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CHARACTER EVIDENCE

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Of all the types of evidence with which a defense counsel must deal, character evidence may be the most difficult and dangerous — "difficult" because of the complexity of rules governing this area of law and "dangerous" because of the potential impact that evidence of bad character may have on the jury. This article examines the Ohio rules governing character evidence.

CIRCUMSTANTIAL USE

Evidence of a person's character is used *circumstantially* in most criminal cases. For example, a person's character for honesty would be circumstantially relevant if that person were charged with theft. The argument would be as follows: A person with an honest character tends to act in conformity with that character and thus is less likely to steal than a person with a bad character for honesty. Of course, the argument cuts both ways. A person with a bad character for honesty tends to act in conformity with that character and thus is more likely to steal than a person with an honest character. The circumstantial use of character is sometimes known as "propensity" or "disposition" evidence.

While character evidence has some probative value, the courts have generally excluded this type of evidence because "it comes with too much dangerous baggage of prejudice, distraction from the issues, time consumption, and hazard of surprise." C. McCormick, Evidence 445 (2d ed. 1972). *See* State v. Lytle, 48 Ohio St.2d 391, 402, 358 N.E.2d 623, 630 (1976) ("Although character is not irrelevant, the danger of prejudice outweighs the probative value of such evidence."). As one commentator has noted, the exclusion of character evidence "implements the philosophy that a defendant should not be convicted because he is an unsavory person, nor because of past misdeeds, but only because of his guilt of the particular crime charged." 2 D. Louisell & C. Mueller, Federal Evidence 79 (1978).

The most important application of this principle in criminal trials is the rule prohibiting the prosecution from introducing evidence of the defendant's bad character in its case in chief. It has long been the rule in Ohio that in "a criminal prosecution, until a defendant offers evidence of his general good character or reputation, the state may not offer testimony of his bad character or bad reputation . . ." State v. Cochrane, 151 Ohio St. 128, 84 N.E.2d 742 (1949)(syllabus 3); *accord*, State v. Lytle, 48 Ohio St.2d 391, 402, 358 N.E.2d 623, 630 (1976); State v. Markowitz, 138 Ohio St. 106, 33 N.E.2d 1 (1941); Sabo v. State, 119 Ohio St. 231, 163 N.E. 28 (1928); Hamilton v. State, 34 Ohio St. 82 (1877); Griffin v. State, 14 Ohio St. 55 (1862); State v. Pigott, 1 Ohio App.2d 22, 197 N.E.2d 911 (1964). It is also error for the prosecution to comment on the defendant's failure to introduce evidence of good character. State v. Markowitz, 138 Ohio St. 106, 33 N.E.2d 1 (1941).

The prohibition against the use of character evidence, however, is not absolute. There are three important exceptions:

(1) A defendant may introduce evidence of his good character, and if he does, the prosecution may introduce rebuttal evidence of bad character.

(2) A defendant may introduce evidence of the victim's character under some circumstances.

(3) Either side may introduce evidence of a witness' character for truth and veracity in order to impeach that witness.

In addition, acts which may incidentally evidence bad character may be offered for other purposes — for example, to show motive, identity, lack of knowledge or accident. Before discussing these issues in detail, it is important to consider how character may be proved.

METHODS OF PROOF

A person's character could be proved by evidence of reputation, opinion, or specific acts.

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Reputation

Reputation evidence is the most common method of establishing character. Typically, a witness familiar with the defendant's reputation concerning a particular character trait testifies about that reputation. Reputation therefore is not synonymous with character; it is only one method of proving character. "There is no doubt that counsel and even courts have sometimes forgetfully treated character and reputation as synonymous . . . Character of a person is that which he really is, rather than what he is reputed to be . . ." State v. Dickerson, 77 Ohio St. 34, 53, 82 N.E. 969 (1907). The Ohio cases permit the use of reputation evidence to prove character. *E.g.*, State v. Elliott, 25 Ohio St.2d 249, 267 N.E.2d 806 (1971), *vacated on other grounds*, 408 U.S. 939 (1972); State v. Cochrane, 151 Ohio St. 128, 84 N.E.2d 742 (1949). *See also* Ohio Jury Instructions – Criminal 411.05 (Provisional 1974).

The offering party, however, must lay a proper foundation establishing the witness' qualifications to testify about a person's reputation in the community: "The preliminary qualifications of the [character] witness must be such as to advise the court and the jury that he has the means of knowing such general reputation of the [person] in the community . . ." Radke v. State, 107 Ohio St. 399, 140 N.E. 586 (1923) (syllabus 1). In addition, the "community" may not be too "remote" – in a place "where he has never lived, and where he is not shown to be generally known or acquainted . . ." Griffin v. State, 14 Ohio St. 55 (1862) (syllabus 5).

Opinion Evidence

Character could be proved also by opinion evidence. For example, a witness who is sufficiently acquainted with the defendant could give his opinion of the defendant's character. The courts, however, have generally excluded opinion evidence. *See* C. McCormick, Evidence 443 (2d ed. 1972).

The Ohio cases are not clear on this issue. When used for *impeachment*, character may only be proved by reputation, not opinion, evidence. Cowan v. Kinney, 33 Ohio St. 422 (1878); Bucklin v. State, 20 Ohio 18 (1851). When used on the *merits* to show the defendant's character, however, the same rule has not been applied consistently. In an early case, Gandolfo v. State, 11 Ohio St. 114 (1860), the Ohio Supreme Court authorized the use of opinion evidence:

> A defendant who . . . is entitled to give evidence of his character for peace and quietness, is not limited to proving what people may have said of him . . . but is entitled to inquire as to his character from those acquainted with him, and they are authorized to speak from his general peaceable and quiet conduct . . . *Id.* at 114 (syllabus 3).

Gandolfo was subsequently followed in State. v. Dickerson, 77 Ohio St. 34, 82 N.E. 969 (1907), in which the Court stated:

> [W]e think the accused is *not confined to his reputation* for a certain trait of character involved in the charge, but may, by those most intimate with him during a course of years, spread before the jury his real self, touching the quality of conduct involved in the issue. Such familiar and intimate acquaintance may enable his neighbors to read him as they would a familiar book. *Id.* at 53-54, 82 N.E. at 971 (emphasis added).

See also Sabo v. State, 119 Ohio St. 231, 239-40, 163 N.E. 28, 31 (1928); State v. Roberts, 71 Ohio Abs. 443, 448 (Ct. App. 1955); Gibbs v. State, 7 Ohio Abs. 374, 375 (Ct. App. 1929).

Although neither *Gandolfo* nor *Dickerson* have ever been overruled, later cases apparently assumed only reputation evidence is permitted. In fact, the Comment to the Ohio Jury Instruction on character states: "Evidence of character must be confined to general reputation." Ohio Jury Instructions – Criminal 411.05 (Provisional 1974). The case cited for that proposition, however, specifically rejects proof by specific acts but not opinion evidence. *See* State v. Elliott, 25 Ohio St.2d 249, 253, 267 N.E.2d 806, 809 (1971), *vacated on other grounds*, 408 U.S. 939 (1972).

Proposed Ohio Rule of Evidence 405(A), 51 Ohio B. 186 (1978), would permit the use of opinion evidence. This follows Federal Rule 405(a) and is supported by the commentators. *See* C. McCormick, Evidence 455-56 (2d ed. 1972); 7 J. Wigmore, Evidence § 1986 (Chadbourn rev. 1978).

Evidence of Specific Acts

A third way of proving character would be by introducing evidence of specific acts. For example, evidence that a person stole money on a previous occasion would be relevant in ascertaining that person's character for honesty. Although evidence of specific acts may be the strongest evidence of character, the courts have generally excluded this method of proof. *See* State v. Cochrane, 151 Ohio St. 128, 134, 84 N.E.2d 742, 745 (1949); Hamilton v. State, 34 Ohio St. 82, 86 (1877); Griffin v. State, 14 Ohio St. 55, 63 (1862). The rationale for this prohibition was commented upon in State v. Elliott, 25 Ohio St.2d 249, 267 N.E.2d 806 (1971), *vacated on other grounds*, 408 U.S. 939 (1972): "The admission of such evidence would raise collateral issues and divert the minds of the jurors from the matter at hand. It is manifestly unfair to compel a party to defend specific acts alleged as proof of bad reputation or character . . ." *Id.* at 253, 267 N.E.2d at 809 (1971). There is, however, an important exception in Ohio. R.C. 2945.56 permits the prosecution to rebut evidence of good character by introducing evidence of a defendant's "previous conviction of a crime involving moral turpitude . . ."

EXCEPTION FOR DEFENDANT'S CHARACTER

The first exception to the general prohibition against the use of character evidence is that the defendant may introduce evidence of his own good character. Typically, the defendant presents such evidence by calling witnesses to testify as to his reputation in the community. In some cases the impact of character evidence may be critical. As the U.S. Supreme Court has commented: "The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone

create a reasonable doubt, although without it the other evidence would be convincing." Edgington v. U.S., 164 U.S. 361, 366 (1896). *Accord*, Michelson v. U.S., 335 U.S. 469, 476 (1948) ("[S]uch testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt . . .").

Relevant Character Trait

The character trait proffered must be relevant to the offense charged. For example, in Booker v. State, 33 Ohio App. 338, 169 N.E. 588 (1929), a defendant charged with unlawful possession of intoxicating liquor was precluded from introducing character evidence because it was not relevant. The court stated:

> In showing his character, however, [the defendant] is confined to that trait of character that is inconsistent with guilt of the offense charged in the indictment. The accused in this case attempted to qualify a witness to testify to the general reputation of the accused for truth and veracity. . . . Such a reputation might properly be shown in a case of perjury, but it is not a trait involved in unlawful possession of liquor. He then attempted to qualify a witness as to the 'general reputation . . . for being a peaceable, quiet, law-abiding citizen.' Objection was made . . . . The court sustained this objection, observing that the crime charged was not one of violence, and in this the court was right, for it is of course true that bootlegging may be both peaceable and quiet. *Id.* at 341-42, 169 N.E. at 590.

The Ohio Supreme Court has also recognized this point.

> The general character which is the proper subject of inquiry should also have reference to the nature of the charge against the defendant. Thus, in the present case, the defendant being charged with a crime necessarily importing dishonesty, called witnesses who gave evidence tending to show a general good character for honesty. Griffin v. State, 14 Ohio 55, 63 (1862).

See also Sabo v. State, 119 Ohio St. 231, 239, 163 N.E. 28, 31 (1928) ("In a murder case, such reputation must relate to his being a peaceable, law-abiding citizen"). Both *Sabo* and *Booker* authorize the use of the general character trait of being a "law-abiding" citizen.

Number of Witnesses

Although R.C. 2945.57 places some conditions on the number of character witnesses that may be called, a trial court may not unreasonably limit the number of character witnesses that a defendant may offer. State v. Carter, 75 Ohio App. 545, 58 N.E.2d 794 (1944) (error to exclude 3 character witnesses after 5 character witnesses had already testified).

Prosecutorial Response

By introducing evidence of his own character, the defendant, in the words of Justice Jackson, may "open[] a veritable Pandora's box . . ." Michelson v. U.S., 335 U.S. 469, 480 (1948). This is because once character is introduced, the prosecutor can respond in two ways. First, the prosecutor may cross-examine the character witnesses about prior incidents in the defendant's past. Second, the prosecution may offer evidence of the defendant's bad character in rebuttal. Thus, what the prosecution is forbidden to do in its case in chief, it may do in rebuttal.

Cross-Examination. The prosecution is permitted to test the witness' qualifications to testify about the defendant's character. For example, in State v. Elliott, 25 Ohio St.2d 249, 267 N.E.2d 806 (1971), *vacated on other grounds*, 408 U.S. 939 (1972), the prosecution asked defense character witnesses whether they had heard about a felonious assault committed by the defendant on a ten-year-old girl. In upholding this type of cross-examination, the Court stated:

> A character witness may be cross-examined as to the existence of reports of particular acts, vices, or associations of the person concerning whom he has testified which are inconsistent with the reputation attributed to him by the witness — not to establish the truth of the facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given his testimony. Such inconsistent testimony tends to show either that the witness is unfamiliar with the reputation concerning which he has testified, or that his standards of what constitutes good repute are unsound. *Id.* (syllabus 2)

The Court cited Michelson v. U.S., 335 U.S. 469 (1948), the leading case on this subject. Michelson was charged with bribing an IRS agent. The U.S. Supreme Court permitted the prosecutor to ask whether the defense character witnesses had "heard" about the defendant's 20-year-old conviction for a trademark violation and 27-year-old *arrest* for receiving stolen property. Although such questions are not supposed to be used as evidence of the defendant's bad character, that in all probability is how the jury will use the information, notwithstanding a limiting instruction. This possibility alone cautions against the use of character evidence unless defense counsel is positive his client in fact has an unimpeachable character.

The prosecution's ability to cross-examine in this manner is not without limitations. The possibility of abuse has been recognized by both commentators and courts. Wigmore wrote:

> This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith. 3A J. Wigmore, Evidence 921 (Chadbourn rev. 1970).

The *Michelson* Court also commented that this type of cross-examination placed a "heavy responsibility on trial courts to protect the practice from any misuse." 335 U.S. at 480. The Court went on to point out that the trial judge in that case

> took pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to the defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or

> asking a groundless question to waft an unwarranted innuendo into the jury box. *Id.* at 481.

Similarly, the Ohio Supreme Court in *Elliott* remarked: "If the defendant had never been convicted of a felonious assault, such question by the prosecutor, being made in bad faith, would be the predicate for error . . . ." 267 N.E.2d at 809. Thus, once the prosecution begins such an inquiry, defense counsel should request a side-bar conference and demand that the prosecution establish the basis for the question. *See also* C. McCormick, Evidence 458 (2d ed. 1972).

There are additional limitations on the prosecutor's cross-examination. Only acts which would affect the particular character trait offered by the defendant can properly be raised on cross-examination. For example, if the character witness testifies about the defendant's character for *honesty*, the witness cannot be cross-examined about *violent acts*. This is why evidence of general "law-abiding" character should be avoided; it gives the prosecutor greater latitude on cross-examination as well as on rebuttal. *See Michelson* at 483-84. In addition, acts which are too remote are not the proper subject of cross-examination. The 27-year-old arrest was admissible in *Michelson* only because "two of [the character] witnesses dated their acquaintance with the defendant as commencing thirty years before the trial." *Id.* at 484.

Rebuttal. Once the defendant introduces evidence of his character, the prosecution may call its own character witnesses in rebuttal. The testimony of the rebuttal character witnesses must relate to the character trait offered by the defense. With one exception, rebuttal is restricted to the use of reputation evidence. State v. Cochrane, 151 Ohio St. 128, 84 N.E.2d 742 (1949). The exception is found in R.C. 2945.56 which provides: "When the defendant offers evidence of his character or reputation, the prosecution may offer, in rebuttal thereof, proof of his previous conviction of a crime involving moral turpitude, in addition to other competent evidence."

EXCEPTION FOR CHARACTER OF THE VICTIM

A second exception to the general prohibition against the use of character evidence involves the victim's character. The victim's character has been admitted (1) on the issue of consent in rape cases and (2) on the issue of self-defense in homicide cases.

Rape Cases

Under the common law, a rape defendant could introduce evidence of the victim's character for chastity. *See* McDermott v. State, 13 Ohio St. 332 (1862); McCombs v. State, 8 Ohio St. 643 (1858). This rule rested on the assumption that a woman who had consented to premarital or extramarital intercourse was more likely to consent in the future than a woman who had not consented to such intercourse. In recent years this assumption, along with other aspects of rape prosecutions, has been severely criticized. Approximately half the states, including Ohio, have responded to this criticism by enacting "shield" laws which limit the admissibility of evidence of the victim's character. R.C. 2907.02(D) provides:

> Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section [rape] unless it involves . . . the victim's past sexual activity with the offender . . .

Ohio's gross sexual imposition statute contains an identical provision. *See* R.C. 2907.05(D).

The constitutionality of shield laws that preclude the defendant from introducing arguably exculpatory evidence has been questioned. Two U.S. Supreme Court cases — Davis v. Alaska, 415 U.S. 308 (1974), and Chambers v. Mississippi, 410 U.S. 284 (1973) — are usually cited in support of the defendant's right to introduce evidence of the victim's character in at least some circumstances. In *Davis* the Court held that a state statute excluding evidence of a juvenile conviction (a type of shield law) violated the defendant's Sixth Amendment right to confrontation under the circumstances of that case. In *Chambers* the Court held that the application of state evidentiary rules which precluded the defendant from introducing critical and reliable defense evidence violated due process. In addition, Congress recognized the force of the constitutional argument in recently enacting a federal shield law. Federal Rule of Evidence 412 explicitly recognizes that the admissibility of evidence of the victim's past sexual activity may be "constitutionally required." Fed. R. Evid. 412(b)(1). Citations to articles discussing the constitutionality of shield statutes are found in 22 C. Wright & K. Graham, Federal Practice and Procedure 424-27 (1978). The Ohio statute is discussed in Comment, *Ohio's New Rape Law: Does It Protect Complainant at the Expense of the Rights of the Accused?*, 9 Akron L. Rev. 337 (1975); Note, *Rape Reform Legislation: Is It the Solution?*, 24 Clev. St. L. Rev. 463 (1975).

Homicide

A homicide defendant may introduce evidence of the victim's violent character on the issue of self-defense. The relevance of violent character in this context is twofold. First, the defendant may wish to show that the victim was the first aggressor — a person with a violent character will tend to act in conformity with that character and thus is more likely to be the first aggressor than a person with a peaceable character. If this is the reason the evidence is offered, it does not matter whether the defendant was aware of the victim's character at the time of the killing. Once the defendant introduces evidence of the victim's character, the prosecution may offer rebuttal evidence. *See* C. McCormick, Evidence 461-62 (2d ed. 1972).

Second, the victim's violent character may also be relevant to show that the defendant reasonably believed he was in danger of death or grevious bodily injury. This does not involve the circumstantial use of character to show the *conduct of the victim*, but rather the *state of mind of the defendant*. In this case, however, the character of the victim must have been communicated to the defendant before the fatal encounter. Most of the Ohio cases involve this issue. *See* McGaw v. State, 123 Ohio St. 196, 174 N.E. 741

(1931); State v. Roderick, 77 Ohio St. 301, 82 N.E. 1082 (1907); Upthegrove v. State, 37 Ohio St. 662 (1882); Marts v. State, 26 Ohio St. 162 (1875).

EXCEPTION FOR CHARACTER OF A WITNESS

In addition to other methods, such as bias or prior inconsistent statements, a witness' character may be used to impeach. Only the witness' character for truth and veracity is relevant. This use of character may be used by either the prosecution or the defense and is permitted whenever a witness, including the accused, takes the stand. The Ohio cases permit the use of reputation but not opinion evidence for this purpose. *See* Cowan v. Kinney, 33 Ohio St. 422 (1878); Bucklin v. State, 20 Ohio 18 (1851). Specific acts if evidenced by a conviction may also be used to impeach. *See* R.C. 2945.42; State v. Murdock, 172 Ohio St. 221, 174 N.E.2d 543 (1961). Whether specific acts not resulting in a conviction may be used for impeachment is unclear. This topic is examined in Giannelli, *Credibility of Witnesses*, 1 Public Defender Reptr. (Dec. 1978).

THE SIMILAR ACTS STATUTE

As discussed above, the circumstantial use of character is prohibited unless one of the three recognized exceptions is applicable. If, however, an act which incidentally evidences character is offered for some purpose *other than to prove character*, the prohibition does not apply. For example, if a person steals a gun and later uses that gun to commit a murder, the theft may be relevant in the homicide prosecution to show the identity of the murderer. Thus, while the theft incidentally evidences character, it is not being offered for that purpose. *See* State v. Watson, 28 Ohio St.2d 15, 275 N.E.2d 153 (1971).

R.C. 2945.59, sometimes known as the "similar acts" or "other acts" statute, identifies many of the issues for which evidence of "other" acts may be admitted. It provides:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Although evidence of "other acts" may be relevant to show, for example, intent or motive, it is laden with the potential of undue prejudice because the jury may use the evidence for the impermissible purpose of determining character. This is true notwithstanding a limiting instruction. *See* Ohio Jury Instructions — Criminal 405.23 (Provisional 1974). Because of this danger, evidence of "other acts" must meet stringent standards to gain admissibility. It is admissible only if it is "*substantially* relevant for some purpose other than to show a probability that the individual committed the crime on trial because he is a man of criminal character." State v. Lytle, 48 Ohio St.2d 391, 402, 358 N.E.2d 623, 630 (1976). (emphasis added). In addition, the prosecution must offer "substantial proof" that the defendant committed the prior act. State v. Carter, 26 Ohio St.2d 79, 269 N.E.2d 115 (1971); Scott v. State, 107 Ohio St. 475, 141 N.E. 19 (1923).

Defense counsel should require that the prosecution establish, out of the presence of the jury, that evidence of other acts is relevant to a contested issue in the case being tried. In other words, such evidence is not admissible solely because the prosecution can identify one of the purposes mentioned in the statute; the prosecution must show that the identified purpose is material in that particular case. As one commentator has remarked: "Particularly to be deplored is what might be called the 'smorgasbord' approach to analysis of other crimes evidence in which the court simply serves up a long list of permissible uses without any attempt to show how any of them are applicable to the case at hand." 22 C. Wright & K. Graham, Federal Practice & Procedure 479 (1978).

Moreover, the Sixth Circuit's decision in Manning v. Rose, 507 F.2d 889 (6th Cir. 1974), indicates that an abuse of such a statute could run afoul of the due process clause. *Accord*, Cunha v. Brewer, 511 F.2d 894, 900-01 (8th Cir. 1975); Heads v. Beto, 468 F.2d 240 (5th Cir. 1972); U.S. v. Johnson, 462 F.2d 592 (3d Cir. 1972); Atwell v. Arkansas, 426 F. 2d 912 (8th Cir. 1970).

For an excellent discussion of other acts evidence, see 22 C. Wright & K. Graham, Federal Practice & Procedure 427-551 (1978). The Ohio statute is discussed in Herbert & Mount, *Ohio's "Similar Acts Statute": Its Uses and Abuses*, 9 Akron L. Rev. 301 (1975); Comment, *Evidence of Criminal History in Ohio Criminal Prosecutions*, 15 Wes. Res. L. Rev. 772 (1964); R. Markus, Trial Handbook for Ohio Lawyers §§ 330, 341 (1973).

REFERENCES

C. McCormick, Evidence §§ 186-94 (2d ed. 1972); 2 J. Weinstein & M. Berger, Weinstein's Evidence 404-1 to 405-41 (1977); 22 C. Wright & K. Graham, Federal Practice & Procedure, 325-640 (1978); 2 D. Louisell & C. Mueller, Federal Evidence 73-195 (1978); R. Markus, Handbook for Ohio Lawyers §§ 336-41 (1973); J. Hurd & B. Long, Ohio Trial Evidence ch. 11 (1957).

* *

RECENT DEVELOPMENTS

Standing

At defendants' trial for armed robbery, the prosecution offered into evidence a sawed-off rifle and shells which police had seized during a search of a car in which defendants were passengers. A motion to suppress the rifle and shells on grounds that the search violated the Fourth Amendment was denied by the trial court. The Supreme Court affirmed because the defendants lacked standing to raise Fourth Amendment objections. Since they did not own the car, the rifle, or the shells, the search did not violate their personal rights. Nor did they have any legitimate expectations of privacy in the searched areas of

the automobile, since they were merely passengers. In addition, the Court abandoned the "legitimately on premises" test of *Jones v. United States*, 362 U.S. 257 (1960), as the measure of Fourth Amendment rights in favor of the *Katz* test of a "legitimate expectation of privacy" in the invaded area. *Rakas v. Illinois*, 99 S. Ct. 421 (U.S. Sup. Ct. 1978).

Exclusion of Female Jurors

Petitioner contended that his right to trial by jury had been violated because of a Missouri law which granted women automatic exemption from jury service upon request. Based upon *Taylor v. Louisiana*, 419 U.S. 522 (1975), the U.S. Supreme Court held "that such systematic exclusion of women which results in jury venires averaging less than 15% female violates the Constitution's fair-cross-section requirement." The Court did go on to say, however, "[W] e recognize that a State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. An exemption appropriately tailored to this interest would, we think, survive a fair-cross-section challenge." *Duren v. Missouri*, 99 S. Ct. 664 (U.S. Sup. Ct. 1979).

Extradition

After the defendant was arrested in Michigan, Arizona charged him with theft, and an arrest warrant was issued in Arizona upon "reasonable cause" to believe he had committed the offense. The Governor of Arizona then issued a requisition for the defendant's extradition. The Governor of Michigan acted on the requisition and ordered the defendant's extradition. The defendant petitioned for a writ of habeus corpus, claiming that the extradition warrant was invalid in that it failed to comply with the Uniform Criminal Extradition Act. His petition was denied, but the Michigan Supreme Court granted review and found the extradition order insufficient because it failed to show probable cause. The U.S. Supreme Court held that under Art. IV, § 2 of the Constitution, "the courts of the asylum state are bound to accept the demanding state's judicial determination since the proceedings of the demanding state are clothed with the traditional presumption of regularity . . . When a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination . . . [W] e hold that once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state." *Michigan v. Doran*, 99 S. Ct. 530 (U.S. Sup. Ct. 1979).

Search and Seizure

Police officers stopped the defendant's car for a traffic violation. As the officers approached the car, the defendant-driver was observed pushing something under the front seat. One officer ordered the defendant out of the car, and positioned himself outside the vehicle so he could look under the seat. He saw a gun, seized it, and arrested the defendant for carrying a concealed weapon. At trial, the defendant moved to suppress the weapon. The motion was overruled and the defendant was convicted. The Ohio Supreme Court found the search properly limited to the purpose of protecting the officer. It upheld the trial court on the ground that "the search and seizure of the weapon was reasonable in its inception and scope [under *Terry* and *Chimel*], and therefore consistent with the protections guaranteed by the Fourth and Fourteenth Amendments." *State v. Smith*, 56 Ohio St.2d 405 (1978).

Speedy Trial

R.C. 2945.71(B)(2) provides that a person charged with a misdemeanor shall be brought to trial within 90 days of arrest. Reasonable continuances may be granted pursuant to R.C. 2945.72. Because the defendant's trial promised to be lengthy, the trial court *sua sponte* set a trial date 123 days beyond this mandatory time limitation. The Ohio Supreme Court found this time extension to be "facially unreasonable," and looked to whether the record reflected sufficient facts to support the continuance. The Court held that use of a standardized entry form indicating a crowded docket is insufficient to support the continuance. Also, the "fact that a comparatively large number of witnesses was expected to be called to testify at trial does not indicate such an exceptional circumstance as to justify the postponement . . ." Since the *sua sponte* continuance order was not "supported by sufficient detail" in the record, the defendant was discharged. *Elmwood Place v. Denike*, 56 Ohio St.2d 427 (1978).

Speedy Trial

Under the Ohio speedy trial statutes an accused must be brought to trial within 90 days if he is held in jail during that period. R.C. 2945.71. In this case trial was set for 91 days after the defendant's arrest. Such a decision is not within the discretion of the trial court. "When a trial date is set beyond the time limits of R.C. 2945.71 and the accused does not acquiesce in that date but merely fails to object to that date, the trial court's action does not constitute a continuance pursuant to R.C. 2945.72(H)." *State v. Cutcher*, 56 Ohio St.2d 383 (1978).

Speedy Trial

On appeal, the State argued that the defendant had waived his right to speedy trial when his counsel informed the trial court that the defense would be unable to proceed with the case until a later time. The trial court made no order or entry granting a continuance. The Ohio Supreme Court ruled that the burden is upon the prosecution and trial court either to see that the defendant is given a speedy trial, or to grant a continuance with facts demonstrating its reasonableness and necessity. *State v. Siler*, 57 Ohio St.2d 1 (1979).

Proof Necessary for Conviction Under Perjury Statute

Defendants were convicted of giving false testimony to a grand jury under R.C. 2921.11. The State's

evidence merely showed that the defendants had allegedly made statements, not under oath, which were in conflict with those made under oath. The Ohio Supreme Court ruled that such a showing was insufficient to convict for perjury under R.C. 2921.11. "We think it clear that proof of perjury can not be made merely by showing a necessary conflict with statements not made under oath." *State v. Goodin*, 56 Ohio St.2d 438 (1978).

Withdrawal of Counsel

When a defendant's appointed counsel files an application with an appellate court to withdraw under *Anders v. California*, 386 U.S. 738 (1967), the request must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* The Court will then make a full examination of the record to determine whether the case is wholly frivolous. If it is, the Court may grant counsel's request to withdraw and dismiss the appeal. In this case, the brief filed by the defendant's counsel failed to comply with the *Anders* requirement. Therefore, the request to withdraw was denied pending compliance with those obligations. *State v. Duncan*, 57 Ohio App.2d 93 (Cuyahoga Cty. 1978).

Defendant's Presence at *In Camera* Proceeding

At trial, the State sought to introduce testimony under R.C. 2945.59 to show other acts tending to demonstrate the appellant's identity or scheme, plan or system in committing the act in question. The defense moved to exclude and the trial court held an *in camera* proceeding to determine admissibility. Over objection the defendant was not allowed to attend. The Court of Appeals held that the defendant had a right to be present during an *in camera* hearing regarding "other acts" testimony. "We find it conceivable that in many situations a defendant's presence at such a hearing could result in his giving defense counsel information that could lead to the exclusion of such potentially damaging evidence from consideration by the triers of fact . . ." *State v. Howard*, 57 Ohio App.2d 1 (Hamilton Cty. 1978).

Sentencing

The trial court ordered the defendant, a minor, to pay a $500 fine and costs after she was found guilty of consuming intoxicating liquor. On appeal, this sentence was found to be contrary to R.C. 2929.22 in that the defendant, being indigent, could not pay the fine "within the time [30 days] allowed without undue hardship . . ." The Court also found that the trial judge acted improperly in basing the sentence on his belief that the defendant had lied on the stand. "To do so is in effect to punish [the defendant] for an offense for which he has been neither charged nor tried and to discourage a defendant from exercising his right to trial and to testify on his own behalf." *State v. Jeffers*, 57 Ohio App.2d 107 (Hamilton Cty. 1978).

Consecutive Sentences

Limitations on consecutive terms of imprisonment are set forth in R.C. 2929.41(E)(2), which provides that such terms "shall not exceed: . . . . 2) An aggregate minimum term of fifteen years, when the consecutive terms imposed are for felonies other than aggravated murder or murder . . ." In interpreting this provision, the Court of Appeals considered three points. First, this limitation is binding on *all* consecutive terms, not just those imposed at any one time or by any one judge. Second, the legislature has shown a presumption in favor of concurrent sentences in R.C. 2929.41(A). Third, R.C. 2901.04 provides that Code sections defining penalties "shall be strictly construed against the state, and liberally construed in favor of the accused." Thus, any ambiguity in the provision concerning limitations on consecutive terms must be resolved in the defendant's favor. The Court concluded that when a consecutive sentence is imposed by a different judge after a separate trial, he is limited by the aggregate number of 15 years. In this case the trial judge erred in sentencing the defendant to a term of 5 to 15 years consecutive to sentences of 7 to 25 years and 5 to 15 years imposed in an earlier trial. The judgment must be modified to comply with the 15 year aggregate minimum. *State v. Wilson*, 57 Ohio App.2d 11 (Hamilton Cty. 1978).

Preliminary Hearing for Indicted Defendants

The California Supreme Court has ruled that denial of a preliminary hearing deprived *indicted* defendants of equal protection under the California Constitution. "[A] defendant charged by indictment is seriously disadvantaged in contrast to a defendant charged by information . . . . Indeed, current indictment procedures create what can only be characterized as a prosecutor's Eden; he decides what evidence will be heard, how it is to be presented, and then advises the grand jury on its admissibility and legal significance. In sharp contrast are information procedures in which the defendant is entitled to an adversarial, judicial hearing that yields numerous protections, including a far more meaningful probable cause determination." *Hawkins v. Superior Court*, 24 Crim. L. Rep. 2197 (Cal. Sup. Ct. 1978).

Warrant Needed for In-Home Arrest

The defendant was arrested inside his home for murder by police acting without a warrant. He then made a statement admitting the murder which occurred three years earlier. The Pennsylvania Supreme Court held that "because of the Fourth Amendment and the substantial expectation of privacy in one's home, an arrest warrant is required to validly arrest someone in his home unless exigent circumstances exist to justify the warrantless intrusion." Given the three year time span, there was no need for swift apprehension. There were no exigent circumstances. Since the defendant's arrest was illegal, his confession must be suppressed. *Commonwealth v. Williams*, 24 Crim. L. Rep. 2241 (Pa. Sup. Ct. 1978).

"Farce and Mockery" Standard Rejected

The defendant petitioned for habeas corpus relief, claiming that he did not have effective assistance of counsel. His petition was dismissed by the District Court on the ground that the cited acts and omissions of the attorney were either not prejudicial, or did not

reduce the defendant's trial to a "farce and mockery of justice." On appeal, the Ninth Circuit rejected the "farce and mockery" standard, describing it as "outmoded." The Court held "that the Sixth Amendment requires that persons accused of crime be afforded reasonably competent and effective representation." This test reflects both a higher standard and greater objectivity than the prior one. Also, "the accused must establish that counsel's errors prejudiced the defense." Since no prejudice was evident, the denial of relief was affirmed. *Cooper v. Fitzharris*, 24 Crim. L. Rep. 2279 (9th Cir. 1978).

Conditional Guilty Pleas to Preserve Fourth Amendment Issues

In *U.S. v. Zudick*, 523 F.2d 848 (3d Cir. 1975), the Third Circuit approved the use of conditional guilty pleas "in appropriate circumstances." The trial court in the present case relied on that precedent in accepting the defendant's conditional guilty plea to mail fraud. The defendant was allowed to preserve his right to appeal the trial court's refusal to suppress evidence obtained in three searches and through electronic surveillance. In following *Zudick*, the Third Circuit pointed out that in cases where there are no questions of fact, there need not be a full trial simply to preserve a legal objection. *U.S. v. Moskow*, 24 Crim. L. Rep. 2277 (3d Cir. 1978).

Attorney's Use of a Fourth Amendment Claim Reviewable on Habeas

In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court ruled that when a person in state custody has had a fair hearing on his Fourth Amendment claim and lost, he cannot obtain federal habeas corpus relief based on that Fourth Amendment claim. The Fourth Circuit interpreted *Stone* in a recent case and said, "We do not read it to say that issuance of a writ of habeas corpus on sixth amendment grounds is barred if a defense attorney fails to object to the admission of evidence in clear violation of the fourth amendment." Thus, the Court allowed federal habeas relief where defendant alleged that he had been denied effective assistance of counsel under the Sixth Amendment. *Sallie v. North Carolina*, 24 Crim. L. Rep. 2281 (4th Cir. 1978).

Voice Identification Line-Up

The victim and other witnesses identified the defendant as a rapist both at a voice identification lineup and in court. The Appellate Court found that the identification procedure was tainted and "substantially likely to cause mis-identification." The Court relied on *Neil v. Biggers*, 409 U.S. 188 (1972), which provided five factors to be considered in determining the admissibility of an out-of-court identification where the procedure used created a substantial likelihood of misidentification. The court must look to the totality of the circumstances, including: "1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description; 4) the level of certainty demonstrated by the witness at the identification procedure; and 5) the length of time between the crime and the identification procedure." Under the circumstances in this case – the six and a half month time span between the rape and the line-up, the brevity of the victim's contact with the rapist, her inability to identify the defendant at the time of the rape despite her prior acquaintance with him, the suspicions she and the other witnesses had of the defendant, and the fact that she knew the defendant was charged with the rape – the Court found the line-up was improper. *Carter v. State*, 24 Crim. L. Rep. 2114 (Fla. Ct. App.2d Dist. 1978).

Stops-Lineups

The defendant was justifiably stopped by police under *Terry*. However, his detention for 20 minutes while the officers checked the area to see if any crimes had been committed could not be justified "as it was completely unrelated to the initial interference by the officers . . . . The scope of the police power to detain must be related to the justification for the stop at its inception – not to an after-found justification." During the illegal detention, the officers discovered that the defendant was wanted for armed robbery. They arrested him and found evidence linking him to the crime. He was then taken to the scene of the crime and identified by the victim. The Court held that since the police had a significant amount of information linking the defendant to the crime, he was more than a potential suspect. Therefore, there was no need for an at-the-scene identification. The defendant should have been taken to the police station and provided a line-up and counsel. A new trial was granted, and the suppression of evidence seized as a result of the illegal detention and evidence of the at-the-scene identification was ordered. *People v. Dixon*, 24 Crim. L. Rep. 2225 (Mich. Ct. App. 1978).

Fourth Amendment Rights of Probationers

Based on an anonymous phone tip that defendant was dealing in drugs, his probation officer conducted a search of his person and automobile. A small handgun was discovered which resulted in the revocation of his probation and conviction for possession of a dangerous weapon. The New York Court of Appeals reversed, ruling that probationers have Fourth Amendment rights. The Court did condition its ruling, however, by saying, "[o]f course the defendant's status as a parolee or probationer is relevant in determining the reasonableness of the search." *People v. Jackson*, 24 Crim. L. Rep. 2318 (N.Y. Ct. App 1978).