing after finding the "polygraph now enjoys general acceptance among authorities, including psychologists and researchers . . . as well as polygraph examiners." *Id.* at 2134. Other cases admitting polygraph evidence include: *State v. Watson,* 115 N.J. Super. 213, 278 A.2d 543 (Hudson Cty. 1971) (admissible for sentencing); *Walther v. O'Connell,* 72 N.Y. Misc.2d 316, 339 N.Y.S.2d 386 (Queens Civ. Ct. 1972); *Matter of Stenzel,* 71 Misc.2d 719, 336 N.Y.S.2d 839 (Niagara Fam. Ct. 1972).

In addition to the above cases, several appellate decisions have indicated that a trial court has discretion to admit or reject polygraph evidence. The leading case on this issue is *Commonwealth v. A Juvenile,* 313 N.E.2d 120 (Mass. 1974), in which the Supreme Judicial Court of Massachusetts held polygraph evidence admissible if: (1) the defendant agrees in advance to the admission of test results, irrespective of the outcome of the examination, and (2) the trial judge conducts a "close and searching inquiry into the qualifications of the examiner, the fitness of the defendant for such examination, and the methods utilized in conducting the tests." *Id.* at 124. *See also United States v. Infelice,* 506 F.2d 1358 (7th Cir. 1974), *cert. denied,* 419 U.S. 1107 (1975); *United States v. Penick,* 496 F.2d 1105 (7th Cir. 1974); *United States v. Chastain,* 435 F.2d 686 (7th Cir. 1970); *United States v. Marshall,* 526 F.2d 1349, 1360 (9th Cir. 1975); *United States v. Watts,* 502 F.2d 726 (9th Cir. 1974); *United States v. Alvarez,* 472 F.2d 111 (9th Cir.), *cert. denied,* 412 U.S. 907 (1973).

Prior to *Sims*, only one other reported Ohio case admitted polygraph evidence absent a stipulation between the parties. In *State v. Hancock,* 71 Ohio Ops.2d 458 (C.P. Hamilton Cty. 1974), the court admitted the results of a polygraph examination after concluding that the "time has come to recognize that the wholesale exclusion of lie detector tests results for want of scientific acceptance and proved reliability is not supported by the facts." *Id.* at 466.

Constitutional Arguments

Several constitutional grounds have been offered to support the admissibility of polygraph evidence. In *State v. Dorsey,* 87 N.M. 323, 532, P.2d 912 (Ct. App. 1975), *aff'd.* 88 N.M. 184, 539 P.2d 204 (1975), a New Mexico appellate court held the admission of polygraph evidence was required by the due process clause. The *Dorsey* opinion relies on *Chambers v. Mississippi,* 410 U.S. 284 (1973), in which a state's evidentiary rules - precluding a party from impeaching its own witness and excluding declarations against penal interests as a hearsay exception - operated to prevent the introduction of defense evidence. According to the United States Supreme Court, such a result violated due process. Under the *Chambers* rationale, a defendant has a right to present critical and reliable defense evidence. *Dorsey* merely applied *Chambers* to the polygraph.

To the extent *Sims* recognizes a constitutional right to present polygraph evidence, it follows *Dorsey.* The *Sims* court, however, relied on the confrontation rather than due process clause. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .". This right has been applied to the states through the due process clause of the fourteenth amendment. *Washington v. Texas,* 388 U.S. 14 (1967). In addition, Section 10, Article I of the Ohio Constitution reads: "In any trial, in any court, the party accused shall be allowed . . . to have compulsory process to procure the attendance of witnesses in his behalf . . ." Based upon these provisions, the *Sims* court held that a criminal defendant, at least in certain cases, "has a right to be examined by a competent, experienced polygraph operator whose reputation for truth and veracity is unblemished, and if the examiner is able to reach a conclusion which favors the defendant's view of the issues, to have compulsory process for his testimony as a witness." 52 Ohio Misc. at 42. Support for this position can be found in the Supreme Court's decision in *Washington* in which Chief Justice Warren wrote: "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in

plain terms the right to present a defense . . ." *Id.* at 19. Thus, once the results of polygraph examinations are found to be reliable, the accused has a constitutional right to "present a defense" in the form of a polygraph examiner.

A different constitutional argument was offered in *United States v. Hart,* 344 F. Supp. 522 (E.D.N.Y. 1971). In *Hart,* a federal district court ruled results of a polygraph examination of a *government* witness which indicated deception were admissible under the *Brady* doctrine. In *Brady v. Maryland,* 373 U.S. 83 (1963), the United States Supreme Court held the withholding of favorable and material defense evidence by the prosecution after it had been requested by the defense violated due process. The *Hart* court interpreted *Brady* as requiring the disclosure of "any evidence which may tend to exculpate the defendant." 344 F. Supp. at 523. Because the government initially thought the polygraph sufficiently reliable to conduct an examination of its witness, it had the burden, according to the court, of explaining why the test results should now be excluded. *Hart* was subsequently followed in *State v. Christopher,* 134 N.J. Super. 263, 339 A.2d 239 (1975), which held the government's administration of a polygraph test constituted an implied stipulation to admit the results.

Enforceability of Pretrial Agreement

In a few reported cases prosecutors have gone beyond stipulating to the admissibility of test results and have agreed to the dismissal of charges if the defendant successfully passes a polygraph examination. Notwithstanding such an agreement, some prosecutors have initiated proceedings even when the defendant passed the examination. Several appellate courts have held that the prosecutor is bound by such an agreement. In *State v. Davis,* 188 So.2d 24 (Fla. App. 1966), for example, the court found that the agreement was "(a) pledge of public faith - a promise made by state officials - and one that should not be lightly disregarded." *Id.* at 27. *Accord, People v. Reagan,* 395 Mich. 306, 235 N.W.2d 581 (1975); *Butler v. State,* 228 So.2d 421 (Fla. App. 1969). This position is supported by the United States Supreme Court's decision in *Santobello v. New York,* 404 U.S. 257 (1971), in which the Court reversed the defendant's conviction because the prosecution failed to keep its part of a negotiated plea agreement. *See generally,* Enforceability of Agreement by State Officials to Drop Prosecution if Accused Successfully Passes Polygraph Test, 36 A.L.R.3d 1280 (1971).

Self-Incrimination

The submission by an accused to a *state-sponsored* polygraph examination implicates the privilege against compulsory self-incrimination. The Supreme Court addressed the fifth amendment aspects of polygraph examinations in *Schmerber v. California,* 384 U.S. 757 (1966):

> Some tests seemingly directed to obtain physical evidence;' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

Id. at 764. Thus, counsel must advise the defendant concerning the waiver of the privilege if the test results are to be admitted at trial. Some courts have required *Miranda* warnings to ensure that the defendant's waiver is voluntarily, knowingly, and intelligently made. *United States v. Ridling,* 350 F. Supp. 90, 97 (E.D. Mich. 1972); *Commonwealth v. A Juvenile,* 313 N.E. 120, 127 (Mass. 1974).

References

A defense counsel who intends to use polygraph evidence, must be thoroughly familiar with the technique. Some of the better references on the subject include: J. REID & F. INBAU, TRUTH AND DECEPTION (1966); MOENSSENS, MOSES, AND INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES (1973) (Chapter 14); N. ANSLEY (Ed.), LEGAL ADMISSIBILITY OF THE POLYGRAPH (1975); TARLOW, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System,* 26 HASTINGS L.J. 917 (1975).

RECENT DEVELOPMENTS

Speedy Trial

Defendant does *not* have to object to setting the trial past speedy trial limits. The Supreme Court reiterates the mandatory nature of the speedy trial provisions (R.C. 2945.71) and holds that when a trial date is set beyond the 90-day limitation, the defendant, on motion, will be discharged. There is no requirement that the defendant object to the setting of the late date. This case, however, is to be contrasted with earlier cases where the date first set was within the proper time and was then continued. When the defendant did not object in those cases, the court ruled that discharge was not proper. *State v. Singer,* 50 Ohio St.2d 103, 362 N.E.2d 1216 (1977).

Burden of Proof - Insanity Defense

Under the provisions of R.C. 2901.05(c)(2), a plea of not guilty by reason of insanity is an affirmative defense. A defendant who pleads insanity only has the burden of going forward with sufficient evidence to raise that defense. He does not have the burden of establishing insanity by a preponderance of the evidence. When the defendant presents sufficient evidence to raise the defense, the state bears the burden of persuasion beyond a reasonable doubt upon every issue necessary to convict the defendant. Thus, the prosecution must prove defendant's sanity beyond a reasonable doubt. *State v. Humphries,* 51 Ohio St.2d 95 (1977).

Alibi Allowed Despite Lack of Notice

Trial court was reversed for failing to allow alibi evidence even though defendant failed to give notice under Crim. R. 12.1. Because defense counsel acted in good faith (by giving other notice), prosecution was not surprised, and alibi was vital to defense, the trial

court abused it discretion in not finding (as Crim. R. 12.1 directs), that "in the interest of justice such evidence should be admitted." *State v. Smith,* 50 Ohio St.2d 51, 362 N.E.2d 988 (1977).

Auto Search

Police officers were summoned to a parking lot with information that men inside a particular car were armed with shotguns. On arrival, the officers ordered the men out of the car at which time they were frisked. One of the officers noticed a "bulging" case in the car, opened it, and found a revolver. Defendant admitted ownership and was subsequently indicted for carrying a concealed weapon. Motion to suppress granted by trail court. State appealed and Court of Appeals affirmed. Frisking justified under *Terry* doctrine but as safety of officers was then secured, no further justification for search existed. *State v. Khail,* No. 36128, Cuyahoga Cty. Ct. App. (1977).

Same or Similar Offense Excluded

Principal ground of appeal in rape case was the erroneous admission of evidence of similar acts. The Court of Appeals agreed but declined to reverse on the harmless error grounds. The case offers an excellent review of the "same or similar offense" statute (R.C. 2945.59) and the cases interpreting it. *State v. Williams,* No. 35847, Cuyahoga Cty. Ct. App. (1977).

Speedy Trial

This case contains a lengthy discussion of speedy trial, both from a statutory and a constitutional point of view. The most interesting part deals with time computation in situations where there is a nolle prosequi or dismissal (through prosecutor's fault) of the indictment followed by reindictment. In such circumstances, the time awaiting trial under the first indictment is to be added to the time awaiting trial under the second indictment. The time between the first dismissal and the reindictment is not to be counted if the defendant, during that interval, is released without bail as no charge is then pending. *State v. Stephens,* No. 35247, Cuyahoga Cty. Ct. App. (1977).

Defendant's Presence During Trial

Only the defendant, and not his counsel, can waive the defendant's right to be present at trial. Thus, defendant's conviction was reversed despite the fact that defendant's counsel and the prosecutor had stipulated that the trial could proceed in the defendant's absence, and despite the fact that the trial court later explained what had occurred and asked the defendant if he objected, which he did not. The Court found that the such acquiescence did not clearly indicate that the defendant waived his right to be present. *State v. Cunningham,* No. 36153, Cuyahoga Cty. Ct. App. (1977).

Sentencing and Cross Examination

The trial court informed defendant's counsel at the pretrial that although a presentence report would be considered if the defendant plead guilty, the defendant would do some time if he elected to go to trial. On appeal, the trial court's refusal to consider granting probation because of the defendant's failure to plea bargain was held to constitute an abuse of discretion. Also, the Court held that the defendant must be allowed the opportunity to negate elements of the offense charged even if the questions asked to elicit such information are leading and even if the State properly objected to them as such. *State v. Powell,* No. 36406, Cuyahoga Cty. Ct. App. (1977).

Sentencing Procedure - Probationer's Rights

Under the new Ohio Criminal Code, the sentence must be pronounced before a defendant can be placed on probation. Thus, instead of suspending the imposition of the sentence and placing the defendant on probation, the trial court should pronounce the sentence suspended and then place the defendant on probation. The court's failure in this case to provide written notice of the charges against the defendant, and its refusal to permit the defendant's mother to address the court violated due process guarantees specified in *Morrisey v. Brewer* as made applicable to probationers in *Gagnon v. Scarpelli.* Due process requires that the probationer be given written notice of the claimed violation and that he have the opportunity to be heard in person and to present witnesses. *State v. McKenzie,* No. 37749, Cuyahoga Cty. Ct. App. (1977).

Duress Defense in Prison Escape Recognized-Voir Dire

In a case of first impression for Ohio, the Court recognized that, under the proper facts, the defense of duress is available to a defendant charged with violating Ohio's escape statute. This defense, however, is limited by a requirement that the prisoner surrender himself to the authorities as soon as he has avoided the threatened harm. The Court also held that when a court itself conducts the voir dire examination in a criminal case pursuant to Crim. R. 24(A), it is error to refuse counsel the opportunity to supplement the examination by personal inquiry of the prospective jurors. *State v. Proctor,* 51 Ohio App.2d 151 (1977). *Ed. Note: See Generally* Annotation, Duress, Necessity, or Conditions of Confinement as Justification for Escape from Prison, 69 A.L.R.3d 678 (1976).

Federal Rules of Evidence in Ohio

The Court adopted the principles embodied in Federal Rules of Evidence 803(24) and 804(b)(5) which provide that hearsay evidence is admissible, notwithstanding the absence of a specific exception, if:

(1) the statement has circumstantial guarantees of trustworthiness;

(2) the statement is offered as evidence of a material fact;

(3) the statement is more probative than other available evidence which could be produced through reasonable efforts (there must be a clear showing of the absence of other available evidence and a showing of the necessity of its admission);

(4) admissibility is clearly in the interst of justice; and

(5) the offering party notifies the adverse party of its intention to offer such evidence.

Erion v. Timken Co., 52 Ohio App.2d 123 (Franklin Cty. 1976). *Ed. Note: Timken* is one of the first Ohio cases to adopt a provision of the Federal Rules of Evidence. The residual hearsay exception applied in *Timken* permits the trial judge to admit hearsay statements, not falling within a recognized exception, on an ad hoc basis. Confrontation clause problems would generally preclude the prosecution from using this exception. The Proposed Ohio Rules of Evidence also contain this exception.

Ohio's Capital Punishment Statute

The Supreme Court heard oral arguments on the constitutionality of the Ohio death penalty statute in January. 22 Crim. L. Rep. 4130. The two cases before the Court are *Bell v. Ohio,* 48 Ohio St.2d 270, 358 N.E.2d 556 (1976) and *Locket v. Ohio,* 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976). The Ohio Supreme Court upheld the constitutionality of the statute in an earlier case, *State v. Bayless,* 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976). *See generally, State v. Bayless, Discretionary Defects May Still Remain in Ohio's Death Penalty Statutes, 4 Ohio Northern L. Rev. 701* (1977): *Gregg v. Georgia: Will the Ohio Death Penalty Survive?, 4 Ohio Northern L. Rev.* 441 (1977).

Right to Counsel at Lineups

A rape victim's one-on-one identification of an unindicted defendant at a preliminary hearing at which the defendant was not represented by counsel violated the defendant's right to counsel. The right to counsel under *Wade* and *Gilbert* had attached because the hearing took place after the initiation of adversary judicial criminal proceedings. *Moore v. Illinois,* 98 S. Ct. 458 (1977).

Double Jeopardy - Lesser Included Offense in Municipality

Where the same act or transaction contitutes a violation of two distinct statutory provisions, the test for determining whether there were two offenses or merely one for purposes of the double jeopardy clause of the Fifth Amendment is whether each provision requires proof of a fact which the other did not. In this case, defendant stole a car and was arrested after using it for 9 days. Defendant pleaded guilty to joyriding - the charge being based on the last day the car was used. Defendant was later charged with auto theft, a felony, based on the original taking of the car. Since joyriding is a lesser included offense of auto theft under Ohio law, the double jeopardy clause barred prosecution for auto theft. It was immaterial that the prosecution for auto theft was based on earlier events since no Ohio statute provides that joyriding is a separate offense for each day the car is operated without the owner's consent. *Brown v. Ohio,* ____ U.S. ____, 53 L. Ed.2d 187 (1977).

Defendant's Right to a Lineup

The trial court has authority to order an out-of-court lineup on defense motion when, in the exercise of its discretion, it deems such appropriate. Generally, such a lineup may be appropriate where the defendant, on timely motion, makes a showing that eyewitness identification is materially at issue and there exists in the particular case a reasonable likelihood of a mistaken identification which a lineup would tend to resolve. *Berryman v. U.S.,* 22 Crim. L. Rep. 2172 (D.C. Ct. App. 1977).

Bail-Equal Protection Challenge

Pretrial detainees brought an action challenging Florida's system of imposing bail on pretrial detainees. The Court held that (1) when challenged on equal protection grounds, Florida's system of imposing bail was subject to close judical scrutiny, (2) a state may not use bail to prevent the pretrial release of unreasonably dangerous persons, and (3) equal protection standards are not satisfied unless the judge is required to consider less financially onerous forms of release before he imposes money bail. This case also contains an extensive discussion of bail. *Pugh v. Rainwater,* 557 F.2d 1189 (5th Cir. 1977).

Right to Counsel at Lineup

A lineup does not end when the suspects file out of the room. Instead, such an identification procedure includes the witness' verbal or written assertion of whatever reaction he had to the viewing. Thus, the Court held that the 6th Amendment-based rule of *U.S. v. Wade,* which guarantees the right to counsel at a lineup occurring after an indictment or information has been returned, requires that counsel be allowed to attend the witness-response stage of the lineup as well as the viewing itself. *State v. McGhee,* 350 So.2d 370 (La. Sup. Ct. 1977). *Ed. Note: McGhee* follows the decision of the California Supreme Court in *People v. Willaims,* 3 Cal.3d 853, 478 P.2d 942 (1971).

Affidavit for Probable Cause

A negligent misstatement in a search warrant affidavit renders the affidavit invalid if it would not establish probable cause without the misstatement. The Court distinguished between "honest mistake" and negligent misstatements. Where the affidavit stated that inspection of suitcases had revealed marijuana when, in fact, the suitcases had not been opened, and the basis for detection was the odor coming from the suitcases, such was a negligent misstatement which did not establish probable cause. *U.S. v. Astroff,* 556 F.2d 1369 (5th Cir. 1977).

Delay of Arrest

There was an 11-month period between the date of the alleged offense and the date of the defendant's arrest. In determining whether this delay constituted a due process violation, the Court did not look solely to the time period. Several factors must be considered, including the reason the government offers to justify the delay. The key factor is prejudice to the accused. No matter how long the delay, it per se will

not justify dismissal unless the accused can demonstrate that he is prejudiced thereby. Prejudice is demonstrated where the defendant has no recollection of what he was doing or where he was at the time of the offense, so as to locate any witness. *State v. Griffin,* 347 So.2d 692 (Fla. App. 1977).

Discovery-Medical Records of Prosecution Witness

Since the mental condition of the prosecuting victim was at issue, the defendant was entitled to discover medical and hospital records of the witness when she was a patient at a state hospital. The interests of justice require the privilege between patient and psychiatrist be withheld. Various methods which a court could employ to provide such discovery are discussed. The Court also approved an in camera inspection of the requested documents to determine if they had any probative value to the defendant. *State v. Brown,* 552 S.W.2d 383 (Tenn. 1977).

Impeachment with Prior Convictions

After a lengthy discussion of impeachment with prior convictions, the Court ruled that evidence of a prior conviction is not admissible to impeach the credibility of a criminal defendant except in prosecutions for perjury and false swearing. However, use of prior convictions is proper where the defendant affirmatively introduces evidence of good character. *State v. McAboy,* 236, S.E.2d 431 (W. Va. 1977).

Handcuffed Defendant

It is error to take a juvenile before the juvenile court in handcuffs, even though no jury is involved, where there is no showing of threat of escape or that guards would not be sufficient. *In re Staley,* 364 N.E.2d 72 (Ill. 1977) *Ed. Note: See also Estelle v. Williams,* 425 U.S. 501 (1976), in which the Supreme Court held that compelling a defendant to wear prison garb during trial violated due process.

Miranda Warnings

The defendant made incriminatory statements following one-half hour of stationhouse interrogation during which time the detective talked to the defendant about people they knew, unrelated events, and the victim. *Miranda* warnings were then given. By that time, however, the detective had persuaded the defendant to talk. The Court held that such statements should have been suppressed at trial. *Miranda* warnings must precede any custodial interrogation designed to obtain incriminatory statements. Where the waiver of rights results from the clever softening up of the defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive must be deemed to be involuntary. *People v. Honeycutt,* 570 P.2d 1050 (Cal. Sup. Ct. 1977).

Miranda Warnings

After his arrest, the defendant was given two *Miranda* warnings and he heeded his attorney's advice not to talk to the police. While in custody, however, he made incriminating statements to a guard after the guard assured him that anything he said would not be used against him. Despite the fact that such statements were voluntary, possessed indicia of reliability, and were not the result of any intentional violation of constitutional standards, the Court held that adherence to the spirit of various Supreme Court decisions required that such statements be suppressed. *Commonwealth v. Dustin,* 22 Crim. L. Rep. (Mass. Sup. Jud. Ct. 1977).

Informers-Disclosure of Identity

An FBI agent was not permitted to testify at a sentencing hearing that two defendants belonged to a Mafia-like group without disclosing, upon demand by the defense, the identity of the informer who allegedly supplied such information. For the court to base a critical decision affecting liberty upon information from a person whom the government prevents the defendant from examining, would violate both the due process and confrontation clauses. *U.S. v. Fatico,* 22 Crim. L. Rep. 2286 (U.S.D.C. E.N.Y. 1977).

Declarations Against Penal Interest

Supreme Judicial Court of Massachusetts adopts the approach taken by Federal Rule of Evidence 804(b)(3) with regard to declarations against penal interest. Under the Federal Rules, a statement against penal interest is admissible provided corroborating circumstances clearly indicate its trustworthiness. *Commonwealth v. Carr,* 22 Crim. L. Rep. 2241 (Mass. Sup. Jud. Ct. 1977).