4. EVIDENCE; DEFENSES

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RIGHT TO APPEAL FAILURE TO GIVE NOTICE

Peguero v. United States, 119 S.Lt. ___, 1999 WL 100902, *97-9217* (1999).

Defendant pled guilty to federal drug charges and was sentenced to prison. The trial court failed to inform defendant at the sentencing hearing of his right to appeal the sentence. He alleged in a subsequent habeas corpus proceeding that this failure violated the express terms of Federal Rule of Criminal Procedure 32(a)(2). The District Court denied relief because defendant actually knew of his right to appeal when he was sentenced and the Third Circuit Court of Appeals affirmed (Ut2 F.3d -k30), taking the position that Rule *32(a)* (2) violations are subject to a harmless-error analysis and that, because defendant was aware of his right to appeal, the purpose of the rule had been satisfied.

A unanimous decision of the United States Supreme Court affirmed in an opinion written by Justice Kennedy. Defendant was not entitled to habeas corpus relief because he knew of his right to appeal and hence suffered no prejudice from the trial court's omission. Rule 32(a)(2) requires a district court to advise a defendant of his right to appeal his sentence, so it was undisputed that the trial court's failure to give the required information was error. The Court said, however, that a trial court's failure to give a defendant advice required by the Federal Rules of Criminal Procedure is a sufficient basis for habeas corpus relief only when the defendant is actually prejudiced by the error.

Since defendant knew he had a right to appeal, the fact that the trial court violated the Rule, standing alone, should not entitle him to habeas corpus relief.

Justice O'Connor filed a concurring opinion joined by Justices Stevens, Ginsburg and Breyer.

EXPERT WITNESS BLOOD LUMINOL TEST FRYE

State v.. Canaan, 964 P.2d 681 (Kan. 1998). State. It was held that the scientific technique upon which a luminol test for the presence of blood is based has been generally accepted as reliable in the scientific community, thus satisfying the test of *Frye v. United States,* 293 F.3d 1013 (D.C.Cir. 1923), for the admissibility of expert testimony based upon luminol testing. The court said evidence established a foundation for a witness's testimony as an expert on the use of a luminol test to detect the presence of blood where the witness was the chief chemist at a regional crime lab and had held this position for 20 years, he had a degree in biology and chemistry, and he had received training in luminol testing.

The mere fact that the luminol test also detected some other substances was irrelevant to its general acceptance in the scientific community as a presumptive blood test. That fact went to the weight, not the admissibility, of the evidence.

"The use of luminol is universally accepted as a presumptive test for blood. The State sought its admission as a presumptive test. The State satisfied the *Frye* test by proving the reliability of the underlying scientific theory upon which the luminol test is based. The scientific technique upon which the luminol test is based has been generally accepted as reliable, and Wilson had been trained to follow the procedures established to test the phenomenon and used those methods properly pursuant to the training.

"The fact that luminol also detects some other substances is irrelevant to its universal acceptance as a presumptive blood test. This fact goes to the weight, not the admissibility, of the evidence. In challenging the weight of this evidence, the defendant elicited testimony that informed the jury that luminol also reacts to other substances."

CONFLICT OF LAW - SNIFFING DOG

Commonwealth v. Sanchez, 716 A.2d 1221 (Pa. 1998).

In a rare conflict of law case the Supreme Court of Pennsylvania ruled that California law, rather than Pennsylvania law, applied to evaluate the legality of a California canine sniff of a package that was shipped by California residents to Pennsylvania. which sniff provided probable cause for a Pennsylvania search warrant. The court said California possessed the greater interest in the validity of the sniff, and Pennsylvania courts had no power to control the activities of a sister state or to punish conduct occurring within that sister state. It concluded that no Pennsylvania state interest would he advanced by analyzing the propriety of the dog sniff under Pennsylvania law.

The court outlined the interests involved resolving a conflict of law issue such as in this:

> The issue before this Court is a strict constitutional law question involving the fundamental right to be free from unreasonable search and seizures. Therefore, the issue is one that must he addressed under the principles of conflicts between substantive laws, which require this Court to evaluate which state has the most interest in the outcome.

Here, California possessed the greater interest in the validity of the canine sniff in question. The canine sniff took place in California and involved a package shipped by California residents. While this Commonwealth has an interest in protecting its citizens from police misconduct and searches that are not supported by probable cause, the courts of this Commonwealth have no power to control the activities of a sister state or to punish conduct occurring within that sister state. No Pennsylvania state interest would he advanced by analyzing the propriety of the canine sniff under Pennsylvania law because the canine sniff did not occur in Pennsylvania and no Pennsylvania state officer was involved in the canine sniff. The courts of California have determined that a canine sniff is not a search requiring probable cause or a warrant. We will not question that decision under the conflicting decisions of Pennsylvania because Pennsylvania has no interest in a canine sniff search conducted within California’s borders, even if the results are later used in the Pennsylvania Courts.”

The chief justice and a justice dissented.

DISCLOSURE OF CI INFORMATION AT TRIAL

State v. *Henderson,* 721 So.2d 85 (La.App. 1998).

The defendant was not entitled to disclosure of a confidential informer's identity in a case where defendant dealt solely with an undercover officer in completing a drug transaction underlying his prosecution and the informer never touched either the funds used to purchase drugs or the drugs themselves. This was true even though the informer made the introduction between the officer and defendant and was present during the transaction. The defendant made no showing as to how disclosure would affect his defense. The informer's involvement in the case was not sufficient participation in the drug transaction to warrant disclosure of his identity, even though he also asked the defendant in the presence of the undercover officer whether defendant had drugs for sale.

"In this case, the defendant dealt with the officer in making the drug deal. As in many of the cases cited above, the informant merely made the introduction and was present during the transaction. The confidential informant was not alone with the defendant at any time during the transaction nor did he handle the funds used to make the purchase or the cocaine. Merely making an introduction and inquiring, in the presence of an undercover officer, whether the defendant had drugs for sale, is not sufficient participation to warrant disclosure of the confidential informant's identity. . . . Further, the defendant made no showing as to his reason for seeking the identity of the informant or how that knowledge would affect his defense. Therefore, under the facts of this case, the defendant failed to carry his burden of showing exceptional circumstances warranting the disclosure of the identity of the informant. Accordingly. the trial court did not err in denying the defendant's request for disclosure of the name of the confidential informant."

DOUBLE JEOPARDY MISTRIAL MANIFEST NECESSITY

State v. Gould *74*i3 A.2d 300 (N.H. 1999).

There was no "manifest necessity" for a trial court's declaration of a mistrial without a defendant's consent based on his intemperate remark of "It's about time" as he approached the witness stand to testify. Therefore, the Double Jeopardy Clause barred a retrial. The court noted that the record was silent on the jury's reaction to the remark and contained no explanation from the trial court as to why or whether lesser sanctions would have been ineffective.

"At best, the record reflects a defendant intent on causing a mistrial hut does not contain evidence of manifest necessity' so essential to its declaration. We discern no circumstance on the face of the record supporting a mistrial and no record evidence of actual prejudice. Because the record is silent on the jury's reaction to the defendant's remark and contains no explanation from the trial court as to why or whether lesser sanctions would have been ineffective, we are left to speculate whether manifest necessity existed. We cannot let a mistrial stand where its justification is neither obvious nor supported by record evidence of actual, incurable prejudice.

DOUBLE JEOPARDY – SAME CONDUCT FOLLOWING CIVIL PENALTY

State v. Stewart. 598 N.W.2d 773 (N.D. 1999).

After a workers compensation bureau's administrative termination of defendant's benefits for filing a false claim, he entered a plea of guilty under the rule of *North Carolina v. Alford,* 400 U.S. 25 (1970) (guilty plea despite claim of innocence) to willfully making a false claim or making a false statement to the bureau. He appealed the failure to dismiss the criminal charge on double jeopardy grounds.

In denying the double jeopardy defense the court ruled the administrative remedy for making a false claim or false statement to the workers compensation bureau was a civil sanction and, therefore, defendant's subsequent criminal prosecution for willfully making a false claim did not violate the Double Jeopardy Clause. This was true, the court said, even though the administrative and criminal sanctions were both contained in the same statute.

"Stewart argues the administrative proceeding and the criminal prosecution arise under the same statute, conduct, and evidence, and the administrative adjudication bars the criminal action under *Blockburger v. United States,* 284 U.S. 299, *52* S.Ct. 180, 76 L.Ed. 306 (1932).

"Under N.D.C.C. § 65-05-33*,* the Legislature has clearly indicated its intent to authorize both an administrative sanction and a criminal penalty for making a false claim or false statements to the Bureau.

"We therefore consider whether the civil statutory scheme is so punitive in purpose or effect as to transform what is denominated as an administrative remedy into a criminal penalty. . . . [We are not persuaded there is evidence of the clearest proof necessary to override the legislative intent and transform the administrative remedy into a criminal penalty."

". . . We conclude the administrative proceeding for reimbursement of benefits paid because of false statements or a false claim and for forfeiture of additional benefits for that injury is a civil sanction. We therefore hold the double jeopardy clause of the federal constitution does not bar the criminal prosecution of Stewart."

DUI FAILURE TO PRESERVE VIDEOTAPE

State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999).

A videotape of a defendant's field sobriety tests conducted at a police station was material to the preparation of his defense to prosecution for DUI and might have led the jury to entertain a reasonable doubt as to his guilt by showing his appearance and condition. Therefore the state had a duty to preserve the videotape as potentially exculpatory evidence, under the due process clause of a state constitution.

However, the court said the state's breach of its duty to preserve the videotape as potentially exculpatory evidence did not hinder the full and complete exposition of defendant's theory that the effects of his medical condition made it appear as if he were intoxicated. Therefore, defendant received a fundamentally fair trial, considering that the state's inadvertently taping over the videotape was simple negligence, defendant brought forward medical testimony as to his medical condition, and he himself testified how his medical condition affected his balance and coordination. The arresting officer in the case testified that he smelled alcohol on defendant's breath and that defendant failed the on-scene sobriety tests.

ENTRAPMENT – POLICE LEAVE KEYS IN CAR

People v. Watson, 990 P.2d 1031 (Cal. 2000).

Police officers engaged in a sting operation in which they staged the arrest of a plainclothes police officer, and left the vehicle he had been driving unlocked with the keys in the ignition. This was purposely done to make it easier to steal the car.

The Supreme Court of California ruled that this did not constitute affirmative police conduct that would make the commission of a crime unusually attractive to a normally law-abiding person, and therefore it was not necessary to give an entrapment instruction in a prosecution for the subsequent theft of the vehicle.

"The sting operation is this case presents no evidence of entrapment, both because the police did not specifically intend it as a communication to defendant personally, and because it did not actually guarantee anything, hut merely conveyed the idea detection was unlikely. The police did nothing more than present to the general community a tempting opportunity to take the Monte Carlo. Some persons, obviously including defendant, might have found the temptation hard to resist. But a person who steals when given the opportunity is an opportunistic thief, not a normally law-abiding person. Specifically, normally law-abiding persons do not take a car not belonging to them merely because it is unlocked with the keys in the ignition and it appears they will not be caught. Defendant presented no evidence of any personal contact whatever between police and himself; certainly he could not show that the police cajoled him, gave him any enticement or guarantee, or even knew or cared who he was,".

Justice Mosk concurred in the judgment.

CONSENT TO ONE OFFICER GOOD FOR ANOTHER

State v. Kimberlin, 977 P.2d 276 (Kan. App. 1999).

It has been held that when two or more police officers are present at a home responding to a call from a resident of the home and there is evidence of violent behavior in the home, a consent given to one officer to enter the home necessarily, as a matter of law, provides consent for adequate backup officers to also enter the home for the safety of the first officer.

"Our concern in this case is officer safety. Melanie [resident] did not hesitate to call for police help in the early hours of the morning when defendant was committing acts of violence, and she did not hesitate to accept that help. In fact, she left the dwelling with the police officers, who took her to a safe haven where she would be protected from further violence. Despite the fact that she requested the presence of the police officers and despite the fact that she invited Officer Tilton into the house, we are asked to conclude that Officer Eubank [backup] had no right to be in the house. We believe that he did. Once Melanie invited Officer Tilton into the house, she also impliedly invited such backup officers as might he necessary to protect the safety of Officer Tilton.

"To accept defendant's reasoning means that an officer might be required to enter a dangerous situation alone and without backup. A person whose behavior set in motion the involvement of the police will not he permitted to deny entrance of backup officers after having invited one officer into the home."

SEARCH - PC FOR AUTOMOBILE – MAY SEARCH PURSE

Wyoming *v. Houghton,* 119 S.Ct. 1297, 1999 WL 181177, No. 98-184 (1999).

After making a routine traffic stop, a highway patrol officer noticed a hypodermic syringe in the driver's shirt pocket. The driver admitted using the syringe to take drugs. The officer then searched the passenger compartment for contraband, removing and searching what defendant, a passenger in the car, said was her purse. She was arrested for possession of drug paraphernalia found in her purse.

The Wyoming Supreme Court ruled that an officer with probable cause to search a vehicle may search all containers that might conceal the object of the search, except that if the officer knows or should know that a container belongs to a passenger who is not suspected of committing a crime, the passenger's container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection. The court found a Fourth Amendment violation and reversed the passenger's conviction (956 P.2d 363).

In a 6-3 decision and an opinion written by Justice Sea ha, the United States Supreme Court reversed the Supreme Court of Wyoming. It held that police officers with probable cause to search a car may inspect the belongings of passengers found in the car that are capable of concealing the object of the search. The Court said the balancing of the relative interests involved weighs decidedly in favor of searching a passenger's belongings. Passengers, no less that drivers, possess a reduced expectation of privacy with regard to the property they transport in cars.

Balancing the passenger's reduced privacy expectations, the Court said the governmental interest in effective law enforcement would be appreciably impaired without the ability to search the passenger's belongings, since an automobile's mobility creates the risk that evidence or contraband will be permanently lost while a warrant is obtained. It noted that a passenger may have an interest in concealing evidence of wrongdoing in a common enterprise with the driver, and a criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car.

It also thought that a rule protecting only a passenger's property would make less sense than a rule that a package may be searched, whether or not its owner is present as a passenger or otherwise. In either case, such a package might contain the object of the search.

Justice Breyer filed a concurring opinion and Justices Stevens, Souter and Ginsburg dissented. In his dissenting opinion Justice Stevens complained that under the Court's ruling the police could search a passenger's briefcase if" . . . there is probable cause to believe [a] taxi driver had a syringe somewhere in his vehicle."

GUILTY PLEA CONSEQUENCES POSSIBLE COMMITMENT AS SEX OFFENDER

People v. *Moore,* 81 Cal.Rptr.2d 658 (Cal.App.

This court took the position that a commitment that a defendant might suffer under a Sexual Violent Predator (SVP) Act following a plea of no contest to a charge of committing a lewd act on a child under the age of 14 was neither a "direct consequence" nor a "penal consequence" of his plea. Therefore the plea-taking court was not required to advise defendant of the possibility of such a commitment, and it was not an abuse of discretion for the trial court to refuse to allow defendant to withdraw his plea.

This result was not changed by the fact that by virtue of defendant's plea and admissions, he would necessarily be subject to a screening under the SVP Act before he would be released from custody.

"We will assume without deciding that Moore is correct, and that, by virtue of his plea and admissions, he will automatically be referred for an initial screening under the SVP Act before his release from prison. However, this screening would not necessarily lead to a finding that Moore was a sexually violent predator (hereafter SVP) under the SVP Act. Any such determination would require additional steps, and would depend on additional findings which would not be controlled by Moore's plea and admissions herein.

"SVP Act proceedings are more analogous to deportation than the commitment proceedings Moore cites because an SVP commitment, like deportation, depends on additional findings by a different tribunal after the defendant has been sentenced. A defendant must be advised of the possibility of deportation but that requirement is imposed by statute (Pen. Code, § 1016.5), rather than by the "judicially declared rule of criminal procedure" Moore invokes *(In re Carabes, supra,* Iii Cal.App.3d at p. 929, 193 Cal.Rptr. 65). If, as Moore maintains, defendants in his situation should be informed of the potential for such a commitment, the remedy is with the Legislature and not this Court."

GUILTY PLEA DIRECT VS. COLLATERAL CONSEQUENCES

State v. Carney*, 5*84 N.W.2d 907 (Iowa 1998).

Due process requires that a defendant be advised of the direct consequences of a guilty plea before he enters such a plea. However, a statutorily mandated *six-year* license revocation upon a third lifetime conviction of DUI did not have an effect on the range of a defendant's punishment, and thus. it was a collateral, not a direct, consequence of his plea of guilty. As such, due process did not require the court accepting the plea to inform defendant of the mandatory license revocation consequence.

HEARSAY EXCITED UTTERANCE 911 TAPES

State v. *Vontress.* 970 P.2d 4*2* (Kan. 1998). State. The statements to a police officer by an acquaintance of the defendant concerning defendant's whereabouts on the morning of a murder were not "hearsay" statements where they were not offered for their truth, hut to demonstrate inconsistencies in defendant's alibi statements and to explain why the officer interviewed defendant three times the day after the murder.

The court applied the rule that when an utterance previously made out of court is offered in evidence merely for the purpose of establishing what was then said and not for the purpose of establishing the truth of the statement, the statement is not "hearsay." If such a statement is relevant, it is admissible through the person who heard it.

"We agree that Vontress put his whereabouts on the morning of the murder in issue by introducing evidence of an alibi. The statements of Tara Dawson were not offered for the truth of the statements, but were offered to demonstrate the inconsistencies in Vontress' alibi statements and to explain why Detective Morris interviewed Vontress three times the day after the murder. The statements by Tara Dawson were not hearsay and would have been admissible lithe jury had been informed of the limited purpose and instructed how it was to weigh that testimony."

HEARSAY EXCITED UTTERANCE 911 TAPES

Commonwealth v. *Brown.* 705 N.F2d 631 (Mass.App. 1999).

An audio tape recording of five "911" telephone calls from neighbors describing their observations of a crime in which defendant broke through a window of an apartment and beat a victim was admissible under the excited utterance exception to the hearsay rule.

The court said that even if the admission of the recording were erroneous, it was harmless error in defendant's prosecution for home invasion, assault, and other crimes, where the evidence was merely cumulative in its effect and there was sufficient other evidence to convict.

HEARSAY OUT OF COURT STATEMENT OF CHILD SEXUAL ASSAULT VICTIM

State v Cardosi, 122 Ohio App.3d 70, 701 N.E.2d 44 (Ohio App. 1997, reported in 1998).

A four-year-old child's out-of-court statements to her parents, a police officer emergency room physician, and a state child welfare investigator, that defendant hurt her by putting his finger and penis into her vagina, were ruled admissible under a statutory child abuse exception to the hearsay rule in a prosecution for felonious sexual penetration, even though the statements were made in response to questions and not all of the child's statements indicated that defendant put his penis into her vagina. The court rejected the defendant's argument that the statements were inconsistent and should have been excluded for that reason.

First, we note that Leah initially brought this incident to her mother's attention without any prompting, when her mother asked why she was screaming. Moreover, we think it is understandable that a child of tender years would he reluctant to talk about such a puzzling and traumatizing incident except in a question-and-answer format. With respect to the trustworthiness and reliability of Leah's statements, we believe it is far more important that no one coached or prodded Leah concerning what had happened to her and less important that Leah had to be encouraged to talk about those events.

"Cardosi additionally argues that Leah's statements were 'inconsistent.' We disagree. Leah consistently indicated in her statements to her mother, her father, the emergency room physician, the police officer who talked to her at the hospital, and the Children's Services investigator that Cardosi had hurt her by inserting his finger into her vagina. On the second occasion when Leah spoke with the Children's Services investigator, Leah indicated that Cardosi had inserted both his finger and his penis into her vagina. Leah did not indicate that Cardosi had inserted his penis instead of his finger. We see no inconsistency in Leaks statements. Examining all of the circumstances surrounding Leah's statements, including those set forth in Evid. R. 807(A)(1), we agree with the trial court that those circumstances demonstrate that Leah was likely to be telling the truth when she made her statements.

PHOTOGRAPHS – SHOCKING NATURE ADMISSIBILITY

State v. Ard, 505 S.E.2d 328 (S.C. 1998).

The photographs of an unborn but viable fetus were properly admitted during the sentencing phase of a capital murder case, even though they were shocking. The court said that since the child was murdered before he was born, there was no other way to vividly present his uniqueness to the jury. The pictures assisted the jury in determining the victim's vulnerability and therefore were relevant in assessing the circumstances of the crime and the defendant's character.

Another feature of the photographs was that the fetus was dressed in clothes his mother intended for him to wear home from the hospital. The court said they were admissible because they revealed the mother's aspirations about the birth of her child and were relevant to the sentence for her murder, in addition to her child.

Identification Voice Exemplar

No Information Available on this Subject at This Time

IDENTIFICATION – PHOTO ARRAY PRISON CLOTHING

State v. Burton, ~06 A.2d 1181 (NJ. Super. A.D. 1998).

A photo array showing defendant and others in orange prison clothing should have been excluded from a theft trial on the ground that its probative value to the issue of identification was substantially outweighed by the danger of undue prejudice. The court said the clothing would draw the jury's attention to the fact that defendant had previously been arrested and incarcerated. Moreover, no jury instruction could effectively and realistically neutralize the prejudice that resulted.

All was not lost for the prosecution, however, since there was overwhelming evidence of the defendant's guilt. The court concluded that the error was harmless, hut warned against such procedures: Although we have found the error to be harmless, we strongly disapprove of the admission into evidence of photographs of defendants in jail clothing. It is an error that should not be repeated. In this were a closer case, we would not hesitate to reverse the conviction on that ground alone. We affirm only because of the overwhelming evidence of guilt.

IDENTIFICATION PHOTO BIASED ID

Green v. United States, 718 A.2d 1042 (D.C. 1998).

Defendant was rebuffed in his proffer to introduce at his murder trial expert testimony about the reliability of eyewitness identification, which focused on unconscious transference and photo-biased identifications. The court said this was properly excluded on the ground that the proffered testimony did not deal with a subject matter beyond the understanding of an average juror and would present unnecessary information.

The court noted that defense counsel had ample opportunity to argue to the jury that the defendant's identification was influenced by the witness's prior viewing of a photo array and, perhaps, by encounters with defendant in other settings.

"Dr. Penrod's testimony was proffered for two reasons upon which this court has not yet ruled in a published opinion: unconscious transference and photo-biased identifications. Courts of other jurisdictions, however, have held that a trial court's exclusion of expert testimony offered for such purposes is not an abuse of discretion. The point of such proffers is always to Undermine the reliability of the identification. As the trial court pointed out, defense counsel in this case had ample opportunity to argue to the jury that Givens' identification influenced by his prior viewing of the photo array and, perhaps, by encounters with Green in other settings, and otherwise to challenge Givens' identification testimony.

Moreover, like the trial court here, we have recognized the importance of cross-examination to emphasize to the jury the eyewitness" equivocations and possible mistakes. . . . The circumstances under which Givens viewed Green on the night of the offenses, the lapse of two years between that night and Givens' first attempt to identity Green, and Givens' equivocation were all made known to the jury through lengthy cross-examination. We note also that the trial court had personally seen the mishaps involving Givens which formed the basis for the proffered testimony, and was in a particularly good position to determine what benefit, if any, expert testimony might provide to explain them."

INEFFECTIVE COUNSEL - DEFENSE ATTORNEY APOLOGIZES TO JURY

Miller v. State, 702 N.E.2d 1053 (Ind. 1998).

The comments of an attorney for a murder defendant to prospective jurors during *voir dire* regarding actions of his investigator in taking photographs of the jurors' homes, in which the attorney expressed regret for any infringement on the privacy of the jurors, but explained that he was doing everything he could to provide a defense for his client did not prejudice the jurors against defendant. Although the attorney told the jurors that he could not "apologize" for his actions, he was in effect doing just that. For these reasons the court rejected defendant's argument on appeal that he had been the victim of ineffective assistance of counsel under the Sixth Amendment.

"In preparation for voir dire, trial counsel had hired his son to photograph the homes of the prospective jurors. At the post-conviction hearing, trial counsel testified that he had learned this technique at a death penalty seminar. Miller's argument is that trial counsel refused to apologize to the prospective jurors after some of them expressed during voir dire their displeasure with the picture-taking incident, and that this alleged refusal prejudiced the jury against Miller.

"Our review of the record indicates that there was evidence to support the post-conviction court's findings of fact. Contrary to Miller's contention, we read the portions of the record that Miller cites in support of this proposition to show that trial counsel was not 'refusing to apologize' in a combative sense. Rather, trial counsel was explaining his reasons for having photographed the prospective jurors' homes, and effectively was apologizing for having done so.

INSANITY DEFENSE – VIDEOTAPING MENTAL EXAM

Robertson v. Superior Court, 82 CaI.Rptr.2d 50 (Cal.App. 1999).

A California intermediate appellate court ruled that trial courts in that state have implied statutory authority to order the videotaping of a mental examination of a criminal defendant who pleads not guilty by reason of insanity. At the same time, the court said that a trial court may do so only after the defendant is given an opportunity to establish that videotaping will materially affect the conduct of the examination.

The appellate court laid down some guidelines for such procedures: in prescribing conditions under which the videotaping may take place, the trial court may take into account the videotaping method, the obtrusiveness of the equipment, and the physical setting of the examination, all of which are extrinsic factors that have an effect on the conduct of the examination.

"As the Attorney General notes, 'the possibility of a free and candid interview with the alienist is impaired' by defendant's knowledge her statements can be used against her later in the same proceedings **(**Quoting *People z. Spencer* (1963) 60 Cal.2d 64, 82, 31 Cal. Rptr. 782, 383 P.2d 134.) Such impairment has never been held to bar the later admission of defendant's statements or require a change in examination procedures. The antiseptic conditions of a laboratory are not required. The effect of videotaping of a defendant's responses or a psychiatrists perceptions may be explored and commented on at trial. However, neither psychiatric angst nor abstract speculation about the harmful effects of videotaping provides a basis for denying a trial court the authority to order videotaping.

"We acknowledge the possibility that videotaping may so impair the ability of an expert to conduct a psychiatric examination as to make the examination impossible to conduct or render the expert's opinion unreliable. The videotaping method, the obtrusiveness of the equipment, the physical setting of the examination are extrinsic factors that impinge on the conduct of an examination and may appropriately be taken into account in deciding whether to permit videotaping or in prescribing conditions under which videotaping may take place. Moreover, it is possible that defendant, if given an opportunity, will be able to demonstrate that videotaping is inherently inimical to the conduct of a credible examination and a reliable assessment of a defendant's mental condition. We cannot determine on this record whether videotaping in the manner proposed by the People will have such an effect. We have expressed our misgivings about the views of Drs. Mattiuzzi and Liebert [two experts who opposed videotaping]. However, the trial court denied defendant's request for an evidentiary hearing and thereby deprived her of the opportunity to present credible evidence addressing the impact of videotaping on the conduct of the examination. We decline to speculate on

what such evidence may show, but will instead vacate the videotaping order of April 11, 1997, and remand this matter for an evidentiary hearing."

The acting presiding judge dissented.

LINE UP SUGGESTIVENESS ADMISSIBILITY

State v. Cottrell, 968 P.2d 1090 (Idaho App.)

The procedures used by the police to help a victim make an identification of a defendant in a rape case were impermissibly suggestive where they told the victim and her mother the name used by the defendant which was the same name defendant had given the victim at the time of the crime, and they used a single-person show-up instead of a line-up.

In spite of the faulty procedures used, the identification was still ruled sufficiently reliable so as not to violate the defendant's due process rights. The victim had numerous opportunities to observe defendant before, during and after the crime, the victim spontaneously identified the voice of defendant as her attacker and physically described defendant, and she emphatically identified defendant at the show-up only a few hours after the crime had taken place.

The chief justice and a justice concurred.

LAY OPINION EVIDENCE RACE OF VOICE ON TELEPHONE

Clifford v. Commonwealth, 7 S.W.3d 371 (Ky. 2000).

A police officer who had listened to an undercover drug transaction, during which an undercover officer was "wired" with an audio transmitter, could testify that a fourth voice he heard, which belonged to the person who engaged in the transaction, sounded like that of a black male, on the issue of whether an informant, who as white, or defendant, who was black, had made the sale of drugs. The court found that the officer's testimony established a proper foundation showing that he could distinguish between black and white voices, notwithstanding his admission that the voices of some black men are indistinguishable from those of white men, and vice versa, and his inability to more specifically demonstrate "how a black man sounds."

"Appellant. . . asserts that Smith should not have been permitted to express his opinion that the fourth voice he heard sounded like that of a black male. A non-expert witness may express an opinion which is rationally based on the perception of the witness and helpful to a determination of a fact in issue. KRE 701. A corollary to this rule is the concept known as the 'collective facts rule,' which permits a lay witness to resort to a conclusion or an opinion to describe an observed phenomenon where there exists no other feasible alternative by which to communicate that observation to the trier of fact.

Whether the collective facts rule would permit a witness to express an opinion that an overheard voice was that of a particular nationality or race has never before been addressed in this jurisdiction. However, it is not an issue of first impression.

"No one suggests that it was improper for Officer Smith to identify one of the voices he heard as being that of a female. We perceive no reason why a witness could not likewise identify a voice as being that of a particular race or nationality, so long as the witness is personally familiar with the general characteristics, or speech patterns of the race or nationality in question, *i.e.,* so long as the opinion is 'rationally based on the perception of the witness.' KRE 701. A proper foundation was laid for Smith's testimony. That foundation was not eradicated by Smith's admission that the voices of sonic black men are indistinguishable from those of white men and vice versa. His inability to more specifically describe or to demonstrate 'how a black man sounds' merely proves the reason for the collective facts rule, *i.e.,* that it would be difficult or impossible for the witness to give such a description or demonstration."

PHOTOGRAPHS – "IN LIFE" OF MURDER VICTIM

State v. Doerr, 969 P.2d 1168 (Ariz. 1998). At a murder trial where the victim's face was badly beaten, the prosecution introduced into evidence an enlarged "in life" photograph of the victim before her death for the asserted purpose of showing the damage that had been inflicted on her. In a case of first impression for it, the court ruled with some reservations, that it was harmless error, where the photograph did not materially affect the outcome of the case.

"it can, of course, be argued that 'in life' photos personalize the victim and help to complete the story for the jurors. . . . The obvious danger is that such photos can also be used to generate sympathy for the victim and his or her family, thereby undermining the defendant's right to an objective determination of guilt or innocence. We do not believe that such damage occurred here, and we are unwilling to adopt an inflexible rule that 'in life' photographs are always inadmissible in homicide cases. It is for the trial court in each instance to exercise sound discretion in balancing probative value against the risk of unfair prejudice.

"In any event, this court will not reverse a conviction if an error is clearly harmless.

Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict. . . ,Given the overwhelming physical evidence introduced at trial and the benign nature of the photograph itself, we conclude that this exhibit did not materially affect the outcome of the case."

GUILTY PLEA AGREEMENT VIOLATION BY PROSECUTOR REMEDY

State v. Jerde, 970 P.2d 781 (Wash.App. 1999).

Prosecutors violated a plea agreement recommending a mid-range sentence for second-degree murder by highlighting aggravating factors at a sentencing hearing and adding an aggravating factor that was not in the presentence report, without prompting from the sentencing court.

The court ruled that when a prosecutor violates a plea agreement, the appropriate remedy is to remand the case for the defendant to choose whether to withdraw the guilty plea or ask for specific performance of the state's plea agreement.

"An objective review of the entire sentencing record suggests that the two prosecutors effectively undercut the plea agreement in a transparent attempt to sustain an exceptional sentence. While the prosecutors maintained that they were adhering to the recommended mid-range sentence, both prosecutors advocated for an exceptional sentence by highlighting aggravating factors and even added an aggravating factor not found in the presentence report. Without prompting from the court, the first prosecutor laid the foundation by articulating several factual and legal arguments that would support an exceptional sentence. To do so was completely unnecessary in light of the State's mid-range recommendation. When it came to Jerde's individual sentencing, the second prosecutor picked up where the first left off by reemphasizing the aggravating circumstances. While the court responded affirmatively when the second prosecutor asked whether it wanted to hear the prosecutor's comments regarding the presentence report, the court's assent does not absolve either prosecutor's comments.

"When the prosecutor breaches a plea agreement, the appropriate remedy is to remand for the defendant to choose whether to withdraw the guilty plea or specifically enforce the State's agreement."

PRIOR RECORDED TESTIMONY – GOOD FAITH EFFORT TO LOCATE

Commonwealth v. Florek, 48 Mass. App.Ct. **414,** 722 N.E.2d 20 (Mass.App. 2000).

The efforts of a prosecutor to locate a sole identifying witness in a robbery prosecution were insufficient to warrant a conclusion that he had made a good faith effort to locate the witness so as to permit the admission of the witness's prior recorded testimony at trial. The record indicated that although the witness's mother furnished an address for the witness out of state and the name and address of another person who might have known his whereabouts, little was done other than mailing summonses and a letter. The prosecution did not enlist the cooperation of the police to find the witness. No attempt was made to make telephone contact with the witness, or summons the witness under the Uniform Law to Secure the Attendance of Witnesses, and there was no reason to believe that further efforts to locate the witness might not be productive.

Unavailability' is established by demonstrating that the party offering the testimony made a good faith effort to obtain the witness's presence at trial.

"We are not persuaded as a matter of law that those efforts by the Commonwealth were sufficient to warrant the judge to conclude that the Commonwealth had made a good faith effort to produce the witness. Although the Commonwealth does not have to exhaust every road to meet its burden, substantial diligence is required. . . . In reaching our conclusion that the Commonwealth has failed to demonstrate the unavailability of the witness, we are also persuaded by the fact the Commonwealth's efforts to locate this witness fall far short of those expended in other cases where a material witness had been found to he 'unavailable'

RES GESTAE – REFUSAL TO SPIT OUT EVIDENCE

Hunter v. State. 970 S *.W.2d* 323 (Ark.App. 1998).

At defendant's trial a police officer testified about defendants refusal to spit out a small, off-white object that the officer saw defendant put in his mouth at the time of his arrest. This was ruled admissible *res gestae* evidence in a prosecution for possession of a bag of marijuana and resisting arrest, even though the object was never recovered.

The court ruled that the testimony provided the jury with the sequence of circumstances leading up to the alleged crimes by explaining that following defendant's refusal to 'spit out the object a struggle ensued between defendant and the officer during which the bag of marijuana fell from defendants clothing. This was classic *res gestae* evidence.

The trial court did not err in admitting the testimony us res gestae. Appellant was tried for possession of a bag of marijuana. That bag fell out of appellants clothing during the struggle with Officer Lackey. Without testimony as to why the officer struggled with appellant, the jury would have been left with significant unresolved questions. Moreover, appellant was tried for resisting arrest. All of the circumstances of a particular crime (here, resisting arrest) are part of the res gestae of the crime, and all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. *Harper* v. State 17 Ark. App. 237, 707 S.W.2d 332 (1986).

Res gestae are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. They are proper to be submitted to a jury, provided they can be established by competent means, sanctioned by law, and afford any fair presumption or inference as to the question in dispute. circumstances and declarations which were contemporaneous with the main fact under consideration or so nearly related to it as to illustrate its character and the state of mind, sentiments or dispositions of the actors are parts of the *res gestae.* *Id.* at 241, 707 S.W.2d at 334. There was no error in admitting the testimony as *res gestae*."

SCIENTIFIC EVIDENCE HYDROCARBON DOGS ADMISSIBILITY

Fitts v. State, 982 S.W.2d 1″5 (Tex.App. 1998). State. Expert testimony on the use of hydrocarbon-sniffing dogs was admissible. The prosecution demonstrated by clear and convincing evidence that the training theory utilized by the expert to train his dogs was

valid, that the methods and technique used to apply the theory were valid, and that his technique was properly applied to a suspicious fire, such that the evidence of the use of accelerants was admissible as reliable in an arson and capital murder case.

There was evidence that the dogs had been reliable in locating areas of the home that might contain evidence of an accelerant 19 out of *50* times, that other experts in the field used the same dogs for similar investigations, and there was nothing in the record to suggest that such evidence was more prej-udicial than probative.

“Several Texas decisions address the use of (1) ‘tracking dogs’ and (2) drug-sniffing dogs utilized for determining probable cause. . . . However, we have found no Texas case addressing the reliability of evi-dence derived from dogs trained to ‘alert’ to the presence of hydrocarbons.

“Viewing the evidence in the light most favorable to the trial court’s decision, we conclude that it was demonstrated by clear and convincing evidence that the training theory utilized by Caviu was valid, that the methods and technique used to apply that theory were valid, and that his technique was properly applied on the occasion in question. Moreover, there is nothing in the record to suggest that the probative value of the dog-sniffing evidence was outweighed by any of the rule 403 factors favoring inadmissibility. We conclude, therefore, that the trial court’s decision to admit the evidence was not an abuse of discretion.”

SELF DEFENSE WITHDRAWAL FROM CONFLICT

State v. Bryant 52O S.E.2d 319 (S.C. 1999).

A murder defendant who brought on the initial difficulty by breaking into the victim's vehicle could not assert self-defense, despite his claim that he withdrew from the conflict and communicated his intent to do so by throwing down his knife. The court said that even if defendant subjectively meant to withdraw from the conflict, he failed to communicate his intent to the victim, where defendant admitted that the victim did not see defendant drop his knife. and he did not tell the victim that he was leaving and did not want to fight.

Appellant concedes he brought on the initial difficulty by breaking into Suber's vehicle. Even if appellant subjectively meant to withdraw from the conflict he failed to communicate this intent to Suber. Although in one statement appellant claimed he dropped the knife because he did not want to fight, appellant admitted Suber did not see him drop the knife. Thus, Suber was unaware of appellant's intent to withdraw from the conflict. Further, appellant never told Suber he was leaving and did not want to fight. If appellant truly intended to withdraw he could have easily left the open parking lot. . . . Because appellant failed to effectively communicate to Suber his intent to withdraw from the conflict, appellant's right to use self-defense was never restored. Appellant, as the aggressor, remained responsible for bringing on the difficulty."

SELF INCRIMINATION - HABEAS CORPUS – ADVERSE INTEREST

State ex rel. Myers v. Sanders, 1999 WL 1133542 (W.Va. 1999).

It was held that a habeas corpus petitioner could invoke the privilege against self- incrimination, as found in the Fifth Amendment of the United States Constitution and a comparable provision of a state constitution, in response to a deposition question in the habeas corpus proceeding, which was civil in nature. However, the court said, the trial court could properly draw an adverse inference from the habeas corpus petitioner's silence pursuant to the privilege.

"We recognize that habeas proceedings are in fact often the only place that certain alleged errors in a criminal trial are raised, and thus, though nominally civil, they have important criminal components. It is decidedly not appropriate for a prosecutor or a petitioner in a habeas corpus proceeding to try to misuse any permissible discovery process related to a habeas proceeding to inquire beyond the issues and allegations raised in the habeas petition, or to seek evidence that could be readily obtained from other sources without the discovery process. Similarly, any adverse inferences permissibly drawn by the circuit court in a habeas corpus proceeding from a petitioner or other witness's silence must he relevant to issues raised in the petition.

"In the case before us, Petitioner's sworn testimony in his verified habeas corpus petition is that he would have testified at trial hut for his trial counsels failure to properly prepare him to do so and that his trial counsel failed to object to certain trial testimony regarding unspecified collateral crimes. Clearly, it is improper for Petitioner to raise these verified, factual assertions and then he able to hide behind the Fifth Amendment, with no adverse impact. In some circumstances a party may permissibly be required to risk adverse consequences in civil proceedings as a result of his or her silence based on the assertion of the right against compelled self-incrimination. Accordingly, we hold that a habeas corpus petitioner may invoke the privilege against self-incrimination, as found in the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution, in response to a deposition question in a civil habeas corpus proceeding. However, the trial court may properly draw an adverse inference from the habeas corpus petitioner's silence pursuant to the privilege."

SENTENCE VICTIMS CRIMINAL RECORD

State v. Spears, 585 N.W.2d 161 (Wis. App. 1998)

A homicide victim's criminal record was relevant at sentencing to rebut his family's favorable portrayal of his character and to support the defendant's claim that her acts were spurred by his attempt to snatch her purse. The sentencing court should have considered it. On remand the sentencing court was ordered to consider the victim's record, but of course, will still have the discretion to give the record whatever weight it deems appropriate."

SPEEDY TRIAL – 35 MONTHS PREJUDICE

United States v. Grimmond, 137 F.3d 823 (4th Cir. 1998).

A 35-month delay between a defendants indictment and arraignment did not violate his Fifth Amendment right to due process. in the absence of any evidence that his defense was adversely impacted by the delay. Additionally, the court ruled that the defendant's Sixth Amendment right a speedy trial was not violated by the 35-month delay. The court said the delay was uncommonly long, but noted that it resulted from a valid decision to allow a state and the District of Columbia to prosecute defendant and a codefendant on state charges without interference by the federal government. The defendant did not assert a speedy trial right until four months before trial, even though he could have done so since he had an attorney when he received notice of the pending federal charges. There was no evidence that he was prejudiced by the delay.

STATUTE OF LIMITATIONS SUBSEQUENT CHARGE OF LESSER OFFENSE

State v. N.S. 991 P.2d 133 (Wash .App. 2000).

In a matter of first impression an intermediate Washington appellate court ruled that a defendant could not be convicted of a lesser offense during a prosecution for a greater crime which was commenced after the statute of limitations had expired on the lesser offense, even if the prosecution for the greater crime was timely.

'The policy behind statues of limitations is to protect defendants from unfair decisions caused by stale evidence and to encourage law enforcement officials to promptly investigate crimes. These same concerns are present when a defendant is charged with a greater crime but convicted of a lesser included offense. . It is clear that a defendant may not he charged with a time-barred offense; therefore, the State should not be able to circumvent the statute of limitations by charging a greater crime and obtaining a conviction on a lesser included offense that is time-barred. This principle holds true even if we assume that prosecutors will always act in good faith and refrain from deliberate overcharging.

The court noted, however, that "a small minority of states permit the greater offense to control as to the statute of limitations for the lesser included offense." See, Alan L. Adelstein, Conflict of the Criminal Statute of Limitations With Lesser Offenses at Trial, 37 Wm. & Mary L.Rev. 199 (1995).