15. Severability of provisions (title 12, ch. 7, sec. 15)

"If any part of title 12–7–14, inclusive, is for any reason declared void, such invalidity shall not affect the remaining portions of said sections."

(*a*) This section merely means that if some subsequent court action should declare any one section of this chapter void or unconstitutional the rest of the chapter would remain in effect.

(*b*) As of September 1961 this chapter has withstood and been upheld in the various courts (see *State* v. *Kilday* attached to this bulletin).

16. Arrest or seizure after commission of offense (title 12, ch. 7, sec. 16)

"The authority given to anyone to arrest any person or seize anything, while such person is actually engaged or such thing is actually used or employed in the commission of any offense, shall not be so construed, as to prevent, if not so arrested or seized, the arrest of such person or the seizure of such thing after the commission of such offense, upon due process of law."

17. Arrest of escapees and parole violators without warrant (title 12, ch. 7, sec. 17)

"The director of the department of social welfare, the warden of the adult correctional institutions, any superintendent or employees connected with any institution under the management and control of the department of social welfare, or any police officer or constable, may arrest without a warrant any person who has escaped from any such institution or who, being absent from such institution, or who being absent from such institution on parole, has violated the conditions of such parole, for the purpose of returning such person to the institution from which the escape was made or from which such parole was granted."

(*a*) This section speaks for itself and is explicit in stating no warrant is needed to arrest an escapee or a parole violator.

C. SUMMARY OF TITLE 12, CHAPTER 7

We have just completed a verbatim account of the Rhode Island arrest law. It is sometimes referred to as the 2-hour law. In the study of the arrest laws of other States and jurisdictions our arrest law could be considered fairly liberal by comparison. But nowhere in these statutes are the police allowed to indiscriminately detain or arrest. There must be, at least a concrete suspicion, that the person to be detained or arrested has done some wrong. This must be remembered by our policemen in Providence.

The arrest that causes less controversy than any other is the arrest made with a warrant. This warrant is signed by a judge who has considered the merits of the case and has decided there is sufficient grounds for further action. However, it is not always possible to secure a warrant and in this event this chapter allows the police officer to arrest without a warrant under certain conditions. Be certain those conditions are present when making an arrest or even detaining a person.

Some important points to remember when contemplating an arrest are:

1. An officer must comply with the law fully, when conducting a search, to insure that evidence can be legally presented in a case.
2. Evidence obtained as the result of an illegal search, or by use of third-degree methods, force, coercion, or duress, is not admissable.
3. The officer has the right to conduct a search coincidental to an arrest.
4. The purpose of the search, conducted coincidental to an arrest, is for the seizure of weapons, fruits of a crime, or other evidence.
5. An abandoned vehicle can be searched at any time, provided it is not within a building.
6. Search of premises may be conducted coincidental to an arrest, with permission, or on authority of a search warrant.

In fighting for the national adoption of a uniform arrest law similar to our present Rhode Island arrest law, O. W. Wilson superintendent of the Chicago Police Department cites these reasons:

1. Public peace and security would be increased by enhancing the likelihood of discovering persons seeking an opportunity to attack.
2. The effectiveness of the administration of justice would be increased by facilitating the investigation of suspects, the arrest of criminals, and the collection of admissable evidence. By these means both clearance and conviction rates would be increased.

3. The security of the police would be increased by permitting them to discover weapons that may be used to attack them and by making it illegal to resist arrest by a known police officer.

4. Higher standards of service and stricter adherence to the legal restrictions imposed on the police would result when a community or other political subdivision was penalized for abuse of authority by its police.

If Rhode Island has an arrest law that many, many police administrators are hoping to get, it behooves each officer to adhere strictly to the letter of the statutes to avoid adverse criticism and publicity that could possibly lead to legislative changes that could tie our hands in fighting crime.

V. Summary and Conclusions

In this training bulletin we have discussed civil rights, human rights and police privileges all in relation to the Rhode Island arrest law.

We tried to show that there are certain basic rights which the policemen of today must respect. There are certain human dignities which we must uphold. Ours is a difficult task. We are sworn to uphold the law, to repress crime, to detect the criminal, to charge the criminal, to preserve order. We must accomplish these missions and not deviate from the letter of the laws ourselves.

It can be done. Intelligent investigation, intelligent interrogation, and a dedication and devotion to duty along with knowledge and commonsense are the most important factors in accomplishing our mission.

The modern policeman must shed his prejudices. He must treat all persons alike. He cannot arrest because a person's eyes are crossed, or his skin is a different color, or because he speaks with an accent. Any police officer that arrests for these reasons is making an unlawful arrest and is subject to departmental and civil action.

When a policeman makes an arrest he should make it and not stand in the middle of a street arguing with a person threatening to make an arrest. Arrests of this type could lead to mobs gathering and possible riot action. For that reason the cruiser personnel should stay in service except for emergency. The cruisers could be the difference between a riot developing or not developing when a policeman is making an arrest. If the policeman making the arrest and the person being arrested are made to wait out in the street for considerable time while a cruiser has to come from the other side of the city many things could develop because the cruiser in the area was out of service for some trivial reason. Because of the delay of the cruiser, tension could build up and serious consequences could result.

This paper is intended in no way to discourage arrests. On the contrary the writer feels that if a police officer is armed with the knowledge as to what he can do and what he cannot do, it will give him confidence to perform duties that he perhaps neglected because of uncertainty as to procedure or tactics. On the other hand we are not looking for a policeman to violate any civil or human rights. In this connection the head of the FBI, John Edgar Hoover, has said, "one of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization, and the entire profession is to be found guilty of a violation of civil rights. Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide for fighting crime with intelligence rather than force."

POLICE DEPARTMENT,
CITY OF PHILADELPHIA,
Philadelphia, Pa., April 14, 1961.

Chief ROBERT V. MURRAY,
Police Department,
Washington, D.C.

DEAR CHIEF MURRAY: Your letter of April 4, 1961, to Commissioner Brown has been referred to me for reply.

When the Honorable Mayor Dilworth was district attorney for the city and county of Philadelphia, he established a 24-hour rule which, in essence, means that no one can remain in the custody of police for more than 24 hours without the benefit of a formal hearing. After the formal hearing, of course, the defendant is either discharged or held for court. For purposes of interrogation, etc., the department loses the defendant as he is transferred to the custody of the prison guards. Should we wish to formally interrogate him at a later date,

we must request the approval of a judge, and the practice in the recent past has been that the judges are reluctant to grant such requests and seldom do.

The department has no procedure or practice by which it is able to charge a person for an offense, investigate, etc., and then, after a prescribed period of time, release him without benefit of a hearing. Anyone held for a period of time must be formally charged. This, of course, does not mean in those instances where a person may be interrogated for an hour or two as a suspect and then permitted to leave.

Hoping this is satisfactory, I remain,

Sincerely yours,

HOWARD R. LEARY,
Deputy Commissioner.

P.S.—Please give my regards to Howard Covel.

POLICE DEPARTMENT,
CITY OF PHILADELPHIA,
Philadelphia Pa., March 16, 1961.

EDGAR E. SCOTT,
Deputy Chief of Police,
Chief of Detectives, Metropolitan Police Department,
Washington, D.C.

DEAR CHIEF SCOTT: This will reply to your letter of March 14, 1961, concerning the practices of holding people for purposes of interrogation prior to formal arrests.

Usually we are able to offer sufficient testimony at the preliminary hearing, before a favorable magistrate, so that he (the magistrate) is able to continue the case for a day or two permitting us the time necessary to get additional information. However, this isn't the practice that is constanly indulged in but is saved for those instances when it is advantageous for us to make the request of the magistrate.

In some instances we interrogate people for a matter of a few hours and then permit them to go home, but those individuals are not formally charged with any crime.

We also have what we call the 24-hour rule which requires us to give a person a formal hearing within 24 hours after they are apprehended by the police. This procedure is religiously adhered to, and we allow for no deviations or exceptions to this policy.

In those instances where we haven't sufficient information to hold the crime suspect, we usually do not interrogate him formally but continuously keep him under surveillance, of course without his knowledge, until we are in a better position to take him into formal custody.

We are also experiencing some resentment when our policemen stop automobiles in order to question the suspect for other reasons than motor vehicle violations. In fact, at the moment it appears to be getting critical.

Sincerely,

ALBERT N. BROWN, *Commissioner.*

THE CITY OF OKLAHOMA CITY,
Oklahoma City, Okla., April 17, 1961.

Mr. ROBERT V. MURRAY,
Chief of Police,
Washington, D.C.

DEAR CHIEF MURRAY: Reference is made to your communication dated April 4, 1961, regarding information on investigation arrests prior to filing charges.

We have no authority to certain specified periods of delay between the arrest and the arraignment for the purpose of fully investigating a criminal case before a felony charge is filed. The practice followed in our jurisdiction in an investigation arrest is that officers of our agency do not take the prisoner before a magistrate. We file our charges in county court and the sheriff's officers pick up the prisoner and arraign him or her in justice of peace court.

In certain cases when an investigation arrest is made, the prisoner's attorney files a writ of habeas corpus before we have time to make the investigation. The prisoner is then taken before a district court judge for a hearing and if the case is of serious nature, the district judge will grant us a reasonable amount of

time (not specified) to complete our investigation and file charges. All statements, written, recorded, or oral, can be used in the State court.

We trust the above is the desired information, and if we can be of further assistance, please advise.

Yours very truly,

ED. E. RECTOR,
Chief of Poice.
HILTON GEER,
Major, Commanding Bureau of Investigation.

CITY OF CINCINNATI,
DEPARTMENT OF SAFETY,
DIVISION OF POLICE,
Cincinnati, Ohio, May 8, 1961.

Mr. ROBERT V. MURRAY,
Chief of Police, Metropolitan Police Department,
Washington, D.C.

DEAR CHIEF MURRAY: The following is submitted relative to your letter of April 4.

After considerable research relative to precourt obtained confessions and the practice of police arresting and holding suspects for investigation, we found:

1. No specific case reported in the State of Ohio.
2. No mention of an allotted time a prisoner may be held before being taken before the court.
3. Nothing on the question of admissibility of a confession gained prior to court.

Section 2935.05 of the Ohio Revised Code specifies the obligation of a person who has effected an arrest and reads as follows:

"When a sheriff, deputy sheriff, marshal, deputy marshal, watchman, or police officer has arrested a person without a warrant, he must, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and must make or cause to be made before such court or magistrate a complaint stating the offense for which the person was arrested.

The crux of the question is the length of time police are permitted to hold a person in custody before taking him to court. In the absence of any law in the State of Ohio, such as the "Uniform Arrest Act" adopted in the States of Delaware, New Hampshire, and Rhode Island which permits police to hold a person in custody "for as long as 24 hours" the courts in Ohio seem to rely on the above mentioned clause—"unnecessary delay." The basis for a suspicious arrest, in our opinion, is the main factor determining the court's outlook on the arrest. What constitutes a "reasonable and probable" ground of suspicion is incapable of exact definition, beyond saying that the officer must not act arbitrarily, but must exercise his discretion in a legal manner, using all reasonable means to prevent mistakes. In other words, he must be actuated by such motives as would influence a reasonable man acting in good faith. These standards have been attained in our department due to constant supervision of arrests and the education afforded the members of our department. We must consider the following dilemma created by a police officer's right to arrest on "probable cause" or "reasonable grounds" and the requirement that the arrestee be taken "without unnecessary delay" before the court for the placing of a criminal charge against him. In order to charge a person with a criminal offense, more is required than "probable cause" or "reasonable grounds" and unless there is evidence of guilt, the court would order the release of the arrestee. This suggests to us that our courts feel that the police should be given an opportunity to detain a person for a "reasonable time" for investigation or interrogation before taking him to court.

As to the matter of admissibility of confessions in court, there is a definite stand on confessions gained through coercion. Every coerced confession has been inadmissible for generations in our courts. If a prevalent abuse of the right to question prisoners exists, the sounder remedy lies in police discipline, as has been our policy, with the result that we have been upheld by our courts when the question arises as to the admissibility of confessions gained during detention before arraignment in court.

In answer to the inquiry as to our procedure in the case of an individual held for investigation and released without formal charge we follow a similar procedure prescribed in section 10 of the "Uniform Arrest Act" which reads as follows:

"Any officer in charge of a police department or any officer authorized by him may release instead of taking before a magistrate any person who has been arrested without a warrant by an officer of his department."

We hope this information will assist you. If we can be of further service, please call on us.

Sincerely,

S. R. SCHROTEL, *Police Chief.*

CITY OF COLUMBUS, OHIO,
April 10, 1961.

ROBERT V. MURRAY,
Chief of Police, Metropolitan Police Department,
District of Columbia.

DEAR CHIEF MURRAY: Received your letter of April 4, 1961, relative to the use of investigative arrests. Our department has no statutory authorization for detaining a suspect for any period of time without obtaining a warrant.

Previously, Ohio General Code, section 2935.05, said, in part, "A police officer who has arrested a person without a warrant must, without unnecessary delay, take the person before a court or magistrate, etc." The interpretation by our judges of the words "unnecessary delay" usually permitted us to detain a person for a reasonable period of time (1 to 3 days), as long as we were actively and continuously in the investigation of the case.

However, effective January 1, 1960, an amendment to this section was made, requiring an officer to "undertake immediate steps to secure a warrant."

Section 106.13, the Ohio General Code further states:

"If the judge or magistrate has brought to his attention that a prisoner is held in jail in his jurisdiction without commitment from a court or magistrate, he shall, by summary process, cause such prisoner to be brought before him to be charged."

More and more attorneys are resorting to the use of this section, forcing us to charge many persons that would perhaps have been freed without formal charges had we been given a few more hours to investigate.

Any subject charged and found not guilty or held for investigation and released without formal charge, may request that his photographs, fingerprints and other records be returned to him. This is authorized by State law.

I think it is only a question of time until our department will be in much the same position as yours. I trust that this information will be of some help to you in your survey.

Sincerely,

GEORGE W. SCHOLER,, *Chief of Police.*

CITY OF CONCORD, NEW HAMPSHIRE,
April 10, 1961.

ROBERT V. MURRAY,
Chief of Police, Metropolitan Police Department,
Washington, D.C.

DEAR CHIEF: We have experienced no difficulty in our courts in New Hampshire, because of the more liberal New Hampshire statutes. Ramifications of the *Mallory* decision, apparently has not reached the New Hampshire courts, as yet.

We experience no difficulty in detaining suspects for a period of 4 hours. To my knowledge, any confession or statement legally obtained during the first 4 hours, have not been questioned by the New Hampshire courts.

We are enclosing a copy of some of the New Hampshire statutes that seem applicable in this case.

Sincerely yours,

WALTER H. CARLSON, *Chief of Police.*

CHAPTER 594—ARRESTS IN CRIMINAL CASES

594:1 DEFINITIONS. As used in this chapter.

"Arrest" is the taking of a person into custody that he may be forthcoming to answer for the commission of a crime.

"Felony" is any crime that may be punished by death or imprisonment in the State prison. Other crimes are "misdemeanors."

"Officer" or "peace officer" is any sheriff or deputy sheriff, mayor or city marshal, constable, police officer, or watchman, or other person authorized to make arrests in a criminal case.

Sources: GS 236:1, GL 254:1, PS 250:1 1941, 163:1, PL 364:1, RL 423:1, 423:20.

NOTE.—This section embraces the definition of "officer" found in RL 422:1.

ANNOTATION

Cited in *Park* v. *United States* (1924) 294 F. 776.

ARREST

594:2 QUESTIONING AND DETAINING SUSPECTS

(a) A peace officer may stop any person abroad whom he has reason to suspect is committing, has committed, or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(b) Any person questioned as provided in subsection (a) who fails to identify himself and explain his actions to the satisfaction of the peace officer stopping him may be detained and further questioned and investigated.

(c) In no case shall the total period of detention provided for by subsections (a) and (b) exceed 4 hours. Such detention shall not constitute an arrest and shall not be recorded as such in any official record. At the end of any such detention period the person so detained shall be released unless arrested and charged with a crime.

594:3 SEARCHING FOR WEAPONS

A peace officer may search for a dangerous weapon any person whom he is questioning or about to question as provided in section 2, whenever he reasonably believes that he might be in danger if such person possessed a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person.

Sources: 1941, 163:3 RL 423:22.

594:4 PERMISSIBLE FORCE

(a) No unnecessary or unreasonable force or means of restraint may be used in detaining or arresting any person.

(b) A peace officer is justified in using force dangerous to human life in making an arrest only when—

(1) The arrest is lawful;

(2) The arrest is on a charge of felony;

(3) There is no other apparently possible means of effecting the arrest; and

(4) The officer has made every reasonably possible effort to advise the person to be arrested that he is a peace officer and is attempting to make an arrest and has reasonable ground to believe that the person is aware of the fact.

Sources: 1941, 163:4 RL 423:23.

ANNOTATION

ANNO: Degree of force that may be employed in arresting one charged with a misdemeanor (3 ALR 1170; 42 ALR 1200).

ANNO: Effect on voluntariness of confession of violence used in making arrest (24 ALR 710).

594:5 RESISTING ARREST

If a person has reasonable ground to believe that he is being arrested and that the arrest is being made by a peace officer, it is his duty to submit to arrest and refrain from using force or any weapon in resisting it regardless of whether there is a legal basis for the arrest.

Sources: 1941, 163:5 RL 423:24.

594:6 AID TO OFFICERS

Every officer in the execution of his office, in a criminal case may require suitable aid; and if any person, when required, shall not give such aid he shall be fined not more than $10.

Sources: RS 178:12, GS 189:12; GS 236:2, GL 254:2; PS 250:2, PL 264:2, RL 423:2.

ANNOTATION

A railroad police officer, in the execution of his office, has authority, by virtue of this statute, to require suitable aid of any person. *La Chance* v. *Berlin Street R. Co.* (1919) 79 NH 291, 109 A 720.

594:7 ARREST ON WARRANT

An officer to whom a warrant for the arrest of an offender may be addressed has power to make the arrest at any time and in any place; and shall have, in any county, the same powers in relation to the process as an officer of that county.

Sources: RS 222:16, CS 237:16, GS 236:9, GL 254:9, PS 250:9, PL 264:12, RL 423:12.

THE COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC SAFETY,
Boston, January 2, 1962.

Mr. ROBERT V. MURRAY,
Chief of Police,
Washington, D.C.

DEAR CHIEF: This will acknowledge your letter of October 24, 1961, requesting his department's experience with matters relating to the questioning and detaining of suspects, arrest without a warrant, release of persons arrested, and permissible delay in bringing a defendant before a magistrate.

Our legislature has not enacted a version of the model Uniform Arrest Act. In this Commonwealth a police officer has the common law authority of sheriffs and constables to arrest without a warrant a person whom he has reasonable grounds to suspect of having committed a felony *Com.* v. *Phelps* 209 Mass. 396. He may also arrest without a warrant a person who commits in his presence any misdemeanor amounting to a breach of the peace *Com.* v. *Gorman* 288 Mass. 594. For statutory misdemeanors not amounting to a breach of the peace there is no authority to arrest without a warrant unless it is given by statute *Com.* v. *Wright* 158 Mass. 149, 159.

"Our law clearly requires that a defendant be brought into court as soon as reasonably possible after arrest * * *. We do not consider the delay in bringing this defendant into court to have been unreasonable" *Com.* v. *Banuchi* 335 Mass. 649, 656. (Arrested at midnight on Sunday, brought into court Wednesday, 2 days and 9 hours later.)

Officers arresting without a warrant had the "duty to bring him before the court as soon as reasonably could be done. It cannot be said as a matter of law that their delay for an hour and a quarter was reasonable" *Keefe* v. *Hart* 213 Mass. 476, 482. (See footnote in *Culombe* v. *Connecticut* 367 U.S. 568, 584.)

"It was the duty of the arresting officers to bring him without delay before the court * * *. But the criminal session was closed for the day * * *. The fact that civil sessions were still open is immaterial * * *. No undue delay was shown." *Com.* v. *DiStasio* 294 Mass. 273, 284.

(Defendant arrested on warrant at about 1 p.m. in Boston. Questioned in Cambridge at about 3 p.m. and made confession. Arraigned next day at Cambridge.)

An arrested person against whom no formal charges are brought is usually released after signing a voluntary agreement to waive all claims of damages. This is the option of the prisoner as "arrest can only be justified by bringing the prisoner before a magistrate. A complaint under oath is not required. It is sufficient to give the magistrate a full statement of the facts" *Wax* v. *McGrath* 255 Mass. 341.

The following chapter 276, section 33A, Massachusetts General Laws may be of interest:

"The police official in charge of the station or other place of detention having a telephone wherein a person is held in custody, shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed of his right to so use the telephone immediately upon being booked, and such use shall be permitted within 1 hour thereafter."

Our records reflect that for the year ending June 30, 1961, only 2 arrests of a total of more than 22,000 made by our Massachusetts State Police were booked as "suspicious person" and released without formal charges.

The policy of this department is to follow the procedure outlined in *Wax* v. *McGrath, supra.* We are not aware of any dissatisfaction with this procedure.

Sincerely,

FRANK S. GILES,
Commissioner of Public Safety.

POLICE DEPARTMENT,
Baltimore, Md., March 16, 1961.

Mr. EDGAR E. SCOTT,
Deputy Chief of Police, Metropolitan Police Department,
Washington, D.C.

DEAR MR. SCOTT: I have your letter of March 14, inquiring as to our procedure in holding persons under suspicion of having committed a crime, and must advise that we are allowed to hold such persons for a reasonable length of time pending investigation.

Sincerely yours,

JAMES M. HEPBRON, *Police Commissioner.*

DEPARTMENT OF POLICE,
New Orleans, La., May 22, 1961.

Mr. ROBERT V. MURRAY,
Chief of Police, Government of the District of Columbia,
Washington, D.C.

DEAR CHIEF MURRAY: I am submitting the enclosed information in response to your request for information pertaining to holding charges in this jurisdiction. The enclosures consist of (*a*) The excerpt pertaining to the Louisiana Revised Statutes, title 14, section 107 (R.S. 14:107, Vagrancy) from the "1960 Cumulative Annual Pocket Part" and (*b*) The excerpt from the Louisiana Statutes Annotated, 1950 pertaining to R.S. 14:107, Vagrancy.

Our basic procedure in this regard is as follows. Our vagrancy statute, as you will observe, is very broad in its coverage. When we find a person whom we strongly suspect of having committed a serious crime, we book him with vagrancy (specifying the particular misconduct of which he is in violation under the vagrancy statute), and the judges—by an informal or tacit working agreement—permit us to interrogate the prisoner and complete our investigation for a period of approximately 72 hours. In unusual cases requiring additional investigation, or in situations in which the release of the suspect would undoubtedly tip off his confederates or coconspirators, the judges have been known to permit us to hold the prisoner for more than 72 hours. By and large, however, our investigations must be completed and a charge of the serious offense either accepted or refused within 72 hours.

This procedure has been an exceptionally valuable police tool in the interest of public safety and the detection of crime. We in the department naturally appreciate the consideration shown us in this regard, and we are ever vigilant to avoid abuse of this procedure. If some attorney comes in and complains about a particular client's being detained, we immediately check with the investigating officers, and if it should appear that the investigating officers are dragging their feet in the investigation, then we order expeditious completion of the investigation and assign additional men to assist in the investigation. In my opinion, this program has been most successful and has not worked an undue hardship on any citizen.

My staff and I would strongly urge the congressional committee investigating this matter to recommend that such a procedure be approved for the District of Columbia Metropolitan Police Department. As you know, so much investigative work is required in many instances before a person can be either properly charged or properly released without a charge in connection with a particular serious crime. If you are going to require a police officer either to charge or release a suspect on the spot, then many persons will be charged who should not be charged, and many criminals will not be brought to justice. I submit to you that the Metropolitan Police Department of the District of Columbia has proven itself on many occasions to be highly competent and zealously respectful of the civil rights of persons with whom it deals. Over the years this Department has earned the respect and confidence of police departments and the general public throughout the entire country. We respectfully submit that the Congress

would not be making a mistake in any way by vesting in the Metropolitan Police Department of the District of Columbia the authority and discretion for utilizing a 72-hour holding charge procedure. On the contrary, such an authorization by Congress would greatly improve the law-enforcement potential in the District.

If we can be of any further assistance to you in securing additional information, please call upon us.

Very truly yours,

JOSEPH I. GIARRUSSO,
Superintendent of Police.

CITY OF DES MOINES,
DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF POLICE,
Des Moines, Iowa, April 10, 1961.

Mr. ROBERT V. MURRAY,
Chief of Police,
Washington, D.C.

DEAR CHIEF MURRAY: In reply to your letter of April 4, the only place in the Iowa code where the word "investigation" appears is in the chapter pointing out the duty of the chief of police and sheriff to take the fingerprints of persons arrested for the following: Investigation, etc. However, arrests are made for investigation and the courts allow a reasonable length of time to complete our investigation before filing charges or releasing the prisoner. Even in cases where writs of habeas corpus are served, when requested by the department, the judge will set the hearing far enough ahead to allow us to continue our investigation.

We do not have any special procedure in the case of an individual held for investigation and then released without formal charge. Naturally in these cases the arresting officer can be sued for false arrest. However, in every suit filed, if the officer showed good grounds for making an arrest the court has ruled in his favor.

I realize that this is not very much help to you but we have tried over the years to amend the chapter so that we could make an arrest for investigation and have it spelled out in the code, but our efforts have been unsuccessful.

Very truly yours,

VEAR V. DOUGLAS,
Acting Chief of Police.
HOWARD R. EIDE,
Captain, Police Academy.

CITY OF INDIANAPOLIS,
Indianapolis, Ind., April 10, 1961.

ROBERT V. MURPHY,
Chief of Police, Metropolitan Police Department,
Washington, D.C.

DEAR SIR: We are happy to inform you that our courts are more liberal in the matter of admitting admissions of the accused into evidence.

In felony cases we are permitted under section 9-704-a of Burns Indiana Statutes (1956 replacement) page 46 to slate a suspect on a preliminary charge and to hold such suspect 7 days.

After the arrest on the preliminary charge and before we take a written statement of admission we are required to apprise the suspect of the charge and that he was entitled to council. That any admissions he made may be used in court at the time of his trial. These facts are stipulated in his written statement.

We are required to slate the suspect in the next regular session of our municipal court at which time the court again apprises the suspect of his rights relative to the charge.

Our municipal courts have only preliminary jurisdiction in felony cases. If we present a prima facie case in municipal court, they set a bond and bind such charge over to the Marion County grand jury. The grand jury hears the evidence and either returns a true bill or a no bill. If a true bill is returned the case is then set for trial by one of our two criminal courts.

We are enclosing a copy of our preliminary charge statute which we trust will be of assistance to you.

Assuring you of our cooperation at all times we remain,

Very truly yours,

ROBERT E. REILLY,
Chief of Police.
By CARL C. SCHMIDT,
Inspector of Detectives.

BURNS INDIANA STATUTES

1956 REPACEMENT—BOOK 4, PART 1

9-704a. *Preliminary charge—Procedure.*—Whenever any law enforcement officer shall have arrested and taken into custody any person reasonably believed to have committed a felony and said detained person(s) offers or advances any explanation, justification, alibi or excuse, or circumstances exist which might or could negative the presence at or participation in said crime by such person under detention, and said officer nevertheless because of reliable information or investigation still verily believes that such detained person is involved in a commission of the felony, there is hereby created an additional and alternative pleading and procedure to the criminal statutes of the State which shall be known as the preliminary charge, and which may be filed against any arrested and detained person under such circumstances.

When any person is so held and detained under such preliminary charge the law enforcement officers shall forthwith take such person before the magistrate, justice, municipal, city, criminal or circuit judge, and shall cause to be prepared forthwith before the court hearing such matters, and if said court be not in session then for the next session of the court having jurisdiction in such matters, an affidavit entitled preliminary charge of _____ (naming the felony involved) and said person so accused shall be entitled to a hearing thereon.

Said affidavit shall otherwise follow the form of affidavit now or hereafter prescribed by statute for the felony on which the preliminary charge is filed, but may be in summary form, and the person so detained under said charge shall at said hearing be apprised of the facts concerning the felony with which he or she is charged, and said court shall apprise said person as to whom is accusing him, shall likewise advise said detained person that anything he may say may be used against him and shall also advise said person that he is entitled to legal counsel. Thereafter said person so charged shall after hearing the accusation against said detained person and any explanation offered by said detained person be permitted to give any explanation, or offer any answer thereto. The court shall thereupon rule in discharge or commitment. If the court should find that the person so held under a preliminary charge should be committed, an order shall issue directed to the county sheriff, the superintendent or chief of police, the marshal, constable or other chief law enforcement officer ordering the holding and detention of any such person, committing said person for a period not exceeding 7 days from the date of said commitment. Said commitment shall be in the following form.

IN _____ COURT

STATE OF INDIANA,
County of _____

To the SHERIFF OF _____ COUNTY:
To the MARSHAL of _____:
To the CHIEF OF SUPERINTENDENT OF POLICE OF _____:
To the CONSTABLE OF _____ TOWNSHIP:

_____ having been brought before me on the preliminary charge of _____ is hereby committed to _____ until the ____ day of _____ at ____ o'clock ____m., at which time you shall produce said person before me in open court and if the said person be not charged with _____ on or before said date said person will at said time be discharged.

_____, *Judge.*

Any person so committed on any such preliminary charge shall be entitled to bail upon providing sufficient surety in the amount now or hereinafter pro-

vided by statute for the felony concerning which the committed person is preliminarily charged, and if at the expiration of the commitment period no formal charge of felony is placed, said committed person shall be discharged, but otherwise shall stand trial if affidavit or indictment be filed against said person. (Acts 1949, ch. 273, — 1, p. 996.)

CITY OF ATLANTA,
DEPARTMENT OF POLICE,
Atlanta, Ga., April 10, 1961.

Chief ROBERT V. MURRAY,
Police Department Headquarters,
Washington, D.C.

DEAR CHIEF: I enjoyed my visit with you very much and I am sure the inquiry will produce fine results.

In reply to your inquiry of April 4, this is to advise that most of the arrests made by this department are made without warrants, because the Georgia law authorizes an arrest without warrant under the following conditions:

(1) That the offense was committed in the presence of an officer.

(2) That the perpetrator is attempting to escape.

(3) That a miscarriage of justice is likely, because an authorized person, to issue a warrant, is not present.

The chief of police or his agent, is authorized to arrest a person, book a case, assess a bond, and allow a prisoner to be released on bond without going before a judge.

When a person is arrested and cannot post bond, we are required to schedule a hearing before the next session of the city court, where the city judge will assess a fine, dismiss the case, or bind the person over to a State or Federal court.

Where a person is suspected of a crime and is detained for further investigation, we have sufficient time to complete the investigation.

Attached hereto are copies of the Georgia laws that authorize such detention.

Those of us in the police department are just as anxious as the courts to protect the rights of a prisoner as we are to protect the community against his unlawful acts. The local courts, both city and State, have given us full cooperation in these cases.

Trusting this is the information that you desire, I am,

Sincerely yours,

H. T. JENKINS, *Chief of Police.*

CODE OF GEORGIA ANNOTATED—1956 SUPPLEMENT

27–210 (920 P.C.) *Diligence of officer arresting.*—Every officer arresting under a warrant shall exercise reasonable diligence in bringing the person arrested before the person authorized to examine, commit, or receive bail and in any event to present the person arrested before a committing officer within 72 hours after arrest. The arresting officer shall notify the accused as to when and where the commitment hearing is to be held. The offender who is not notified of the time and place of the commitment hearing, before the hearing, shall be released. (Acts 1956, p. 796.)

27–212 (922 P.C.) *Duty of person arresting without warrant.*—In every case of an arrest without a warrant the person arresting shall without delay convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose and any person who is not conveyed before such office within 48 hours shall be released. (Acts 1956, pp. 796, 797.)

GEORGIA DIGEST, WEST KEY NUMBER SYSTEM

63 (4). Suspicion or reasonable grounds for belief that offense has been committed

Georgia 1860. Officer may, without warrant, arrest one on reasonable suspicion of his having committed felony, and he will be protected even though no felony has been committed, if he has reasonable ground for his belief (*Johnson* v. *State*, 30 Ga. 426).

POLICE DEPARTMENT,
Tallahassee, Fla., April 12, 1961.

Mr. ROBERT V. MURRAY,
Chief of Police, District of Columbia,
Washington, D.C.

DEAR CHIEF MURRAY: In reply to your letter of April 4, 1961, this is to advise that we have not been affected by the decision in the *Andrew Mallory* case or the *Trilling* case.

Our State statutes are silent as to the exact time between arrest and arraignment. Although our courts have recognized so-called investigation arrests or "arrests on suspicion," we do not have any statute regarding the same. In short, our statutes do not provide for the holding of a suspect on suspicion alone. However, confessions otherwise freely and voluntarily given are accepted by our courts as competent and proper no matter when given. The great majority of our confessions are made between the time of arrest and arraignment. Our courts seem to operate on the theory that the question of the legality or illegality of the arrest or previous detention is not properly a part of the trial.

There is no special procedure in the case of an individual held for investigation and released without formal charge. Wording this another way, our statutes do not recognize any detention without formal charge. However, our courts recognize the holding of an individual for an investigation for a reasonable length of time. The facts of each case would probably be considered by the court as to what a reasonable length of time would be.

Yours very truly,

FRANK STOUTAMIRE, *Chief of Police.*

CITY OF MIAMI,
Miami, Fla., April 13, 1961.

ROBERT V. MURRAY,
Chief of Police, District of Columbia,
Washington, D.C.

DEAR CHIEF MURRAY: In reply to your mimeographed letter of April 4, we are very much interested in any information you may be able to obtain concerning lawful procedures in connection with "investigation arrests." The *Mallory* decision has been discussed at great length on numerous occasions by local judges and various meetings of local law enforcement officers.

According to the laws of the State of Florida, an officer who has arrested a person without a warrant shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, etc. In all honesty, the law is not adhered to and we realize we are jeopardizing our cases on occasion by making an arrest and then obtaining the necessary evidence. This we feel to be a necessary evil. On many occasions, when a person is held by us on an open charge his attorney usually obtains a writ of habeas corpus at which time we are required to release the individual or to file charges.

We are aware that the State of California has a law which permits police to hold suspects without a formal charge for a stated number of hours. In previous years we have attempted to have our State legislature enact a similar law, but so far have been unsuccessful in our efforts. To date we have never been in serious difficulty following the release, without charge, of a person originally committed on an investigation arrest. To this end we realize we have been fortunate but we don't know what course of action would be pursued if a suit were entered under such circumstances.

The State attorney's office, who of course is also well aware of the *Mallory* case, does assign a member of their staff to be available during weekends and holidays if it is deemed necessary to file charges without delay. Other than this no formal machinery has been established to take an arrested person before the nearest magistrate without unnecessary delay.

We realize that we have not been of any great assistance to you but we would very much appreciate a copy of the results of your survey since we are faced with a similar problem.

Sincerely yours,

J. A. YOUELL,
Assistant Chief of Police.

CITY OF WILMINGTON,
BUREAU OF POLICE,
Wilmington, Del., November 1, 1961.

ROBERT V. MURRAY,
Chief of Police, Metropolitan Police Department,
Washington, D.C.

MY DEAR CHIEF MURRAY: In regard to your letter of October 24, 1961, relative to our uniform arrest law, I wish to advise you that this law has been one of our greatest tools to effective law enforcement in this city.

I am enclosing a copy of this law and, as you can see, we are not permitted to make any record of the persons detained unless an arrest is made.

It would be very difficult, indeed, to estimate the number of persons detained for questioning under this law, as it is used daily by our detective and uniform divisions.

I would like to point out that once a person is detained, the officer or officers should detain the suspect only as long as they are interrogating and once the interrogation is complete, the subject is to be released or arrested, i.e., if the officer or officers pick up a suspect and he is detained for interrogation as a burglary suspect and the officers complete their interrogation in 45 minutes, this subject would then be released or arrested. In any event, the questioning could not be more than 2 hours and the suspect would have to be released or arrested at that time.

The following is a quote handed down from our attorney general's office in regard to police having the right to detain persons under 11 Del. C. 1902 when appropriate questions are directed to the detained person.

"After the person is lawfully detained for questioning, he is not denied his constitutional guarantee of due process if he is refused the privilege of telephoning an attorney or family. In several cases directly on point in surrounding States, the court directed that such actions by police officers were not a denial of due process. *Commonwealth ex rel Lockoski* v. *Claudy, Warden, et al.* (94 A. 2d 203, 172 Pa. Super. 330); *Commonwealth* v. *Agoston* (72 A. 2d 575, Cert. Den. 71 S. Ct. 9, 340 U.S. 844, 95 L. Ed. —).

"The issue is different, however, after arrest. Pursuant to statute, the person arrested must be brought immediately to the nearest magistrate or to the municipal court. At this point, he should be permitted the privilege of telephoning an attorney or his family for, if the defendant is arraigned or given a preliminary hearing, the presence of counsel is usually deemed necessary concomitant and a denial to him of such counsel would probably be deemed a denial of due process."

I am also enclosing an opinion from the Supreme Court of the State of Delaware which may prove to be of value to you by answering some of the questions that may be directed to you.

If further information is desired, please do not hesitate to write.

Sincerely,

JOHN J. SMITH,
Chief of Police.

CHAPTER 19, TITLE 11, SECTION 1902, DELAWARE CODE OF 1953

SEC. 1902. Questioning and detaining suspects.

(a) A peace officer may stop any person abroad who he has reasonable ground to suspect of committing, has committed, or is about to commit a crime, and may demand of him his name, address, business abroad, and where he is going.

(b) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(c) The total period of detention provided for by this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 68, 1959

WILLIAM J. DE SALVATORE, DEFENDANT BELOW, APPELLANT

v.

STATE OF DELAWARE, APPELLEE

OPINION

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 68, 1959

WILLIAM J. DE SALVATORE, DEFENDANT BELOW, APPELLANT

v.

STATE OF DELAWARE, APPELLEE

(June 3, 1960)

Southerland, C. J., Wolcott and Bramhall, JJ., sitting.

Appeal from the Superior Court in and for New Castle County.

Robert C. O'Hora and John P. Daley, of Wilmington, attorneys for appellant.

Clement C. Wood, Chief Deputy Attorney General, and Murray M. Schwartz, Deputy Attorney General, attorneys for appellee.

Wolcott, J.: This is an appeal from a conviction before a Superior Court Judge, in the absence of a jury, of driving a motor vehicle under the influence of intoxicating liquor. The bases of the appeal are the denial by the trial judge of the following defense motions: (1) to suppress intoximeter test results by reason of the State's failure to produce for inspection one component part of the intoximeter; (2) to suppress the testimony of the officers taking the defendant into custody by reason of an asserted lack of authority to make an arrest; (3) to suppress evidence on the basis of an asserted invalidity of the "Uniform Arrest Act" (11 *Del. C.*, § 1902); and (4) an objection to questions addressed by the prosecution to the State Chemist designed to elicit an opinion concerning the physical condition of a man with 0.243 percent of blood alcohol by weight.

The facts involved in this prosecution are briefly summarized.

At approximately 1:00 A.M. on February 2, 1959, two uniformed Delaware Memorial Bridge guards, known generally to the community as "Bridge Police", were proceeding south on Route 13 approaching the overpass of Basin Road, a point three or four miles south of the Delaware Memorial Bridge. The two officers noticed a car across the grass plot dividing the north and south lanes of Route 13 at a point where there was no legal crossover. The car, thus observed, drove into the parking lot of a diner immediately to the south of the Basin Road overpass and stopped. The two officers followed in the patrol car and pulled up alongside the observed vehicle.

The driver of the car, who turned out to be this appellant, was requested to get out of his car. He did so slowly and leaned against the open door of his car. He emitted the odor of alcohol. He appeared unsteady on his feet. When asked for his registration and license, he fumbled in finding them. He admitted to having had some beer to drink. The officers concluded the appellant should be given a sobriety test, which he agreed to submit to.

Before leaving the parking lot, and after the appellant had given in response to questions his name and address, the officers told him he was being placed under a 2-hour detention for the purposes of the sobriety test and that at the end of that period he would either be released or a charge would be placed against him. Appellant voluntarily went with the officers to the police station, although in no event, the officers testified, would they have permitted him not to have accompanied them.

At the police station the appellant was administered physical coordination tests. His attitude changed from cooperative to indifferent to insulting. His speech was confused. His eyes watery, his balance and walk were "swaying," and he was "uncertain" on the finger-to-nose and picking up coins tests. His language became abusive and obscene when he was told a charge would be

placed against him. Prior to this, he had been given an intoximeter test which, on later analysis, showed a 0.243 percent of blood alcohol by weight.

The above-described events were concluded within 40 minutes from the time the appellant first drove into the parking lot. The officers then placed the appellant in formal arrest. At the time they had no warrant for his arrest. At 2:00 a.m. formal charges of driving a motor vehicle while under the influence of intoxicating liquor were placed against appellant before a local justice of the peace. Thereafter, the appellant was delivered to the county jail. In due course, he was tried and convicted in the Superior Court from whence comes this appeal.

Appellant challenges the right of the State to use the evidence collected within 2 hours of his original detention citing *Rickards* v. *State*, 6 Terry 573, 77 A. 2d 199, for the exclusion of illegally obtained evidence at the subsequent trial. His attack is threefold. First, it is argued that the Bridge police, having only the powers of constables, have no power to arrest on view for violation of the Motor Vehicle Code, a Bridge policeman may exercise such power only on the Bridge or its approaches, which appellant defines as excluding the Basin Road overpass, and, third, that 11 *Del. C.*, § 1902, the so-called Uniform Arrest Act, is unconstitutional as authorizing detention without probable cause. On the basis of these arguments, he urges us to rule that his detention was illegal, thus paving the way for the application of the rule of *Rickards* v. *State*.

By 17 *Del. C.*, Ch. 4, the Delaware Interstate Highway Division of the State Highway Department was created and charged with the duty of operating the existing Delaware Memorial Bridge. By § 409 the Division is authorized to establish regulations respecting the use of the Delaware Memorial Bridge and, to that end, is authorized by § 411 to employ such guards as are deemed advisable for the proper operation of the Bridge. It is enacted that such guards shall have the powers of a constable in the performance of their duties. The guards, thus authorized, now constitute the uniformed police force maintained by the Delaware Interstate Highway Division.

Appellant argues that the Bridge police have only the powers of arrest of a constable which are limited by 10 *Del. C.*, § 2723 to the power to arrest only for breaches of the peace committed in the constable's presence. He argues further that since 21 *Del C.*, § 701, authorizing certain officers to make arrests for violations of the Motor Vehicle Code, was amended by 48 *Laws*, Ch. 195 to omit constables from the listed officers having power to arrest for traffic violations, it follows that the Bridge police have no authority to make an arrest for a traffic violation.

We doubt that this technical argument is sound for the reason that the very nature of their employment requires the Bridge police to enforce the traffic laws on the Bridge, and we think they might well fit within the class described in 21 *Del C.*, § 701 as "other police officers." We are not required to so hold, however, for there is another and complete answer to the argument.

By 11 *Del. C.*, Ch. 19, the so-called Uniform Arrest Law, a peace officer, defined as "any public officer authorized by law to make arrests in a criminal case" is authorized by § 1902 to detain for investigation for a period of not in excess of 2 hours any person reasonably suspected of having committed a crime, and at the end of that time either release him or arrest him and charge him with a crime. It is specifically enacted that such detention shall not be an arrest.

We think it axiomatic that constables, and thus Bridge police, are peace officers within the meaning of § 1902 since they have the authority to make arrests in a criminal case. Irrespective, therefore, of the right of the Bridge police to make arrests pursuant to 21 *Del. C.*, § 701, they have the right to detain and arrest under 11 *Del. C.*, § 1902.

However, appellant argues that assuming 11 *Del. C.*, § 1902 authorizes the Bridge police to detain and arrest, still that authority may be exercised only within the limited area over which the Delaware Interstate Highway Division has control, viz., the Bridge proper and, possibly, its approaches. Since the point at which the appellant was originally detained is admittedly outside of that limited area, it is argued that the detention was illegal.

As a general rule, in the absence of statutory or constitutional authority, peace officers, including constables, cannot act outside of the territorial limits of the body from which they derive their authority. 80 *C.J.S., Sheriffs and Con-*

stables, § 36(b); *Lawson* v. *Buzines*, 3 Harr. 416. We note, however, that the authority conferred by 11 *Del. C.*, § 1902 is not limited territorially by its terms, and that by 10 *Del. C.*, § 2721 the jurisdiction of constables extends throughout the county of their appointment. We think, therefore, that the Bridge police, as peace officers, are authorized by statute to make arrests and to detain suspects at least within the confines of New Castle County.

Next, appellant argues that 11 *Del. C.*, § 1902 is unconstitutional because it permits a peace officer to stop any person who he has "reasonable ground to suspect" has committed a crime, as distinguished from detaining upon "reasonable ground to believe", which appellant says is the constitutional requirement for lawful detention and arrest without a warrant. Appelant argues that arrests or detentions without warrant are constitutional only when made on "probable cause" and not on mere suspicion. He cites numerous Federal authorities in support. We may assume that he is correct in arguing that arrests without warrant may be made only upon probable cause.

We point out, however, that 11 *Del C.*, § 1902 purports to govern, not arrests for crime which are governed by 11 *Del. C.*, § 1906, but detentions of persons in the course of the investigating of crime. Such police practice has long been recognized as valid by the courts when kept within reasonable bounds. Cf. *U.S.* v. *Bonanno*, 180 F. Supp. 71, and *People* v. *Henneman*, 367 Ill. 151, 10 N.E. 2d 649. This court, also, has upheld the investigatory power of the police to detain for questioning. *Wilson* v. *State*, 10 Terry 37, 50, 109 A.2d 381, 388.

We can find nothing in 11 *Del. C.*, § 1902 which infringes on the rights of a citizen to be free from detention except, as appellant says, "for probable cause". Indeed, we think appellant's attempt to draw a distinction between an admittedly valid detention upon "reasonable ground to believe" and the requirement of § 1902 of "reasonable ground to suspect" is a semantic quibble. We point out that in *Wilson* v. *State*, in referring to the arrest of the defendant, we said, "Nor can it be doubted that the arrest was legal, that is, upon reasonable suspicion of felony." In this context, the words "suspect" and "believe" are equivalents.

We hold, therefore, that 11 *Del. C.*, § 1902 is constitutional. We hold further that the recited facts concerning this detention more than satisfy the statutory requirement of grounds of belief or suspicion in the mind of the detaining officer. Not only did the appellant commit a violation of the Motor Vehicle Laws (crossing the grass plot) in the presence of the officers, but upon talking to him the officers had more than reasonable grounds to believe he had committed another violation in their presence (driving under the influence of liquor). We think the officers could have exercised their authority at that time under 11 *Del. C.*, § 1906 and have placed the appellant under arrest.

We, accordingly, hold that there is no taint of illegality in the detention and charging of the appellant, and that, therefore, the rule of *Rickards* v. *State*, supra, did not require the suppression of the evidence in question.

Appellant argues, also, for the suppression of the results of the analysis of the percentage of alcohol in his blood made from the intoximeter test. The basis for the argument is the failure of the State to produce for appellant's inspection one component of the apparatus used in the test. That component is described as the ascarite tube.

An intoximeter consists of three main parts, (1) a balloon with mouthpiece; (2) a fritted glass impregnated with sulphuric acid and potassium permanganate, and (3) a chemical train consisting of two connected glass tubes containing certain chemicals. The first tube, into which the breath is first passed, contains magnesium perchlorate which absorbs the moisture and alcohol from the breath. Thereafter, the breath passes into the second, or ascarite, tube which absorbs the carbon dioxide from the breath.

The process of analysis requires the chemist by distillation to determine the amount of alcohol absorbed in the first tube. The chemical contents of the first tube are all used up in the distillation process. The quantity of breath in which the amount of alcohol was contained is determined by the chemist from the differential in weight of the ascarite tube before and after the taking of the intoximeter test. On the basis of these two items, it is then possible to compute the percentage of alcohol in the subject's blood.

It appears that it is not the practice of the State Chemist who makes the required analysis, to retain the ascarite tube used in a particular test for the reason

that it is thereafter unusable. Rather, the practice is to return the tube to the manufacturer in order to obtain a refund on the cost.

Prior to the trial, appellant moved for production for his inspection of the ascarite tube. The State was unable to produce the tube because of the policy of returning the used tubes to the manufacturer.

Appellant thereupon moved to suppress the analysis of the intoximeter test on the ground that his rights have been violated by the inability to examine the ascarite tube, and on the further ground that the tube, itself, was the best evidence and since it was destroyed by the State the State may not offer secondary evidence of the test.

The results of the intoximeter tests are admissible in evidence in this State by reason of 11 *Del. C.*, § 3507 authorizing the admission into evidence of a chemical analysis of the breath of any person in cases where the issue is whether such person was or was not under the influence of intoxicating liquor.

Appellant does not argue, as of course he could not, that this analysis is inadmissible in evidence. The statute precludes that argument. He does argue that the State's failure to produce for his inspection one of the components has deprived him of an important right—that of an opportunity to demonstrate, possibly, the inaccuracy of the analysis. He cites several authorities in support of his argument that the failure to produce for inspection and analysis material, the character of which is in issue, is reversible error. Cf. *State* v. *Bramhall*, 63 S. 603, and an unreported case in the Federal District Court for Delaware, *U.S.* v. *City Dressed Beef Co., Inc.*, Civil Action No. 1426.

The authorities cited, however, are not in point, for in them it was possible to produce at least some of the material to be analyzed. In the case of intoximeter tests the material necessary to the making of the analysis is necessarily used up in the process. The only remaining element, the ascarite tube, furthermore sheds no meaningful light on the results since, by itself, it does not determine the final analysis.

In the case before us it appears that the ascarite tube went out of the possession of the State in accordance with the practice followed in several thousand such analyses before the appellant moved to produce for inspection. In our opinion the State has committed no error in disposing of an apparently useless tube in the absence of a request by the appellant to preserve it. Particularly is this so when chemical analysis of substances made by qualified chemists are as a matter of course received in evidence without the production in evidence of the substance itself. 2 *Wharton's Criminal Evidence* (11th Ed.), §§ 788, 1002. We express no opinion, however, on what would result if timely application for inspection of the component parts had been made.

Next, appellant argues that the ascarite tube was the best evidence of the result of the test, and that, therefore, the chemist's analysis should have been rejected. The answer to this contention is that, alone, the ascarite tube proves nothing with respect to blood alcohol content. The so-called Best Evidence Rule comes into play only when the secondary evidence offered, of itself, shows that better evidence exists of the fact sought to be proved. 1 *Wharton's Criminal Evidence* (11th Ed.), §§ 366, 387. Secondary evidence is excluded not because it is necessarily inferior in probative quality, but because it, itself, presupposes that direct, primary evidence is held back. To state the rule is to show its inapplicability in this case.

Finally, appellant argues that it was error to permit the State Chemist to testify in answer to a question as to whether or not in his experience he had seen any individual wih a 0.243 blood alcohol by weight reading who would not be under the influence of alcohol. Over the defense objection he answered that he had never found anyone with a reading of 0.243 who was capable of operating a motor vehicle.

Appellant objects on the ground that the witness had not been qualified as an expert, and that the statute permits only the admission into evidence of the results of the analysis without comment from the witness.

We think the objection is without merit. Similar testimony has been given by qualified chemists in other jurisdictions and upheld on appeal, even in trials before a jury which is not this case. *Commonwealth* v. *Capalbo*, 308 Mass. 376, 37 N.E. 2d 225; *People* v. *Markham*, 153 Cal. App. 2d 260, 314 P. 2d 217; *State* v. *Libby*, 153 Me. 1, 133 A. 2d 877; *State* v. *Cline*, 339 P. 2d 657. And see 2 *Wharton's Criminal Evidence* (11th Ed.), § 1001.

For the foregoing reasons, the conviction below is affirmed.

STATE OF DELAWARE,
DELAWARE STATE POLICE HEADQUARTERS,
Dover, Del., November 1, 1961.

Chief ROBERT V. MURRAY,
Metropolitan Police Department,
Washington, D.C.

DEAR CHIEF MURRAY: Enclosed is a copy of the Uniform Arrest Act of the State of Delaware, including the history of the law and judicial opinions, which you requested.

You will note that in section 1902, chapter 19 of title 11, the courts have upheld the constitutionality of the 2-hour detention period prior to arraignment for a specific charge or the release of a person without a charge being placed.

You will note further that in a case of operating under the influence, the courts ruled that evidence obtained during the 2-hour period of detention was admissible; even though the person so charged was not arraigned at the conclusion of the 2-hour period but was held all night due to his intoxicated condition and arraigned the following morning.

In section 1911, chapter 19, title 11, "Hearing Without Delay: Permissible Delay," you will note that a person not released at the conclusion of the 2-hour detention may be held for purposes of continued investigation for a period not greater than 24 hours following arrest, Sundays and holidays excluded. Furthermore, the investigator, upon application to a resident judge of the county where he is detained or the county where the crime was committed, may request an additional period not to exceed 48 hours, which would give an investigator 72 hours, excluding Sundays and holidays, to complete his investigation after arrest but prior to arraignment. (This section of the statute has never been tested as to constitutionality.)

However, all of our investigations, when necessary, are conducted under this provision of the statute. I sincerely hope that this information may assist your three-man committee in studying the problems of arrest and arraignment in your jurisdiction.

If I can be of further assistance in any way, please feel free to call upon me.

Sincerely yours,

JOHN P. FERGUSON, *Superindendent.*

11—DELAWARE LAWS, CHAPTER 19

SUBCHAPTER I. ARREST AND COMMITMENT

Cross References

Extradition, see section 2501 et seq. of this title.

SEC. 1901. DEFINITIONS.

As used in this subchapter—

"Arrest" is the taking of a person into custody in order that he may be forthcoming to answer for the commission of a crime;

"Peace Officer" is any public officer authorized by law to make arrests in a criminal case.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, Ch. 304 Code 1935, Sec. 5343-A.

REVISION NOTE:
Definitions of "felony" and "misdemeanor" were omitted from this section as covered by the general classification of crimes in section 101 of this title.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935 by adding these provisions as section 5343-A.

SEC. 1902. QUESTIONING AND DETAINING SUSPECTS.

(a) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed, or is about to commit a crime, and may demand of him his name, address, business abroad, and where he is going.

(b) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(c) The total period of detention provided for by this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded as an arrest

in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws. Ch. 304. Code 1935, Sec. 5343–B.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935 by adding these provisions as Section 5343–A.

NOTES OF DECISIONS

Arrest, acts as constituting 1
Sobriety test 2
Treatment of prisoner 3
7 Del. Code Ann.—19

1. Arrest, acts as constituting

Where a uniformed officer merely approached defendant and asked him what he had a package, defendant was not thereby placed under arrest. *State* v. *Gulczynski*, 2 W.W. Harr. 120, 32 Del. 120, 120A.8 (1952).

2. Sobriety Test

Action of state trooper who took defendant into custody following collision on highway in which defendant's automobile was involved, in insisting that defendant take sobriety test during first 2 hours, of defendant's detention was not a violation of defendant's constitutional privilege against self incrimination, Del. Const. Art. I, Sec. 7, and evidence obtained as result of such tests was admissible in evidence against defendant in prosecution for operating motor vehicle while under influence of intoxicating liquor. *State* v. *Smith*, 91 A. 2d, 188 (1952)

Where defendant was taken into custody by state trooper after collision occurred on highway in which defendant's automobile was involved and during first 2 hours of detention defendant submitted voluntarily to sobriety test, fact that defendant was not formally placed under arrest for operating motor vehicle while under influence of intoxicating liquor until following morning, notwithstanding statutory requirement that at end of 2-hour detention of person who fails to identify himself or explain his actions to satisfaction of peace officer who has reasonable grounds to believe such person has committed a crime such person should be arrested and charged, did not render inadmissible evidence relating to results of sobriety tests. Id.

3. Treatment of prisoner.

Any cruel or unnecessary exposure of a prisoner to cold, or deprivation of suitable clothing or covering, while in the custody of the officer arresting him, is unlawful, rendering the officer liable. *Petit* v. *Colmary*, 4 Penn. 266, 20 Del. 266, 55 A. 344 (1903).

SUPPLEMENTARY INDEX TO NOTES
Constitutionality 1/2
Peace officers, who are 4
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1/2. Constitutionality

This section, which permits a peace officer to stop any person who peace officer has "reasonable ground to suspect" has committed a crime, is constitutional, and is not void because it permits police officer to stop any person who peace officer has "reasonable ground to suspect" has committed a crime, as distinguished from detaining on "reasonable ground to believe", since words "suspect" and "believe" are equivalents in context of the statute. *De Salvatore* v. *State*, 163 A. 2d., 244 (1960).

1. Arrest, acts as constituting

Where, in criminal proceeding, evidence was sufficient to establish that officers had not stopped defendant to demand his name, address, business abroad, and destination but had taken him at once to the police station, officers' taking of defendant in custody constituted an "arrest" within this section, and, therefore, defendant's detention beyond 2-hour period was lawful, and statement

made during such detention was admissible in subsequent criminal proceeding. *Wilson* v. *State*, 10 Terry 37, 49 Del. 37, 109 A. 2d 381 (1954), Certiorari denied 75 S. Ct. 574, 348, U.S. 983, 99 L. Ed. 765.

Fact that defendant was under arrest at time he made statements to police officers would not, in itself, operate to exclude such statement in subsequent criminal proceeding nor would delay in placing formal charge against defendant necessarily exclude it, but this was circumstance which court and jury should consider in determining whether statement was voluntary. Id.

Defendant's arrest upon reasonable suspicion of felony of rape was legal. Id.

4. Peace officers, who are

Constables, and thus Delaware Memorial Bridge Guards, known generally to the community as Bridge Police, are "peace officers" within meaning of this section authorizing a "peace officer" to detain for investigation for a period of not in excess of 2 hours any person reasonably suspected of having committed a crime, and at the end of that time either release him or arrest him and charge him with a crime. *De Salvatore* v. *State*, 163 A. 2d 244 (1960).

5. Reasonable grounds

Where Delaware Memorial Bridge Guards, known generally to the community as Bridge Police, noticed automobile cross grass plot dividing north and south lanes at Route 13 at point where there was no legal crossover, and automobile was then driven by defendant to a parking lot immediately to south of Basin Road overpass and was stopped, and when defendant got out of automobile he appeared unsteady while on his feet and he emitted odor of alcohol, and he fumbled in finding his registration and license, and he admitted having some beer to drink, officers had "reasonable ground to suspect" defendant within meaning of this section permitting a peace officer to stop any person who peace officer has "reasonable ground to suspect" has committed a crime. *De Salvatore* v. *State*, 162 A–2d 244 (1960).

SEC. 1903. SEARCHING QUESTIONED PERSON FOR WEAPON

A peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in section 1902 of this title, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person. The arrest may be for the illegal possession of the weapon.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, 304. Code 1935, Sec. 5343–C.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935 by adding these provisions as section 5343–C.

SEC. 1904. PERMISSIBLE FORCE FOR ARREST

(a) No unreasonable force or means of restraint shall be used in detaining or arresting any person.

(b) A peace officer who is making an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall he be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect an arrest.

(c) A peace officer, who has reasonable ground to believe that the person to be arrested has committed a felony, is justified in using such force as may be necessary to effect an arrest, to prevent escape, or to overcome resistance only when—

(1) There is no other apparently possible means of making the arrest or preventing escape; and

(2) The officer has made every reasonable effort to advise the person that he is a peace officer and is making an arrest.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, Ch. 304. Code 1935, Sec. 5343–D.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935 by adding these provisions as section 5343–D.

NOTES OF DECISIONS

Conduct of officer 3
Degree of force 2
Duty of officer 1
See, also, Notes of Decisions under section 1905 of this title.

1. Duty of officer

It is the duty of a constable to execute a warrant of arrest in a lawful manner, and, when acting as a peace officer, he must not commit a trespass by exceeding his authority. *Petit* v. *Colmary*, 4 Penn. 266, 20 Del. 266, 55 A. 344 (1903).

2. Degree of force

If officer shot by accused at the time he attempted to arrest accused had good grounds to suspect that accused had committed a felony, he had authority to make the arrest, and for that purpose had the right to enter accused's home in a peaceable manner and use as much force as was reasonably necessary to effect the arrest, and accused had no right to resist, provided he had good reason to know that officer was a peace officer and was given to understand that he was under arrest. *State* v. *Price*, 7 Boyce, 544, 30 Del. 544 108 A. 385 (1919).

A peace officer may use whatsoever force is reasonably necessary to prevent the escape or secure the arrest of any person he may find engaged in a breach of the peace or any criminal offense, but he must use no more force and violence than is reasonably necessary to secure the arrest and to convey him to a place of custody. *State* v. *Mills*, 6 Penn. 497, 22 Del. 497, 69 A. 841 (1908).

An officer in the discharge of a public duty may, if attacked by another, avail himself of the law of self-defense in the same manner as any other person, using such force as may be necessary to protect himself. *Petit* v. *Colmary*, 4 Penn. 266, 20 Del. 266, 55 A. 344 (1903).

The amount of force which a police officer may lawfully use in making an arrest is so much as is necessary to effect the arrest, and no more and when he uses more force than the occasion calls for, he is guilty of an assault and battery. *State* v. *Mahon*, 3 Harr. 568, 3 Del., 568 (1840).

3. Conduct of officer

The conduct of a peace officer under a mistake of power or of propriety should not be severely punishable if there was an absence of malicious or reckless purpose. *State* v. *Lafferty*, 5 Har. 491, 5 Del. 491 (1854).

SEC. 1905. RESISTING ARREST

If a person has reasonable ground to believe that he is being arrested by a peace officer, he shall refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for arrest.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, Ch. 304. Code 1935, Sec. 5343–E.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935, by adding these provisions as section 5343–E.

NOTES OF DECISIONS

See, also, Notes of Decisions under section 1904 of this title.

1. Unreasonable force or violence of officer

If a public officer uses more force than is necessary to make an arrest, he is liable for assault, and the person arrested may in self-defense use such force as is necessary to repel the attack; but, if the force used be from motives of revenge, the person offending is guilty of assault and battery, *State* v. *Wyatt*, 4 Boyce, 473, 27 Del. 473, 89 A. 217 (1913).

Where an officer is resisted in making an arrest, and in retaliation uses more force than is reasonably necessary to effect the arrest, it is unlawful. *Petit* v. *Colmary*, 4 Penn. 266, 20 Del. 266, 55 A., 344 (1903).

Although one was arrested with unlawful violence in the first instance, yet if he submitted to the arrest, and afterwards, while in the peaceful custody of the officer, forcibly attacked the officer, such attack was a resistance of a peace officer. *State* v. *Dennis*, 2 Marv., 433, 16 Del. 433, 2 Hardesty, 184, 43 A. 261 (1895).

Though a peace officer use unreasonable force in making an arrest, yet if the person assaulted resist, not in self-defense, but with intent of resisting arrest, he is guilty of an offense. Id.

One may repel unreasonable violence used by a peace officer in arresting him by such force only as is reasonably necessary to repel it. Id.

If an officer in arresting a prisoner in the first instance uses undue violence, the prisoner may, in self-defense, use so much force as is necessary to repel it, and no more. Id.

SEC. 1906. ARREST WITHOUT WARRANT

(a) An arrest by a peace officer without a warrant for a misdemeanor is lawful whenever he has reasonable ground to believe that the person to be arrested has committed a misdemeanor—

(1) in his presence; or

(2) out of his presence and without the State, and if Law enforcement officers of the state where the misdemeanor was committed request an arrest and the accused will not be apprehended unless immediately arrested.

(b) An arrest by a peace officer without a warrant for a felony, whether committed within or without the State is lawful whenever—

(1) he has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed; or

(2) a felony has been committed by the person to be arrested although before making the arrest the officer had no reasonable ground to believe the person committed it.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, Ch. 304. Code 1935, Sec. 5343–F.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935, by adding these provisions as section 5343–F.

CROSS REFERENCES

Arrest, see section 701 of Title 21, Motor Vehicles.

Intoxicated persons, arrest with or without warrant, see section 611 of this title.

NOTES OF DECISIONS

1. Common law

At common law, peace officers had authority to arrest without warrant on reasonable suspicion that felony had been committed. *Rickards* v. *State*, 77, A.2d. 199 (1951).

2. Generally

Where one person arrested another without a warrant it was at his own peril. *State* v. *Clark*, 2 Del. CAS. 210 (1804).

3. Presence of officer

The words "in his presence," as used in connection with an officer's authority to make an arrest without a warrant for an offense committed "in his presence," cannot be construed technically or strictly; it being sufficient to justify an arrest if the officer knows the offense was committed, which knowledge he may obtain, not only by seeing but by accused's admissions before arrest. *State* v. *Gulczynski*, 2 W.W. Harr. 120, 32 Del. 120, 120 A.88 (1922).

An arrest without warrant being valid if for an offense committed in the officer's presence or view, where accused upon being accosted by an officer and asked what he had in a package, finally replied "liquor, two gallons," his subsequent arrest was valid. Id.

A police officer may, without a warrant, arrest a person whom he finds engaged in a breach of the peace or any criminal offense within his view or within his hearing. *State* v. *Mills*, 6 Penn. 497, 22 Del. 497, 69 A. 841 (1908). See, also *State* v. *Wyatt*, 4 Boyce, 473 89 A. 217 (1913).

An arrest by an officer without a warrant can only be made where the offense is committed in his presence and view, and at the time of its commission or in the immediate pursuit of the offender. *Marshall* v. *Cleaver*, 4 Penn. 450, 20 Del. 450, 56 A. 380 (1903).

A peace officer may arrest a person without warrant for an offense committed in his presence and view, for which he would have a right to make the arrest with a warrant if committed out of his presence. Id.

An arrest for a breach of peace cannot be legally made without a warrant, if not committed in the presence of the officer making the arrest. *State* v. *Crocker*, 1 Houst. Cr.Cas. 434 (1874).

4. Reasonable grounds

An officer needs no warrant to make an arrest, if he has reasonable cause to suspect a felony has been committed. *State* v. *Price*, 7 Boyce, 544, 30 Del. 544, 108, A. 385 (1919).

The burden is on an officer to show that there was reasonable ground for an arrest made without warrant, and, if he fails to make such showing, he will be liable for false imprisonment. *Marshall* v. *Cleaver*, 4 Penn. 450, 20 Del. 450, 56, A. 380 (1903).

A peace officer, such as a constable or sheriff may arrest, even without a warrant, one concerned in a breach of the peace or other crime or when he has reasonable grounds to suspect the person of such offense. *State* v. *Brown*, 5 Har. 505, 5 Del. 505 (1854).

5. Breach of peace

A public peace officer may arrest without a warrant any person found engaged or involved in a breach of the peace. *State* v. *Dennis*, 2 Hardesty, 184, 2 Marv. 433, 16 Del. 433, 43 A. 261 (1805).

6. Disorderly persons

A constable or police officer of a city may arrest at his own instance, without a warrant, one who is shouting and making a noise at a late hour of the night. *State* v. *Russell*, 1 Houst. Cr. Cas. 122 (1862).

7. Intoxicated persons

14 Del. Laws, c. 418, Sec. 16 (section 611 of this title), expressly authorized the arrest, without warrant, of any person found drunk or excited by liquor, and noisy, in the street, highway or other public place of the county. *Marshall* v. *Cleaver*, 2 Penn. 450, 20 Del. 450, 56 A. 380 (1903).

A peace officer is justified in arresting and imprisoning without warrant, one whom he finds drunk on the streets, or engaged in or threatening a breach of the peace, or who commits an assault on him without just cause. Id.

Where Delaware Memorial Bridge Guards, known generally to the community as Bridge Police, noticed automobile cross grass plot dividing north and south lanes of Route 13 at point where there was no legal crossover, and automobile was then driven by defendant to a parking lot immediately to south of Basin Road overpass and was stopped, and when defendant got out of automobile he appeared unsteady while on his feet, and he emitted the odor of alcohol, and he fumbled in finding his registration and license, and he admitted having some beer to drink, officers could have arrested the defendant under this section dealing with arrests for crime. *De Salvatore* v. *State*, 163, A. 2d 244 (1960).

8. Justification for arrest

If no felony had been committed before the arrest, it was no justification that the person arresting was an officer. *State* v. *Clark*, 2 Del. Cas. 210 (1804).

SEC. 1907. VALIDITY OF ARREST ON IMPROPER GROUNDS

If a lawful cause of arrest exists, the arrest is lawful even though the officer charges the wrong offense or gives a reason that does not justify the arrest.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, Ch. 304. Code 1935, Sec. 5343–G.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935 by adding these provisions as section 5343–G.

NOTES OF DECISIONS

1. Generally

Court, in a criminal action, will not inquire into the method by which defendant is brought before it, since proper tribunals and adequate laws exist for determining responsibility and liability of those who, in mistaken zeal, may willfully or ignorantly exceed their authority in making arrests. *State* v. *Moore*, 4 Terry 509, 43 Del. 509, 50 A.2d 791 (1947).

SEC. 1908. POSSESSION AND DISPLAY OF WARRANT

An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but, if the person arrested so requests, the warrant shall be shown to him as soon as practicable.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, Ch. 304, Code 1935, Sec. 5343–H.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935 by adding these provisions as section 5343–H.

SEC. 1909. SUMMONS INSTEAD OF ARREST; FORM; PENALTY FOR NONAPPEARANCE

(a) In any case in which it is lawful for a peace officer to arrest without a warrant a person for misdemeanor, he may, but need not, give him a written summons. (See sample attached.)

(b) If the person fails to appear in answer to the summons or if there is reasonable cause to believe that he will not appear, a warrant for his arrest may issue.

(c) Whoever willfully fails to appear in answer to the summons may be fined not more than $100 or imprisoned for not more than 30 days or both.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, Ch. 304. Code 1935, Sec. 5343–I.

1951 AMENDMENT:
48 Del. Laws, Ch. 304, amended Code 1935 by adding these provisions as section 5343–I.

SEC. 1910. RELEASE OF PERSON ARRESTED WITHOUT WARRANT

(a) Any officer in charge of a police department or any officer delegated by him may release, instead of taking before a magistrate, any person who has been arrested without a warrant by an officer of his department whenever—

(1) He is satisfied either that there is no ground for making a criminal complaint against the person or that the person was arrested for drunkenness and no further proceedings are desirable; or

(2) The person was arrested for a misdemeanor and has signed an agreement to appear in court at a time designated, if the officer is satisfied that the person is a resident of the State and will appear in court at the time designated.

(b) A person released as provided in this section shall have no right to sue on the ground that he was released without being brought before a magistrate.

HISTORY AND SOURCE OF LAW

DERIVATION:
48 Del. Laws, ch. 304. Code 1935, sec. 5343–J.

1951 AMENDMENT:
48 Del. Laws, ch. 304, amended code 1935 by adding these provisions as sec. 5343–J.

SEC. 1911. HEARING WITHOUT DELAY; PERMISSIBLE DELAY

If not otherwise released, every person arrested shall be brought before a magistrate without unreasonable delay, and in any event he shall, if possible, be so brought within 24 hours of arrest, Sunday and holidays excluded, unless a resident judge of the county where he is detained or of the county where the crime was committed for good cause shown orders that he be held for a further period of not exceeding 48 hours.

HISTORY AND SOURCE OF LAW

DERIVATION:		1951 AMENDMENT:
48 Del. Laws, ch. 304.	Code 1935, sec. 5343–K.	48 Del. Laws, ch. 304, amended code 1935 by adding these provisions as sec. 5343–K.

NOTES OF DECISIONS

Defendant in custody 1

1. Defendant in custody

In murder prosecution, where defendant was already in prison serving a sentence for another offense when he was taken from the prison to police headquarters for questioning about the homicide, failure of the police to bring the defendant before a magistrate within 24 hours was not a violation of criminal rule 5(a) of the Superior Court Rules and of this section, since they do not apply to a case in which defendant is already in custody. *Garner* v. *State*, 1 Storey 301, 145 A. 2d 68 (1958).

SEC. 1912. IDENTIFICATION OF WITNESS

Whenever a peace officer has reasonable ground to believe that a crime has been committed, he may stop any person who he has reasonable ground to believe was present thereat and may demand of him his name and address. If the person fails to identify himself to the satisfaction of the officer, he may take the person forthwith before a magistrate. If the person fails to identify himself to the satisfaction of the magistrate, the latter may require him to furnish bond or may commit him to jail until he so identifies himself.

HISTORY AND SOURCE OF LAW

DERIVATION:		1951 AMENDMENT:
48 Del. Laws, ch. 304.	Code 1935, sec. 5343–L.	48 Del. Laws, ch. 304, amended code 1935, by adding these provisions as sec. 5343–L.

CITY AND COUNTY OF DENVER,
DEPARTMENT OF POLICE,
Denver, Colo., June 7, 1961.

ROBERT V. MURRAY,
Chief of Police, Metropolitan Police Department,
Government of the District of Columbia,
Washington, D.C.

DEAR SIR: In reply to your letter of April 4, 1961, enclosed please find a brief manual on the laws of arrest in the State of Colorado.

Investigation arrests are permitted in our jurisdiction under a reasonable time rule. The "reasonable time" is dependent upon the type of case and circumstances. Confessions must be voluntary, and the district attorney must prove that the confession was voluntarily given by the defendant without the use of force, threats, promises, or other inducements.

A confession which was voluntarily made is not inadmissible because the defendant was not informed his confession might be used against him, or because he was in police custody at the time, or because there was a delay between the arrest and the time of the confession, or because the defendant was not represented by an attorney, or because his friends and family were not allowed to see him until after the confession, or because he was accused of the crime charged and other offenses. See *Cahill* v. *People*, III Colo. 29, 38–39.

We are given considerable latitude on length of interrogation. In *Downey* v. *People*, 121 Colo. 307, at page 318, the Colorado Supreme Court said:

"We hold that the law enforcement officers of the State in their effort to solve a murder case, in the interest of justice, must have a reasonable latitude in arresting and questioning one justifiably suspected of being the murderer, and

if in so doing the investigating authorities give proper consideration to the comfort and well-being of the suspect person, and conduct themselves in a manner free from threats, promises, or mistreatment of the suspect, a confession thus secured may be received in evidence, even though it was the result of several extended periods of interrogation of the accused."

The periods of interrogation referred to were these: On one day the suspect was taken on a trip to the scene of the crime and was questioned. This took 3 hours. The next day he was questioned for 6 hours and 45 minutes, as follows: 11 a.m. to 12 noon; 2 to 3 p.m.; 4 to 6:15 p.m.; and 8 to 10:30 p.m. After 10:30 p.m., the accused talked to one officer for an hour or so. On the following afternoon he confessed.

On voluntariness of confession, see *Bruner* v. *People*, 113 Colo. 194. On information obtained from involuntary confessions, see *Osborn* v. *People*, 83 Colo. 4, 28. On compulsory submission, see *Block* v. *People*, 125 Colo. 136. We also suggest you see our Habeas Corpus Act, Colorado Revised Statutes 1953, 65–1–1, 65–1–3.

In the case of an individual held for investigation and released without formal charge there is no special procedure other than his release from custody.

If we can be of any further assistance, please call on us.

Very truly yours,

JAMES E. CHILDERS,
Chief of Police.
By W. G. NELSON,
Division Chief, Commanding, Criminal Investigations.

POLICE DEPARTMENT,
CITY AND COUNTY OF SAN FRANCISCO,
San Francisco, Calif., April 14, 1961.

ROBERT, V. MURRAY,
Chief of Police, Metropolitan Police Department,
District of Columbia, Washington, D.C.

DEAR CHIEF MURRAY: The following sections I believe are pertinent to your inquiry and are quoted verbatim from the Penal Code of the State of California:

SEC. 821: MAGISTRATE BEFORE WHOM DEFENDANT ARRESTED FOR FELONY TO BE TAKEN: DEFENDANT ARRESTED IN ANOTHER COUNTY. If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county, as provided in Section 824.

If the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit him to bail in the amount specified in the endorsement referred to in Section 815a, and direct the defendant to appear before the court or magistrate by whom the warrant was issued on or before a day certain which shall in no case be more than 10 days after such admittance to bail. If bail be forthwith given, the magistrate shall take the same and endorse thereon a memorandum of the aforesaid order for the appearance of the defendant.

If the warrant on which the defendant is arrested in another county does not have bail set thereon, or if the defendant arrested in another county does not require the arresting officer to take him before a magistrate in that county for the purpose of being admitted to bail, or if such defendant, after being admitted to bail, does not forthwith give bail, the arresting officer shall immediately notify the law enforcement agency requesting the arrest in the county in which the warrant was issued that such defendant is in custody, and thereafter such law enforcement agency shall take custody of such defendant within 5 days in the county in which he was arrested and shall take such defendant before the magistrate who issued the warrant, or before some other magistrate of the same county.

SEC. 822: DISPOSITION OF PERSON ARRESTED ON MISDEMEANOR CHARGE WHILE IN ANOTHER COUNTY: ADMISSION TO BAIL: FIXATION OF TIME AND PLACE FOR APPEARANCE. If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit him to bail in the

amount specified in the endorsement referred to in Section 815a, and direct the defendant to appear before the court or magistrate by whom the warrant was issued on or before a day certain which shall in no case be more than 10 days after such admittance to bail. If bail be forthwith given, the magistrate shall take the same and endorse thereon a memorandum of the aforesaid order for the appearance of the defendant.

SEC. 825: TIME WITHIN WHICH DEFENDANT MUST BE TAKEN BEFORE MAGISTRATE: ATTORNEY MAY VISIT PRISONER: REFUSAL TO PERMIT VISIT A MISDEMEANOR FORFEITURE FOR REFUSAL AND RECOVERY THEREOF. The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 2 days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of five hundred dollars, to be recovered by action in any court of competent jurisdiction.

SEC. 836: ARRESTS BY PEACE OFFICERS: ARREST UNDER WARRANT OR WITHOUT WARRANT. A peace officer may make an arrest in obedience to a warrant, or may without a warrant, arrest a person;

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

SEC. 842. NECESSITY THAT WARRANT BE IN POSSESSION OF ARRESTING OFFICER: WARRANT MUST BE SHOWN, WHEN. An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but if the person arrested so requests it, the warrant shall be shown to him as soon as practicable.

SEC. 847: DUTY OF PRIVATE PERSON MAKING ARREST TO TAKE PRISONER BEFORE MAGISTRATE OR DELIVER TO PEACE OFFICER. When peace officer not liable for false arrest or false imprisonment. A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer. There shall be no civil liability on the part of and no cause of action shall arise against any peace officer, acting within the scope of his authority, for false arrest or false imprisonment arising out of any arrest when—

(a) Such arrest was lawful or when such peace officer, at the time of such arrest, had reasonable cause to believe such arrest was lawful; or

(b) When such arrest was made pursuant to a charge made, upon reasonable cause, of the commission of a felony by the person to be arrested; or

(c) When such arrest was made pursuant to the requirements of Penal Code Sections 142, 838 or 839.

SEC. 849: ARREST WITHOUT WARRANT: PERSON ARRESTED TO BE TAKEN BEFORE NEAREST MAGISTRATE: COMPLAINT TO BE LAID: RIGHT OF PEACE OFFICER TO RELEASE PERSON ARRESTED FROM CUSTODY. (a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person must be laid before such magistrate.

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only.

(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.

(3) The person arrested was arrested for a misdemeanor, and has signed an agreement to appear in court or before a magistrate at a place and time designated, as provided in this code.

In a legal interpretation of the above-described section 825, it was held that this section, which declares that a defendant "must in all cases be taken before the magistrate without unnecessary delay, and, in any event, 2 days after his arrest, excluding Sundays and holidays," does not authorize 2-day detention in all cases, but places a limit on what may be considered necessary delay, and detention of less than 2 days, if unreasonable under the circumstances, is a violation of the statute.

It has been generally held in this State that where the arrest is lawful, subsequent unreasonable delay in taking the person before the magistrate does not affect the legality of the arrest, although it could well subject the offending person to liability for so much of imprisonment as occurs after a period of necessary or reasonable delay.

I trust the foregoing will be of some assistance to you.

Very truly yours,

THOMAS J. CAHILL, *Chief of Police.*

LANSING POLICE,
Lansing, Mich., April 11, 1961.

Chief ROBERT V. MURRAY,
Metropolitan Police Department,
Washington, D.C.

DEAR CHIEF MURRAY: Reference is made to your inquiry of April 4 concerning arrests and arraignments of persons apprehended by this department.

The procedure which we follow can be found in section 157, "Arrest by Peace Officer Without Warrant," Michigan Criminal Law and Procedure, by Gillespie. There is no set time that a subject can be held; however, it must be reasonable.

Sincerely yours,

PAUL TAYLOR, *Chief of Police.*

POLICE DEPARTMENT,
CITY OF NEW YORK,
New York, N.Y., March 27, 1961.

EDGAR E. SCOTT,
Deputy Chief of Police, Chief of Detectives, Metropolitan Police Department, Washington, D.C.

DEAR MR. SCOTT: Your communication addressed to the police commissioner relative to the holding of persons for investigation or on suspicion of a crime has been referred to the undersigned for reply.

Please be advised that there is no statutory authority in this State to hold a person for any period of time for investigation or on suspicion of a crime.

Section 177 of the Code of Criminal Procedure outlines the broad powers of arrest by a peace officer without a warrant and should be of assistance in answering your queries.

Section 177. In what cases allowed:

A peace officer may, without a warrant, arrest a person—

1. For a crime, committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;
4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;
5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections 185, 186, and 187 of this code.

I trust this information will be of assistance to you.

Very truly yours,

LEONARD E. REISMAN,
Deputy Commissioner in Charge of Legal Matters.

SYNOPSIS OF COURT CASES PERTINENT TO MALLORY RULE

Anonymous v. *Baker*

(360 U.S. 287 (1959))

Question: Whether due process clause of 14th amendment requires presence of counsel in hearing room with witnesses summoned in State judicial inquiry into improper practices at the bar.

Brooklyn Bar Association presented petition charging ambulance chasing and other unethical practices by local bar; N.Y. State Supreme Court ordered an investigation. Justice Baker presided. Appellants were private investigators, not lawyers; subpenaed to testify, appeared with counsel. Justice Baker told appellants counsel not allowed in hearing room, but appellants would be free to leave room to consult counsel at any point. For that reason appellants refused to testify. Convicted of contempt. Appellants Division affirmed; N.Y. Court of Appeals dismissed appeals. U.S.S.C. treated appeal as cert. petition.

Held: Affirmed. Weaker claim of denial due process than *Groban*, since judge conducted investigation and allowed free right of consultation of counsel. Doesn't matter that appellants might have been prosecuted as result of investigation.

Dissent (Warren, Black, Douglas, Brennan): Reaffirms dissenting view in *Groban*.

IN RE GROBAN (352 U.S. 330 (1957))

Question was whether appellants had right, under due process clause of 14th amendment, to have counsel present in giving of testimony in fire marshal's investigation.

Fire marshal investigating fire on premises of appellants, subpenaed appellant to appear. Refused to permit counsel to attend under authority of Ohio Code. Appellants declined to testify without counsel present. Under Ohio Code, fire marshal committed appellant to county jail until willing to comply. Habeas corpus denied — affirmed by Ohio Supreme Court.

Held: Affirmed (5–4 vote, opinion by Reed). No more right to presence of counsel in fire marshal's hearing than in grand jury. Privilege of silence is protection of witness. Presence of counsel might encumber proceeding — State code not contrary to fundamental liberty and justice.

Dissent: (Black, Warren, Douglas, Brennan.) Due process requires attendance of counsel at secret inquisition which holds possibility of incrimination of witness or citation for contempt.

TONY A. COLEMAN *v.* UNITED STATES (317 F. 2D 891 (4–19–63))

Conviction on housebreaking count 7 affirmed. Conviction on housebreaking counts 1–6 reversed. (JJ. Danaher (writing), Burger, (Washington dissenting as to count 7).)

12:25 a.m.—Defendant seen by police standing by store door, padlock broken, defendant carrying tire iron. Defendant claimed waiting for a friend, carrying tire iron for protection.

12:30 a.m.—Defendant arrested at scene for housebreaking (count 7). Defendant taken to precinct.

1:00 a.m.—Two detectives sent from headquarters to interrogate defendant, questioning commenced. Defendant denied complicity in housebreaking (count 7).

Detectives went back to store, got samples of paint and wood chips from door. Returned to defendant and told him laboratory test would compare samples with particles on tire iron.

1:45 a.m. (approx.)—Defendant admitted guilt (count 7).

1:45–3:00 a.m.—Defendant questioned as to other unsolved housebreakings.

3:00 a.m. (approx.)—Defendant admitted guilt in other cases (counts 1–6).

3:00–3:30 a.m.—Defendant accompanied police to scene of other cases (counts 1–6).

3:30–4:45 a.m.—Transcription of confession as to counts 1–6.

10:00 a.m.—Defendant presented to magistrate.

Oral confession (count 7) and written confession (counts 1–6) received at trial.

Held: Interrogation on count 7 was permissible, since delay for questioning was brief and purpose was not to get self-incriminating statements, but to check defendant's story against independent evidence (paint samples).

Interrogation on counts 1–6 not permissible, since (*a*) enough evidence on count 7 to charge and present defendant promptly; (*b*) no evidence on counts 1–6 except subsequent confession; (*c*) purpose of delay on 1–6 was to build case from nothing by interrogation; and (*d*) delay was protracted.

CHARLES S. COLEMAN v. UNITED STATES

(313 F. 2d 576 (12–20–62).—Conviction for robbery and murder reversed. JJ. Edgerton (writing), Washington, Bastian (dissenting)

Police questioned Coleman numerous times without arrest, prior to date of arrest, 1–17–61 (following times on that date).

6:45 p.m.—Police arrested defendant, took him to police station and locked him up.
7:30–8:00 p.m.—Police interrogated defendant—non-incriminatory statements.
8:00–8:45 p.m.—Defendant locked up again.
8:45–8:50 p.m.—Further questioning; oral confession given by defendant.
9:10–10:50 p.m.—Confession transcribed.
10:50 p.m.—Defendant booked.
10:00 a.m. (following day)—Defendant before magistrate.

Oral and written confessions received at trial.

Held: Unnecessary delay (court does not say what portion of delay was permissible), error to admit both confessions. Defendant should have been brought before magistrate instead of interrogated, no matter what hour. If magistrate is unavailable, questioning is still not permissible.

UNITED STATES v. JAMES J. JONES

(D.C.D.C. Crim. No. 366–63, tried 7–22–63 before Wright, J.)

Charges: assault with dangerous weapon, assault with intent to kill, robbery, carrying concealed weapon.

10:45 a.m.—Defendant arrested on warrant.
10:55 a.m.—Defendant arrived precinct No. 3 with arresting officer.
11:00 a.m.—Detective started to question defendant. Defendant immediately confessed shooting, denied robbery.

Oral confession offered at trial. No objection by defense counsel. Judge asked if it was necessary to take defendant to precinct, since warrant apparently valid. Government stated it was necessary after arrest to book defendant, fingerprint him and prepare lineup sheet. Judge asked defense counsel if he objected. Counsel did and confession excluded.

Defendant found guilty of assault with dangerous weapon, not guilty on others.

TEXT OF CERTAIN CASES DECIDED BY THE U.S. COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

DURHAM v. UNITED STATES.
No. 11859.

United States Court of Appeals
District of Columbia Circuit.

Argued March 19, 1954.

Decided July 1, 1954.

Petition for Rehearing In Banc
Denied Sept. 10, 1954.

From judgment of the United States District Court for the District of Columbia, Alexander Holtzoff, J., convicting the defendant of housebreaking after trial without a jury, the defendant appealed. The Court of Appeals, Bazelon, Circuit Judge, adopting a new test of criminal responsibility, held that if defendant's unlawful act was the product of mental disease or mental defect, he was not criminally responsible.

Reversed and remanded for new trial.

1. Criminal Law ⇐625

In prosecution for housebreaking, trial court's acceptance of waiver of pretrial lunacy hearing from defendant who stated he needed hospitalization and whose testimony showed confusion was error notwithstanding certification from acting superintendent of mental hospital that defendant was mentally competent to stand trial. D.C.Code 1951, §§ 22–1801, 22–2201, 22–2202, 24–301.

2. Criminal Law ⇐331

In prosecution for housebreaking, psychiatrist's opinion that defendant had been of unsound mind on date when crime was committed was sufficient to satisfy "some evidence" test and thereby to shift to prosecution the burden of proving defendant's sanity, though psychiatrist could not state categorically that defendant had not known right from wrong. D.C.Code 1951, §§ 22–1801, 22–2201, 22–2202, 24–301.

3. Criminal Law ⇐1168(1)

Trial court's erroneous holding that there was no evidence of alleged housebreaker's mental state as of date when crime was committed, and that presumption of sanity therefore prevailed, was prejudicial and required reversal. D.C. Code 1951, § 24–301.

4. Criminal Law ⇐311, 331

When lack of mental capacity is raised as a defense to a charge of crime, the law presumes that the defendant is sane, but as soon as some evidence of mental disorder is introduced, sanity must be proved beyond a reasonable doubt as part of prosecution's case. D.C.Code 1951, § 24–301.

5. Criminal Law ⇐623

When issue of insanity is raised by introduction of "some evidence" so that presumption of sanity is no longer absolute, trier of fact must weigh the whole evidence, including that supplied

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by the presumption of sanity, on the issue of capacity in law of accused to commit the crime, and failure so to weigh the whole evidence on such issue is reversible error. D.C.Code 1951, § 24–301.

6. Common Law ⇐14

Former common law should not be followed where changes in conditions have made it obsolete.

7. Criminal Law ⇐48

In District of Columbia, formulation of tests of criminal responsibility is entrusted to the courts, and they may adopt changes in such tests retroactively. D.C.Code 1951, § 24–301.

8. Common Law ⇐10

Common-law procedure in all matters relating to crime continues in force except where supplanted by special statutory provisions.

9. Criminal Law ⇐48

An accused is not criminally responsible if his unlawful act was product of mental disease or mental defect. D.C. Code 1951, § 24–301.

10. Criminal Law ⇐48

Term "disease", as used in rule that an accused is not criminally responsible if his unlawful act was product of mental disease or mental defect, means condition which is considered capable of either improving or deteriorating, and term "defect" as so used means condition which is not considered capable of improving or deteriorating and which may be either congenital, or traumatic, or the residual effect of physical or mental disease. D.C.Code 1951, § 24–301.

See publication Words and Phrases, for other judicial constructions and definitions of "Defect" and "Disease".

11. Criminal Law ⇐773(1)

Whenever there is some evidence that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed, trial court must provide jury with guides for determining whether accused can be held criminally responsible. D.C. Code 1951, § 24–301.

12. Criminal Law ⇐773(2)

Instructions to jury relative to criminal responsibility must in substance advise jury that they may find defendant guilty only if they find, beyond reasonable doubt, from evidence and from facts fairly deducible, (1) that defendant was not suffering from diseased or defective mental condition at time of the act, or (2) that the act was not the result of such condition. D.C.Code 1951, § 24–301.

13. Criminal Law ⇐48

In determining whether accused was suffering from diseased or defective mental condition, and whether his act was caused by such condition, jury may consider symptoms, phases, manifestations, testimony of psychiatrists as to nature of the disease or defect, and its range of inquiry may include but is not limited to whether accused knew right from wrong, whether he acted under compulsion of an irresistible impulse, or had been deprived of or lost the power of his will. D.C.Code 1951, § 24–301.

14. Criminal Law ⇐311
Mental Health ⇐439

Accused person who is acquitted by reason of insanity is presumed to be insane and may be committed for indefinite period to a hospital for the insane. D.C.Code 1951, § 24–301.

Mr. Abe Fortas, Washington, D. C., appointed by this Court, with whom Mr. Abe Krash, Washington, D. C., was on the brief, for appellant.

Mr. Gerard J. O'Brien, Jr., Asst. U. S. Atty., Washington, D. C., with whom Messrs. Leo A. Rover, U. S. Atty., and Lewis A. Carroll and Arthur J. McLaughlin, Asst. U. S. Attys., Washington, D. C., were on the brief, for appellee. Mr. William J. Peck, Asst. U. S. Atty. at time record was filed, Washington, D. C., entered an appearance for appellee.

Before EDGERTON, BAZELON and WASHINGTON, Circuit Judges.

BAZELON, Circuit Judge.

Monte Durham was convicted of housebreaking,[1] by the District Court sitting without a jury. The only defense asserted at the trial was that Durham was of unsound mind at the time of the offense. We are now urged to reverse the conviction (1) because the trial court did not correctly apply existing rules governing the burden of proof on the defense of insanity, and (2) because existing tests of criminal responsibility are obsolete and should be superseded.[2]

I.

Durham has a long history of imprisonment and hospitalization. In 1945, at the age of 17, he was discharged from the Navy after a psychiatric examination had shown that he suffered "from a profound personality disorder which renders him unfit for Naval service." In 1947 he pleaded guilty to violating the National Motor Theft Act[3] and was placed on probation for one to three years. He attempted suicide, was taken to Gallinger Hospital for observation, and was transferred to St. Elizabeths Hospital, from which he was discharged after two months. In January of 1948, as a result of a conviction in the District of Columbia Municipal Court for passing bad checks, the District Court revoked his probation and he commenced service of his Motor Theft sentence. His conduct within the first few days in jail led to a lunacy inquiry in the Municipal Court where a jury found him to be of unsound mind. Upon commitment to St. Elizabeths, he was diagnosed as suffering from "psychosis with psychopathic personality." After 15 months of treatment, he was discharged in July 1949 as "recovered" and was returned to jail to serve the balance of his sentence. In June 1950 he was conditionally released. He violated the conditions by leaving the District. When he learned of a warrant for his arrest as a parole violator, he fled to the "South and Midwest obtaining money by passing a number of bad checks." After he was found and returned to the District, the Parole Board referred him to the District Court for a lunacy inquisition, wherein a jury again found him to be of unsound mind. He was readmitted to St. Elizabeths in February 1951. This time the diagnosis was "without mental disorder, psychopathic personality." He was discharged for the third time in May 1951. The housebreaking which is the subject of the present appeal took place two months later, on July 13, 1951.

According to his mother and the psychiatrist who examined him in September 1951, he suffered from hallucinations immediately after his May 1951 discharge from St. Elizabeths. Following the present indictment, in October 1951, he was adjudged of unsound mind in proceedings under § 4244 of Title 18 U.S.C., upon the affidavits of two psychiatrists that he suffered from "psychosis with psychopathic personality." He was committed to St. Elizabeths for the fourth time and given subshock insulin therapy. This commitment lasted 16 months—until February 1953—when he was released to the custody of the District Jail on the certificate of Dr. Silk, Acting Superintendent of St. Elizabeths, that he was "mentally competent to stand trial and * * * able to consult

1. D.C.Code §§ 22-1801, 22-2201 and 22-2202 (1951).

2. Because the questions raised are of general and crucial importance, we called upon the Government and counsel whom we appointed for the indigent appellant to brief and argue this case a second time. Their able presentations have been of great assistance to us. On the question of the adequacy of prevailing tests of criminal responsibility, we received further assistance from the able brief and argument of Abram Chayes, *amicus curiae* by appointment of this Court, in Stewart v. United States, —— U.S.App. D.C. —, 214 F.2d 879.

3. 18 U.S.C. § 408 (1946). 1948 Revision, 18 U.S.C. §§ 10, 2311-2313.

with counsel to properly assist in his own defense."

He was thereupon brought before the court on the charge involved here. The prosecutor told the court:

> "So I take this attitude, in view of the fact that he has been over there [St. Elizabeths] a couple of times and these cases that were charged against him were dropped, I don't think I should take the responsibility of dropping these cases against him; then Saint Elizabeths would let him out on the street, and if that man committed a murder next week then it is my responsibility. So we decided to go to trial on one case, that is the case where we found him right in the house, and let him bring in the defense, if he wants to, of unsound mind at the time the crime was committed, and then Your Honor will find him on that, and in your decision send him back to Saint Elizabeths Hospital, and then if they let him out on the street it is their responsibility."

Shortly thereafter, when the question arose whether Durham could be considered competent to stand trial merely on the basis of Dr. Silk's ex parte statement, the court said to defense counsel:

> "I am going to ask you this, Mr. Ahern: I have taken the position that if once a person has been found of unsound mind after a lunacy hearing, an ex parte certificate of the superintendent of Saint Elizabeths is not sufficient to set aside that finding and I have held another lunacy hearing. That has been my custom. However, if you want to waive that you may do it, if you admit that he is now of sound mind."

[1] The court accepted counsel's waiver on behalf of Durham, although it had been informed by the prosecutor that a letter from Durham claimed need of further hospitalization, and by defense counsel that "* * * the defendant does say that even today he thinks he does need hospitalization; he told me that this morning."[4] Upon being so informed, the court said, "Of course, if I hold he is not mentally competent to stand trial I send him back to Saint Elizabeths Hospital and they will send him back again in two or three months."[5] In this atmosphere Durham's trial commenced.

[2–4] His conviction followed the trial court's rejection of the defense of insanity in these words:

> "I don't think it has been established that the defendant was of unsound mind as of July 13, 1951, in the sense that he didn't know the difference between right and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of mind.
>
> "While, of course, the burden of proof on the issue of mental capacity to commit a crime is upon the Government, just as it is on every

4. Durham showed confusion when he testified. These are but two examples:

"Q. Do you remember writing it? A. No. Don't you forget? People get all mixed up in machines.

"Q. What kind of a machine? A. I don't know, they just get mixed up.

"Q. Are you cured now? A. No, sir.

"Q. In your opinion? A. No, sir.

"Q. What is the matter with you? A. You hear people bother you.

"Q. What? You say you hear people bothering you? A. Yes.

"Q. What kind of people? What do they bother you about? A. (No response.)"

Although we think the court erred in accepting counsel's admission that Durham was of sound mind, the matter does not require discussion since we reverse on other grounds and the principles governing this issue are fully discussed in our decision today in Gunther v. United States, —— U.S.App.D.C. ——, —— F.2d ——.

5. The court also accepted a waiver of trial by jury when Durham indicated, in response to the court's question, that he preferred to be tried without a jury and that he waived his right to a trial by jury.

other issue, nevertheless, the Court finds that there is not sufficient to contradict the usual presumption of [sic] the usual inference of sanity.

"There is no testimony concerning the mental state of the defendant as of July 13, 1951, and therefore the usual presumption of sanity governs.

"While if there was some testimony as to his mental state as of that date to the effect that he was incompetent on that date, the burden of proof would be on the Government to overcome it. There has been no such testimony, and the usual presumption of sanity prevails.

* * * * * *

"Mr. Ahern, I think you have done very well by your client and defended him very ably, but I think under the circumstances there is nothing that anybody could have done." [Emphasis supplied.]

We think this reflects error requiring reversal.

In Tatum v. United States we said, "When lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of mankind and presumes that all people, including those accused of crime, are sane."[6] So long as this presumption prevails, the prosecution is not required to prove the defendant's sanity. But "as soon as 'some evidence of mental disorder is introduced, * * * sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt.'"[7] Here it appears that the trial judge recognized this rule but failed to find "some evidence." We hold that the court erred and that the requirement of "some evidence" was satisfied.[8]

In Tatum we held that requirement satisfied by considerably less than is present here. Tatum claimed lack of memory concerning the critical events and three lay witnesses testified that he appeared to be in "more or less of a trance," or "abnormal," but two psychiatrists testified that he was of "sound mind" both at the time of examination and at the time of the crime. Here, the psychiatric testimony was unequivocal that Durham was of unsound mind at the time of the crime. Dr. Gilbert, the only expert witness heard,[9] so stated at least four times. This crucial testimony is set out in the margin.[10] Intensive questioning by the court failed to pro-

6. 1951, 88 U.S.App.D.C. 386, 389, 190 F. 2d 612, 615.

7. 88 U.S.App.D.C. at page 389, 190 F.2d at page 615, quoting Glueck, Mental Disorder and the Criminal Law 41–42 (1925).

8. In its brief, the prosecution confounds the "some evidence" test with the "evidence sufficient to create a reasonable doubt" test, despite our explanation in Tatum that the "'evidence sufficient to create a reasonable doubt' test" applies only after the issue has been raised by "some evidence" and the burden is already upon the Government to prove the defendant's sanity beyond a reasonable doubt. 88 U.S.App.D.C. at page 390, 190 F.2d at page 616.

9. Dr. Amino Perretti, who also examined Durham in connection with those procedings and furnished an affidavit that Durham was of unsound mind, was unable to testify due to illness.

10. (1) "Q. [Mr. Ahern]. As a result of those examinations did you reach a conclusion as to the sanity or insanity of the defendant? A. Yes, I did arrive at an opinion as to his mental condition.

"Q. And what is that opinion? A. That he at that time was of unsound mind.

"Q. Can you tell us what disorder he was suffering from, Doctor? A. The report of his case at the time, as of October 9, 1951, I used the diagnosis of undifferentiated psychosis, but according to the record the diagnosis was at the time of commitment psychosis with psychopathic personality.

* * * * *

"Q. At that time were you able to make a determination as to how long this condition had existed? A. According to the record I felt at the time that he had been in that attitude or mental disorder for a period of some few to several months."

(2) "Q. [Mr.Ahern]. Directing your

duce any retraction of Dr. Gilbert's testimony that the "period of insanity would have embraced the date July 13, 1951." And though the prosecution sought unsuccessfully in its cross- and recross-examination of Dr. Gilbert to establish that Durham was a malingerer who feigned insanity whenever he was trapped for his misdeeds, it failed to present any expert testimony to support this theory. In addition to Dr. Gilbert's testimony, there was testimony by Durham's mother to the effect that in the interval between his discharge from St. Elizabeths in May 1951, and the crime "he seemed afraid of people" and had urged her to put steel bars on his bedroom windows.

Apparently the trial judge regarded this psychiatric testimony as "no testimony" on two grounds: (1) it did not adequately cover Durham's condition on July 13, 1951, the date of the offense; and (2) it was not directed to Durham's capacity to distinguish between right and wrong. We are unable to agree that for either of these reasons the psychiatric testimony could properly be considered "no testimony."

(1) Following Dr. Gilbert's testimony that the condition in which he found Durham on September 3, 1951 was progressive and did not "arrive overnight," Dr. Gilbert responded to a series of questions by the court:

"Q. [Court]. Then is it reasonable to assume that it is not possible to determine *how far* this state of unsound mind had progressed by July 13th? Isn't that so? A. [Dr. Gilbert]. As to the seriousness of the symptoms as compared with them and the time I observed him, that's true, except that his travels were based, according to his statement to me, on certain of the symptoms and his leaving Washington, his giving up his job and work and leaving the work that he had tried to do.

"Q. But you can't tell, can you, *how far* those symptoms had progressed and become worse by the

attention specifically to July 13, 1951, will you give us your opinion as to the mental condition of the defendant at that time? A. From my previous testimony and previous opinion, to repeat, it was my opinion that he had been of unsound mind from sometime not long after a previous release from Saint Elizabeths Hospital [*i. e.*, May 14, 1951]."

(3) "Q. [Mr. Ahern]. In any event, Doctor, is it your opinion that that period of insanity would have embraced the date July 13, 1951? A. Yes. My examination would antedate that; that is, the symptoms obtained, according to my examinations, included that—the symptoms of the mental disorder.

"Q. Can you tell us what symptoms you found, Doctor? A. Well, he was trying to work for a while, he stated, and while he was working at one of these People's Drug Stores he began to hear false voices and suffer from hallucinations and believed that the other employees and others in the store talked about him, watched him, and the neighbors did the same, watching him from their windows, talking about him, and those symptoms continued and were present through the time that I examined him in September and October.

* * * * *

"Q. [Mr. McLaughlin]. You were asked the specific question, Doctor, whether or not in your opinion on July 13, 1951, this defendant was of unsound mind and didn't know the difference between right and wrong. Can you express an opinion as to that? A. Yes. It is my opinion he was of unsound mind."

(4) "Q. [Mr. McLaughlin]. Can you tell us—this is for my own information, I would like to know this—you say that this defendant, at the time you examined him in 1951 was of unsound mind and had been of unsound mind sometime prior to that; is that your statement? A. Yes, sir.

"Q. Can you tell us how long prior to that time he was of unsound mind? A. Well, while he was working in People's Drug Store the symptoms were present, and how long before that, I didn't get the date of that.

"Q. When was he working in People's Drug Store?

* * * * *

"A. Sometime after his discharge from Saint Elizabeths Hospital.

"Q. In 1947? A. Oh, no; 1951."

13th of July? A. No, not *how far* they were, that is correct." [Emphasis supplied.]

Thereafter, when the prosecutor on re-cross asked Dr. Gilbert whether he would change his opinion concerning Durham's mental condition on July 13, 1951, if he knew that Durham had been released from St. Elizabeths just two months before as being of sound mind, the court interrupted to say: "Just a minute. The Doctor testified in answer to my question that he doesn't know and he can't express a definite opinion as to his mental condition on the 13th of July." This, we think, overlooks the witness' unequivocal testimony on direct and cross-examination,[11] and misconceives what he had said in response to questioning by the court, namely, that certain symptoms of mental disorder antedated the crime, although it was impossible to say how far they had progressed.

Moreover, any conclusion that there was "no testimony" regarding Durham's mental condition at the time of the crime disregards the testimony of his mother. Her account of his behavior after his discharge from St. Elizabeths in May 1951 was directly pertinent to the issue of his sanity at the time of the crime.

(2) On re-direct examination, Dr. Gilbert was asked whether he would say that Durham "knew the difference between right and wrong on July 13, 1951; that is, his ability to distinguish between what was right and what was wrong." He replied: "As I have stated before, if the question of the right and wrong were propounded to him he could give you the right answer." Then the court interrupted to ask:

"The Court. No, I don't think that is the question, Doctor—not whether he could give a right answer to a question, but whether he, himself, knew the difference between right and wrong in connection with governing his own actions. * * * If you are unable to answer, why, you can say so; I mean, if you are unable to form an opinion.

"The Witness. I can only answer this way: That I can't tell how much the abnormal thinking and the abnormal experiences in the form of hallucinations and delusions—delusions of persecution—had to do with his anti-social behavior.

"I don't know how anyone can answer that question categorically, except as one's experience leads him to know that most mental cases can give you a categorical answer of right and wrong, but what influence these symptoms have on abnormal behavior or anti-social behavior—

"The Court. Well, your answer is that you are unable to form an opinion, is that it?

"The Witness. I would say that that is essentially true, for the reasons that I have given."

Later, when defense counsel sought elaboration from Dr. Gilbert on his answers relating to the "right and wrong" test, the court cut off the questioning with the admonition that "you have answered the question, Doctor."

The inability of the expert to give categorical assurance that Durham was unable to distinguish between right and wrong did not destroy the effect of his previous testimony that the period of Durham's "insanity" embraced July 13, 1951. It is plain from our decision in Tatum that this previous testimony was adequate to prevent the presumption of sanity from becoming conclusive and to place the burden of proving sanity upon the Government. None of the testimony before the court in Tatum was couched in terms of "right and wrong."

[5] Finally, even assuming *arguendo* that the court, contrary to the plain meaning of its words, recognized that the prosecution had the burden of proving Durham's sanity, there would still be a fatal error. For once the issue of

11. See note 10, supra.

insanity is raised by the introduction of "some evidence," so that the presumption of sanity is no longer absolute, it is incumbent upon the trier of fact to weigh and consider "the whole evidence, including that supplied by the presumption of sanity * * *" on the issue of "the capacity in law of the accused to commit" the crime.[12] Here, manifestly, the court as the trier of fact did not and could not weigh "the whole evidence," for it found there was "no testimony concerning the mental state" of Durham.

For the foregoing reasons, the judgment is reversed and the case is remanded for a new trial.

II.

It has been ably argued by counsel for Durham that the existing tests in the District of Columbia for determining criminal responsibility, *i. e.*, the so-called right-wrong test supplemented by the irresistible impulse test, are not satisfactory criteria for determining criminal responsibility. We are urged to adopt a different test to be applied on the retrial of this case. This contention has behind it nearly a century of agitation for reform.

A. The right-wrong test, approved in this jurisdiction in 1882,[13] was the exclusive test of criminal responsibility in the District of Columbia until 1929 when we approved the irresistible impulse test as a supplementary test in Smith v. United States.[14] The right-wrong test has its roots in England. There, by the first quarter of the eighteenth century, an accused escaped punishment if he could not distinguish "good and evil," *i. e.*, if he "doth not know what he is doing, no more than * * * a wild beast."[15] Later in the same century, the "wild beast" test was abandoned and "right and wrong" was substituted for "good and evil."[16] And toward the middle of the nineteenth century, the House of Lords in the famous M'Naghten case[17] restated what had become the accepted "right-wrong" test[18] in a form which has since been followed, not only in England[19] but in most American jurisdictions[20] as an exclusive test of criminal responsibility:

> "* * * the jurors ought to be told in all cases that every man is to

12. Davis v. United States, 1895, 160 U.S. 469, 488, 16 S.Ct. 353, 358, 40 L.Ed. 499.

13. 1882, 12 D.C. 498, 550, 1 Mackey 498, 550. The right-wrong test was reaffirmed in United States v. Lee, 1886, 15 D.C. 489, 496, 4 Mackey 489, 496.

14. 1929, 59 App.D.C. 144, 36 F.2d 548, 70 A.L.R. 654.

15. Glueck, Mental Disorder and the Criminal Law 138–39 (1925), citing Rex v. Arnold, 16 How.St.Tr. 695, 764 (1724).

16. Id. at 142–52, citing Earl Ferrer's case, 19 How.St.Tr. 886 (1760). One writer has stated that these tests originated in England in the 13th or 14th century, when the law began to define insanity in terms of intellect for purposes of determining capacity to manage feudal estates. Comment, *Lunacy and Idiocy—The Old Law and Its Incubus*, 18 U. of Chi.L.Rev. 361 (1951).

17. 8 Eng.Rep. 718 (1843).

18. Hall, Principles of Criminal Law 480, n. 6 (1947).

19. Royal Commission on Capital Punishment 1949–1953 Report (Cmd. 8932) 79 (1953) (hereinafter cited as Royal Commission Report).

20. Weihofen, *The M'Naghten Rule in Its Present Day Setting*, Federal Probation 8 (Sept. 1953); Weihofen, Insanity as a Defense in Criminal Law 15, 64–68, 109–47 (1933); Leland v. State of Oregon, 1952, 343 U.S. 790, 800, 72 S.Ct. 1002, 96 L.Ed. 1302.

"In five States the M'Naghten Rules have been in substance re-enacted by statute." Royal Commission Report 409; see, e. g., "Sec. 1120 of the [New York State] Penal Law [McK.Consol. Laws, c. 40] [which] provides that a person is not excused from liability on the grounds of insanity, idiocy or imbecility, except upon proof that at the time of the commission of the criminal act he was laboring under such a defect of reason as (1) not to know the nature and quality of the act he was doing or (2) not to know that the act was wrong." Ploscowe, *Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and*

be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." [21]

As early as 1838, Isaac Ray, one of the founders of the American Psychiatric Association, in his now classic Medical Jurisprudence of Insanity, called knowledge of right and wrong a "fallacious" test of criminal responsibility.[22] This view has long since been substantiated by enormous developments in knowledge of mental life.[23] In 1928 Mr. Justice Cardozo said to the New York Academy of Medicine: "Everyone concedes that the present [legal] definition of insanity has little relation to the truths of mental life." [24]

Medico-legal writers in large number,[25] The Report of the Royal Commission on Capital Punishment 1949–1953,[26] and The Preliminary Report by the Committee on Forensic Psychiatry of the

Mentally Defective Offenders, 43 J. Crim.L., Criminology & Police Sci. 312, 314 (1952).

21. 8 Eng.Rep. 718, 722 (1843). "Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion." Leland v. State of Oregon, supra, note 20, 343 U.S. at page 798, 72 S.Ct. 1002. Since Davis v. United States, 1895, 160 U.S. 469, 484, 16 S.Ct. 353, 40 L.Ed. 499, a contrary rule of procedure has been followed in the Federal courts. For example, in compliance with Davis, we held in Tatum v. United States, supra, note 8, 88 U.S.App.D.C. 386, 389, 190 F.2d 612, 615, and text, "as soon as 'some evidence of mental disorder is introduced, * * * sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt.'"

22. Ray, Medical Jurisprudence of Insanity 47 and 34 et seq. (1st ed. 1838). "That the insane mind is not entirely deprived of this power of moral discernment, but in many subjects is perfectly rational, and displays the exercise of a sound and well balanced mind is one of those facts now so well established, that to question it would only betray the height of ignorance and presumption." Id. at 32.

23. See Zilboorg, *Legal Aspects of Psychiatry* in One Hundred Years of American Psychiatry 1844–1944, 507, 552 (1944).

24. Cardozo, What Medicine Can Do For the Law 32 (1930).

25. For a detailed bibliography on Insanity as a Defense to Crime, see 7 The Record of the Association of the Bar of the City of New York 158–62 (1952). And see, *e. g.*, Alexander, the Criminal, the Judge and the Public 70 et seq. (1931); Cardozo, What Medicine Can Do For the Law 28 et seq. (1930); Cleckley, the Mask of Sanity 491 et seq. (2d ed.1950); Deutsch, The Mentally Ill In America 389–417 (2d ed.1949); Glueck, Mental Disorder and the Criminal Law (1925), Crime and Justice 96 et seq. (1936); Guttmacher & Weihofen, Psychiatry and the Law 218, 403–23 (1952); Hall, Principles of Criminal Law 477–538 (1947); Menninger, The Human Mind 450 (1937); Hall & Menninger, *"Psychiatry and the Law"—A Dual Review*, 38 Iowa L.Rev. 687 (1953); Overholser, The Psychiatrist and the Law 41–43 (1953); Overholser & Richmond, Handbook of Psychiatry 208–15 (1947); Ploscowe, *Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and Mentally Defective Offenders*, 43 J.Crim.L., Criminology & Police Sci. 312, 314 (1952); Ray, Medical Jurisprudence of Insanity (1st ed.1838) (4th ed.1860); Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 Yale L.J. 183 (1953); Weihofen, Insanity as a Defense in Criminal Law (1933), *The M'Naghten Rule in Its Present Day Setting*, Federal Probation 8 (Sept. 1953); Zilboorg, Mind, Medicine and Man 246–97 (1943), *Legal Aspects of Psychiatry*, American Psychiatry 1844–1944, 507 (1944).

26. Royal Commission Report 73–129.

Group for the Advancement of Psychiatry [27] present convincing evidence that the right-and-wrong test is "based on an entirely obsolete and misleading conception of the nature of insanity." [28] The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior. As Professor Sheldon Glueck of the Harvard Law School points out in discussing the right-wrong tests, which he calls the knowledge tests:

> "It is evident that the knowledge tests unscientifically abstract out of the mental make-up but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders. In brief, these tests proceed upon the following questionable assumptions of an outworn era in psychiatry: (1) that lack of knowledge of the 'nature or quality' of an act (assuming the meaning of such terms to be clear), or incapacity to know right from wrong, is the sole or even the most important symptom of mental disorder; (2) that such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved; and (3) that the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind." [29]

Nine years ago we said:

> "The modern science of psychology * * * does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go." [30]

By its misleading emphasis on the cognitive, the right-wrong test requires court

27. The Committee on Forensic Psychiatry (whose report is hereinafter cited as Gap Report) was composed of Drs. Philip Q. Roche, Frank S. Curran, Lawrence Z. Freedman and Manfred S. Guttmacher. They were assisted in their deliberations by leading psychiatrists, jurists, law professors, and legal practitioners.

28. Royal Commission Report 80.

29. Glueck, *Psychiatry and the Criminal Law*, 12 Mental Hygiene 575, 580 (1928), as quoted in Deutsch, The Mentally Ill in America 396 (2d ed. 1949); and see, *e. g.*, Menninger, The Human Mind 450 (1937); Guttmacher & Weihofen, Psychiatry and the Law 403–08 (1952).

30. Holloway v. United States, 1945, 80 U.S.App.D.C. 3, 5, 148 F.2d 665, 667, certiorari denied, 1948, 334 U.S. 852, 68 S.Ct. 1507, 92 L.Ed. 1774.

More recently, the Royal Commission, after an exhaustive survey of legal, medical and lay opinion in many Western countries, including England and the United States made a similar finding. It reported:

> "The gravamen of the charge against the M'Naghten Rules is that they are not in harmony with modern medical science, which, as we have seen, is reluctant to divide the mind into separate compartments—the intellect, the emotions and the will—but looks at it as a whole and considers that insanity distorts and impairs the action of the mind as a whole." Royal Commission Report 113. The Commission lends vivid support to this conclusion by pointing out that "It would be impossible to apply modern methods of care and treatment in mental hospitals, and at the same time to maintain order and discipline, if the great majority of the patients, even among the grossly insane, did not know what is forbidden by the rules and that, if they break them, they are liable to forfeit some privilege. Examination of a number of individual cases in which a verdict of guilty but insane [the nearest English equivalent of our acquittal by reason of insanity] was returned, and rightly returned, has convinced us that there are few indeed where the accused can truly be said not to have known that his act was wrong." Id. at 103.

and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid [31] and irrelevant testimony in determining criminal responsibility.[32]

The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon *any* particular symptom.[33] In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role,[34] not merely one for which they have no special competence.[35] As the Royal Commission emphasizes, it is dangerous "to abstract particular mental faculties, and to lay it down that unless these particular faculties are destroyed or gravely impaired, an accused person, whatever the nature of his mental disease, must be held to be criminally responsible * * *." [36] In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines.[37]

Despite demands in the name of scientific advances, this court refused to alter the right-wrong test at the turn of the century.[38] But in 1929, we reconsidered in response to "the cry of scientific experts" and added the irresistible impulse

31. See Guttmacher & Weihofen, Psychiatry and the Law 421, 422 (1952). The M'Naghten rules "constitute not only an arbitrary restriction on vital medical data, but also impose an improper onus of decision upon the expert witness. The Rules are unanswerable in that they have no consensus with established psychiatric criteria of symptomatic description save for the case of disturbed consciousness or of idiocy, * * *." From statement by Dr. Philip Q. Roche, quoted id. at 407. See also United States ex rel. Smith v. Baldi, 3 Cir., 1951, 192 F.2d 540, 567 (dissenting opinion).

32. In a very recent case, the Supreme Court of New Mexico recognized the inadequacy of the right-wrong test, and adopted what it called an "extension of the M'Naghten Rules." Under this extension, lack of knowledge of right and wrong is not essential for acquittal "if, by reason of disease of the mind, defendant has been deprived of or lost the power of his will * * *." State v. White, N.M., 270 P.2d 727, 730.

33. Deutsch, The Mentally Ill in America 400 (2d ed.1949); Keedy, *Irresistible Impulse as a Defense in Criminal Law*, 100 U. of Pa.L.Rev. 956, 992 (1952).

34. Professor John Whitehorn of the Johns Hopkins Medical School, who recently prepared an informal memorandum on this subject for a Commission on Legal Psychiatry appointed by the Governor of Maryland, has said: "Psychiatrists are challenged to set forth a crystal-clear statement of what constitutes insanity. It is impossible to express this adequately in words, alone, since such diagnostic judgments involve clinical skill and experience which cannot wholly be verbalized. * * * The medical profession would be baffled if asked to write into the legal code universally valid criteria for the diagnosis of the many types of psychotic illness which may seriously disturb a person's responsibility, and even if this were attempted, the diagnostic criteria would have to be rewritten from time to time, with the progress of psychiatric knowledge." Quoted in Guttmacher & Weihofen, Psychiatry and the Law 419–20 (1952).

35. "* * * the legal profession were invading the province of medicine, and attempting to install old exploded medical theories in the place of facts established in the progress of scientific knowledge." State v. Pike, 1870, 49 N.H. 399, 438.

36. Royal Commission Report 114. And see State v. Jones, 1871, 50 N.H. 369, 392–393.

37. Keedy, *Irresistible Impulse as a Defense in Criminal Law*, 100 U. of Pa.L. Rev. 956, 992–93 (1952).

38. See, *e. g.*, Taylor v. United States, 1895, 7 App.D.C. 27, 41–44, where we rejected "emotional insanity" as a defense, citing with approval the following from the trial court's instruction to the jury: "Whatever may be the cry of scientific experts, the law does not recognize, but condemns the doctrine of emotional insanity—that a man may be sane up until a moment before he commits a crime, insane while he does it, and sane again soon afterwards. Such a doctrine would be dangerous in the extreme. The law does not recognize it; and a jury cannot without violating their oaths." This position was emphatically reaffirmed in Snell v. United States, 1900, 16 App.D.C. 501, 524.

test as a supplementary test for determining criminal responsibility. Without "hesitation" we declared, in Smith v. United States, "it to be the law of this District that, in cases where insanity is interposed as a defense, and the facts are sufficient to call for the application of the rule of irresistible impulse, the jury should be so charged." [39] We said:

> "* * * The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases, where the defense of insanity is interposed. The accepted rule in this day and age, with the great advancement in medical science as an enlightening influence on this subject, is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong." [40]

As we have already indicated, this has since been the test in the District.

Although the Smith case did not abandon the right-wrong test, it did liberate the fact finder from exclusive reliance upon that discredited criterion by allowing the jury to inquire also whether the accused suffered from an undefined "diseased mental condition [which] deprive[d] him of the will power to resist the insane impulse * * *." [41] The term "irresistible impulse," however, carries the misleading implication that "diseased mental condition[s]" produce only sudden, momentary or spontaneous inclinations to commit unlawful acts.[42] As the Royal Commission found:

> "* * * In many cases * * * this is not true at all. The sufferer from [melancholia, for example] experiences a change of mood which alters the whole of his existence. He may believe, for instance, that a future of such degradation and misery awaits both him and his family that death for all is a less dreadful alternative. Even the thought that the acts he contemplates are murder and suicide pales into insignificance in contrast with what he otherwise expects. The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman. This is merely an illustration; similar states of mind are likely to lie behind the criminal act when murders are committed by persons suffering from schizophrenia or paranoid psy-

39. 1929, 59 App.D.C. 144, 146, 36 F.2d 548, 550, 70 A.L.R. 654.

40. 59 App.D.C. at page 145, 36 F.2d at page 549.

41. 59 App.D.C. at page 145, 36 F.2d at page 549.

42. Impulse, as defined by Webster's New International Dictionary (2d ed.1950), is:

"1. Act of impelling, or driving onward with *sudden* force; impulsion, esp., force so communicated as to produce motion *suddenly*, or *immediately* * *.

"2. An incitement of the mind or spirit, esp. in the form of an *abrupt* and vivid suggestion, prompting some *unpremeditated* action or leading to unforeseen knowledge or insight; a *spontaneous* inclination * * *.

"3. * * * motion produced by a *sudden* or *momentary* force * * *." [Emphasis supplied.]

choses due to disease of the brain."[43]

[6] We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted.[44]

[7, 8] B. In the District of Columbia, the formulation of tests of criminal responsibility is entrusted to the courts[45] and, in adopting a new test, we invoke our inherent power to make the change prospectively.[46]

[9] The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870.[47] It is simply that an accused is not criminally responsible if

43. Royal Commission Report 110; for additional comment on the irresistible impulse test, see Glueck, Crime and Justice 101–03 (1936); Guttmacher & Weihofen, Psychiatry and the Law 410–12 (1952); Hall, General Principles of Criminal Law 505–26 (1947); Keedy, *Irresistible Impulse as a Defense in Criminal Law*, 100 U. of Pa.L.Rev. 956 (1952); Wertham, The Show of Violence 14 (1949).

The New Mexico Supreme Court in recently adopting a broader criminal insanity rule, note 32, supra, observed: "* * * insanity takes the form of the personality of the individual and, if his tendency is toward depression, his wrongful act may come at the conclusion of a period of complete lethargy, thoroughly devoid of excitement."

44. As we recently said, "* * * former common law should not be followed where changes in conditions have made it obsolete. We have never hesitated to exercise the usual judicial function of revising and enlarging the common law." Linkins v. Protestant Episcopal Cathedral Foundation, 1950, 87 U.S.App.D.C. 351, 355, 187 F.2d 357, 361, 28 A.L.R.2d 521. Cf. Funk v. United States, 1933, 290 U.S. 371, 381–382, 54 S.Ct. 212, 78 L.Ed. 369.

45. Congress, like most State legislatures, has never undertaken to define insanity in this connection, although it recognizes the fact that an accused may be acquitted by reason of insanity. See D.C.Code § 24–301 (1951). And as this court made clear in Hill v. United States, Congress has left no doubt that "common-law procedure, in all matters relating to crime * * * still continues in force here in all cases except where special provision is made by statute to the exclusion of the common-law procedure." 22 App. D.C. 395, 401 (1903), and statutes cited therein; Linkins v. Protestant Episcopal Cathedral Foundation, 87 U.S.App.D.C. at pages 354–55, 187 F.2d at pages 360–361; and see Fisher v. United States, 1946, 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382.

46. See Great Northern R. v. Sunburst Oil & Refining Co., 1932, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360; National Labor Relations Board v. Guy F. Atkinson Co., 9 Cir., 1952, 195 F.2d 141, 148; Concurring opinion of Judge Frank in Aero Spark Plug Co. v. B. G. Corporation, 2 Cir., 1942, 130 F.2d 290, 298, and note 24; Warring v. Colpoys, 1941, 74 App.D.C. 303, 122 F.2d 642, 645, 136 A.L.R. 1025; Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 Texas L.Rev. 514, 535 (1943); Carpenter, *Court Decisions and the Common Law*, 17 Col.L.Rev. 593, 606–07 (1917). But see von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv.L.Rev. 409, 426 (1924). Our approach is similar to that of the Supreme Court of California in People v. Maughs, 1906, 149 Cal. 253, 86 P. 187, 191, where the court prospectively invalidated a previously accepted instruction, saying:

"* * * we think the time has come to say that in all future cases which shall arise, and where, after this warning, this instruction shall be given, this court will hold the giving of it to be so prejudicial to the rights of a defendant, secured to him by our Constitution and laws, as to call for the reversal of any judgment which may be rendered against him."

47. State v. Pike, 1870, 49 N.H. 399.

his unlawful act was the product of mental disease or mental defect.[48]

[10] We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

[11, 12] Whenever there is "some evidence" that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed, the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible. We do not, and indeed could not, formulate an instruction which would be either appropriate or binding in all cases. But under the rule now announced, any instruction should in some way convey to the jury the sense and substance of the following: If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act.[49] These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case.[50]

[13] The questions of fact under the test we now lay down are as capable of determination by the jury as, for example, the questions juries must determine upon a claim of total disability under a policy of insurance where the state of medical knowledge concerning the disease involved, and its effects, is obscure or in conflict. In such cases, the jury is not required to depend on arbitrarily selected "symptoms, phases or manifestations"[51] of the disease as criteria for determining the ultimate questions of fact upon which the claim depends. Similarly, upon a claim of criminal irresponsibility, the jury will not be required to rely on such symptoms as criteria for determining the ultimate question of fact upon which such claim depends. Testimony as to such "symptoms, phases or manifestations," along

48. Cf. State v. Jones, 1871, 50 N.H. 369, 398.

49. "There is no *a priori* reason why every person suffering from any form of mental abnormality or disease, or from any particular kind of mental disease, should be treated by the law as not answerable for any criminal offence which he may commit, and be exempted from conviction and punishment. Mental abnormalities vary infinitely in their nature and intensity and in their effects on the character and conduct of those who suffer from them. Where a person suffering from a mental abnormality commits a crime, there must always be some likelihood that the abnormality has played some part in the causation of the crime; and, generally speaking, the graver the abnormality, * * * the more probable it must be that there is a causal connection between them. But the closeness of this connection will be shown by the facts brought in evidence in individual cases and cannot be decided on the basis of any general medical principle." Royal Commission Report 99.

50. The court may always, of course, if it deems it advisable for the assistance of the jury, point out particular areas of agreement and conflict in the expert testimony in each case, just as it ordinarily does in summing up any other testimony.

51. State v. Jones, 1871, 50 N.H. 369, 398.

with other relevant evidence, will go to the jury upon the ultimate questions of fact which it alone can finally determine. Whatever the state of psychiatry, the psychiatrist will be permitted to carry out his principal court function which, as we noted in Holloway v. U. S., "is to inform the jury of the character of [the accused's] mental disease [or defect]."[52] The jury's range of inquiry will not be limited to, but may include, for example, whether an accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse, or had "been deprived of or lost the power of his will * * *."[53]

Finally, in leaving the determination of the ultimate question of fact to the jury, we permit it to perform its traditional function which, as we said in Holloway, is to apply "our inherited ideas of moral responsibility to individuals prosecuted for crime * * *."[54] Juries will continue to make moral judgments, still operating under the fundamental precept that "Our collective conscience does not allow punishment where it cannot impose blame."[55] But in making such judgments, they will be guided by wider horizons of knowledge concerning mental life. The question will be simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder.[56]

[14] The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility.[57] The rule we state in this opinion is designed to meet these requirements.

Reversed and remanded for a new trial.

52. 1945, 80 U.S.App.D.C. 3, 5, 148 F.2d 665, 667.

53. State v. White, see n. 32, supra.

54. 80 U.S.App.D.C. at page 5, 148 F.2d at page 667.

55. 80 U.S.App.D.C. at pages 4–5, 148 F.2d at pages 666–667.

56. See text, supra, 214 F.2d 870–872.

57. An accused person who is acquitted by reason of insanity is presumed to be insane, Orencia v. Overholser, 1947, 82 U.S.App.D.C. 285, 163 F.2d 763; Barry v. White, 1933, 62 App.D.C. 69, 64 F.2d 707, and may be committed for an indefinite period to a "hospital for the insane." D.C.Code § 24–301 (1951). We think that even where there has been a specific finding that the accused was competent to stand trial and to assist in his own defense, the court would be well advised to invoke this Code provision so that the accused may be confined as long as "the Public Safety and * * * [his]welfare" require. Barry v. White, 62 App. D.C. at 71, 64 F. 2d at 709.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,019

ELSIE V. JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided July 19, 1962

Mr. John Paul Sullivan (appointed by the District Court) for appellant.

Mr. Abbott A. Leban, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, and *Nathan J. Paulson* and *Victor W. Caputy,* Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, BASTIAN and WRIGHT, *Circuit Judges.*

WRIGHT, *Circuit Judge:* Appellant was convicted of manslaughter. On appeal she alleges trial court error in failing to grant her motion for judgment of acquittal by reason of insanity. In the alternative, she asserts that her

conviction should be set aside and the case remanded for a new trial because a confession obtained in violation of Rule 5(a), F.R.Cr.P., was admitted into evidence.

This case was tried in the District Court before our opinions in *Naples* v. *United States,* No. 16,436 (decided April 13, 1962, opinion rendered May 8, 1962), and *Williams* v. *United States,* No. 16,793 (decided May 4, 1962), were announced. In those cases the defendants, after confessing orally at police headquarters, and prior to being taken "before the nearest available" committing magistrate, made additional incriminatory statements on being returned to the scenes of their crimes for further police investigation. This we held to be "unnecessary delay" under *Mallory*[1] and ruled the additional statements inadmissible on timely objection.[2]

Here the facts are substantially the same as in *Naples* and *Williams.* The police, having brought appellant and several witnesses to the killing of one Claude R. Smith to homicide headquarters for questioning, without undue de-

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[1] *Mallory* v. *United States,* 354 U.S. 449.

[2] In *Naples* we reversed the conviction, timely objection to the admission of the additional statements having been entered. In *Williams,* where timely objection was not made, we stated:

> "Had there been timely and adequate objection at the trial, we could agree with the argument advanced by counsel appointed by this court that the trial judge should have excluded the statement attributed to Williams when he was brought back to the store of the National Coin Company. By that time, the police already were possessed of ample evidence of probable cause upon which they could and should have brought Williams before the Commissioner. Instead, they took the appellant to the scene of the crime. The statement then made could be said to have been elicited during a period of unreasonable delay, and hence to have been erroneously received in evidence. * * *" (pp. 4-5, slip opinion).

lay elicited an oral confession from her.[3] She was thereupon placed under arrest at approximately 4:25 A.M. on Sunday, July 3, 1960. After an additional hour of questioning, the police returned appellant to the scene of the killing where, with her help, they found the weapon used, a knife. Thereupon, she was returned to homicide headquarters, where the questioning continued until about 8:00 A.M. when she signed a full confession, claiming self defense. She was not brought before the committing magistrate until the following day, Monday, July 4, at 9:00 A.M.[4] Since the time elapsed from arrest until the written confession was obtained and the police procedures used during that interval in this case were substantially the same as in *Naples* and *Williams,* in view of appellant's timely objection the ruling on the admissibility of the confession here must be the same.[5]

The Government attempts to distinguish this case from *Naples* and *Williams,* arguing that there the delay was daytime delay whereas here the delay until the confession was signed occurred between 4:30 and 8:00 o'clock in the morning, the suggestion being that a magistrate was not as available during that time. The record is barren of any evidence indicating that the police made any effort to determine availability of a magistrate. And on argument the Government admitted that not only a magistrate, but

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[3] Appellant states that the admission of this threshold confession also violates Rule 5(a), but the point is not seriously urged, probably in view of our opinions in *Naples,* supra; *Williams,* supra; *Lockley* v. *United States,* 106 U.S.App.D.C. 163, 270 F.2d 915; *Heideman* v. *United States,* 104 U.S.App.D.C. 128, 259 F.2d 943; *Metoyer* v. *United States,* 102 U.S.App. D.C. 62, 250 F.2d 30.

[4] In view of *United States* v. *Mitchell,* 322 U.S. 65, the appellant makes no point of the delay subsequent to signing the confession.

[5] See Note 2. Compare *Metoyer* v. *United States,* supra.

an Assistant United States Attorney, are, and were on July 3, 1960, available to the police twenty-four hours a day.[6] The fact that it was more than twenty-eight hours after the arrest before the appellant was finally taken before a magistrate indicates at least that getting her there "without unnecessary delay" was less than uppermost in their minds.

The Government argues that, in any event, the admission of the written confession was harmless error,[7] being merely cumulative. It may be seriously questioned whether any written and signed confession in a criminal case can ever be merely cumulative.[8] A confession is a most persuasive form of proof. It is difficult to conceive its admission being non-prejudicial to the defendant under any circumstances.[9]

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[6] This arrangement with the United States Attorney and the Municipal Court has been in effect for several years.

[7] Rule 52(a), F.R.Cr.P.

[8] With reference to a coerced confession, in *Payne* v. *Arkansas*, 356 U.S. 560, 568, the Court stated:

> "* * * But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

See also, *Lyons* v. *Oklahoma*, 322 U.S. 596, 597, n. 1; *Bram* v. *United States*, 168 U.S. 532.

[9] The right not to be a witness against one's self, like the right to counsel, is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76.

Here the written confession bore on appellant's claim of self defense, her only real defense. Unlike her oral confession, the statement "he was making his getaway" when she stabbed him appears only in the written version, which she was unable to read. No language is better calculated to destroy a claim of self defense. And the jury during its deliberations, in spite of the "getaway" language in the written confession, was obviously concerned about the question of self defense because it requested additional instructions on this very issue.

Appellant's mental condition presented an issue for the jury. Two psychiatrists testified that her act was a product of mental disease or defect and one said it was not. Thus the jury was required to judge the credibility of the witnesses, a typical jury function.

Judge Edgerton concurs in the court's disposition of the *Mallory* point, but dissents from its holding that a jury issue was presented as to mental disability.

Reversed and remanded.

BASTIAN, *Circuit Judge,* concurring in part and dissenting in part: I concur in the opinion of Judge Wright in its holding that the District Court did not err in refusing to grant appellant's motion for judgment of acquittal by reason of insanity. On the issue of insanity, the testimony of the psychiatrists at the trial of this case was in conflict as to the question of whether or not, at the time she committed the crime charged against her, appellant was suffering from a mental disease. In such circumstances, this issue was properly resolvable only by the jury and, in the instant case, the jury resolved it against appellant, as indeed they were entitled to do under our system of criminal jurisprudence.

My dissent is directed toward the majority's holding ap-

pellant's written confession inadmissible. While I recognize that the question is a close one, I do not think Rule 5(a) was violated here.

I would affirm the judgment of the District Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,304

ERNEST MCDONALD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided October 8, 1962

Mr. Harry L. Ryan, Jr. (appointed by this court) for appellant.

Mr. Nathan J. Paulson, Assistant United States Attorney at the time of argument, for appellee. *Messrs. David C. Acheson,* United States Attorney, *Charles T. Duncan,* Principal Assistant United States Attorney, and *Arthur J. McLaughlin* and *Judah Best,* Assistant United States Attorneys, were on the brief for appellee. *Mr. Daniel J. McTague,* Assistant United States Attorney, also entered an appearance for appellee.

Mr. Abe Krash and *Miss Selma Levine* filed a brief on behalf of the American Orthopsychiatric Association, as *amicus curiae.*

Mr. Warren E. Magee filed a brief on behalf of the American Psychiatric Association, as *amicus curiae.*

Before WILBUR K. MILLER, *Chief Judge,* and EDGERTON, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER and WRIGHT, *Circuit Judges,* sitting *en banc.*

PER CURIAM: Appellant was convicted of manslaughter and sentenced to from five to fifteen years' imprisonment. He had been charged with second degree murder for aiding and abetting his employer, Davis, in the shooting of one Jenkins during an altercation. The District Court allowed this appeal *in forma pauperis* and we appointed new counsel. After the case was heard by a division of this court, a rehearing *en banc* was ordered *sua sponte.*

In this appeal appellant urges that the court's charge to the jury was fatally defective in two respects. First, the court failed to state that, if acquitted by reason of insanity, appellant would be confined in a mental hospital until it was determined that he was no longer dangerous to himself or others. D.C.Code §24-301(d). This statement is required unless it "appears affirmatively on the record" that the defendant did not want it. *Lyles* v. *United States,* 103 U.S.App.D.C. 22, 25, 254 F.2d 725, 728, *certiorari* denied, 356 U.S. 961.

Second, in its charge the court twice enumerated the alternative verdicts available to the jury. But both times it failed to include "not guilty because of insanity." Thus, before charging on the issue of insanity, the court instructed the jury to return one of the following five possible verdicts: (1) guilty of second degree murder, (2) guilty of manslaughter, (3) guilty of assault with a dangerous weapon, (4) guilty of assault, or (5) not guilty. (Tr. 275.) Later the court did charge the jury on criminal responsibility, concluding: "If you * * * are not satisfied beyond a reasonable doubt that the act was not a product of a mental defect, then your verdict must be not guilty because of insanity." (Tr. 288.)

After the charge was concluded, the court called a bench conference at which defense counsel expressed substantial[1] satisfaction with the instructions, making no reference to or request concerning the so-called *Lyles* instruction on mandatory commitment of persons found not guilty by reason of insanity. Thereupon the court told the jury:

> "I am going to repeat something that I said to you earlier and that is that you may return any one of five possible verdicts in this case. Your verdict may be either guilty of second degree murder or guilty of manslaughter or guilty of assault with a dangerous weapon or guilty of assault or not guilty." (Tr. 290.)

The Government urges us to find from defense counsel's failure to object to the court's charge that it "appears affirmatively" that appellant did not want the *Lyles* instruction on hospital confinement, and that the omission of an insanity verdict from the court's lists of alternatives must be deemed harmless because of reference to it elsewhere. The Government also urges that the evidence was insufficient to require an instruction on responsibility, hence any defects in the instruction are immaterial. We do not agree that the instruction was unnecessary.

I.

Under *Davis* v. *United States,* 160 U.S. 469, if there is "some evidence" supporting the defendant's claim of mental disability, he is entitled to have that issue submitted to the jury. Under *Durham* v. *United States,* 94 U.S.App. D.C. 228, 214 F.2d 862, evidence of a "mental disease" or "mental defect" raises the issue. The subject matter being what it is, there can be no sharp quantitative or qualitative definition of "some evidence." Certainly it means more

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[1] Defense counsel requested a further charge upon a matter not relevant here. The court denied the request.

than a scintilla,[2] yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal.[3] The judgment of the trial judge as to the sufficiency of the evidence is entitled to great weight on appeal, but, since the defendant's burden is merely to raise the issue, any real doubt should be resolved in his favor.[4]

In this case a psychiatrist and a psychologist testified that the defendant had a "mental defect," principally because his I.Q. rating shown by various tests was below the "average" intelligence range of 90 to 110. His overall I.Q. was 68. Neither witness was able to say whether appellant's mental defect stemmed from organic injury or from some other cause. But the psychiatrist testified that some organic pathology can only be established by autopsy and that McDonald's defect probably prevented him from progressing beyond the sixth grade.

The witnesses also explained generally how mental defect affects behavior. The psychologist testified that a

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[2] *Battle* v. *United States,* 209 U.S. 36, 38.

[3] Compare *Tatum* v. *United States,* 88 U.S.App.D.C. 386, 190 F.2d 612; *Durham* v. *United States,* 94 U.S.App.D.C. 228, 232, 214 F.2d 862, 866; *Wright* v. *United States,* 102 U.S.App. D.C. 36, 39, 250 F.2d 4, 7; *Logan* v. *United States,* 109 U.S. App.D.C. 104, 284 F.2d 238; *Fitts* v. *United States,* 10 Cir., 284 F.2d 108; *United States* v. *Currens,* 3 Cir., 290 F.2d 751, 761; *Hall* v. *United States,* 4 Cir., 295 F.2d 26.

[4] In considering the quantum of evidence necessary to raise the issue of criminal responsibility, we cannot ignore our experience that in most cases the accused does not possess the knowledge and financial ability required to seek and obtain expert testimony in his behalf. Ordinarily such persons can only obtain examinations by psychiatrists employed in government institutions, and if these examinations are inadequate, "the [resulting] inadequacy of the evidence is not a point in favor of the prosecution." *Williams* v. *United States,* 102 U.S.App.D.C. 51, 55-56, 250 F.2d 19, 23-24.

person suffering from a mental defect would have less ability than normal persons to distinguish between right and wrong in complex situations (Tr. 233); would tend to act impulsively under stress (*ibid.*); and would readily become dependent upon and be strongly influenced by someone who befriended him (Tr. 234-235). The witness testified further that McDonald had a mental defect, which she defined as "a state of mental development which does not reach the level of average intelligence," (Tr. 245) and that "if McDonald had a person on whom he was dependent * * * and if that person should produce a gun and threaten another * * * McDonald [would not] be as able as the average adult to assess and evaluate the situation and the consequences of whatever action he might take * * *" (Tr. 235).[5] The psychiatrist stated that McDonald would lack the ability of normal persons to foresee the consequences of his acts and offered an opinion that appellant's relationship to Davis was to some extent a product of his mental deficiency.

Evidence of a 68 I.Q. rating, standing alone and without more, is not evidence of a "mental defect," thus invoking the *Durham* charge. Where, as here, other evidence of mental abnormality appears, in addition to the I.Q. rating, the *Davis* case would control and the instruction should be given. The introduction of competent evidence of mental disorder raises the issue of causality sufficient for jury consideration. See *Durham* v. *United States,* 94 U.S.App. D.C. 228, 241, n.49, 214 F.2d 862, 875, n.49; *Blocker* v. *United States,* 107 U.S.App.D.C. 63, 274 F.2d 572; *Goforth* v. *United States,* 106 U.S.App.D.C. 111, 269 F.2d 778; *United States* v. *Amburgey,* D. D.C., 189 F.Supp. 687. Cf. *Tatum* v. *United States,* 88 U.S.App.D.C. 386, 190 F.2d 612.

It does not follow, however, that whenever there is any testimony which may be said to constitute "some evidence"

[5] McDonald's testimony suggests that he was financially and socially dependent upon Davis. (See Tr. 161-163.)

of mental disorder, the Government must present affirmative rebuttal evidence or suffer a directed verdict. A directed verdict requires not merely "some evidence," but proof sufficient to compel a reasonable juror to entertain a reasonable doubt concerning the accused's responsibility.[6] *Durham* v. *United States,* 94 U.S.App.D.C. at 232, n.8, 214 F.2d at 866, n.8; *Hall* v. *United States,* 4 Cir., 295 F.2d 26. See 9 Wigmore, *Evidence,* §2487; Abbott, *Two Burdens of Proof,* 6 Harv.L.Rev. 125. Whether uncontradicted evidence, including expert opinion evidence, which is sufficient to raise a jury question on the mental issue is also sufficient to require a directed verdict depends upon its weight and credibility. *Douglas* v. *United States,* 99 U.S. App.D.C. 232, 239 F.2d 52. *Davis* v. *United States,* 160 U.S. 469, clearly supports this position. There the Supreme Court said that the jury, in considering an insanity plea, must weigh all the evidence, including the presumption of sanity. *Id.* at 488. Whether uncontradicted expert testimony overcomes the presumption depends upon its weight and credibility, and weight and credibility ordinarily are for the jury. See *Stewart* v. *United States,* 94 U.S.App.D.C. 293, 295, 214 F.2d 879, 882.

II.

Our eight-year experience under *Durham* suggests a *judicial* definition, however broad and general, of what is included in the terms "disease" and "defect." In *Durham,* rather than define either term, we simply sought to distinguish disease from defect. Our purpose now is to make it very clear that neither the court nor the jury is bound by

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[6] *Wright* v. *United States,* 102 U.S.App.D.C. 36, 250 F.2d 4; *Douglas* v. *United States,* 99 U.S.App.D.C. 232, 239 F.2d 52; *Satterwhite* v. *United States,* 105 U.S.App.D.C. 398, 267 F.2d 675; *Hopkins* v. *United States,* 107 U.S.App.D.C. 126, 275 F.2d 155; *Campbell* v. *United States,* D.C.Cir., —— F.2d —— (3/29/62).

ad hoc definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a "mental disease or defect" for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation and functioning of these processes and controls.

We emphasize that, since the question of whether the defendant has a disease or defect is ultimately for the triers of fact, obviously its resolution cannot be controlled by expert opinion.[7] The jury must determine for itself, from all the testimony, lay and expert, whether the nature and degree of the disability are sufficient to establish a mental disease or defect as we have now defined those terms. What we have said, however, should in no way be construed to limit the latitude of expert testimony.[8] *Carter* v. *United States,* 102 U.S.App.D.C. 227, 236, 252 F.2d 608, 617.

III.

Having determined in Part I hereof that the charge on criminal responsibility was required, we revert now to a consideration of the other contentions made by the parties with respect to that charge as given. The able and experienced trial court, in the course of the charge, failed to give the *Lyles* instruction concerning the disposition of a de-

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[7] See, however, *Isaac* v. *United States,* 109 U.S.App.D.C. 34, 284 F.2d 168, where the evidence required the direction of a judgment of acquittal by reason of insanity.

[8] See Note 9, infra.

fendant acquitted by reason of insanity, and we are unable, from our study of the record, to say that this defendant affirmatively waived it. *Lyles* v. *United States,* supra, 103 U.S.App.D.C. at 25-26, 254 F.2d at 728-729. Since the case will have to be retried, it may be well simply to note two other inadvertences in the court's charge which we are confident will not recur on retrial.

As heretofore indicated, following a bench conference after the judge had concluded his charge, an additional instruction was given the jury, outlining the alternative possible verdicts, without including not guilty by reason of insanity. Also, in its concluding remarks relating to mental responsibility of the accused, the court charged as follows:

> "If you find that this defendant committed this offense, that is, murder in the second degree or the lesser included offenses and you further find that at the time he committed this offense he was suffering from a mental disease or defect which affected him, that he was incapable of distinguishing right from wrong or if he could tell right from wrong was incapable of controlling his actions, then you would find that the defendant's act was the product of the defendant's mental abnormality." (Tr. 283.)

This is not an accurate statement of the *test* for criminal responsibility in this Circuit. We think the jury may be instructed, provided there is testimony on the point, that capacity, or lack thereof, to distinguish right from wrong and ability to refrain from doing a wrong or unlawful act[9] may be considered in determining whether there is a re-

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[9] An expert may not be compelled to testify in these terms if he believes they are essentially moral or legal considerations beyond the scope of his special competence as a behavioral scientist. *Stewart* v. *United States,* 101 U.S.App. D.C. 51, 53, 247 F.2d 42, 44.

lationship between the mental disease and the act charged. It should be remembered, however, that these considerations are not to be regarded in themselves as independently controlling or alternative tests of mental responsibility in this Circuit. They are factors which a jury may take into account in deciding whether the act charged was a product of mental disease or mental defect. *Wright* v. *United States,* supra, 102 U.S.App.D.C. at 44, 250 F.2d at 12; *Misenheimer* v. *United States,* 106 U.S.App.D.C. 220, 271 F.2d 486, *certiorari* denied, 361 U.S. 971.

Reversed and remanded.

DANAHER, *Circuit Judge,* concurring: I concur in Parts I, II and III of the court's opinion.

As to the *Lyles* point with respect to hospital confinement following a verdict of not guilty by reason of insanity, I have not changed my view.

Here the defense did not request such an instruction although various other requests were submitted. Rule 30 provides that no omission from the charge shall be assigned as error by the appellant unless before the jury retires, objection be made "stating distinctly the matter to which he objects and the grounds of his objection."

The judge specifically asked trial counsel if he had "any other objection to the charge, as given." He replied, "No other objection to the charge."

Of course the instruction, if requested, would have been given. Cf. *Bruno* v. *United States,* 308 U.S. 287 (1939). But in view of the trial strategy, the accused may not have wanted an instruction on the *Lyles* question. We now seem to say that the defense could sit back, wait to see what verdict the jury might reach, and thereafter secure reversal here because it does not "affirmatively" appear that the *Lyles* instruction was waived. *Lyles* thus becomes a legal

trap for the trial judge who relied upon the position voiced by counsel.

I do not subscribe to that view.

BASTIAN, *Circuit Judge,* concurring: I concur, except that I adhere to the view stated in my opinion in *Lyles* v. *United States,* 103 U.S.App.D.C. 22, at 29, 254 F.2d 725, at 732 (1957), *cert. denied,* 356 U.S. 1961 (1958), that the trial court should not be obliged to give, in its charge, a statement as to the effect of a verdict of not guilty by reason of insanity.

I believe Parts I and II of the majority opinion are correct and will do much to relieve the natural uncertainty in the minds of the District Court as to the insanity question.

WILBUR K. MILLER, *Chief Judge,* dissenting in part and concurring in part:

Distilled to its essence, the majority opinion reverses McDonald's conviction because the trial judge did not tell the jury the "meaning" [1] of a verdict of not guilty by reason of insanity, as apparently required by *Lyles* v. *United States.*[2] That is the only decisional conclusion reached by the majority, as clearly appears from the following excerpt from the latter portion of their opinion:

> ". . . The able and experienced trial court, in the course of the charge, failed to give the *Lyles* instruction concerning the disposition of a defendant acquitted by reason of insanity, and we are unable, from our study of the record, to say that this defendant af-

[1] That is, the consequences.

[2] 103 U. S. App. D. C. 22, 254 F. (2d) 725 (1957).

> firmatively waived it. *Lyles* v. *United States,* supra, 103 U. S. App. D. C. at 25-26, 254 F. 2d at 728-729. Since the case will have to be retried, it may be well simply to note two other inadvertences in the court's charge which we are confident will not recur on retrial."

Thus, the majority are saying that the case will have to be retried because the *Lyles* instruction was not given, *i.e.,* that the judgment is being reversed for that reason. Having so ruled, they say "it may be well *simply to note* two other inadvertences in the court's charge . . .." (Emphasis added.) The majority do not base reversal on either of those "two other inadvertences," nor could they reasonably have done so, as I shall show later in this dissent.

I dissent from the reversal of McDonald's conviction on the ground that the *Lyles* instruction was not given because I am convinced that the majority opinion in the *Lyles* case is in that respect not an authoritative holding of this court and therefore is not binding on us in this or any other case; and that, if it is a binding precedent, it should be overruled as an incorrect statement of the law. I think, moreover, that if the *Lyles* requirement of the "meaning" instruction is considered authoritative, and if it is not overruled, nevertheless McDonald's conviction should not be reversed for the failure to give it, because it appears affirmatively on the record that McDonald did not want the instruction. In that event, the *Lyles* opinion says it is not reversible error to omit the "meaning" instruction.

First, as to my suggestion that the Lyles requirement of the "meaning" instruction is obiter dictum. There the majority correctly but unnecessarily say a verdict of not guilty by reason of insanity "means the accused will be confined in a hospital for the mentally ill until the superintendent of such hospital certifies, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others."

Then this language follows, 103 U. S. App. D. C. at 25-26, 254 F. (2d) at 728-729:

> "Sometimes a defendant may not want such an instruction given. If that appears affirmatively on the record we would not regard failure to give it as grounds for reversal. Otherwise, whenever hereafter the defense of insanity is fairly raised, the trial judge shall instruct the jury as to the legal meaning of a verdict of not guilty by reason of insanity in accordance with the view expressed in this opinion."

The implication is clear that a failure to instruct on the "meaning" of such a verdict would be regarded as reversible error, unless the accused had indicated he did not want the instruction.

I suggest that Point I of the *Lyles* majority opinion, which includes the language just quoted, is not an authoritative holding of this court, but is a gratuitous essay on the subject with which it deals. It decides a question which was not presented by the facts of the *Lyles* case, and was not suggested or discussed by the parties. Demonstrably, it is *obiter dictum* which the court is not required to follow in this or any case.

An analysis of the introductory paragraphs of the *Lyles* opinion and its text under Point I will show the foregoing to be true. The *Lyles* majority said in an early paragraph, *id.* at 24-25, 254 F. (2d) at 727-728:

> "Our present consideration is addressed to several issues which can be stated as follows:
>
> "1. In cases where the defense of insanity is asserted what, if anything, should the court instruct the jury about the consequences of a verdict of not guilty by reason of insanity, pursuant to D. C. Code § 24-301?"
>
> (Three other "issues" are stated, with which we are not concerned.)

Thus, they were careful not to say this "issue" was presented by the parties or inherent in the record. Consciously, then, they stated an abstract question and pro-

ceeded to give an advisory and directory opinion about it. This is not, I think, a function of an appellate court. The *Lyles* majority announced, in effect, that failure to give the "meaning" instruction is reversible error; but they said it in a case in which the instruction *had been given* in language which they said was satisfactory!

This is apparent from the text of the *Lyles* majority opinion under Point I which discusses the "issue" quoted above. The discussion begins thus, *id.* at 25, 254 F. (2d) at 728:

"The judge told the jury:

> " 'If a defendant is found not guilty on the ground of insanity, it then becomes the duty of the Court to commit him to St. Elizabeths Hospital, and this the Court would do. The defendant then would remain at St. Elizabeths Hospital until he is cured and it is deemed safe to release him; and when the time arrives he will be released and will suffer no further consequences from this offense.' "

Nobody criticized or attacked the foregoing statement in the court's charge and, as I have pointed out, the *Lyles* majority said it was satisfactory. Giving the instruction just quoted was not, therefore, one of the "Plain errors or defects affecting substantial rights" which Rule 52(b) of the Federal Rules of Criminal Procedure says "may be noticed although they were not brought to the attention of the court." Regardless of that, they said, after quoting from the charge:

> "This point arises under the doctrine, well established and sound, that the jury has no concern with the consequences of a verdict, either in the sentence, if any, or the nature or extent of it, or in probation. *But we think that doctrine does not apply in the problem before us.* . . ." (Emphasis supplied.)

But, as shown above, there was no problem before the court of the sort which the *Lyles* majority stated and discussed under Point I, except a so-called "issue" which they themselves posed as a problem, but which was not in the

case. I repeat that neither party had said the judge's charge in this respect was improper, inadequate or incomplete, and point out again that the *Lyles* majority found it satisfactory. In those circumstances, it seems plain that the whole discussion under Point I is *obiter dictum* which should not be treated as an authoritative holding.

It was not until Point II was reached that the *Lyles* majority began to discuss an issue which was actually presented. The discussion begins thus, *id.* at 26, 254 F. (2d) at 729:

> "Having made to the jury the statement above quoted and discussed, the trial judge immediately said:
>
> "'I think I should add that Dr. Cushard of St. Elizabeths Hospital testified, as you will recall, that on a prior occasion he found no mental disorder whatever in the defendant, and that the defendant was a man of average intelligence.'
>
> Dr. Cushard had so testified. The question is whether the trial judge erred in making the quoted remark at the time and in the context in which he made it. . . ."

This was the portion of the judge's charge that was actually attacked by the appellant. He called it a "gratuitous digression" which "conveyed to the jury that the Appellant would be promptly released due to the fact that Doctor Cushard testified that Lyles was 'without mental disorder during his residence at St. Elizabeths Hospital.'" This, said Lyles, "effectively undermined the defense of insanity."

With respect to this, the Government's brief said:

> "Appellant argues still further, not that the trial court failed to instruct in accordance with applicable legal principles, but only that the summarization vitiated by innuendo the otherwise admittedly correct instructions. . . ."

Curiously enough, the *Lyles* majority refused to reverse on Point II. I discuss this Point only to emphasize the fact that Point I was not mentioned in either brief, and that

only the attack on the instructions, discussed in the *Lyles* case in Point II, was presented to the court.

Second, as to my suggestion that the Lyles requirement of the "meaning" instruction is incorrect as a matter of law and should be overruled. As I have said, in the present case the majority depend entirely upon the gratuitous *dictum* of Point I of the *Lyles* opinion as requiring reversal. Of course they can, if they choose, adopt the pronouncements of Point I and authoritatively announce here that a failure to give the instruction there prescribed was reversible error, for this is a case in which *the instruction was not given* and, according to the majority, was not affirmatively waived. But they have not made such an original announcement; apparently they have considered themselves bound by the *Lyles dictum*, and have followed it without adopting it as their own holding. I think it should not be adopted here because, in my view, it is not a correct statement of the law. A verdict of not guilty by reason of insanity is covered by what the *Lyles* majority admitted is "the doctrine, well established and sound, that the jury has no concern with the consequences of a verdict, either in the sentence, if any, or in the nature or extent of it, or in probation."

If the *Lyles* majority's Point I discussion be regarded as an actual holding instead of a mere statement by the way, for the same reasons I think it should be overruled. In elaboration of those reasons, I reproduce here a portion of Judge Bastian's dissent from Point I of the *Lyles* opinion, in which Judge Danaher and I joined, *id.* at 29-30, 254 F. (2d) at 732-733:

> "It seems to me unwise and unnecessary that a jury be told the result of their verdict of 'not guilty by reason of insanity.' In Federal courts, as at common law, the jury are not told the quantum of punishment which may be meted out if they convict, or that probation may be granted. For instance, they are not told that if a defendant is found guilty of manslaughter he may be

punished by a fine not exceeding $1,000 or imprisonment not exceeding 15 years, or both. This is salutary, since their only function is to determine from the evidence the factual issue of guilt or innocence, and in reaching a verdict they should not be swayed by an extra-evidentiary consideration such as whether they approve of the possibility of probation or of the penalty which may be imposed by the trial judge. The jury will probably know, as Judges Prettyman and Burger suggest, that a verdict of guilty will result in the imposition of punishment unless probation is granted, but they will not know what the punishment may be and, therefore, will not be influenced to acquit if they consider the possible penalty too severe.

"The issue of insanity, fairly raised, does no more than present another factual question to the jury: whether the defendant was mentally responsible when the criminal act was done. That issue also should be determined on the basis of the evidence only and, in deciding it, the jury should not be influenced by a consideration of the result of an acquittal by reason of insanity; that is an extraneous consideration wholly unconnected with the evidence from which the jury must reach a determination of the factual issue raised concerning the defendant's mental condition.

"In short, the jury should be told nothing as to how the defendant will be dealt with in case of acquittal by reason of insanity. . . ."

A strong statement which takes the same position was made by the Fifth Circuit in *Pope* v. *United States,* 298 F. (2d) 507 (1962), where the court had an identical question before it. The only error specified by Pope was the refusal of the trial court to grant his request for the following instruction to the jury, which he lifted from the *Lyles* opinion, 298 F. (2d) at 508:

"If a defendant is found not guilty on the ground of insanity, it then becomes the duty of the Court to commit him to St. Elizabeths Hospital, and this the Court would do. The defendant then would remain at St. Elizabeths Hospital until he is cured and it is deemed safe to release him; and when that time arrives he will

be released and will suffer no further consequences from this offense."

The court said:

"We have concluded that the court properly refused the charge. It is not a correct statement of the law. . . .

"The primary question raised here relates in large measure to the province of the court and the duty and function of a jury in a criminal case where the statute imposes the duty upon the court to determine the sentence to be given. Generally speaking, jurors decide the facts in accordance with the rules of law as stated in the instructions of the court. Unless otherwise provided by statute, it is the duty of the court to impose sentence, or make such other disposition of the case as required by law, after the facts have been decided by the jury. To inform the jury that the court may impose minimum or maximum sentence, will or will not grant probation, when a defendant will be eligible for a parole, or other matters relating to the disposition of the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts, and to confuse the issue or issues to be decided. . . ."

Pope cited and relied upon the *Lyles* case, but the Fifth Circuit merely said, "Different rules and different statutes apply to the Court in the District of Columbia . . .." This was a polite way of rejecting the *Lyles* case as unsound. The statutes are not substantially different, and the rules are different only because a majority of this court announced by way of *dictum* a rule which the Fifth Circuit thought incorrect. For the reasons given in Judge Bastian's *Lyles* dissent and in the *Pope* case, I vigorously protest against the adoption of the *Lyles* Point I *dictum* as the law of this circuit.

Third, as to my suggestion that the Lyles instruction was waived. Even if the *Lyles* Point I is adopted by the present majority as the law of this circuit, or if it is held by them to be an authoritative pronouncement instead of *obiter dictum*, I strongly urge that, nevertheless, they err

in reversing McDonald's conviction because the *Lyles* instruction was not given; for I think it "appears affirmatively on the record" that he did not want such an instruction given.

With respect to this, the majority merely say, ". . . [W]e are unable, from our study of the record, to say that this defendant affirmatively waived" the *Lyles* instruction. Their only discussion of the record in this regard is the following:

> "After the charge was concluded, the court called a bench conference at which defense counsel expressed substantial satisfaction with the instructions, making no reference to or request concerning the so-called *Lyles* instruction on mandatory commitment of persons found not guilty by reason of insanity. . . ."

I think this is quite enough to justify the conclusion that defense counsel, who undoubtedly was familiar with the *Lyles* decision, deliberately decided he did not want the instruction given. The import of the majority's language is that the instruction is not "affirmatively waived" unless the trial judge says in effect, "I am required to give the *Lyles* instruction unless you do not want it," and defense counsel answers, "We do not want it given." This is, I think, a far too stringent restriction of the principle of waiver. My view is that, by his approval of the charge without the *Lyles* instruction, and his failure to request that it be given, McDonald's counsel effectively and affirmatively indicated he did not want it given. In passing, I suggest that it is unusual—to use a mild adjective—to permit a defendant to tell the trial judge whether or not to give an instruction said by the *Lyles* majority to be so necessary that its omission will require reversal.

In addition to the omission of the *Lyles* instruction which he assigned as error, McDonald argues the court's charge to the jury was fatally defective in a second respect which the majority describes as follows:

> ". . . [I]n its charge the court twice enumerated the

alternative verdicts available to the jury. But both times it failed to include 'not guilty because of insanity.' Thus, before charging on the issue of insanity, the court instructed the jury to return one of the following five possible verdicts: (1) guilty of second degree murder, (2) guilty of manslaughter, (3) guilty of assault with a dangerous weapon, (4) guilty of assault, or (5) not guilty. Later the court did charge the jury on criminal responsibility, concluding: 'If you . . . are not satisfied beyond a reasonable doubt that the act was not a product of a mental defect, then your verdict must be not guilty because of insanity.'

"After the charge was concluded, the court called a bench conference at which defense counsel expressed substantial satisfaction with the instructions . . .. Thereupon the court told the jury:

> " 'I am going to repeat something that I said to you earlier and that is that you may return any one of five possible verdicts in this case. Your verdict may be either guilty of second degree murder or guilty of manslaughter or guilty of assault with a dangerous weapon or guilty of assault or not guilty."

No further reference to McDonald's second attack on the instructions is made by the majority except the following comment after the final announcement of reversal because of the omission of the *Lyles* "meaning" instruction: "Since the case will have to be retried, it may be well simply to note two other inadvertences in the court's charge which we are confident will not recur on retrial." The first of these "inadvertences" was thus described: ". . . [F]ollowing a bench conference after the judge had concluded his charge, an additional instruction was given the jury, outlining the alternative possible verdicts, without including not guilty by reason of insanity. . . ."

Thus, the fact that the trial judge, although he instructed the jury carefully, correctly and at considerable length[3]

[3] The portions of the charge having to do with the possible verdict of not guilty by reason of insanity aggregate about five pages of transcript.

that it might find McDonald not guilty by reason of insanity, did not include that in a list of possible verdicts is described by the majority as an "inadvertence" only; it is not characterized as error, and certainly reversal is not based upon it. Nor could it logically have been. It is elementary that a judge's charge to a jury is to be considered as a whole, and that parts of it are not to be picked out as so deficient as to require reversal when the supposed deficiency is remedied or supplied by another portion of the charge. To me, it is inconceivable that the jury could have been misled into thinking that it could not return a verdict of not guilty by reason of insanity when the judge had so emphatically and at such length, and at more than one place in the charge, instructed it that it might do so.

Moreover, the listing of five possible verdicts in the charge plainly was not intended to exclude the possibility of a verdict of not guilty by reason of insanity. This clearly appears from the judge's language when he first mentioned the five possible verdicts:

> "What, then, do these lesser included offenses mean to you as members of this jury? They mean that you have the right to return any one of five possible verdicts in this case. You may find this defendant guilty as indicted, which is guilty of murder in the second degree; or, you may find the defendant guilty of manslaughter; or, you may find the defendant guilty of assault with a dangerous weapon; or, you may find the defendant guilty of assault, or you may find the defendant not guilty."

It will be observed from the foregoing that the judge was discussing and trying to clarify the signicance of the term "lesser included offenses." To construe this as excluding a verdict of not guilty by reason of insanity, which he discussed at such length and with such care in other places in the charge, seems to me to be not only illogical but also a decided undervaluation of the intelligence of the average jury.

I note also that McDonald's counsel did not complain

that the charge might give the jury the impression that acquittal for insanity was not a possible verdict. At the end of the charge, the judge asked, "Does the defendant request any further charge?", to which his counsel responded, "Yes. We renew our request for the charge on the right to recover stolen property." Thus, he approved of the portion of the charge now criticized by the majority.

Quoted by the majority in this connection is the following statement by the trial judge after a bench conference which followed the conclusion of the charge:

> "I am going to repeat something that I said to you earlier and that is that you may return any one of five possible verdicts in this case. Your verdict may be either guilty of second degree murder or guilty of manslaughter or guilty of assault with a dangerous weapon or guilty of assault or not guilty."

As he expressly said, he was repeating an earlier statement which was an explanation of the significance of the term "lesser included offenses." It was not intended to, and I feel sure it did not, expunge from the minds of the jurors the painstaking instruction already given that a verdict of not guilty by reason of insanity might be returned.

The second "inadvertence" in the court's charge is thus described and treated in the majority opinion:

> ". . . Also, in its concluding remarks relating to mental responsibility of the accused, the court charged as follows:
>
> " 'If you find that this defendant committed this offense, that is, murder in the second degree or the lesser included offenses and you further find that at the time he committed this offense he was suffering from a mental disease or defect which affected him, that he was incapable of distinguishing right from wrong or if he could tell right from wrong was incapable of controlling his actions, then you would find that the defendant's act was the product of the defendant's mental abnormality.'
>
> "This is not an accurate statement of the *test* for criminal responsibility in this Circuit. We think the

> jury may be instructed, provided there is testimony on the point, that capacity, or lack thereof, to distinguish right from wrong and ability to refrain from doing a wrong or unlawful act may be considered in determining whether there is a relationship between the mental disease and the act charged. It should be remembered, however, that these considerations are not to be regarded in themselves as independently controlling or alternative tests of mental responsibility in this Circuit. They are factors which a jury may take into account in deciding whether the act charged was a product of mental disease or mental defect. *Wright* v. *United States,* supra, 102 U. S. App. D. C. at 44, 250 F. 2d at 12; *Misenheimer* v. *United States,* 106 U. S. App. D. C. 220, 271 F. 2d 486, *certiorari* denied, 361 U. S. 971."

The *Wright* opinion is wrong, as I think I demonstrated in dissenting from it. Judges Danaher and Bastian joined in my dissent, and Judge Burger concurred only in the result reached by the majority opinion. I think the *Wright* case should be reexamined and repudiated.

The *Misenheimer* case cited by the majority does not seem to me to support their conclusion. But I must admit that *Campbell* v. *United States,*[4] which I think should be overruled as grossly erroneous, does support it. The latter case makes specific a rule which the court had in effect adopted in the *Durham* case and subsequent decisions: that a defendant may be sane to the extent that he is able to distinguish right from wrong and to control his conduct so as to refrain from doing wrong, and yet have some other sort of mental infirmity which excuses him from criminal responsibility. For example, that he is "emotionally unstable;" that, as here, he may be led by a dominant personality; that he is a "sociopath," which really means that he cannot get along with other people.

This rule has been developed over my repeated protests.

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[4] No. 16, 414, decided March 29, 1962.

I renew them here. The *Campbell* case should be overruled and the cases from which it sprang, including *Durham* v. *United States*,[5] should also be repudiated or substantially modified. My view is that a person who deliberately chooses to do what he intelligently knows is a criminal act, although he has mental capacity enough to refrain from doing it, should not be excused from criminal responsibility because in some other respects he differs from ordinary men. If a defendant has mental capacity to understand the criminality of his act and to refrain from doing it, he is sane in the legal sense, even though he may have some eccentricities or limitations of mental ability in other respects which psychiatrists may say amount to a mental disease or defect.

These are my reasons for dissenting from the reversal of McDonald's conviction.

In the main, I agree with Part I of the majority opinion, particularly with that portion which discusses the "some evidence" holding of the *Davis* case.[6] How much evidence is the "some evidence" referred to in that case? Unless and until the Supreme Court changes the *Davis* rule, which I hope it will do, the district and circuit courts will be forced to answer that question. The majority are correct, I think, in saying, "Certainly it [the *Davis* 'some evidence' rule] means more than a scintilla, yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal." But the majority do not go far enough. They should expressly overrule cases such as *Tatum* v. *United States*, 88 U. S. App. D. C. 386, 190 F. (2d) 612 (1951); *Clark* v. *United States*, 104 U. S. App. D. C. 27, 259 F. (2d) 184 (1958); and *Goforth* v. *United States*, 106 U. S. App. D. C. 111, 269 F. (2d) 778 (1959), which held the insanity issue was raised by

[5] 94 U. S. App. D. C. 228, 214 F. (2d) 862 (1954).

[6] Davis v. United States, 160 U. S. 469 (1895).

the defendants' self-serving statements which in my view did not constitute even a scintilla of evidence of insanity.

In the *Tatum* case, this court said:[7] "In essence, however, the entire defense [of insanity] rested upon appellant's insistence that he remembered nothing of what happened at the time the offense was committed." Tatum's trial counsel did not request, and the trial court did not give, an instruction on insanity, and the omission was not urged as error on appeal. But this court, acting under the "plain error" rule,[8] held the instruction should have been given because the issue was raised by Tatum's statement that he did not remember committing the crime. In its opinion the court said:[9]

> ". . . '[I]n criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.' . . ."

This statement is at variance with the majority's pronouncement in this case—in which I heartily join—that a scintilla is not enough, under which Tatum's conviction could not have been reversed. It is essential, I think, that the *Tatum* case be overruled.

The *Clark* case is of the same type and, pursuant to what the majority now says, should be repudiated. There, this court said: "Defense counsel's attempt to take the issue of insanity out of the case was error." [10] Defense counsel had

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[7] 88 U. S. App. D. C. at 388, 190 F. (2d) at 614.

[8] Rule 52(b), Fed. R. Crim. P.

[9] 88 U. S. App. D. C. at 391, 190 F. (2d) at 617, quoting 53 Am. Jr., Trial, § 580, p. 458.

[10] I suppose the court meant to say this amounted to ineffective assistance of counsel.

conceded that his client was guilty of some degree of homicide, although the trial judge told the jury Clark had raised the issue of insanity by merely saying from the stand, "I must have been insane." By holding that in such a setting defense counsel was ineffective because he did not argue the issue of insanity, this court approved the trial judge's ruling that Clark's statement was sufficient to raise the issue. I suggest that the statement was not "some evidence" of insanity and did not amount even to a scintilla. If a defendant may raise the issue of insanity by simply saying, "I must have been insane," the Government must be prepared to meet the issue in every criminal case. This court's approval of a ruling to that effect should be replaced by disapproval.

The *Goforth* case is equally inconsistent with the majority's holding in the present case as to the "some evidence" rule. As the dissenting judge said:[11]

> "There was not one word of testimony from any source to indicate that appellant was suffering from any mental disease or defect. At the most there was only his own testimony, totally uncorroborated, as to imaginings of his intoxicant-befuddled mind—a not unusual phenomenon of continued and continuous drinking, and a far cry from mental disease or defect."

As to Part II of the majority opinion, I thoroughly agree with the majority that

> ". . . What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. . . ."

That is what I meant when I said earlier in this dissent that a person who chooses to do what he knows is a criminal act, when he is mentally able to control his conduct and refrain from doing the criminal act, is sane in the legal sense even though he has some aberration or emotional

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[11] 106 U. S. App. D. C. at 113, 260 F. (2d) at 780.

disturbance which psychiatrists classify as a mental disease or defect. In such a case, the psychiatrically diagnosed "mental disease" could not possibly be the cause of the crime.

It is therefore my conclusion that the judgment of conviction should be upheld and I dissent from its reversal. But, with the limitations indicated, I concur in Parts I and II of the majority opinion, which could largely be retained in an opinion affirming the conviction. In fact, I think the court should go further than it does in those portions of the majority opinion, and should take the steps advocated by a minority of the court in *Blocker* v. *United States,* 110 U. S. App. D. C. 41, at 61, 288 F. (2d) 853, at 873 (1961). But the court does take two important, much needed and long overdue steps: (a) it says, for the first time, what *we* mean by the term "mental disease or defect" in connection with criminal responsibility; (b) it rules quite clearly that the jury is the sole and final judge of the credibility of all witnesses, including those who testify as experts, and that it is to be so instructed. Heretofore, these two elements have been sadly lacking in this court's opinions.

Taken together, these steps mean that hereafter the jury will know it is not bound by what experts say is a "mental disease or defect" if the abnormal mental condition described by them does not, in the jury's opinion, substantially affect the defendant's capacity to control his conduct in relation to the law. Under this important change, it will be for the jury to decide whether what the experts say in a given case amounts to a mental abnormality which substantially affects the defendant's capacity to control his conduct and conform to the law. These two steps have long been urged. *E.g.,* see the dissenting opinions in *Blocker* v. *United States, supra,* and *Campbell* v. *United States,* No. 16,414, March 29, 1962, and June 28, 1962.

The rulings to which I refer have become especially necessary because of the frequent alteration and expansion of

the definition of "mental disease" by those experts who appear most frequently as witnesses in this jurisdiction. They suddenly reclassified psychopathic (sociopathic) personality as a mental disease in *In re Rosenfield,* 157 F. Supp. 18 (D.D.C. 1957); they reclassified emotionally unstable personality as a mental disease in *Campbell* v. *United States, supra;* they reclassified narcotics addiction as a mental disease in *United States* v. *Carroll,* Criminal No. 383-62 (D.D.C. June 28, 1962) and *United States* v. *Horton,* Criminal No. 59-62 (D.D.C. July 12, 1962). I think it obvious that the new classifications were made by the doctors for clinical purposes only, for demonstration is not needed to make it plain that these conditions newly called "mental diseases" are not such in the legal sense. Until now, this court has allowed the shifting wind of expert nomenclature to control its decisions.

In *United States* v. *Spaulding,* 293 U. S. 498 (1935), the Supreme Court said, at page 506:

> "The medical opinions that respondent became totally and permanently disabled before his policy lapsed are without weight. . . . [T]hat question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase, and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case. . . ."

I think it follows from the foregoing that psychiatrists may not testify as to their conclusions as to the ultimate questions of insanity and causality which must be decided by the jury. Any lawyer or judge with trial experience will know how an expert witness can be properly questioned to elicit admissible information which will help the jury in reaching its decision, without asking him for his conclusion on the ultimate jury question.

The majority have made a worthwhile effort to clarify the confusion engendered in the minds of trial judges by

the *Durham* case and subsequent decisions. The effort may succeed if the present majority opinion is not whittled away by this court in future cases.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16637

EARL TATUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided November 1, 1962

Mr. John W. Cragun (appointed by this court) for appellant.

Mr. Paul A. Renne, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, *Victor W. Caputy,* Assistant United States Attorney, and *Nathan J. Paulson,* Assistant United States Attorney at the time of argument, were on the brief, for appellee. *Mr. Abbott A. Leban,* Assistant United States Attorney, also entered an appearance for appellee.

Before WILBUR K. MILLER, FAHY, and BURGER, *Circuit Judges.*

PER CURIAM: Appellant challenges the admissibility of a confession made within 20 minutes after he was taken into

police custody and makes other contentions which were not preserved for review by timely objection.

Our review of the record in light of the contentions on the merits satisfies us that there was no error warranting reversal.

For the reasons set forth in the case *Tatum* v. *United States,* No. 16773, D.C. Cir., Nov. 1, 1962, we remand the case to the District Court for resentencing pursuant to that opinion.

Sentence set aside and case remanded for resentencing.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16881

CARL A. TATUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided December 20, 1962

Mr. Dickson R. Loos (appointed by this court) for appellant.

Mr. Daniel Rezneck, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, and *Nathan J. Paulson,* Assistant United States Attorney at the time the brief was filed, were on the brief, for appellee. *Messrs. Frank Q. Nebeker,* Assistant United States Attorney, and *John R. Schmertz, Jr.,* Assistant United States Attorney at the time the record was filed, also entered appearances for appellee.

Before EDGERTON, WASHINGTON, and BASTIAN, *Circuit Judges.*

EDGERTON, *Circuit Judge:* Appellant drove the car in-

volved in the Sheriff Road robbery-killing. Facts are stated in our opinion in *Jackson* v. *United States,* No. 16879, decided today.

Appellant was arrested shortly after 8:00 p.m. on January 17, 1961 and brought to the 14th precinct police station about 8:50. He was questioned for ten minutes in the lobby and denied all knowledge of the crime. He was then put in the cellblock. At 10:30 he was "booked". At 11:00 he was confronted by Coleman who had just made a written confession. Appellant still denied complicity. He made a non-incriminating statement at 11:15 p.m. He was questioned, partly in the absence of Coleman, from 11:15 till midnight. He still maintained his innocence. At 12:15 or 12:25 a.m. on January 18, while Detective Shirley was preparing a "lineup sheet," appellant is said to have agreed to confess. His written confession was completed at 3:00 a.m. He was brought before the United States Commissioner at 10:00 a.m.

The confession should have been excluded under the *McNabb-Upshaw-Mallory* rule. F.R.CRIM.P. 5(a); *Mallory* v. *United States,* 354 U.S. 449 (1957). Probably when he denied all knowledge of the crime about 9:00 p.m. after ten minutes questioning, and certainly when he did so again upon confronting Coleman at 11:00 p.m., the police should have taken him before a magistrate or else released him. As we point out in *Coleman* v. *United States,* No. 16880, decided today, a magistrate is regularly available at any hour. The circumstances in which appellant's statements were obtained on the morning of January 18 are inconsistent with the legislative purpose "to avoid all the evil implications of secret interrogation of persons accused of crime." *McNabb* v. *United States,* 318 U.S. 332, 344 (1943). *Cf. Anderson* v. *United States,* 318 U.S. 350, 355 (1943). "[T]he delay must not be of a nature to give opportunity for the extraction of a confession." *Mallory* v. *United States,* 354 U.S. at 455. We must apply the rule that "a

confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate . . ." *Upshaw* v. *United States,* 335 U.S. 410, 413 (1948).

The judgment must be reversed and the case remanded for a new trial.

Reversed and remanded.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16880

CHARLES S. COLEMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided December 20, 1962

Mr. David R. Peasback (appointed by this court) for appellant.

Mr. Daniel A. Rezneck, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, and *Nathan J. Paulson,* Assistant United States Attorney at the time of argument, were on the brief, for appellee. *Mr. John R. Schmertz, Jr.,* Assistant United States Attorney at the time of argument, also entered an appearance for appellee.

Before EDGERTON, WASHINGTON, and BASTIAN, *Circuit Judges.*

EDGERTON, *Circuit Judge:* Appellant Coleman was a passenger in the car involved in the Sheriff Road robbery and

killing. Facts are stated in our opinion in *Jackson* v. *United States,* No. 16879, decided today.

The police questioned Coleman on six or seven separate occasions, and as far as appears could have questioned him again at will, before they arrested him at 6:45 p.m. on January 17, 1961. They took him across town to a police station and locked him in a room. Between 7:30 and 8:00 p.m. he was interrogated and made a non-incriminatory statement about his whereabouts at the time of the crime. He was again locked up alone from 8:00 to about 8:45. Three officers then arrived who had been called for the admitted purpose of questioning him. Questioning was resumed, and a "'threshold'" confession was obtained at 8:50. From 9:10 to 10:50 p.m. it was reduced to writing. He was then "booked". He was not brought before a magistrate until 10:00 a.m. the next day.

There was unnecessary delay. As long ago as 1946 we said that "both by law and practice" a prisoner may be brought before a committing magistrate "at any hour." *Akowskey* v. *United States,* 81 U.S.App.D.C. 353, 354, 158 F. 2d 649, 650. We recently said: "[N]ot only a magistrate, but an Assistant United States Attorney, are, and were . . . available to the police twenty-four hours a day." *Elsie V. Jones* v. *United States,* 113 U.S.App.D.C. ——, ——, 307 F. 2d 397, 399 (1962). *Cf. Ginoza* v. *United States,* 279 F. 2d 616 (9th Cir. 1960). If because of some extraordinary circumstance no magistrate were available, it would not follow that questioning could continue. The time between arrest and confession was not, as we said it was in the *Heideman* case, "consumed only by the questions . . . and by the preparing of papers, booking, photographing, fingerprinting and transportation . . ." *Heideman* v. *United States,* 104 U.S.App.D.C. 128, 131, 259 F. 2d 943, 946 (1958), *cert. denied,* 359 U.S. 959 (1959). The delay was "of a nature to give opportunity for the extraction of a confession." *Mallory* v. *United States,* 354 U.S. 449, 455

(1957). Since the confessions were obtained during an unnecessary and therefore unlawful detention they should have been excluded. F.R.CRIM.P. 5(a); *McNabb* v. *United States,* 318 U.S. 332 (1943). Other cases are cited in our opinion in *Tatum* v. *United States,* No. 16881, decided today. Failure to exclude the confessions was prejudicial error and the judgment must be reversed. *Elsie V. Jones* v. *United States, supra.*

Since there must be a new trial, we consider claims of error based on the contention that there was no evidence that appellant aided or abetted in the shooting and that, therefore, he could not be guilty of murder in the second degree. These claims must be rejected. "All those who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible . . . for the acts of each, if done in pursuance of, or as incidental to, the common design." *Turberville* v. *United States,* 112 U.S.App.D.C. 400, 402-03, 303 F. 2d 411, 413-14 (1962), *cert. denied,* 370 U.S. 946 (1962).[1] The jury could reasonably regard the shooting as incidental to the common design of robbery. The court did not instruct specifically on "common purpose", but the general instructions on aiding and abetting were adequate and counsel for Coleman did not object to them.

Reversed and remanded for a new trial.

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[1] Quoting 1 WHARTON, CRIMINAL LAW §258 (12th ed. 1932).

BASTIAN, *Circuit Judge,* dissenting: My examination of the record indicates that the confession was freely and voluntarily given, and in no sense was it obtained in violation of the Mallory rule.

The police questioned appellant on several occasions prior to his arrest. Having additional information, they arrested him in the 2700 block of Wade Road, S. E., on January 17, 1961, at 6:45 P.M. He was taken to the Fourteenth Precinct, located at 42nd and Benning Road, S. E., arriving there at 7:20 P.M. and then being taken to an upstairs room at the precinct. Appellant was not questioned on his way to the precinct, nor did he volunteer any statement. Detective Shirley testified that at about 7:30 P.M., after appellant had been advised of his rights and that anything he stated might be used against him, Coleman gave a statement claiming an alibi. He was then left alone until 8:45 P.M., when the officers familiar with the case, who had been called from downtown to the precinct, arrived to interrogate him. Thus confronted, appellant admitted his guilt within five minutes. Surely his oral admissions, at least, may be received. *Metoyer* v. *United States,* 102 U.S.App.D.C. 62, 250 F.2d 30 (1957); and see *Mitchell* v. *United States,* 322 U.S. 65 (1944). Thereupon, the officers undertook to reduce those threshold admissions to writing, a process involving a reasonable time, before booking the appellant. He was given a preliminary hearing at 10:00 A.M. the next day. No confession or statement made by appellant after the confession was offered in evidence.[1]

During the interim between the giving of the alibi at 7:30 P.M. and the interrogation of appellant at 8:45 P.M.,

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[1] "A confession made during a period of necessary delay in arraignment is not inadmissible because that period was followed by a period of unnecessary delay." See *Lockley* v. *United States,* 106 U.S.App.D.C. 163, at 166, 270 F.2d 915, at 918 (1959).

the police were engaged in checking his story against those of others who were being interrogated and whose stories, as it turned out, shattered his alibi. The police can and indeed should, in fairness to a defendant, check his story and, if it is contradicted—as it was here—confront the accused with the evidence against him. This may take time, and if that time is not so unreasonable as to bring it into conflict with the Mallory rule, it is proper. I think that the time here was not so unreasonable.

If the accused's claim of an alibi had been found to be correct, after having been checked out, he should and would have been released. The police had the right and the duty to check the alibi to see if Coleman was the man to be charged with this cold-blooded murder, and it turned out that he was.

It is to be remembered that the District Court properly submitted to the jury, after hearing the testimony out of the presence of the jury, the question of whether or not the confession was voluntary. Obviously, the jury found that it was.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17183

BENJAMIN E. WHITE, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court
for the District of Columbia

Decided November 21, 1962

Mr. J. E. Bindeman (appointed by this court) for appellant.

Mr. Robert A. Levetown, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, *Frank Q. Nebeker* and *Tim Murphy,* Assistant United States Attorneys, were on the brief, for appellee. *Mr. Nathan J. Paulson,* Assistant United States Attorney at the time the brief was filed, also entered an appearance for appellee.

Before FAHY, DANAHER and BASTIAN, *Circuit Judges.*

DANAHER, *Circuit Judge:* Appellant was convicted of housebreaking and larceny. He contends that the District Court erred in permitting police officers to testify as to

certain admissions and in denying his timely motion for mistrial when the prosecutor called to the attention of the jury that the defendant had failed to take the stand.[1]

About 1 P.M. on September 1, 1961, a stock clerk named Simmons was in the stockroom of Sears Roebuck & Company at 4500 Wisconsin Avenue when the appellant entered. Outside the two main doors to the stockroom were signs reading "For Employees Only." Appellant was wearing a uniform of a type customarily worn by Sears' employees. He extended a greeting to Simmons who observed that the shirt worn by the appellant bore a blue Sears emblem. Simmons thought appellant was a new porter as the latter walked to the area where the television sets were stored. Appellant picked up a "TV" set in a sealed carton and went out through the store carrying the television set.

The following day appellant again entered the Sears store wearing a Sears shirt. Appellant was on the basement level heading back toward the stockroom when Simmons first saw him. Simmons and two other employees walked toward the appellant who then "started walking pretty fast up the steps," got on the escalator and went as far as the second floor where a store detective stopped him. After appellant told the detective he had found the shirt, appellant was asked to accompany the detective to the "security" room. Simmons was summoned and there identified appellant as the "man who had taken the TV set the day before." The store detective then notified Precinct No. 8 nearby, and two Metropolitan police officers came over, arriving about 12:45 P.M.

After ascertaining the foregoing and other facts, the Metropolitan police took the appellant back to the precinct.

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[1] On brief, he also had argued that the court erred in admitting into evidence without proper identification a certain television set, the theft of which was charged in the second count. In view of our disposition of the case, we deem unnecessary any further reference to this particular point.

Upon arrival, appellant's name and appropriate information were entered in an arrest book, and a written charge was noted with the arresting officer's name.

The officers then had in their possession obviously adequate evidence of "probable cause," not only to "support the arrest," but if believed by a jury, "ultimately his guilt." But without any justifiable excuse to be gathered from the record, the police did not then present White before a committing magistrate. Instead, they took him to the second floor of their headquarters for the admitted purpose of questioning him in regard to the larceny.[2]

At the trial, defense counsel, retained by the appellant, objected to any statement made by White at the precinct "on the ground it was taken under duress and not voluntarily made."

The trial judge conducted a hearing to ascertain what if any "duress" might predicate the objection. During the hearing in the absence of the jury appellant did not testify. The testimony elicited from the officers supplied no evidence of "duress," and White's admissions were thereafter received in evidence before the jury. Had defense counsel objected on *Mallory* grounds, we would have a grave question as to whether or not the appellant's admissions would be admissible in view of the opinions of this court on this point. After repeatedly denying the larceny, the appellant finally admitted his act and informed the officers of the address where the television set might be found.[3]

The argument now for the first time advanced that the trial judge should have excluded such admissions on *Mallory* grounds comes too late considering the record as a whole. We frequently have pointed out that objections to

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[2] Mallory v. United States, 354 U.S. 449, 454 (1957); cf. Upshaw v. United States, 335 U.S. 410, 414 (1948).

[3] One of the officers, not on September 2, but two days later, September 4, 1961, went to the location described by the appellant and there found the set.

the receipt of evidence should be made in the trial court. *Williams* v. *United States,* —— U.S.App.D.C. ——, ——, 303 F.2d 772, 774, *cert. denied,* 369 U.S. 875 (1962) and cases cited.

Appellant did not take the stand as the trial was resumed. His counsel had filed no requests for special instructions. Government counsel, apparently intending to counter the argument of defense counsel, undertook to caution the jury "in advance" that the jurors always should keep in mind that the arguments of counsel are not evidence. He reminded the jury of the evidence before it, which included, of course, the appellant's admissions. The prosecutor pointed out that the Government's only exhibit was the television set, recovered pursuant to White's directions. Then he stated:

> *"The Government would also bring to your attention the fact that the defendant failed to take the stand.* No inference at all is to be given to you by the fact [*sic*] that he exercised this right. This is a very important right to the individual; it is an important right in our system of justice.
>
> "It is my job to prove to you—" (Emphasis added.)

Defense counsel interrupted and asked for a bench conference. During that colloquy,[4] counsel moved for a mistrial because of the prosecutor's comment "on the failure of

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[4] After counsel had expressed his view respecting the Government's "commenting on the defendant's failure to take the stand," the judge said to the prosecutor—but not then to the jury:

"THE COURT: I don't think it is very wise to say that, [Prosecutor]. The Court in its charge to the jury will point out that no inference of guilt whatsoever arises from the defendant's failure to take the stand.

"I do think it is better in these situations to refrain from such comment. It might sound as though you are, by inference, putting some suggestion or connotation on this fact. I recognize that that is not your intention. I would never mention this in the trial of a criminal case."

the defendant to take the stand." The motion for mistrial was denied. We think there was error.

Even if the judge had then admonished the prosecutor and had promptly instructed the jury on the point, we would have had a close question. At least in those circumstances the jurors might have tried to eliminate from their thinking any possible inference of guilt from the appellant's failure to refute or explain his admissions[5] or otherwise to counter what had been offered against him. Of course, the jury knew that White had not testified.

Here the judge did neither. He made no reference to the challenged episode in his charge. Although later he correctly instructed the jury "that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf" and properly explained the rationale of the rule, we are not persuaded that no prejudice arose. The prosecutor's statement had been made openly in argument before the jury. The colloquy, the judge's comment and his ruling on the motion for mistrial had occurred at the bench. The jury was without knowledge of what had there been said. How much "prejudice" may be attributable to an occurrence of this sort we have no way of knowing. The Supreme Court has said "The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it."[6] We have noted that "strict observance [of this principle] has been many times commended to prosecuting attorneys."[7]

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[5] We assume it to be unlikely that they will be offered at a new trial.

[6] Wilson v. United States, 149 U.S. 60, 65 (1893).

[7] Milton v. United States, 71 App.D.C. 394, 396, 110 F.2d 556, 558 (1940); cf. Stewart v. United States, 366 U.S. 1, 2 (1961): "Ordinarily, the effectuation of this protection is a relatively simple matter—if the defendant chooses not to take

We have carefully considered all aspects of the case in our effort to determine whether or not there was harmless error. FED. R. CRIM. P. 52(a) reads: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." But it is beyond doubt that an accused is afforded a "substantial right" in deciding whether or not to take the stand.[8] We find ourselves unable to say with fair assurance and in the total setting here presented, that there was no prejudice.[9]

Reversed.

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the stand, *no comment or argument about his failure to testify is permitted.*" (Emphasis added.) And see Turner v. District of Columbia, 98 A.2d 786 (D.C. Mun. App. 1953); Brooks v. District of Columbia, 48 A.2d 339, 341 (D.C. Mun. App. 1946).

[8] Bruno v. United States, 308 U.S. 287, 292 (1939). Indeed, if the accused decides *not* to testify, it is fatal to refuse an instruction that his failure to take the stand shall not tell against him. *Ibid.;* cf. Langford v. United States, 178 F.2d 48, 55 (9 Cir. 1949).

[9] Kotteakos v. United States, 328 U.S. 750, 764-765 (1946); Starr v. United States, 105 U.S.App.D.C. 91, 94-96, 264 F.2d 377, 380-382 (1958), *cert. denied,* 359 U.S. 936 (1959). In any event, it does not "affirmatively" appear from the whole record that there was no prejudice. Bihn v. United States, 328 U.S. 633, 638 (1946). Cf. Campbell v. United States, 85 U.S.App.D.C. 133, 176 F.2d 45 (1949).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,410

ROBERT A. MUSCHETTE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided July 25, 1963

Mr. Alfred L. Scanlon (appointed by this court) for appellant.

Mr. William C. Pryor, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, and *Frank Q. Nebeker* and *Harold H. Titus, Jr.,* Assistant United States Attorneys, were on the brief, for appellee.

Before PRETTYMAN, *Senior Circuit Judge,* and WILBUR K. MILLER and WRIGHT, *Circuit Judges.*

PER CURIAM: Robert A. Muschette and another were indicted May 8, 1961, for housebreaking and petit larceny. In a trial which began June 19, 1961, the jury was unable to reach a verdict, but a second trial in the following December resulted in conviction. Muschette was sentenced

to imprisonment for a term of from two to six years to run concurrently with a four-to-twelve-year sentence imposed in an unrelated case in June, 1961, which he was serving when he was tried in the present case.

Muschette appeals, urging that his confession, without which he says he could not have been convicted, was extracted from him by physical abuse during a period of unnecessary delay in presenting him to a committing magistrate following his unlawful arrest without a warrant.

Evidence for the prosecution showed that during the night of April 6-7, 1961, police were attracted to a clothing store by the ringing of its burglar alarm. The store had been entered from an adjoining vacant building through a hole dug in the masonry wall, and a small safe had been carried from the first floor to a landing halfway up stairs leading to the second floor. The burglars set off the alarm as they ascended the stairs, so they abandoned the safe on the landing and fled the scene.

The officers found near the hole a sledge hammer, a watch, a crowbar and an army duffel bag containing a hacksaw and another crowbar. Imprinted on the duffel bag were a name and army serial number: "Jeffrey H. Matthews 13491323." It was revealed during a hearing out of the presence of the jury that Jeffrey H. Matthews, having been located and interviewed by the police, acknowledged ownership of the bag and stated he had last seen it about two weeks before when he was living with Robert A. Muschette at 403 M Street, N. E.

At about 2:00 p.m. April 7, police officers went to that address with the obvious purpose of asking Muschette about the duffel bag Matthews had said he had left there. They interviewed him in his upstairs room, to which he invited them to get away from the noise of a party going on in the lower part of the house. The officers observed in plain view a pair of trousers on which brick and mortar

dust was seen. When Muschette, who admitted he owned the trousers, was asked about the source of the brick and mortar dust, he appeared confused and told two conflicting stories. Thereupon, at about 2:20 p.m. the officers arrested him and took him to the Safe Squad office in police headquarters, arriving there about 2:35 p.m. Within ten minutes thereafter, Muschette made an oral confession which took about five or ten minutes. Typing the statement was somewhat delayed because the stenographer assigned to that office was ill and arrangements had to be made for a typist from another office. However, it was completed and signed by Muschette and witnessed about 3:45 p.m. He was presented to the United States Commissioner a few minutes after 4:00 o'clock.

Prior to the trial, Muschette made a *pro se* written motion to suppress as evidence the articles taken from his room, contending that his arrest was illegal because the police did not have a warrant or probable cause and that therefore the seizure was unlawful. The motion was denied, but none of the articles seized was introduced as evidence in the subsequent trial.

Testifying at the trial, Muschette fixed the visit of the officers at an earlier hour, thus enlarging the interval between his arrest and his presentment to the Commissioner. He also claimed they arrested him before they had seen the soiled trousers. He denied committing the crime and repudiated the confession, saying the officers were repeatedly striking him on the sides of his head with a telephone directory[1] and he confessed to avoid the continuance of this physical abuse. The question whether the confession was voluntary was submitted to the jury and its verdict shows it did not accept Muschette's statement that he had been coerced by police brutality.

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[1] The Washington telephone directory is so large and heavy that a lethal blow could be struck with it.

The discovery of Jeffrey Matthews' duffel bag containing burglary tools and his statement about it fully justified the police in going to 403 M Street and interviewing Muschette about it. Indeed, the information then in hand required that they inquire of Muschette whether the duffel bag had in truth ever been in his house, and if so how it happened to be at the scene of the crime. But clearly at that point they had no cause to arrest Muschette. Naturally Matthews assigned the incriminating bag to some place other than his own possession, but the probability of the truth of his immediate response was, to say the least, doubtful. There may have been, at that stage of events, cause to arrest Matthews but certainly none to arrest Muschette. And, moreover, even Matthews did not inculpate Muschette; he merely said he had left the bag at Muschette's house. So the officers went to Muschette's house.

The officers knew the burglars had broken through a brick wall into the store where the duffel bag and the burglary tools were discovered; and, of course, they had seen the litter of shattered brick and mortar caused by breaking the opening through which the burglars had crawled. On a chair in Muschette's room, in plain view, was a pair of trousers and on the trousers was telltale brick and mortar dust. Muschette admitted ownership but told conflicting stories. Here, then, in the cumulated data, was probable cause, so they arrested him.

As the jury determined, from evidence which amply justified their conclusion, that the confession had not been extracted by police brutality but was voluntarily given, we turn to consider whether, after Muschette's arrest, there was unnecessary delay in presenting him to a committing magistrate which, under the Supreme Court's *Mallory* holding,[2] rendered the confession inadmissible even though it was voluntarily given.

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[2] Mallory v. United States, 354 U. S. 449 (1957).

Muschette was arrested at 2:20 p.m., arrived at the Safe Squad office after a ride in a squad car at 2:35, and orally confessed not later than 2:45. So, the oral confession began about 25 minutes after the arrest. The confession was reduced to typewritten form and signed and witnessed by 3:45 p.m. Thus it took an hour for the oral confession to be given, a typist from another office to be located and secured, the statement to be typed, read, signed and witnessed. Then, about 20 minutes later, Muschette was taken before the Commissioner. Thus the total time lapse between arrest and presentment was about an hour and 35 to 45 minutes.

Certainly the 25 minutes—which included the 15-minute ride to the station house—between Muschette's arrest and the beginning of his oral admission of guilt involved no delay. And, as we said in the *Heideman* case,[3] "Delay after a confession is less crucial than delay before a confession." Even so, the time here, which encompassed not only the typing, etc., but the administrative routine of charging, booking, fingerprinting, etc., indicates no delay.

Evaluations of situations such as this should be realistic. The extraction of a confession by whatever means is outlawed and its products are not admissible in a court of law. But the "Mallory Rule" is not a carpenter's measuring stick to be used by merely laying it alongside the material to be evaluated. It was not intended, we think, to be a mechanical rule that in all instances the mere passage of a given length of time would require the rejection of a confession. The problem is not to be solved by watching the clock; the solution is to be reached by determining whether the delay which occurred was in fact unnecessary when the sum total of the circumstances shown is considered.

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[3] Heideman v. United States, 104 U. S. App. D. C. 128, 130, 259 F. (2d) 943, 945 (1958), *cert. denied* 359 U. S. 959 (1959).

We emphasize that this record contains no suggestion that the confessions were extracted by questioning. Muschette did not claim they were. He said they were beaten out of him; but the jury did not believe him, so that problem is not for us.

We comment further that the typing and signing of a confession voluntarily given is not always and exclusively a detriment to the accused because, once written, his statement cannot be changed by his accusers. Written versions of statements by prospective witnesses are well-nigh universal practice. What the witness—or an accused—said is not thereafter the subject of convenient recollection. So the typing of a voluntary confession is neither unnecessary or unreasonable. We think that in the present case it was proper procedure.

We think the one hour and 20 minutes occupied by the various activities described here was not, under the circumstances, unreasonable and cannot properly be characterized as unnecessary. We are quite clear that there was no unnecessary delay in presenting Muschette to a committing magistrate within the meaning of Criminal Rule 5(a) as construed by the *Mallory* holding of the Supreme Court.

Affirmed.

WRIGHT, *Circuit Judge, dissenting*: In *McNabb* v. *United States,* 318 U.S. 332, 343-344 (1943), the Supreme Court, in applying former 18 U.S.C. § 595, the predecessor statute to Rule 5(a), F.R.Crim.P.,[1] stated:

"The purpose of this impressively pervasive re-

[1] Rule 5(a), in pertinent part, provides: "An officer making an arrest * * * shall take the arrested person without unnecessary delay before the nearest available commissioner * * *."

> quirement of criminal procedure is plain. * * * For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection. A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application."

The *McNabb* opinion closed with the observation that "[t]he history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." 318 U.S. at 347.

This routine criminal case, coming some twenty years after the decision in *McNabb,* demonstrates not only the continuing validity of the *McNabb-Mallory*[2] doctrine, but also the fact that its prophylactic command continues to be disregarded. The appellant here maintains that the police invaded his home without a warrant and without his permission, searched his bedroom, and subjected him to extensive, but fruitless, questioning there before taking him down to police headquarters and coercing him to confess through the administration of physical brutality. The police deny these allegations while admitting that they did indeed go to appellant's home to question him about a safe robbery. There, according to the police, they were invited to his bedroom where they discovered incriminating evidence in open view. The police further state that, after some questioning in which the appellant refused to admit his participation in any crime, they

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[2] *Mallory* v. *United States,* 354 U.S. 449 (1957).

arrested him and took him to the "Safe Squad Office" [3] at police headquarters where he readily and voluntarily made a full confession in ten minutes.

Thus we have presented a situation which *McNabb, Upshaw,*[4] *Mallory,* and their progeny were intended to avoid: allegations of police brutality in abstracting a confession before the person arrested comes under the protection of the committing magistrate, and a denial of the brutality by the police. Congress and the courts have realized that the testimony of a lone defendant under these circumstances is ordinarily no match for testimony from several police officers who could not, of course, be expected to admit brutality in any event, since one who would be guilty of such conduct would find little difficulty in denying it under oath.[5] On the other hand, Congress and the courts have also recognized that many of the claims of police brutality have little substance, but, nevertheless, are sometimes given credence when arrested persons are unduly delayed in police custody before being transferred to judicial custody. These twin evils Rule 5(a) was designed to eliminate.

Mallory, in declaring an uncoerced confession obtained in violation of Rule 5(a) inadmissible in evidence, stated that an arrested person "is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damag-

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[3] It appears that the "Safe Squad Office" is one of several rooms at police headquarters similar to the "Homicide Squad Office," the "Vice Squad Office," and the "Stolen Vehicle Office," where investigation and interrogation with respect to particular crimes are conducted by officers experienced in these specialties.

[4] *Upshaw* v. *United States,* 335 U.S. 410 (1948).

[5] See Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 Geo.L.J. 1, 27 (1958).

ing statements to support the arrest and ultimately his guilt." 354 U.S. at 454. Here, instead of being taken to the nearest commissioner without unnecessary delay as required by Rule 5(a), appellant was taken to the Safe Squad Office at police headquarters "in order to carry out a process of inquiry" which resulted in a confession. That the police were able to obtain the confession quickly, once the defendant was in the Safe Squad Office, does not make the violation of his rights less objectionable.

The important fact is that the police delayed until appellant confessed, and then brought him before the commissioner.

I respectfully dissent.

PRESS RELEASE FROM DEPARTMENT OF JUSTICE OF MONDAY, AUGUST 18, 1958, CITING AN EXCERPT RE "McNABB-MALLORY" QUESTION

STATISTICS ON COMMITMENTS AT ST. ELIZABETHS HOSPITAL, SHOWING PRELIMINARY INFORMATION ON CURRENT STUDY BY STANDING COMMITTEE ON "PROBLEMS CONNECTED WITH MENTAL EXAMINATION OF THE ACCUSED IN CRIMINAL CASES, BEFORE TRIAL," JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT

JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT,
January 3, 1964.

CHAIRMAN, SENATE DISTRICT COMMITTEE,
Senate Office Building, Washington, D.C.

DEAR SIR: Pursuant to your request, we are pleased to advise that in the course of our research we have compiled statistical data relating to the length of time which elapses between the mandatory commitment in the District of Columbia which follows an acquittal by reason of insanity and subsequent release from St. Elizabeths Hospital, to which such persons are committed.

For the period fiscal 1954 through fiscal 1962, St. Elizabeths Hospital received a total of 251 persons acquitted by reason of insanity. Approximately two-thirds of this number are still at the hospital, having received neither conditional nor unconditional release. Of the one-third who have received such releases, approximately 15 percent received such a release within 2 years, 31 percent within 3 years, and 35 percent within 4 years. It should be stressed that the foregoing figures represent raw data which has not been doublechecked or evaluated by the executive committee.

Regrettably such research as we have done which might establish a relationship between these periods of time and the length of sentences which might be imposed during the same period in similar cases is so incomplete as to be of no value at this time. We are hopeful to do additional work in this area before our report is completed, but do not expect to be able to do this until late spring.

If public release is to be made of the information we have furnished above, we would appreciate an indication that it was derived from raw data supplied by our committee.

Respectfully yours,

JOSHUA OKUN,

Project Director, Standing Committee on "Problems Connected With Mental Examination of the Accused in Criminal Cases, Before Trial," Georgetown University Law Center.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
ST. ELIZABETHS HOSPITAL,
Washington, D.C., January 14, 1964.

Mr. FRED L. McINTYRE,
Counsel, Senate Committee on the District of Columbia,
New Senate Office Building, Washington, D.C.

DEAR MR. McINTYRE: In answer to your telephone request of January 14 to Mr. Weinstein, the attached tables have been reproduced for your use.

These tables show the number of patients admitted to St. Elizabeths Hospital as "not guilty by reason of insanity" from the U.S. District Court for the District of Columbia during fiscal years 1954–62, for each type of offense. These tables also show the numbers of patients granted unconditional or conditional releases, respectively, by the length of time from admission to release.

The attached material was assembled initially at the expense of the Judicial Conference of the District of Columbia Circuit, Standing Committee on "Problems Connected With Mental Examination of the Accused in Criminal Cases, Before Trial," of which Prof. Joshua Okun is project director. Any use of these data should be accompanied by an appropriaate acknowledgment.

At your request, the data related to unconditional releases will be brought up to date through fiscal year 1963. This information should reach you by Thursday, January 16. Comparable data related to conditional releases through fiscal year 1963 would require considerable time to assemble.

I hope this information is useful to you. If we can be of further assistance in any way, please call on us.

Sincerely yours,

DALE C. CAMERON, M.D., *Superintendent.*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
ST. ELIZABETHS HOSPITAL,
Washington, D.C., January 15, 1964.

MR. FRED L. MCINTYRE,
Counsel, Senate Committee on the District of Columbia,
New Senate Office Building, Washington, D.C.

DEAR MR. MCINTYRE: As I noted in my letter of January 14, tables showing the time from admission to unconditional release for patients "not guilty by reason of insanity" would be brought up to date through fiscal year 1963.

These tables are attached along with two additional tables showing (1) the percentages of patients unconditionally released within specified length of time after admission and (2) comparable accumulative percentages.

If I can be of further assistance, please call on me.

Sincerely yours,

DALE C. CAMERON, M.D., *Superintendent.*

The Department of Justice made public today the following letter stating its position on several legislative measures pending in Congress:

August 18, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: I understand that the Senate will soon consider various bills dealing with recent Supreme Court decisions. It may be helpful, therefore, if the views of the Department of Justice on these measures, are restated at this time.

* * * * * * *

Another measure which has the virtue of attempting to meet only one problem, thereby avoiding the possibilities of varied, unanticipated, and undesirable consequences, is H.R. 11477, a bill to amend chapter 223 of title 18, United States Code, to provide for the admission of certain evidence, and for other purposes.

It is directed to the law enforcement problem raised by the Supreme Court decision in *Mallory* v. *United States*, 354 U.S. 448. Its scope is narrow. It is aimed at one legal problem. Its effect may be anticipated. In the *Mallory* case, the Court ruled inadmissible a confession made during a delay between arrest and arraignment which the Court considered to be unnecessary. The bill would provide that evidence, including statements and confessions, otherwise admissible, would not be inadmissible solely because of reasonable delay in taking an arrested person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States. We have no objection to the enactment of this bill.

* * * * * * * *

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Attorney General.

The following tables show, for fiscal years 1954 through 1963, (1) the number of persons committed to St. Elizabeths Hospital by the U.S. District Court for the District of Columbia, as a result of acquittal by reason of insanity; (2) the type of crime for which tried and committed; (3) the number granted "unconditional release," and (4) the time elapsed between commitment and unconditional release:

Time until unconditional release approved

ALL CRIMES

Crime, fiscal year	Admission total	1 to 6 months	6 to 11 months	1 to 2 years	2 to 3 years	3 to 4 years	4 to 5 years	5 or more years	Died	Not approved
Total	320	16	13	14	9	8	1	1	3	255
1954	4	3		1						
1955	8	1	4	2						1
1956	14	3	4	2	1	1	1			2
1957	8		1	1	1	2				3
1958	18	2						1	1	14
1959	33	2	3	2	4	4			1	17
1960	35	1	1	1	1	1				30
1961	64	1		5	2				1	55
1962	67	2								65
1963	69	1								68

ASSAULT

Total	30	2	3	3	1	2				19
1955	2		1	1						
1956	3		1		1	1				
1959	6	1	1	1		1				2
1960	2									2
1961	7			1						6
1962	6	1								5
1963	4	2								4

FORGERY

Total	25	3	1	1	3					17
1954	1	1								
1955	2	1		1						
1956	1		1							
1957	1									1
1958	1									1
1959	4	1			1					2
1960	3				1					2
1961	6				1					5
1962	2									2
1963	4									4

HOUSEBREAKING

Total	50	1	3	1		2	1			42
1954	1			1						
1955	1		1							
1956	2		1				1			
1957	2					1				1
1958	2	1								1
1959	6									6
1960	9		1			1				7
1961	5									5
1962	13									13
1963	9									9

Time until unconditional release approved—Continued

LARCENY

Crime, fiscal year	Admission total	1 to 6 months	6 to 11 months	1 to 2 years	2 to 3 years	3 to 4 years	4 to 5 years	5 or more years	Died	Not approved
Total	15	1	1	1	1	1			1	9
1956	1			1						
1957	1		1							
1958	2								1	1
1959	2				1	1				
1960	2									2
1961	1									1
1962	3									3
1963	3	1								2

MANSLAUGHTER

Total	3									3
1958	1									1
1963	2									2

MURDER

Total	51	3		2		2			2	42
1956	2	1								1
1957	1					1				
1958	5	1								4
1959	7			1		1			1	4
1960	6	1		1					1	6
1961	15									12
1962	10									10
1963	5									5

ROBBERY

Total	40	2	3	2		1		1		31
1954	1	1								
1955	2		1							1
1956	1	1								
1957	1			1						
1958	4							1		3
1959	4		2			1				1
1960	3									3
1961	7			1						6
1962	11									11
1963	6									6

UNAUTHORIZED USE OF VEHICLE

Total	25	2	1	1						21
1956	2		1							1
1958	3									3
1960	2	1		1						
1961	8									8
1962	7	1								6
1963	3									3

NARCOTICS

Total	19			1						18
1961	5			1						4
1962	7									7
1963	7									7

Time until unconditional release approved—Continued

RAPE (FORCIBLE)

Crime, fiscal year	Admission total	1 to 6 months	6 to 11 months	1 to 2 years	2 to 3 years	3 to 4 years	4 to 5 years	5 or more years	Died	Not approved
Total	12									12
1960	3									3
1961	3									3
1962	4									4
1963	2									2

RAPE (STATUTORY)

Total	1									1
1961	1									1
1963	0									0

OTHER SEX OFFENSE

Total	20			2	4					14
1956	1			1						
1957	1				1					
1959	4				2					2
1960	1									1
1961	7			1	1					5
1962	2									2
1963	4									4

OTHER FELONIES

Total	11	2	1							8
1954	1	1								
1955	1		1							
1956	1	1								
1957	1									1
1960	3									3
1962	2									2
1963	2									2

Percent of admissions unconditionally released, fiscal years 1954–63

Fiscal year admitted	Admissions		Time until 1st unconditional release approved							Died	No unconditional release approved
	Number	Percent	1 to 6 months	6 to 11 months	1 to 2 years	2 to 3 years	3 to 4 years	4 to 5 years	5 or more years		
Total	320	100	5.0	4.1	4.4	2.8	2.5	0.3	0.3	0.9	79.7
1954	4	100	75.0		25.0						0
1955	8	100	12.5	50.0	25.0						12.5
1956	14	100	21.5	28.6	14.3	7.1	7.1	7.1			14.3
1957	8	100		12.5	12.5	12.5	25.0				37.5
1958	18	100	11.1						5.6	5.6	77.7
1959	33	100	6.1	9.1	6.1	12.1	12.1			3.0	51.5
1960	35	100	2.9	2.9	2.9	2.9	2.9				85.5
1961	64	100	1.6		7.8	3.1				1.6	85.9
1962	67	100	3.0								97.0
1963	69	100	1.4								98.6

Cumulative percentage, unconditional release

Fiscal year admitted	Admissions		Time until 1st unconditional release approved						
	Number	Percent	Less than 6 months	Less than 12 months	Less than 2 years	Less than 3 years	Less than 4 years	Less than 5 years	5 or more years
Total	320	100	5.0	9.1	13.5	16.3	18.8	19.1	19.4
1954	4	100	75.0	75.0	100.0	100.0	100.0	100.0	100.0
1955	8	100	12.5	62.5	87.5	87.5	87.5	87.5	87.5
1956	14	100	21.5	50.1	64.4	71.5	78.6	85.7	85.7
1957	8	100	0	12.5	25.0	37.5	62.5	62.5	62.5
1958	18	100	11.1	11.1	11.1	11.1	11.1	11.1	----
1959	33	100	6.1	15.2	21.3	33.4	45.5	----	----
1960	35	100	2.9	5.8	8.7	11.6	----	----	----
1961	64	100	1.6	1.6	9.4	----	----	----	----
1962	67	100	3.0	3.0	----	----	----	----	----
1963	69	100	1.4	----	----	----	----	----	----

The following tables show, for fiscal years 1954 through 1962, (1) the number of persons committed to St. Elizabeths Hospital by the U.S. District Court for the District of Columbia, as a result of acquittal by reason of insanity; (2) the type of crime for which tried and committed; (3) the number granted "conditional release"; and (4) the time elapsed between commitment and conditional release:

Time until 1st conditional release approved

ALL CRIMES

Crime, fiscal year	Admission total	1 to 6 months	6 to 11 months	1 to 2 years	2 to 3 years	3 to 4 years	4 to 5 years	5 or more years	Died	Not approved
Total	251	8	12	23	13	5	4	----	2	184
1954	4	----	----	1	----	----	----	----	----	3
1955	8	----	----	----	----	----	----	----	----	8
1956	14	----	2	----	----	----	1	----	----	11
1957	8	1	2	1	1	----	----	----	----	3
1958	18	1	----	1	2	4	2	----	1	7
1959	33	1	2	7	5	----	1	----	----	17
1960	35	----	2	6	4	1	----	----	----	22
1961	64	2	3	6	1	----	----	----	1	51
1962	67	3	1	1	----	----	----	----	----	62

ASSAULT

Total	26	3	1	1	1	----	----	----	----	20
1955	2	----	----	----	----	----	----	----	----	2
1956	3	----	----	----	----	----	----	----	----	3
1959	6	----	----	----	1	----	----	----	----	5
1960	2	----	----	1	----	----	----	----	----	1
1961	7	1	----	----	----	----	----	----	----	6
1962	6	2	1	----	----	----	----	----	----	3

FORGERY

Total	21	2	----	4	1	----	----	----	----	14
1954	1	----	----	----	----	----	----	----	----	1
1955	2	----	----	----	----	----	----	----	----	2
1956	1	----	----	----	----	----	----	----	----	1
1957	1	1	----	----	----	----	----	----	----	----
1958	1	----	----	----	1	----	----	----	----	----
1959	4	1	----	2	----	----	----	----	----	1
1960	3	----	----	1	----	----	----	----	----	2
1961	6	----	----	1	----	----	----	----	----	5
1962	2	----	----	----	----	----	----	----	----	2

Time until 1st conditional release approved—Continued

HOUSEBREAKING

Crime, fiscal year	Admission total	1 to 6 months	6 to 11 months	1 to 2 years	2 to 3 years	3 to 4 years	4 to 5 years	5 or more years	Died	Not approved
Total	41	1	1	3	1	2				33
1954	1			1						
1955	1									1
1956	2						1			1
1957	2		1		1					
1958	2									2
1959	6				1		1			4
1960	9				1	1				7
1961	5									5
1962	13									13

LARCENY

Total	12		1	2					1	8
1956	1									1
1957	1									1
1958	2								1	1
1959	2		1	1						
1960	2			1						1
1961	1									1
1962	3									3

MANSLAUGHTER

Total	1									1
1958	1									1

MURDER

Total	46	1	5	3	5	2			1	29
1956	2		1							1
1957	1									1
1958	5	1			1	2				1
1959	7		1	2	2					2
1960	6		1		1					4
1961	15		2		1				1	11
1962	10			1						9

ROBBERY

Total	34			3	2	1	1			27
1954	1									1
1955	2									2
1956	1									1
1957	1			1						
1958	4			1		1	1			1
1959	4				1					3
1960	3				1					2
1961	7			1						6
1962	11									11

UNAUTHORIZED USE OF VEHICLE

Total	22			2		1	1			18
1956	2									2
1958	3					1	1			1
1960	2			1						1
1961	8			1						7
1962	7									7

Time until 1st conditional release approved—Continued

NARCOTICS

Crime, fiscal year	Admission total	1 to 6 months	6 to 11 months	1 to 2 years	2 to 3 years	3 to 4 years	4 to 5 years	5 or years	Died	Not approved
Total	12	1								11
1961	5	1								4
1962	7									7

RAPE (FORCIBLE)

Total	10			1						9
1960	3			1						2
1961	3									3
1962	4									4

RAPE (STATUTORY)

Total	1				1					
1960	1				1					

OTHER SEX OFFENSES

Total	16		3	5						8
1956	1		1							
1957	1		1							
1959	4			2						2
1960	1									1
1961	7		1	3						3
1962	2									2

OTHER FELONIES

Total	9	1	1	1						6
1954	1									1
1955	1									1
1956	1									1
1957	1									1
1960	3		1	1						1
1962	2	1								1

Cumulative percentages, less than 1st conditional release

Fiscal year admitted	Admissions		Time until 1st conditional release							Died	No conditional release
	Number	Percent	Less than 6 months	Less than 12 months	Less than 2 years	Less than 3 years	Less than 4 years	Less than 5 years	5 or more years		
Total	320	100	3.1	7.2	16.3	21.6	24.1	25.6	25.6	0.6	73.8
1954	4	100			25.0	25.0	25.0	25.0	25.0		75.0
1955	8	100									100.0
1956	14	100		14.3	14.3	14.3	14.3	21.4	21.4		78.6
1957	8	100	12.5	37.5	50.0	62.5	62.5	62.5	62.5		37.5
1958	18	100	5.6	5.6	11.1	22.2	44.4	55.6		5.6	38.8
1959	33	100	3.0	9.1	30.3	45.5	48.5				45.5
1960	35	100		5.7	22.9	40.0					51.4
1961	64	100	3.1	7.8	23.4					1.6	70.3
1962	67	100	4.5	7.5							88.1
1963	69	100	2.9								97.1

Time until 1st conditional release

Fiscal year	Total	1 to 6 months	6 to 11 months	1 to 2 years	2 to 3 years	3 to 4 years	4 to 5 years	5 or more years	Died	No conditional release
Total	320	10	13	29	17	8	5		2	236
1954	4			1						3
1955	8									8
1956	14		2				1			11
1957	8	1	2	1	1					3
1958	18	1		1	2	4	2		1	7
1959	33	1	2	7	5	1	2			15
1960	35		2	6	6	3				18
1961	64	2	3	10	3				1	45
1962	67	3	2	3						59
1963	69	23								67

Council on Law Enforcement, District of Columbia—Report of Ad Hoc Committee on Detention and Release From St. Elizabeths

I. BACKGROUND

It must be made clear at the outset that this report is not still another commentary on the *Durham* rule. At its September 10, 1963, meeting, the Council on Law Enforcement, District of Columbia, was giving attention to H.R. 7525, sometimes called the District of Columbia omnibus crime bill. Title II of that bill contains what the House Committee on the District of Columbia reported (H. Rept. 579) as "changes in *Durham* rule." Furthermore, in the course of the report there are some nine printed pages dealing with title II of H.R. 7525 under a caption called "Title II—*Durham* Rule."

It was pointed out at the September 10 meeting of the Council on Law Enforcement, District of Columbia, that there were provisions in title II of H.R. 7525 that are not, strictly speaking, covered by the *Durham* rule, but that these provisions rather go to release or discharge. The *Durham* rule, it will be recalled, is the standard for determination of the legal defense of insanity in the District of Columbia. This rule is that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect (*Durham* v. *U.S.*, 214 F. 2d 862, D.C. Cir., 1954). The *Durham* rule does not treat of the question of release or discharge; so much of title II of H.R. 7525, therefore, as deals with release is not related to the *Durham* rule.

At about the same time, local newspapers were carrying articles about those who had been at St. Elizabeths Hospital and who had been either discharged or had escaped, and who, during their discharged or fugitive status, had been apprehended in additional offenses.

As a consequence the Chairman of the Law Enforcement Council, District of Columbia, appointed this ad hoc committee to report to the Council on the subjects of detention and release from St. Elizabeths.

II. DETENTION

Facilities of detention must satisfy the dual aspect of commitment: protection of society and treatment of the defendant.

If one justifies indeterminate commitment on the grounds that a person will be treated, and conditions his release on satisfactory treatment, then conditions should be such as to facilitate this end. But commitment also serves the function of protecting society from a dangerous individual, and there comes a stage where the public must bear a degree of risk if the patient is to receive the degree of freedom necessary for therapeutic purposes. This conflict between the goals of commitment has recently come to the attention of the public with the news that 147 "prisoner-patients" have escaped from St. Elizabeths since January 1963.

The term "prisoner-patients" applies to those persons who were committed to St. Elizabeths Hospital under section 24–301 as a result of a verdict of acquittal by reason of insanity. There are currently 738 "prisoner-patients" at St. Elizabeths; 395 are in John Howard Pavilion, the maximum security ward for men; 30 women are at Dix, the maximum security ward for females; about 100 persons are in medium-security wards; and 152 are given unaccompanied ground-leave privileges (minimum security). Fifty are on conditional release.

Most of the 147 "prisoner-patients" who have escaped this year were on unaccompanied ground-leave privilege. Only two persons in the last 5 years have escaped from John Howard Pavilion. Twenty-nine criminal offenses were committed by the escapees while at large. The offenses covered a range of murder, rape, robbery, assault, larceny, auto theft, housebreaking, traffic offenses, forgery, and unauthorized use of a motor vehicle.

As a result of the publicity on the escapees, a special subcommittee of the House Committee on Education and Labor was formed, with the title of Ad Hoc Subcommittee on the Investigation of the Administration and Operation of St. Elizabeths Hospital.

The special subcommittee began hearings on November 12. Those testifying at the hearings were: Boisfeuillet Jones, special assistant to the Secretary of Health, Education, and Welfare for health and medical affairs; Dr. Dale Cameron, Superintendent of St. Elizabeths Hospital; Dr. Walter Barton, medical director of the American Psychiatric Association; Dr. Layton, head of the Bureau of Mental Health of the District of Columbia Department of Health; and John B. Layton, Deputy Chief of Detectives, Metropolitan Police Department.

The hearings focused on the general problem and future of St. Elizabeths, and not merely the problem of detention of persons committed as a result of criminal proceedings. It appeared that the aim of the committee was to get a picture of what studies of St. Elizabeths were already underway—such as studies being carried on by the Department of Health, Education, and Welfare, and in the Health Department of the District of Columbia, which are focusing on the future role of St. Elizabeths in relationship to the mental health program of the District of Columbia—what future studies are needed, what form they should take, and what should be their goals. Particularly emphasized by Dr. Barton in his testimony was the need for a study of the mentally ill offender. The security aspects of St. Elizabeths were of particular interest to the committee members. In his testimony, Dr. Cameron stated that the escapes from St. Elizabeths were due to (1) lack of personnel; (2) inadequacies of buildings; and (3) errors in judgment.

As for lack of personnel, Dr. Cameron estimated that there is a realistic need for one employee per patient. Dr. Cameron said that the competence of the physicians immediately responsible for making judgments about a patient's readiness for increased responsibility was particularly important in connection with the escape problem. This is because most of the prisoner-patients have just walked off the grounds while unaccompanied on the campus.

Dr. Cameron's long-range solution to the problem was a security hospital with a completely separate subcampus at St. Elizabeths. This would provide for continuity of care, flexibility of restrictions, and the necessary security to prevent elopements.

"John Howard Pavilion is quite satisfactory as a maximum security unit. Needed are approximately 400 additional beds for medium and minimum security, so located in relation to maximum security facilities that there can be a free and ready flow of patients among maximum, medium, and minimum security areas without a change in the professional staff responsible for their treatment and supervision. This means that John Howard Pavilion should be so modified that it can provide all three levels of security within that building, and the staff involved take care of patients in that facility throughout their entire period of hospitalization. Two additional smaller, but comprehensive, units are required. To state more precisely the number of beds needed, a more definitive study than we have been able to make is needed. Such a study

should include such factors as the population trends of the District of Columbia, and the anticipated proportion of the population that we might expect to receive as a result of criminal proceedings" (testimony before ad hoc subcommittee).

Dr. Cameron said that the security hospital would be for those who were in need of this kind of environment, regardless of whether they came to St. Elizabeths by civil or criminal commitment. Certain prisoner-patients, depending on their illness, would not be kept in the security hospital.

This program is aimed at a long-range solution. At the close of his testimony, Dr. Cameron devoted his attention to what can be done now to reduce the number of escapes by persons who are likely to commit acts of violence. Although 147 prisoner-patients have escaped, of whom 29 are still at large, Dr. Cameron emphasized that this number is very small in relation to the total number of patients hospitalized. At the current time they are shifting a few nursing assistants from wards for civil patients to the services where prisoner-patients are treated outside the maximum security area. Dr. Cameron made the statement that "we can and are reducing the rapidity with which patients admitted as a result of criminal proceedings are allowed an opportunity to assume increasing responsibility for their own behavior." (This is contrary to the often-stated legal view that the purpose of those found not guilty by reason of insanity is not punitive but treatment. Such a person is a patient, not a prisoner, *Hough* v. *U.S.*, 106 U.S. App. D.C. 192 (1959).)

From the testimony heard at the committee, it would appear that it will be some time before anything of a permanent nature is done regarding the escape of criminal offenders. This problem will no doubt be treated as one of many when the future of St. Elizabeths is carefully studied.

In this connection, attention is invited to H.R. 9072, which provides for the establishment of a commission on the improvement of St. Elizabeths Hospital. The commission would be composed of five members appointed by the President and would be authorized to appoint a full-time staff director. The purpose of the commission is to make a full and complete investigation and study of all phases of the operation of St. Elizabeths Hospital with a view to determining the steps which must be taken to accomplish the congressional policy, as stated in the bill, "so that such institution will provide an example to other institutions through the Capital and Nation which are engaged in treatment of the mentally ill."

III. RELEASE PROVISIONS

Title II of H.R. 7525 contains several subsections dealing with release or discharge which differ from comparable provisions in section 24–301 of the District of Columbia Code. For the purpose of reporting to the Council, this committee does not feel it necessary for elaborate textual treatment, but feels, rather, that the accompanying chart adequately points out the differences between the present law and the omnibus crime bill on release provisions.

Respectfully submitted.

CHESTER H. GRAY,
HUGH F. RIVERS,
MORRIS MILLER,
Chairman,
Ad Hoc Committee.

DECEMBER 1963.

Comparison of release provisions of sec. 24–301, District of Columbia Code and H.R. 7525 (omnibus crime bill)

Provisions	Sec. 24–301, District of Columbia Code	H.R. 7525 (omnibus crime bill)
Movant	Superintendent of the hospital where the person is confined.	Superintendent of hospital or the committed person.
Types of release	Unconditional and conditional	Discharge and release on probation.
Standard for unconditional release or discharge.	1. Recovery of sanity. 2. That such person will not in the reasonable future be dangerous to himself or others. 3. In the superintendent's opinion, the person is entitled to unconditional release.	1. Recovery of sanity. 2. Such person may be discharged without danger to himself or others.
Standards for conditional release or release on probation.	1. Such person will not in the reasonable future be dangerous. 2. Recovery need not be complete (*Hough* v. *U.S.*, 106 USCA DC 192 (1959)).	1. Such person may be released without danger to himself or others. 2. Recovery of sanity.
How application is made	Certification	Report to the court.
Who receives a copy	Prosecutor (U.S. Attorney or Corporation Counsel).	Prosecutor and defense attorney.
Hearing and examination by psychiatrists before release.	The court may hold a hearing, in its discretion; it must upon objection by the United States or District of Columbia.	Court can no longer order release on report alone. There must be an examination by 2 psychiatrists and a report within 60 days.
Further hearings	None provided	If the court is not satisfied with report of psychiatrists, a hearing is to be ordered at which the defendant may put on his own psychiatrists. The burden here is on defendant to prove he may be discharged. If he fails he may be released only by favorable application of superintendent and psychiatrists.
Committed person as movant		Procedure same as in case of application by superintendent.
Time limitations	None	When committed person is movant the court need not consider his application until at least 6 months after confinement. If the court is adverse, defendant may not apply again until 1 year after date of any preceding hearing on appliation.
Habeas corpus provided for	Yes	Yes.
Standards for release on a writ of habeas corpus.	1. Recovery of sanity. 2. That defendant will not in the reasonable future be dangerous. 3. The superintendent acted arbitrarily and capriciously in refusing to certify the defendant (*Overholser* v. *Russell*, 108 USCA DC 400 (1960)).	

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE U.S. ATTORNEY,
Washington, D.C., January 14, 1964.

HON. ALAN BIBLE,
Chairman, Committee on the District of Columbia,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I understand from Fred McIntyre that your committee is interested in the effect of the *McDonald* decision (*McDonald* v. *United States*, 114 U.S. App. D.C. 120 (1962), 312 F. 2d 847), upon the volume of acquittals by reason of insanity in criminal cases in the District of Columbia. *McDonald* was decided in the autumn of 1962 and the first full year which would reflect this decision is the calendar year 1963. The following comparison should give you the figures you need:

	Verdict, not guilty by reason of insanity	Uncontested (trial by court)	Jury verdict	Directed verdict (jury trial) [1]
Fiscal year ending—				
June 30, 1960	36	19	17	5
June 30, 1961	66	47	19	8
June 30, 1962	67	42	25	9
June 30, 1963	50	35	15	3
Calendar year ending Dec. 31, 1963	33	22	11	1

[1] This column included in jury verdict of acquittal by reason of insanity.

This table would indicate that acquittals by reason of insanity, and particularly directed verdicts, have fallen off pretty sharply since the *McDonald* decision. While I believe this is true, I do not think that *McDonald* alone is responsible for the sharp decrease in the figures in the last two annual horizontal columns. Part of the reason is that criminal trials have fallen off about 20 percent in volume because of the very much reduced criminal trial performance of the district court.

Sincerely yours,

DAVID C. ACHESON, *U.S. Attorney.*

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Legislative Reference Service

COMPILATION OF DISTRICT OF COLUMBIA AND STATE CRIMINAL STATUTES SHOWING A COMPARISON OF MANDATORY MINIMUM AND MAXIMUM SENTENCES THAT CAN BE IMPOSED IN CONNECTION WITH CERTAIN CRIMINAL OFFENSES.

By
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American Law Division
January 17, 1964

DISTRICT OF COLUMBIA

D.C. Code

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 22-2401 through 22-2404 1st Degree: Premeditated malice or the killing while perpetrating certain crimes. Penalty: Shall be death unless the jury by a unanimous vote recommends life imprisonment: if the jury is unable to agree the court impose a sentence of death or life imprisonment. 2nd Degree: Act with malice aforethoughtexcept those defined as 1st degree. Penalty: Shall be imprisoned for life or not less than 20 years.	§ 22-2405 Without malice aforethought, sudden heat of passion. (63 F. Supl. 968). Penalty: Shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding 15 years or both.	§ 22-2901 By force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear shall take from the person or immediate actual possession of another, anything of value. Penalty: Shall suffer imprisonment for not less than 6 months nor more than 15 years.	§ 22-501 Assault with the intent to kill, rob, rape, or poison. Penalty: Shall be imprisoned for not more than 15 years. § 22-502. Assault with intent to commit mayhem or with a dangerous weapon. Penalty: Shall be imprisoned for not more than 10 years.	§ 22-401 Maliciously burning or attempting to burn any dwelling, etc. Penalty: Shall be imprisoned for not less than 1 year nor more than 10 years.	No general provision.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
$22-1801 Offense is termed "housebreaking". The entering of any dwelling, etc. with the intent to break and carry away anything connected therewith, or to commit any criminal act. Penalty: shall be imprisoned for not more than 15 years.	$22-2201 The feloniously taking and carrying away of anything of value in the amount of value of $100 and upwards. Penalty: shall suffer imprisonment for not less than one nor more than ten years.	$22-1202 Wrongful converting of property to own use which has come into contact or possession by virtue of employment. Penalty: shall be punished by a fine of not exceeding $1,000 or by imprisonment for not more than ten years or both.	$22-2801 The carnal knowledge of a female forcibly and against her will, or carnal knowledge and abuse of a female child under 16 years. Penalty: shall be imprisoned for not more than 30 years. Death, if jury, in their verdict, adds the words "with the death penalty."	$22-3204 Carrying either openly or concealed, a pistol unless licensed, or any deadly or dangerous weapon, capable of being concealed. Penalty: shall be imprisoned for not more than ten years.

ALABAMA

Code of Alabama

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
Title 14 - § 318 1st Degree: Penalty shall be punishment by Death or Life Imprisonment. (Discretion of Jury). 2nd Degree: Penalty shall be punished by imprisonment for not less than 10 years.	Title 14 - § 322 Punishment shall be imprisonment for not less than 1 nor more than 10 years. (Discretion of Jury).	Title 14 - § 415 Punishment shall be at the jury's discretion, by death or imprisonment for not less than 10 years.	Title 14 - § 38 Convicted shall be imprisoned not less than 2 years nor more than 20 years.	Title 14-§ 23 1st Degree: Penalty shall be imprisonment for not less than 2 years nor more than 20 years. Title 14 - § 24 2nd Degree: Penalty shall be imprisonment for not less than 2 years nor more than 10 years. [Arson resulting in death or maiming shall bring death or Life].	No general provision.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
Title 14 $85 Penalty:(1st Degree) shall be not less than 10 years imprisonment or death. (Discretion of jury). 2nd Degree Title 14 $86 Penalty: shall be not less than 1 year imprisonment nor more than 10 years.	Title 14 $331 Penalty: shall be imprisonment not more than ten years nor less than 1 year.	Title 14 $126 Penalty: shall be not less than 1 year nor more than 10 years.	Title 14 $395 Penalty: shall be death or imprisonment for not less than 10 years. (Discretion of jury)	Title 14 $161 Penalty: shall be not less than $50 nor more than $500 and may also be imprisonment in the county jail or sentenced to hard labor for the county for not less than 6 months.

ALASKA

Alaska Compiled Laws

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 65-4-1 through 65-4-3 1st Degree: shall be sentenced to imprisonment at hard labor for life or for any term of years. 2nd Degree: shall be imprisoned not less than 15 years.	§ 65-4-4 Shall be imprisoned not more than 20 nor less than 1 year.	§ 65-4-24 Shall be imprisoned not exceeding 5 years nor less than 1 year.	§ 65-4-22 With dangerous weapon shall be punished by imprisonment in penitentiary not more than 10 years nor less than 6 months; or imprisonment in county jail not more than 1 year nor less than 1 month or by fine of $100 to $1000.	§ 65-5-1 1st Degree: Shall be sentenced to imprisonment for not less than 2 nor more than 20 years. 2nd Degree: § 65-5-2 Shall be sentenced to not less than 1 nor more than 10 years or by fine not more than $5000 or by both.	§§ 66-21-1 through 66-4-5 Habitual Criminals after 4 convictions - life imprisonment.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§ 65-5-31 1st Degree: Shall be imprisoned not less than 1 nor more than 10 years; if at night, not more than 15 years; if human in dwelling at time of burglary, not more than 20 years. § 65-5-32 - 2nd Degree: Burglary not in dwelling shall be imprisoned not less than 2 nor more than 5 years.	§ 65-5-41 Shall be imprisonment not less than one year nor more than ten years.	§ 65-5-61 Shall be imprisonment not less than 1 nor more than 10 years.	§ 65-4-13 Shall be imprisonment not more than 20 nor less than 1 year. (Special exceptions for males under 19 - and in case of females - relatives under 16.)	§ 65-12-2 Shall be fine of not more than $200 nor less than $10; imprisonment in county jail not less than 5 days nor more than 100 days; or by both in discretion of court.

ARIZONA

Arizona Revised Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 13-453 1st Degree: Shall be punished by Death or Imprisonment for Life. (Discretion of jury unless plea of guilty makes it discretion of court). 2nd Degree: Shall be punished by imprisonment not less than 10 years.	§ 13-457 Shall be punished by imprisonment not to exceed 10 years.	§ 13- 643 Punishment shall be imprisonment for not less than 5 years.	§ 13-245 Punishment shall be fine not less than $ 100 nor more than $ 2000, imprisonment for not less than 1 nor more than 5 years or both.	§ 13-231 1st Degree: Shall be imprisoned for not less than 2 nor more than 20 years. 2nd Degree: Shall be imprisoned for not less than 1 nor more than 10 years.	§§ 13-1649 - 13-1650 deal with increased sentences for subsequent convictions.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§13-302 1st Degree: (Nighttime) Penalty: punishable by not less than 1 nor more than 15 years imprisonment. 2nd Degree: (Daytime) Penalty: is punishable by imprisonment not to exceed 5 years.	§§13-662 and 13-671 Penalty: punishable by imprisonment for not less than one year nor more than 10 years.	§§13-662 and 13-671 Penalty: Offense is punishable by imprisonment for not less than 1 nor more than 10 years.	§13-614 Penalty: Offense is punishable by imprisonment for life, or any term not less than 5 years.	§13-911 Penalty: Carrying concealed weapons is punishable by fine - $20 to $300 and by imprisonment in county jail for not less than 10 nor more than 30 days.

ARKANSAS

Arkansas Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 41-2227 1st Degree: Shall suffer death or life imprisonment at hard labor. § 43-2153 allows life imprisonment at jury's discretion. 2nd Degree: Shall be sentenced to imprisonment not less than 5 nor more than 21 years (Jury to find degree).	§ 41-2229 Whoever convicted shall undergo imprisonment in "said jail and penitentiary house" for not less than 2 nor more than 7 years.	§ 41-3602 Punishment shall be imprisonment for not less than 3 nor more than 21 years.	§ 41-608 Punishment shall be fine not less than $100 nor exceeding $1000 and imprisonment not exceeding 1 year.	§ 41-501 Penalty shall be imprisonment for not less than 1 nor more than 10 years.	No general provisions.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§ 41-1003 Shall be imprisonment not less than 2 nor more than 21 years.	§ 41-3907 Shall be imprisonment not less than 1 nor more than 21 years.	§ 41-3927 Shall be same as in larceny - not less than 1 nor more than 21 years.	§ 41-3403 Shall be death or by § 43-2153, life imprisonment at hard labor. (Jury's discretion.)	§§ 41-4501, 41-4503 Shall be punishment by fine of not less than $50 nor more than $200 or by imprisonment in county jail for not less than 30 days nor more than 3 months, or both.

CALIFORNIA

West's Annotated California Codes
Penal Code

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 190 & 190.1 1st Degree: Penalty shall be death or imprisonment for life at jury's or court's discretion. (Penalty verdict if by jury must be unanimous). No death penalty for one under 18 at time of crime. 2nd Degree: Is punishable by imprisonment from 5 years to life .	§ 193 Penalty is imprisonment for not exceeding 10 years.	§ 213 1st Degree: Penalty is imprisonment for not less than 5 years. 2nd Degree:Penalty is imprisonment for not less than 1 year.	§ 220 Assault with intent to commit mayhem is punishable by imprisonment not less than 1 nor more than 20 years. § 245 Assault with deadly weapon is punishable by imprisonment not exceeding 10 years or in county jail not exceeding 1 year or by fine not exceeding $5000 or by both fine and imprisonment.	§ 447a Penalty shall be imprisonment for not less than 2 nor more than 20 years.	§ 644 Habitual criminals. After two previous felony convictions life imprisonment.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
$461 1st Degree Penalty: is imprisonment for not less than 5 years. 2nd Degree: Penalty: is imprisonment for not less than 1 year nor more than 15 years or imprisonment in county jail not exceeding 1 year.	$489 Penalty: is imprisonment for not more than 10 years or imprisonment in county jail for not more than one year.	$514 Penalty: is imprisonment for not more than 10 years or imprisonment in county jail for not more than 1 year. (Reference back to $489.)	$264 Penalty: is imprisonment for not less than three years (special exceptions where girl is under 18).	$12020 Penalty: Punishment shall be imprisonment in county jail not exceeding 1 year or in state prison for not less than 1 nor more than 5 years.

COLORADO

Colorado Revised Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 40-2-3 1st Degree: Penalty shall be death or imprisonment for life at hard labor. (Jury's discretion). 2nd Degree: Penalty shall be imprisonment for a term not less than 10 years and which may extend to life.	§ 40-2-8 Penalty shall be imprisonment for not less than 1 year which may extend to 8 years.	§ 40-5-1 Penalty shall be imprisonment for not less than 1 nor more than 14 years unless he or confederate armed with dangerous weapon in which case penalty shall be 2 years or life. (Exception for under 21).	§ 40-2-34 Penalty shall be imprisonment for not less than 1 nor more than 14 years.	§ 40-3-1 1st Degree: Penalty shall be imprisonment for not more than 20 years. 2nd Degree: § 40-3-2 Penalty shall be imprisonment for not more than 10 years.	§§ 39-13-1 through 39-13-3 Habitual Criminal Act. After 3 previous felony convictions - life imprisonment.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
$40-3-6 Penalty: Punishment shall be imprisonment for not less than 1 nor more than 10 years.	$40-5-2 Penalty: shall be imprisonment not less than 1 nor more than 10 years.	$40-5-16 Penalty: shall be imprisonment not less than 1 nor more than 10 years by punishing as for larceny. ($40-5-2)	$40-2-28 Penalty: is at the discretion of the court - imprisonment for life or for not less than 3 years.	$40-11-1 Penalty: shall be imprisonment in jail for not more than 1 year or by fine not more than $500 or by both.

CONNECTICUT

General Statutes of Connecticut

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offender
§ 53-10 1st Degree: Penalty shall be death unless jury's verdict recommends life imprisonment. § 53-11 2nd Degree: Penalty shall be imprisonment during his life.	§ 53-13 Penalty shall be fine of not more than $1000 or imprisonment not more than 15 years or both.	§ 53-67 Penalty shall be imprisonment for not more than 7 years.	§ 53-16 Penalty shall be fine of not more than $500 or imprisonment not more than 5 years or both.	§ 53-82 Penalty shall be imprisonment for not less than 2 nor more than 20 years.	§§ 54-118, deal with punishment for second and third convictions. Penalty: may be imprisoned for not exceeding twice the maximum for offense.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
$53-68 Penalty: shall be imprisonment for not more than 20 years.	$53-63 1st Degree:(over $2,000) Penalty: shall be imprisonment for not more than 20 years or fine not more than $2,000 or both. 2nd Degree: (over $250) Penalty: shall be imprisonment not over 5 years or fine not more than $200 or both.	$53-355 Penalty: shall be imprisonment not more than 10 years or fine not more than $1,000 or both.	$53-238 Penalty: shall be imprisonment for not more than 30 years.	$53-206 Penalty: shall be fine of not more than $500 or imprisonment for not more than 3 years or both.

DELAWARE

Delaware Code, Annotated
Title 11

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 571 1st Degree: Penalty shall be death. § 572 2nd Degree: Penalty shall be imprisonment for life and fine in court's discretion.	§ 575 Penalty shall be fine not more than $10,000 or imprisonment not more than 30 years or both.	§ 811 Penalty shall be fine not less than $500 or imprisonment not less than 3 nor more than 25 years and may be whipped.	No aggravated assult as such. Penalties for assault with intent to murder, § 577, fine not less than $500 nor more than $1,000 or imprisonment for not more than 20 years; with intent to rob,, § 812, shall be fined not less than $300, imprisoned not less than 1 year, and may be whipped; with intent to rape, § 782, shall be fined not less than $200 nor more than $500, imprisoned for not more than 10 years and may be whipped. § 105 - common law assault, penalty shall be fine or imprisonment or both at court's discretion.	§ 351 1st Degree: Penalty shall be imprisonment not less than 2 nor more than 20 years. § 352 2nd Degree: Penalty shall be fine not less than $500 nor more than $5,000 and imprisonment not less than 2 nor more than 10 years.	No general provisions.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§ 392 1st Degree Shall be imprisoned not less than 25 years nor more than 40 years. § 393 2nd Degree Shall be imprisoned not less than 5 nor more than 20 years.	§ 631 Shall be imprisoned for not more than 3 years and may be whipped.	§ 635 Shall be fined or imprisoned or both in Court's discretion.	§ 781 Shall be life imprisonment unless jury recommends mercy, then any time not less than 3 years.	§ 463 Shall be fined not less than $25 nor more than $2000 or imprisoned for not less than 20 days nor more than 7 days, or both.

FLORIDA

Florida Statutes, Annotated

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 782.04 1st Degree: Penalty: Shall be punishable by death. 2nd Degree: Penalty: Shall be imprisonment for life or for any number of years not less than 20.	§ 782.07 Penalty shall be imprisonment not exceeding 20 years or imprisonment in county jail not exceeding 1 year or by fine not exceeding $5,000.	§ 813.011 Penalty shall be life imprisonment or for any lesser term in court's discretion.	§ 784.04 Penalty shall be imprisonment not exceeding 5 years or in the county jail not exceeding 1 year or by fine not exceeding $3,000 or by both.	§ 806.01 (dwelling) 1st Degree: Penalty shall be punished by imprisonment for not more than 20 years. § 806.02 2nd Degree: (other buildings) Penalty shall be imprisonment for not more than 10 years.	§ 775.10 After 3 previous felony convictions -- life imprisonment.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§810.01 1st Degree: (Dwelling house) (armed) Penalty: shall be imprisonment for life or for term of years determined by the Court. Penalty for unarmed offender shall be imprisonment not exceeding 20 years. 2nd Degree: (Other buildings) Penalty: shall be imprisonment not exceeding 15 years unless high explosives involved - then penalty not exceeding 20 years.	§811.021 Penalty: shall be imprisonment not exceeding 5 years or in the county jail not exceeding 12 months or by fine not exceeding $1,000.	§812.01 Same as larceny.	§794.01 Penalty: shall be death unless jury recommends mercy. If mercy, life imprisonment or for any term of years in discretion of judge.	§790.01 (Concealed weapons) Penalty: shall be imprisonment for not less than 3 months nor more than 6 months or by fine not less than $100 nor more than $500.

GEORGIA

Code of Georgia

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 26-1005 Penalty shall be death but may be life imprisonment at court or jury's discretion.	§ 26-1008 Punishment shall be imprisonment and labor for not less than 1 nor longer than 20 years.	§ 26-2502 Penalty for robbery by force or weapon- Shall be death or life imprisonment or imprisonment and labor for not less than 4 nor more than 20 years. §§ 26-2503, 26-2504 Penalty for robbery by intimidation or sudden snatching shall be imprisonment and labor for not less than 2 nor more than 20 years.	No aggravated assault. Assault with intent to murder-- 2-10 years; with intent to rape-- 1-20 years; with intent to rob -- imprisonment and labor-- 2-4 years.	§ 26-2208 1st Degree: (Dwelling) Penalty: Shall be imprisonment for not less than 2 nor more than 20 years unless arson results in death or maiming of another - when penalty same as murdor statute §26-1005 2nd Degree (other than dwelling) Penalty: Shall be imprisonment for not less than 1 nor more than 10 years unless death or maiming as in 1st Degree.	No general provision.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§26-2402 Penalty: shall be imprisonment for not less than 1 nor more than 20 years.	§26-2627 Larceny from the person Penalty shall be imprisonment for not less than 2 years nor more than 5 years. §26-2630 Larceny from house: Penalty shall be imprisonment and labor for not less than 1 nor more than 10 years.	§26-2809 Penalty: shall be imprisonment and labor for not less than 1 year nor more than 5 years.	§26-1302 Crime shall be punished by death unless jury recommends mercy, in which event life imprisonment. Jury may fix punishment by imprisonment and hard labor for not less than 1 nor more than 20 years.	§26-5101 Anyone carrying concealed weapons shall be guilty of a misdemeanor. § 27-2506 Shall be punishable by a fine not to exceed $1,000 or imprisonment in county jail not to exceed six months or work in public works not to exceed 12 months, in discretion of judge.

HAWAII

Revised Laws of Hawaii

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§291.5 1st Degree Penalty: Shall be imprisonment at hard labor for life not subject to parole. 2nd Degree Penalty: Shall be imprisonment at hard labor for a term of any number of years not less than 20.	§291.8 Penalty: Shall be imprisonment at hard labor for not more than 10 years.	§306.11 1st Degree: Penalty: Shall be imprisonment at hard labor for life or any number of years at court's discretion. 2nd Degree: Penalty: Shall be imprisonment at hard labor for not more than 20 years.	§264.3 Aggravated assault offenders shall be fined not less than $5,000 or imprisoned at hard labor not more than 10 years or both.	§263.3 1st Degree: Penalty: Shall be imprisonment at hard labor for life. 2nd Degree: Penalty: Shall be imprisonment at hard labor for life or any term of years.	no general provisions.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§266-4 1st Degree (nighttime, or by one armed with deadly weapon, or inhabited) Penalty: shall be imprisonment at hard labor not more than 20 years. 2nd Degree: (All other) Penalty: shall be imprisonment not more than 10 years.	§293-19 Penalty: shall be imprisonment at hard labor not more than 10 years.	§281-6 Penalty: shall be fine not more than five times value of property embezzled or imprisonment at hard labor not more than ten years. (Embezzler under 16 - court may mitigate.)	§309-31 Penalty: shall be imprisonment for life at hard labor not subject to parole, or subject to parole, or for any number of years.	§267-25 Carrying deadly weapons - Penalty: shall be fine of not more than $250 or imprisonment not more than 1 year or both.

IDAHO

General Laws of Idaho

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 18-4004 1st Degree: Penalty: Shall be death or life imprisonment. (Jury's discretion) 2nd Degree: Penalty: Shall be imprisonment not for less than 10 years and may extend to life.	§ 18-4007 Penalty is imprisonment not exceeding 10 years or fine not more than $2,000 or both.	§ 18-6503 Penalty is imprisonment for not less than 5 years which may be extended to life.	§ 18-912 Aggravated assault and battery offenders shall be punished by fine of not less than $100 or by imprisonment in county jail for not less than 3 months nor more than 1 year or by imprisonment in penitentiary not over 3 years or by fine over $1,000.	§ 18-801 1st Degree: Penalty: Shall be imprisonment for not less than 2 nor more than 20 years. § 18-802 2nd Degree: Penalty: Shall be imprisonment for not less than 1 nor more than 10 years.	§ 19-25-14 On third felony conviction, sentence shall be not less than 5 years and may extend to life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
$18-1403 1st Degree (Nighttime) Penalty: is imprisonment for not less than 1 nor more than 15 years. 2nd Degree: (Daytime) Penalty: is imprisonment for not more than 5 years $18-1405 Burglary with explosives Penalty: shall be imprisonment for not less than ten nor more than 25 years.	$18-4606 Penalty: is imprisonment for not less than 1 nor more than 14 years.	$18-2413 Same as larceny	$18-6104 Penalty: is imprisonment not less than 1 year which may be extended to life. (Discretion of judge).	$18-3302 Penalty: shall be fine of not less than $25.00 nor more than $200.00 and by imprisonment in county jail not less than 20 days nor more than 90 days.

ILLINOIS

Smith-Hurd
Illinois Annotated Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
Ch. 38 § 9-1 Shall be death or imprisonment for indeterminate term with a minimum of not less than 14 years. Accused found guilty by jury sentence of death must be in jury's verdict.	Ch. 38 § 9-2 Shall be imprisonment from 1 to 20 years.	Ch. 38 §§ 18-1 and 18-2 Shall be imprisonment from 1 to 20 years. Armed robbery shall be imprisonment for an indeterminate term with a minimum of not less than 1 year.	Ch. 38 § 12-2 Shall be fined not to exceed $1000 or imprisoned in a penal institution other than the penitentiary not to exceed 1 year or both.	Ch. 38 § 20-1 Shall be imprisonment for any indeterminate term with a minimum of not less than 1 year.	No general provision.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
Ch. 38, §19-1 Penalty: shall be imprisonment for any indeterminate term with a minimum of 1 year.	Ch. 38, §16-1 Penalty: shall be imprisonment from 1 to 10 years.	Same as larceny.	Ch. 38, §11-1 Penalty: shall be imprisonment for indeterminate term with a minimum of not less than one year.	Ch. 38, §24-1 Penalty: shall be fine not to exceed $500 or imprisonment in a penal institution other than penitentiary not to exceed 1 year or both, unless weapon involved may discharge more than 8 shots with single firing when imprisonment shall be in penitentiary from 1 to 5 years.

INDIANA

Burn's Indiana Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 10-3401 1st Degree: Penalty: Shall be death or life imprisonment. 2nd Degree: Penalty: Shall be imprisonment during life.	§ 10-3405 Penalty shall be imprisonment not less than 2 nor more than 21 yrs.	§ 10-4101 Penalty shall be imprisonment for not less than 10 nor more than 25 years and disfranchisement for period. For physical injury inflicted during robbery penalty shall be life imprisonment.	§ 10-410 Aggravated assault and battery offender shall be imprisoned for not less than 1 year nor more than 5 years and may be fined not to exceed $1,000.	§ 10-301 1st Degree: (dwelling) Penalty: Shall be imprisonment not less than 2 nor more than 14 years. § 10-302 2nd Degree (not dwelling) Penalty: Shall be imprisonment not less than 1 nor more than 10 years.	§ 9-2207 Habitual criminals Act. After two previous felony convictions, a third felony conviction shall be punished by imprisonment for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
$10-701 1st Degree (Dwelling) Penalty: shall be imprisoned not less than 10 nor more than 20 years, and be disfranchised for period. 2nd Degree (Non-dwelling) Penalty: shall be imprisoned not less than 2 nor more than 5 years and disfranchised for period.	$10-3001 Penalty: shall be imprisoned for not less than 1 year nor more than 10 years and fine not exceeding $500 and disenfranchisement for determinate period.	$10-1704 Penalty: shall be imprisoned for not less than 2 nor more than 20 years and fined not less than $1 nor more than $1,000 and be disfranchised for determinate period.	$10-4201 Penalty: shall be imprisoned for not less than 2 nor more than 21 years. (Female - child under 12, punishment shall be life imprisonment.	$10-4706 Penalty: shall be fined not exceeding $500. In case of three such convictions within two years penalty shall be imprisonment for not more than one year.

IOWA

Iowa Code Annotated

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§690.2 1st Degree: Penalty: Shall be death or life imprisonment at hard labor. (jury or court's discretion). §690.3 2nd Degree: Penalty: Shall be punishment by imprisonment for life or for a term not less than 10 years.	§690.10 Penalty: Shall be imprisonment not exceeding 8 years and fine not exceeding $1,000.	§711.2 Penalty for robbery with aggravation (armed) shall be imprisonment for a term of 25 years. §711.3 Penalty for robbery without aggravation shall be imprisonment not exceeding 10 years.	§694.6 Assault with intent to inflict bodily injury shall be punished by imprisonment in county jail not exceeding 1 year or fine not exceeding $500.	§707.1 Penalty for burning dwelling house and parcels thereof shall be imprisonment for not more than 20 years. §707.2 Penalty: (Miscellaneous Buildings) shall be imprisonment for not more than 10 years.	§§747.1 through 747.7 Habitual Criminals Act. After two previous felony convictions, a third felony conviction shall be punished by imprisonment for any term not more than 40 years.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§708.2 Penalty: (if armed) shall be imprisonment for life or any term of years. (Burglary- defined, nighttime). §708.3 Penalty: (if not armed) shall be imprisonment not exceeding 20 years. (Also Burglary by explosives and by means of electricity.)	§709.2 Penalty: shall be imprisonment not more than 5 years or in county jail not more than 1 year or by fine of not more than $1000 or by both.	§710.5 Same as larceny	§698.1 Penalty: shall be imprisonment for life or any term of years not less than 5.	§695.3 Carry concealed weapons shall be punishable by fine of not more than $1000 or by imprisonment of not more than 5 years or by both in Court's discretion may also order surety to keep peace and reduce penalty for first offense.

KANSAS

General Statutes of Kansas

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 21-403 1st Degree: Penalty: Shall be death or life imprisonment at hard labor. (Jury or court's discretion)(No death penalty for 1 under 18 at time of crime). 2nd Degree: Penalty: Shall be confinement and hard labor for not less than 10 years.	§ 21-421 1st Degree: Penalty: Shall be confinement and hard labor for a term not less than 5 years nor more than 21 years. 2nd Degree: Penalty: Shall be confinement and hard labor for a term not less than 3 years nor more than 5 years.	§ 21-530 1st Degree: Penalty: Shall be confinement and hard labor not less than 10 nor more than 21 years. 2nd Degree: Penalty: Shall be confinement and hard labor not exceeding 10 nor less than 5 years.	§ 21-431 Penalty for assault with felonious intent shall be confinement and hard labor for a term not exceeding 10 years.	§ 21-581 1st Degree: Penalty: (Dwelling) Shall be confinement and hard labor for not less than 2 nor more than 20 years. § 21-582 2nd Degree: Penalty:(Other buildings) Shall be confinement and hard labor for not less than 1 nor more than 10 years.	§ 21-107a Second felony convictions shall be confinement not less than double the penalty of 2nd conviction. Third felony conviction shall be imprisonment for not less than 15 years.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§ 21-523 1st Degree Shall be not less than 10 nor more than 21 years. (Nighttime - dwelling) 2nd Degree Shall be not less than 5 nor more than 10 years (dwelling - daytime)	§ 21-534 Shall be confinement at hard labor not exceeding 5 years.	§ 21-544 Shall be fine of not more than $500 or imprisonment in county jail not more than 1 year or both.	§ 21-424 (female under 18 years) shall be confinement and hard labor not less than 1 nor more than 21 years. (any female) Shall be confined and hard labor not less than 5 years nor more than 21 years.	§ 21-2411 Shall be fine not exceeding $100 or imprisonment in county jail not exceeding 3 months or both. (Discretion of court).

KENTUCKY

Kentucky Revised Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 435-010 Shall be death or confinement for life.	§ 435-020 Shall be confinement for not less than 2 years nor more than 21 years.	§ 433-120 Shall be confinement for not less than 2 nor more than 10 years. § 433-140 Armed robbery shall be confinement for life or death.	§ 433.150 (Armed) Shall be imprisoned for life, or by death.	§ 433-010 (Dwelling) Shall be confinement for not less than 2 nor more than 20 years. § 433-020 (Non-dwelling) Shall be confinement for not less than 1 nor more than 10 years.	§ 431-190 After two previous felony convictions, third felony conviction shall be punished by confinement for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§433-120 shall be confinement for not less than 2 nor more than 10 years. §433-140 Armed burglary shall be confinement for life or death.	§433-220 shall be confinement for not less than 1 nor more than 5 years.	§434-010 shall be confinement for not less than 1 nor more than 10 years.	§435-090 shall be death or confinement for life without privilege of parole, or life confinement, or confinement for not less than 10 nor more than 20 years.	§435-230 shall be confinement for not less than 2 nor more than 5 years.

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LOUISIANA

Louisiana Revised Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
14 § 30 Penalty shall be death.	14 § 31 Penalty shall be imprisonment at hard labor for not more than 21 years.	14 § 64 Penalty for armed robbery shall be imprisonment at hard labor for not less than 5 and not more than 30 years. 14 § 65 Penalty - simple robbery - shall be imprisonment with or without hard labor for not more than 5 years.	14 § 37 Penalty for aggravated assault shall be fine of not more than $300 or imprisonment for not more than 2 years or both.	14 § 51 Penalty for aggravated arson shall be imprisonment for not less than 2 nor more than 20 years. 14 § 52 Penalty for simple arson ($500 or more damage) shall be fine not more than $5,000 and imprisonment at hard labor for not more than 10 years.	15 § 529.1 Under sentencing are provisions for increasing sentences for second and subsequent offenses. (Also under individual sections - provisions for increased penalties for second and subsequent offenses.)

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
14 §60 Aggravated burglary Penalty: shall be imprisonment at hard labor for not less than 1 nor more than 30 years. 14 §62 Simple burglary Penalty: shall be imprisonment at hard labor for not more than 9 years.	14 §67 Penalty:(for taking something of value of $100 or more) shall be imprisonment with or without hard labor, for not more than 10 years. Penalty: ($20 - $100 value) shall be fine not more than $300 or imprisonment with or without hard labor, for not more than 2 years, or both.	14 §67 Same as larceny (Greater penalty for 2nd offense, etc.)	14 §42 Penalty: for aggravated rape shall be death. 14 §43 Penalty: for rape shall be imprisonment at hard labor for not less than 1 nor more than 20 years.	14 §95 Penalty: for illegal carrying of weapons shall be fine of not more than $500 or imprisonment for not more than 1 year or both. (Additional penalties for second and third convictions - provisions).

MAINE

Revised Statutes of Maine

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
Ch. 130 §1 Penalty shall be life imprisonment.	Ch. 130 § 8 Penalty shall be fine of not more than $1,000 or imprisonment for not more than 20 years.	Ch. 130 §16 Penalty shall be imprisonment for any term of years.	Ch. 130 §21 Penalty shall be fine of not more than $1,000 or imprisonment for not more than 5 years. Ch. 130 § 19 Penalty for assault with intent to maim (if armed with dangerous weapon) shall be imprisonment not less than 1 year nor more than 20 years.	Ch. 131 §1 Penalty shall (for burning dwelling house) be imprisonment for not less than 1 nor more than 20 years. (Loss of life in consequence of burning makes offender guilty of murder).	No general provisions.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
Ch. 131 §8 Penalty: shall be imprisonment for any term of years. Ch. 131 §9 Penalty: (burglary with explosives) shall be imprisonment for not less than 20 years nor more than 40 years.	Ch. 132 §1 Penalty: shall be imprisonment for not more than 5 years.	Ch. 132 §7 Same as larceny	Ch. 130 §10 Penalty: shall be imprisonment for any term of years.	Ch. 137 §19 Penalty: shall be fine of not more than $100 or imprisonment for not more than 90 days.

MARYLAND

Annotated Code of Maryland
Art. 27

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 413 1st Degree: Shall be death or life imprisonment (court or jury's discretion) 2nd Degree: Shall be imprisonment for not less than 5 nor more than 18 years.	§ 387 Shall be imprisonment for not more than 10 years or in court's discretion may be fine not more than $500 or imprisonment in jail for not more than 2 years or both.	§§ 486, 488 Shall be restoration of or full value of thing taken from owner and imprisonment for not less than 3 nor more than 10 years. (Armed robbery - restoration and imprisonment for not more than 20 years.	§ 12 (With intent to murder, rape, etc.) ranging from imprisonment not less than 2 years to death.	§ 6 (Dwelling) Shall be imprisonment for not less than 2 nor more than 20 years. § 7 (Other buildings) shall be imprisonment for not less than 1 nor more than 7 years.	No general provision.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§ 30 Shall be restoration or payment of value to owner and imprisonment in jail or in Maryland House of Correction or in Maryland penitentiary for not more than 20 years.	§ 340 Shall be restoration of thing to owner or payment to him of full value thereof and fine not more than $1,000 or imprisonment not more than 15 years or in house of correction or jail for not more than 10 years or both fine and imprisonment.	§ 129 Shall be imprisonment in the jail or house of correction for not more than 3 years or in the penitentiary for not more than 15 years.	§ 461 Shall be death or imprisonment for life or for a term not less than 18 months nor more than 21 years. (Discretion of court or jury).	§ 36 Shall be fine not more than $1000 or imprisonment in jail or the Maryland House of Correction for not more than 2 years.

MASSACHUSETTS

Massachusetts General Laws Annotated

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
Ch. 265 § 2 1st Degree: Shall be death unless jury's verdict recommends life imprisonment. (No recommendation permitted in case of rape or attempted rape). 2nd Degree: Shall be imprisonment for life.	Ch. 265 § 13 Shall be imprisonment for not more than 20 years or by fine not more than $1,000 and imprisonment in jail for not more than 2½ years.	Ch. 265 § 17 Shall be imprisonment for life or for any term of years.	Ch. 265 § 15 Penalty for assault to murder or maim shall be imprisonment for not more than 10 years or by fine not more than $1,000 and imprisonment in jail for not more than 2½ years.	Ch. 266 § 1 (dwelling) shall be imprisonment for not more than 20 years or imprisonment in jail or house of correction for not more than 2½ years. Ch. 266 § 2 (other than dwelling) shall be imprisonment for not more than 10 years or by imprisonment in jail or house of correction for not more than 2½ years.	Many individual crimes carry individual penalties for habitual criminals but no habitual offender act as such.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
Ch. 266 § 15 For unarmed burglary shall be imprisonment for not more than 20 years, and if previously convicted of unarmed burglary, not less than 5 years.	Ch. 266 § 30 Shall be imprisonment for not more than 5 years or by fine of not more than $600 and imprisonment in jail for not more than 2½ years.	Ch. 266 § 52 Shall be imprisonment for not more than 15 years or fine not more than $2000 and imprisonment in jail for not more than 2½ years. (Bank official or agent.)	Ch. 265 § 22 Shall be imprisonment for life or for any term of years.	Ch. 269 § 10 Shall be imprisonment for not less than 2½ years nor more than 5 years, or for not less than 6 months nor more than 2½ years in a jail or house of correction.

MICHIGAN

Michigan Statutes Annotated

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 28.548 1st Degree: Shall be solitary confinement at hard labor for life. § 28.549 2nd Degree: Shall be imprisonment for life or any term of years (Court's discretion).	§ 28.553 Shall be imprisoned not more than 15 years or by fine not more than $7,500, or both.	§ 28.797 (armed) Shall be punishable by imprisonment for life or for any term of years. § 28.798 (unarmed) Shall be punishable by imprisonment not more than 15 years.	§ 28.276(1) Shall be punishable by imprisonment in the county jail or the state prison not more than a year or fine of $500 or both.	§ 28.267 (dwelling) Shall be punishable by imprisonment not more than 20 years. § 28.268 (nondwelling) Shall be punishable by imprisonment not more than 10 years.	§ 28.1082 et seq. Habitual offender act prescribes longer penalties for second and subsequent felony convictions ranging from 1½ times longest term to life imprisonment.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapon
$28.305 If convicted (nighttime) Penalty: shall be guilty of a felony punishable by imprisonment for not more than 15 years. $28.306 If convicted (daytime) Penalty: shall be guilty of a felony punishable by imprisonment for not more than 5 years or fine of not more than $2500.	$28.588 If convicted, Penalty: shall be guilty of a felony punishable by imprisonment not more than 5 years or by fine of not more than $2500.	$28.371 If convicted, Penalty: shall be guilty of a felony punishable by imprisonment not more than 10 years or fine not exceeding $5,000.	$28.788 If convicted, Penalty: shall be guilty of a felony punishable by imprisonment for life or for any term of years.	$28.423, 28.424 If convicted, of carrying with unlawful intent or carrying concealed without license, penalty shall be guilty of a felony punishable by imprisonment for not more than 5 years or fine not more than $2500.

MINNESOTA

Minnesota Statutes Annotated

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 619.07 1st Degree: Penalty: Shall be imprisonment for life. § 619.08 2nd Degree: Penalty: Shall be imprisonment for not less than 15 nor more than 40 years (Exception involving rape and sodomy-life imprisonment.)	§ 619.17 1st Degree: Penalty: Shall be imprisonment not less than 5 nor more than 20 years. § 619.26 2nd Degree: Penalty: Shall be imprisonment for not less than 1 nor more than 15 years or fine not more than $1,000 or both.	§ 619.42 1st Degree: Penalty: Shall be imprisonment not less than 5 nor more than 40 years. § 619.43 2nd Degree: Penalty: Shall be imprisonment for not less than 2 nor more than 15 years.	§ 619.37 1st Degree: Penalty: Shall be imprisonment for not less than 5 nor more than 10 years. § 619.38 2nd Degree: Penalty: Shall be imprisonment for not more than 5 years or fine not more than $1,000 or both.	§ 621.021 1st Degree: Penalty: (dwelling) Shall be imprisonment for not less than 2 nor more than 20 years. § 621.025 2nd Degree: Penalty: (other buildings) shall be imprisonment for not less than 1 nor more than 10 years.	§ 610.29 et seq. After three previous felony convictions, fourth felony conviction - life imprisonment under specified conditions.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
$621.07 1st Degree Penalty: shall be imprisonment for not less than 10 years $621.09 2nd Degree Penalty: shall be imprisonment for not more than 10 years.	$622.05 1st Degree Penalty: shall be imprisonment not less than 1 nor more than 10 years. $622.06 2nd Degree Penalty: shall be imprisonment for not more than 5 years, imprisonment in the county jail for not more than 1 year or fine of not more than $500.	Same as larceny.	$617.01 Penalty: shall be imprisonment not less than 7 nor more than 30 years.	$616.41 Penalty: shall be guilty of a gross misdemeanor and punishable under $610.20 by imprisonment in county jail for not more than 1 year or by fine of not more than $1000.

MISSISSIPPI

Mississippi Code Annotated

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 2217 Shall be death or life imprisonment. (Court's or jury's discretion.)	§ 2233 Shall be imprisonment not less than 2 nor more than 20 years or imprisonment in county jail not more than 1 year or fine not less than $500 or both.	§ 2364 Shall be imprisonment not more than 15 years.	§ 2011 (armed) shall be imprisonment for not more than 10 years or fined not more than $1,000 or imprisoned in county jail not more than 1 year, or both.	§ 2006 1st Degree: (dwelling) shall be imprisonment not less than 2 nor more than 20 years. § 2007 2nd Degree: (non dwelling) shall be imprisonment not less than 1 nor more than 10 years.	No general provision.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§2036 (inhabited dwelling) shall be imprisonment not less than 7 nor more than 15 years. §2038 (dwelling generally) shall be imprisonment not more than 10 years.	§2240 shall be imprisonment for term not exceeding 5 years.	§2115 shall be imprisonment for not more than 10 years or a fine of not more than $1000 and imprisonment in county jail not more than 1 year or either.	§2358 shall be death or life imprisonment.	§2079 shall be fined not less than $25.00 nor more than $100 or imprisonment in county jail nor more than 3 months or both.

MISSOURI

Vernon's Ann. Mo. Statutes

Murder	Manslaughter	Robbery	Aggrevated Assault	Arson	Habitual Offenders
§§ 559.010-559.030 1st Degree Penalty: Shall suffer death or life imprisonment. 2nd degree Penalty: Shall be imprisoned for not less than 10 years.	§§559.080-559.140 Penalty: Shall be imprisoned for not less than 2 nor more than 10 years or by imprisonment in county jail not less than 6 months, or by a fine not less than $500 or by both a fine not less than $100 and imprisonment in county jail not less than 3 months.	§§ 560.120-560.135 1st Degree (with deadly weapon) Penalty: Shall suffer death, or imprisoned for not less than 5 years. 1st Degree (by other means). Penalty: Shall be imprisoned for not less than 5 years. 2nd Degree: Penalty: Shall be imprisoned for not exceeding 5 years nor less than 3 years.	§ 559.190 Intent to kill, rob, rape, burglary, etc. Penalty: Shall be imprisoned for not exceeding 5 years, or in county jail not less than 6 months, or by a fine not less than $100 and imprisonment in county jail not less than 3 months, or a fine not less than $100. § 559.220 (common assault). Penalty: Shall be fined not exceeding $100, or imprisoned in county jail not exceeding 6 months, or both.	§ 560.010 Penalty: Shall be imprisoned for a term of not less than 2 years.	§ 556.280 A general statute which provides special provisions relating to punishment of second offenses.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§560.035 - 560.095 1st Degree Penalty: shall be imprisoned for not less than five years nor more than twenty years. 2nd Degree Penalty: shall be imprisoned for not less than two nor more than ten years.	§560.155 - 560.161 Penalty: imprisonment for not more than ten years nor less than two years, or imprisonment in county jail for not more than two years, or by a fine of not more than $1,000 or both.	No specific provisions Same as Larceny	§559.060 Penalty: shall suffer death, or be imprisoned for not less than two years, in the discretion of the jury.	§564.610 Penalty: imprisonment not exceeding two years, or by fine not less than $100 nor more than $1,000 or by imprisonment in county jail not less than 50 days nor more than 1 year or both.

MONTANA

Rev. Codes of Montana

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 94-2501 through 94-2505 1st Degree Penalty: Shall suffer death, in discretion of jury, or if left to court, life imprisonment. 2nd Degree Penalty: Imprisonment for not less than 10 years.	§§ 94-2507, 94-2508 Penalty: Imprisonment not exceeding 10 years.	§§ 94-4301 through 94-4603 Penalty: Imprisonment for not less than 1 year.	§ 94-601 1st Degree: Intent to kill or commit felony. Penalty: Imprisonment for not less than 5 nor more 20 years. 2nd Degree: Intent to injure. Penalty: Imprisonment for not less than 1 nor more than 5 years, or fine not exceeding $2,000, or both.	§§ 94-501 through 94-505 1st Degree: (dwellings). Penalty - Imprisonment for not less than 2 years nor more than 20 years. 2nd Degree: (buildings other than dwellings). Penalty: Imprisonment for not less than 1 nor more than 10 years.	No general statute found.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§§94-902, 94-903 1st Degree (Nighttime) Penalty: Imprisonment for not less than 1 nor more than 15 years. 2nd Degree (Daytime) Penalty: Imprisonment for not more than five years.	§§94-2704, 94-2706 Penalty: Imprisonment for not less than one nor more than 14 years.	§94-1501 (Public officers) Penalty: Imprisonment for not less than one nor more than 10 years.	§§94-4101 - 94-4104 Penalty: Imprisonment for not less than 2 nor more than 99 years.	§94-909 (With intent to assault Penalty: Imprisonment for not less than 1 year nor more than 5. §94-3525 (Carrying in cities or towns) Penalty: fine not exceeding $500 or by imprisonment in county jail not exceeding 6 months, or both, or imprisonment in penitentiary not exceeding five years. §94-3526 (Outside cities and towns) Penalty: Imprisonment in county jail not less than 6 months nor more than 1 year, or by fine not less than $25 nor more than $300 or both.

NEBRASKA

Rev. Stat. of Nebraska

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 28-401 1st Degree Penalty: Shall suffer death or imprisoned during life in discretion of jury. § 28-401 2nd Degree Penalty: shall be imprisoned not less than 10 years, or during life.	§ 28-403 Penalty: Shall be imprisoned not more than 10 years nor less than 1 year.	§ 28-414 Penalty: Shall be imprisoned for not less than 3 nor more than 50 years.	§ 29-409 (Felonious) Penalty: Shall be imprisoned for not more than 15 nor less than 2 years.	§ 28-504.01 1st Degree (dwelling) Penalty: Shall be imprisoned for not less than 2 nor more than 20 years. 2nd Degree: (other buildings) Penalty: Shall be imprisoned for not less than 1 nor more than 10 years.	§ 29-2221 A two time offender of a felony upon conviction of another felony. Penalty: Shall be imprisoned for not less than 10 nor more than 20 years unless greater punishment may be given for felony committed.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§28-532 Penalty: shall be imprisoned for not more than 10 years nor less than one year, or by fine not exceeding $500 or imprisoned in county jail not exceeding six months. §28-533 (Feloniously entering buildings) Penalty: shall be imprisoned for not more than 20 years nor less than 3 years.	§28-505 Penalty: shall be imprisoned for not less than 1 nor more than 7 years.	§28-538 Penalty: same as feloniously stealing property. (See grand larceny).	§28-407 Penalty: shall be imprisoned not more than 20 nor less than 3 years.	§28-101 Penalty: shall be fined not exceeding $1,000 or imprisoned for a period not exceeding 2 years.

NEVADA

Nevada Revised Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 200.010--200.030 1st Degree Penalty: Death or imprisonment for life in discretion of jury. 2nd Degree Penalty: Shall be imprisoned for a term not less than 10 years, which may be extended to life.	§§ 200.040--200.080 Penalty: Shall be imprisoned for a term not exceeding 10 years.	§ 200.380 Penalty: Shall be imprisoned for not less than 5 years.	§ 200.400 (Assault with intent to commit crime). Penalty: Shall be imprisoned for not less than 1 nor more than 14 years. (Assault with deadly weapon). Penalty: Shall be imprisoned for not less than 1 nor more than 2 years, or a fine of not less than $1,000 nor more than $5,000, or both.	§§ 205.010--205.055 1st Degree (dwelling) Penalty: Shall be imprisoned for not less than 2 nor more than 20 years. 2nd Degree: (other buildings). Penalty: Shall be imprisoned for not less than 1 nor more than 10 years.	§ 207.010 General law for mulitple offenses providing penalties ranging from imprisonment for not less than 10 years to life.

Burglary	Grand Larceney	Embezzlement	Rape	Carrying Dangerous Weapons
§205.060. 1st degree: (nighttime) Penalty: imprisonment for not less than 1 nor more than 15 years. 2nd degree: (daytime) Penalty: imprisonment for not more than five years.	§205.220. Penalty: imprisonment not less than 2 years nor more than 14 years.	§205.300. Penalty: See Grand Larceney.	§200.360. Penalty: shall be imprisoned for not less than 20 years, or death in discretion of the jury.	§202.350 Penalty: shall be imprisoned for not less than one year nor more than five.

NEW HAMPSHIRE

N.H. Rev. Stat. Ann.

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 585:1-585:4 1st Degree: Penalty: Shall be death or imprisonment for life in discretion of jury. 2nd Degree: Penalty: Shall be imprisoned for life or for such term as the court may order.	§§ 585.8-585:11 1st Degree: Penalty: Shall be imprisoned for not more than 30 years. 2nd Degree: Penalty: Shall be imprisoned for not more than 10 years, or fine not more than $1,000, or both.	§ 585:18 Penalty: Shall be imprisoned for not more than 30 years.	§ 585:22 Penalty: Shall be fined not more than $500, or imprisoned for not more than 3 years, or both.	§ 584:1 Penalty: (dwelling) Shall be imprisoned for not more than 30 years. (Personal property) Penalty: Shall be imprisoned for not more than 3 years, or fined not more than $1,000 and imprisoned not more than 1 year.	§ 591:1 General provisions relating to third or more convictions on certain offenses. Penalty: Shall be imprisoned for not more than 15 years.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§583:1. (intent to commit certain crimes in nighttime). Penalty: shall be imprisoned for not more than 25 years. (other criminal intent in nighttime). Penalty: imprisoned not more than 15 years.	§580.3. Penalty: shall be imprisoned not more than five years.	§580-28. Penalty: shall be fined not more than $2,000, or imprisoned not more than 5 years, or both.	§585:15. Penalty: shall be imprisoned for not more than 30 years.	§585:27. Penalty: shall be fined not more than $100, or imprisoned not more than one year, or both.

NEW JERSEY

N.J. Statutes Ann.

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 2A:113-1 through 2A:113-4. 1st Degree: Penalty: Death, unless jury recommends life imprisonment. 2nd Degree: Penalty: Shall be imprisoned for not more than 30 years.	§ 2A:113-5 Penalty: Shall be fined for not more than $1,000, or by imprisonment for not more than 10 years, or both.	§ 2A:141-1 Penalty: Shall be a fine not more than $5,000, or imprisoned for not more than 15 years, or both.	§ 2A:90-1 (Attrocious Assault) Penalty: Fine of not more than $2,000, or by imprisonment for not more than 7 years, or both. § 2A:90-2. Assault with intent to kill, rob, rape, etc. Penalty: Shall be a fine not more than $3,000, or by imprisonment of not more than 12 years, or both.	§§ 2A:89-1, 2A:85-6 Penalty: Fine of not more than $2,000, or by imprisonment for not more than 7 years, or both.	§§ 2A:85-8 through 2A:85-12. General law relating to certain crimes and misdemeanors. Penalties: 2nd offense, doubly maximum punishment. 3rd offense, triple maximum punishment. 4th offense, or subsequent offense, life imprisonment.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§24:94-1. Penalty: fine not more than $2,000, or by imprisonment for not more than seven years, or both.	§2A:119-2. Penalty: guilty of a high misdemeanor. shall be punished by a fine not more than $2,000, or by imprisonment for not more than seven years, or both.	§§2A:102-1 through 2A:102-12. Penalty: ranges in a scale of various officers being guilty of a high misdemeanor or a misdemeanor. High misdemeanor - Penalty: fine of not more than $1,000 or by imprisonment not more than seven years, or both. Penalty: Misdemeanor:/fine of not more than $1,000, or by imprisonment for not more than 3 years, or both.	§2A:138-1. Penalty: shall be fined not more than $5,000, or by imprisonment for not more than 30 years, or both.	§2A:151-41. Penalty: guilty of a misdemeanor, punished by a fine of not more than $1,000, or by imprisonment for not more than 3 years, or both.

NEW MEXICO

New Mexico Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§40-24-4 through 40-34-10 1st Degree: Penalty: Shall suffer death unless the jury shall specify life imprisonment. 2nd Degree: Penalty: Shall be imprisoned for any period not less than 3 years.	§ 40-24-10 Penalty: Shall be imprisoned for a period not less than 1 year nor more than 10 years.	§§ 40-42-1, 40-42-3. Penalty: (unarmed). Shall be imprisoned for not less than 3 years nor more than 15 years. Penalty: (armed) Shall be imprisoned for not more than 25 years, nor less than 3 years.	§ 40-6-4 Penalty: (intent to commit felony). Shall be imprisoned for not more than 3 years nor less than 6 months, or by a fine not exceeding $1,000 nor less than $100. § 40-6-6. Penalty: (intent to kill). Shall be imprisoned for not more than 25 years nor less than 1 year, or fined not exceeding $1,000 or both.	§ 40-5-1 Penalty: Shall be imprisoned for not less than 2 years nor more than 20 years.	§§ 41-16-1 through 41-16-4 2nd conviction - term not less then half the longest term of first conviction. 3rd conviction - not less than the longest term, nor more than 3 times the longest term for a first conviction. 4th conviction - imprisoned for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§ 40-9-1 Shall be imprisoned for not less than 3 nor more than 15 years. § 40-9-2 (Armed) Shall be imprisoned not more than 25 years nor less than 3 years. § 40-9-3 (Unarmed) Shall be imprisoned for not more than 5 years nor less than one year.	§ 40-45-1 to § 40-45-2 Shall be imprisoned for not more than 10 years.	§ 40-45-19 (If exceeds $50) Shall be imprisoned for not less than 1 year nor more than 10 years or fined not to exceed $1,000 or both.	§ 40-39-1 Imprisonment for not less than 1 year nor more than 99 years.	§ 40-17-1 Shall be fined not less than $50 nor more than $300 or by imprisonment for not less than 60 days nor more than 6 months, or both.

NEW YORK

McKinney's Consolidated Laws of New York, Penal Law

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§1044-1048 1st Degree: Death unless the jury recommends life imprisonment. 2nd Degree: Shall be imprisoned for not less than 20 years, the maximum is life.	§§ 1050-1053 1st Degree: Imprisonment for not more than 20 years. 2nd Degree: Imprisonment for not exceeding 15 years, or a fine not more than $1,000 or both.	§§ 2120-2127 1st Degree: Imprisonment for not less than 10 years nor more than 30 years. 2nd Degree: Imprisonment not exceeding 15 years.	§§ 240-243 1st Degree: (intent to kill, . . .armed) Imprisonment for not exceeding 10 years. 2nd Degree: Imprisonment for not exceeding 5 years or a fine not more than $1,000 or both.	§§ 220-227 1st Degree: (nighttime) Penalty: Imprisonment for a term not exceeding 40 years. 2nd Degree (daytime) Penalty: Imprisonment for a term not exceeding 25 years.	§§ 1941, 1942 2nd & 3rd conviction of felony - if crime is punishable for less than life - person must be imprisoned the minimum not less than half the longest term prescribed for a first conviction and the maximum not longer than twice such longest term. Provides that the minimum not be less than 5 years. 4th conviction of felony - not less than 15 years and maximum is life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§§400-407 1st Degree (Nighttime) Penalty: The minimum of which shall not be less than 10 years nor more than 30 years. 2nd Degree (Daytime) For a term not exceeding 15 years.	§§1294 1st Degree (Nighttime) Imprisonment for a term not exceeding 10 years. 2nd Degree Penalty: Imprisonment for a term not exceeding 5 years.	§§305, 1935 (Bank employees) Penalty: Imprisonment not more than 7 years or by fine not more than $1,000 or both.	§2010 1st Degree Penalty: Imprisonment for not more than 20 years. 2nd Degree Penalty: Imprisonment for not more than 10 years.	§1897, 1935 (Certain weapons) Penalty: A felony, imprisonment not more than 7 years, or by fine not more than $1,000 or both. (Other weapons) Penalty: A misdemeanor, but is a felony if person has been previously convicted of a crime. Misdemeanor - imprisonment for not more than 1 year or by fine not more than $500 or both.

NORTH CAROLINA

Gen. Statutes of North Carolina

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 14-17 1st Degree: Shall be punished with death. 2nd Degree: Shall be imprisoned not less than 2 years nor more than 30 years.	§ 14-18 Shall be imprisoned in county jail or state prison for not less than four months nor more than 20 years.	§ 14-87 (with weapon) Shall be punished by imprisonment for not less than 5 nor more than 30 years.	§ 14-32 (with deadly weapon) Shall be imprisoned or work for Highway Dept. for not less than 4 months nor more than 10 years.	§ 14-58 Shall suffer death.	No general provision.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§§14-51, 14-52 First Degree -(Occupied, sleeping, dwelling) Penalty: shall suffer death. 2nd Degree (Building not occupied) im- Penalty: shall be prisoned for life, or for a term of years in discretion of court.	§§14-70 Penalty: See Burglary for goods over value of $100. In cases of aggravation or hardened offenders, the court may in its discretion imprison for a period not exceeding ten years. Less than $100 value - in discretion of court.	§14-90 Penalty: same as larceny.	§14-21 Penalty: shall be punished with death.	§14-269 Penalty: Guilty of a misdemeanor and fined or imprisoned at discretion of court.

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NORTH DAKOTA

North Dakota Century Code

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 12-27-12 through 12-27-14 1st Degree: Shall be confined at hard labor for life. 2nd Degree: Shall be imprisoned for not less than 10 nor more than 30 years.	§§ 12-27-16 through 12-27-20 1st Degree: Shall be imprisoned for not less than 5 nor more than 15 years. 2nd Degree: Shall be imprisoned for not less than 1 year nor more than 5 years, or in county jail for not more than 1 year or by fine of not more than $1,000, or both.	§§ 12-31-01 through 12-31-09 1st Degree: Shall be imprisoned for not less than 1 year. 2nd Degree: Shall be imprisoned for not less than 1 year nor more than 10 years.	§ 12-26-10 Shall be fined not more than $1,000 or be imprisoned for not more than 1 year, or both.	§§ 12-34-01, 12-34-02 (Dwelling) Shall be imprisoned for not more than 20 years nor less than 2 years. (other buildings) Shall be imprisoned for not less than one and not more than 10 years.	§§ 12-06-18, 12-06-22 2nd offense - if first conviction exceeds 5 years, shall be imprisoned for not less than 10 years. 3rd offense - shall be imprisoned for not more than twice the maximum for first conviction. 4th offense - may be punished by life imprisonment.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§§12-35-01, 12-35-02 Penalty: shall be imprisoned for not less than one year nor more than 10 years.	§§12-40-01 - 12-40-04 Penalty: shall be imprisoned for not less than 3 months in county jail, or not more than 10 years in State prison, or by a fine of not less than $500 nor more than $1,000, or both.	§§12-3601 - 12-36-04 Penalty: same as larceny.	§§12-30-01 - 12-30-06 1st Degree - shall be imprisoned for not less than one year. 2nd Degree - shall be imprisoned for not less than one year if not a minor.	§62-03-01 - 62-03-04 Penalty: shall be imprisoned for not more than 2 years or in county jail for not more than one year - or by a fine not more than $100, or both.

OHIO

Page's Ohio Revised Code

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 2901.01 1st Degree: death unless jury recommends mercy, then shall be life imprisonment. § 2901.05 2nd degree: Shall be imprisonment for life.	§ 2901.06 1st Degree: Shall be imprisoned for not less than 1 nor more than 20 years. 2nd Degree (motor vehicle)	§ 2901.12 Shall be imprisoned not less than 1 nor more than 25 years. § 2901.13. (armed) Shall be imprisoned for not less than ten nor more than 25 years.	§ 2901.24 (intent to kill, rape, or rob) shall be imprisoned for not less than 1 nor more than 15 years.	§ 2907.02 Shall be imprisoned not less than 2 nor more than 20 years.	§§ 2961.11, 2961.12 Provides that anyone who has been three times previously convicted of various crimes shall be adjudged an habitual criminal and shall be sentenced to imprisonment for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§2907.09 Penalty: (inhabited dwelling) shall be imprisoned not less than five nor more than 30 years. §2907.10 Penalty: (uninhabited dwelling) shall be imprisoned not less than one nor more than 15 years.	§2907.20 Penalty: shall be imprisoned for not less than one nor more than 7 years.	§2907.34 Penalty: shall be imprisoned not less than 1 nor more than 10 years.	§2905.01 Penalty: shall be imprisoned not less than 3 nor more than 20 years.	§2923.01 Penalty: shall be fined not more than $500, or imprisoned in county jail not less than 30 days nor more than six months.

OKLAHOMA

Oklahoma Statutes Ann.

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
Title 26 §§ 701-707 Shall suffer death, or imprisonment for life at hard labor in discretion of jury.	Title 21 §§ 711-722 1st Degree: Punishable by imprisonment for a term not less than 4 years. 2nd Degree: Punishable by imprisonment for a term not more than 4 years nor less than 2 years, or by imprisonment in county jail not exceeding 1 year, or by fine not exceeding $1,000 or both.	Title 21 §§ 791-801 1st Degree: Punishable by imprisonment not less than 10 years. 2nd Degree: Punishable by imprisonment not exceeding 10 years.	Title 21 §§ 645, 646, 647 (with weapon) Imprisonment not exceeding 5 years, or by imprisonment in county jail not exceeding 1 year. (without weapon) Imprisonment in a county jail not exceeding 1 year, or by a fine of not more than $500, or both.	Title 21 §§ 1381-1392 1st Degree: Imprisonment for not less than 1 nor more than 30 years. 2nd Degree: Imprisonment for not less than 1 nor more than 5 years.	Title 21, § 51. General law providing double penalties for second and subsequent offenses.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
Title 21 §§1431-1436 1st Degree Penalty: any term not less than seven years nor more than 20 years. 2nd Degree Penalty: imprisonment not exceeding 7 years and not less than 2 years.	Title 21 §§1704, 1705 Penalty: punishable by imprisonment not exceeding 5 years.	Title 21, §§1451-1462 Penalty: same as feloniously stealing according to value (see larceny).	Title 21 : 1111-1116 1st Degree Penalty: punishable by death or imprisonment for not less than 15 years in discretion of jury. 2nd Degree Penalty: punishable by imprisonment not less than one year nor more than 15 years.	Title 21 §§1271, 1272, 1276 1st Conviction Penalty: fine not less than $25 nor more than $50 or by imprisonment in county jail not to exceed 30 days or both. 2nd or Subsequent Convictions Penalty: fine not less than $50 nor more than $250 or imprisonment in county jail not less than 30 days nor more than 3 months or both.

OREGON

Oregon Revised Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 163.010 1st Degree: Death unless jury recommends life imprisonment. 2nd Degree: Shall be punished by life imprisonment.	§ 163.080 Shall be imprisoned for not more than 15 years and a fine not exceeding $5,000.	§ 163.280 (While armed) Shall be imprisoned for life or for any lessor term. § 163.290 (unarmed) Shall be imprisoned for not more than 15 years.	§ 163.240 (Assault while owned) Shall be imprisoned for not more than 20 years. § 163.250 (Unarmed) Shall be imprisoned for not more than 5 years.	§ 164.020 1st Degree: Shall be imprisoned for not less than 2 years nor more than 20 years. § 164.030. 2nd Degree: Shall be imprisoned for not less than 1 nor more than 10 years.	§§ 168.011--168.031 2nd Conviction - may be sentenced for a period not exceeding twice the longest term prescribed for 1st conviction. 3rd Conviction - Shall be sentenced to a term not less than, nor more then 3 times, the longest term prescribed for offense last convicted. 4th Conviction - Shall be not less than twice the longest term prescribed for last offense, or may be sentenced for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§164.230 (Dwelling) Penalty: shall be imprisoned for not more than 15 years. (Other buildings) Penalty: shall be imprisoned for not more than 3 years.	§164.030 (Exceeds $75) Penalty: shall be imprisoned for not more than 10 years. (Under $75) Penalty: shall be imprisoned in county jail not more than 1 year, or by fine not more than $100 or both.	§165.005 Penalty: see larceny	§163.210 Penalty: shall be imprisoned for not more than 20 years.	§166.220 (With intent to use) Penalty: shall be fined not less than $50 nor more than $500, or by imprisonment in county jail not less than 1 month nor more than 6 months or by imprisonment in the State prison not exceeding 5 years. (Just carrying) Penalty: shall be fined not less than $10 nor more than $200, or by imprisonment in county jail not less than 5 days nor more than 100 days, or both.

PENNSYLVANIA

Purdon's Penn. Statutes Ann., Title 18

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 4701 1st Degree: Death, or imprisoned for life at discretion of jury. 2nd Degree: first offense imprisonment not exceeding 20 years, or fined not more than $10,000 or both, for second offense - shall be imprisoned for life.	§ 4703 Shall be fined not exceeding $6,000 and imprisoned not exceeding 12 years.	§ 4704 Shall be fined not exceeding $5,000 or imprisoned not exceeding 10 years, or both.	§ 4709 Shall be fined not exceeding $2,000 or imprisoned not exceeding 3 years, or both.	§ 4905 Shall be imprisoned for not exceeding 20 years, or fined not exceeding $10,000, or both.	§ 5108 Second & third offenses if within 5 years of first conviction shall be imprisoned for a term of which shall not be more than twice the term prescribed for a first conviction. Fourth offense - Shall be imprisoned for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§4901. Penalty: shall be fined not exceeding $10,000, or imprisoned not exceeding 20 years, or both.	§4807. Penalty: shall be fined not exceeding $2,000, or imprisoned not exceeding 5 years, or both.	§4827. Penalty: shall be fined not exceeding $2,000 or imprisoned not exceeding 5 years, or both.	§4721. Penalty: shall be fined not exceeding $7,000, or imprisoned not exceeding 15 years, or both.	§4416. Penalty: shall be fined not exceeding $500 or imprisoned not exceeding one year, or both.

RHODE ISLAND

General Laws of Rhode Island

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 11-23-1 through 11-23-2 1st Degree: Shall be imprisoned for life. 2nd Degree- Shall be imprisoned for not less than 10 years and may be imprisoned for life.	§ 11-23-3 Shall be imprisoned for not exceeding 20 years.	§ 11-39-1 Shall be imprisoned for any term not less than 5 years.	§§ 11-5-1 through 11-5-2 (intent to commit certain crimes) Shall be imprisoned not exceeding 20 years nor less than 1. (with dangerous weapon). Shall be punished by imprisonment for not more than 10 years.	§§ 11-4-1 through 11-4-3 (dwelling) Shall be imprisoned for not less than 2 nor more than 20 years. (building other than dwelling). Shall be imprisoned for not less than 2 nor more than 20 years.	§ 12-19-21 (two or more convictions) Shall be imprisoned for a term not exceeding 25 years in addition to penalty for crime.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§11-8-1. Penalty: shall be imprisoned for life or for any term not less than five years.	§§11-41-1 through 11-41-5. (over $500). Penalty: shall be imprisoned for not more than 5 years, or fined not more than $1,000, or both. (under $500) Penalty: shall be imprisoned for not more than one year or fined not more than $500 or both.	§11-41-3. See Larcency	§11-37-1. Penalty: shall be imprisoned for life or for any term not less than 10 years.	§11-47-42. Penalty: shall be fined not more than $500, or by imprisonment not more than a year, or both.

SOUTH CAROLINA

Code of Laws of South Carolina

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 16-51, 16-52 Shall suffer death, or life imprisonment in the discretion of the jury.	§ 16-55 Shall be imprisoned not exceeding 30 years nor less than 2 years.	§ 16-333 (While armed) Shall be imprisoned for not exceeding 25 years.	§ 16-93 (with concealed weapons) Shall suffer additional punishment of imprisonment for not less then 3 months nor more than 12 months.	§ 16-311 Shall be imprisoned for not less than 2 nor more than 20 years.	No general provision

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§16-331. Penalty: shall be imprisoned for life unless jury recommends mercy, whereon the punishment shall be reduced to imprisonment for a term not less than five years.	§16-352, 17-552. Penalty: Confinement in Penitentiary workhouse, or penal farm for a period not less than 3 months nor more than 10 years.	§16-363. (Public funds) Penalty: fine and imprisonment in discretion of court proportioned to amount of embezzlement.	§§16-71, 16-72. Penalty: shall suffer death unless jury recommends mercy, imprisoned not exceeding 40 years nor less than five years.	§16-145. Penalty: shall be fined not more than $100 and not less than $20, or imprisoned not more than 30 nor less than 10 days.

SOUTH DAKOTA

South Dakota Code

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 13.2012 Shall be death or to hard labor for life.	§ 13.2013-13.2023 1st Degree: Punishable by imprisonment for not less than 4 years. 2nd Degree: Punishable by imprisonment not more than 4 years nor less than 2 years, or in county jail not exceeding 1 year, or fine not exceeding $1,000 or both.	§ 13.2603 1st Degree: Punishable not less than 1 nor more than 20 years. 2nd Degree: Punishable not exceeding 7 years nor less than 1 year.	§ 13.2302 (with weapon) Punishable by imprisonment not exceeding 5 years or in county jail not exceeding 1 year, or fine not exceeding $500, or both.	§§ 13.3601, 13.3602 (dwelling) Shall be imprisoned for not exceeding 20 years. (non-dwelling) Shall be imprisoned not exceeding 10 years.	§ 13.0611 Second & third convictions may be sentenced to a term not more then twice the longest term prescribed for a first conviction. Fourth and subsequent may be sentenced for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§13.3705. Penalty: 1st degree-imprisoned not less than 10 years. 2nd degree - imprisoned not exceeding 15 years and not less than 5 years.	§13.3603. Penalty: imprisoned not exceeding 10 years or in county jail not exceeding one year.	§13.4008. See Larcency.	§13.2803. Penalty: 1st degree - punishable by imprisonment not less than 10 years. 2nd degree - punishable by imprisonment not exceeding 20 years.	§13.1609 Penalty: shall be fined not exceeding $500 or be imprisoned in county jail not exceeding one year or in State Prison not exceeding one year, or by both.

TENNESSEE

Tennessee Code Ann.

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§39-2402 through 39-2408 1st Degree- Shall suffer death or imprisonment for life or over 20 years as the jury may determine. 2nd Degree: Shall be imprisoned not more than 20 nor less than 10 years.	§ 39-2410 Shall be confined in penitentiary not less than 2 years nor more than 10 years.	§ 39-3901 Shall be imprisoned not less than 5 nor more than 25 years.	§ 39-601 (deadly weapon) Shall be imprisoned not less than 2 nor more than 10 years.	§ 39-501 Shall be imprisoned for not less than 1 nor more than 21 years.	§§ 40-2801 through 40-2807 A habitual criminal is one who has been convicted of three felonies. Punishment except where death is imposed is life imprisonment and ineligible for parole.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§39-901. (Nighttime). Penalty: shall be imprisoned for not less than five nor more than 15 years. §39-903. 2nd degree (daytime) Penalty: shall be imprisoned not less than 3 years nor more than 15 years.	§39-4204. Penalty: punishable by imprisonment not less than 3 years nor more than 10 years.	§39-4232. See Larceny.	§39-3702. Penalty: shall suffer death, or life imprisonment or not less than 10 years in the discretion of the jury.	§39-4901. Penalty: shall be fined $50 and imprisoned in county jail with imprisonment only in the discretion of the court.

TEXAS

Vernon's Texas Penal Code

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
Art. 1257 Shall be death or imprisonment for life or for any term not less than 2 years.	Art. 1237 (negligent homicide) Shall be punished by confinement in jail not exceeding 1 year or by fine not exceeding $1,000.	Art. 1408 Shall be imprisoned for life or a term not less than 5 years. (with weapon) Shall be death or imprisoned for not less than 5 years.	Art. 1148 Shall be fined not less than $25 nor more than $1,000 or imprisonment in jail not less than 1 month nor more than 2 years, or both.	Art. 1314 Shall be imprisoned not less than 2 nor more than 20 years.	Art. 62, 63, 64 Second and subsequent convictions - shall be highest punishment affixed for such offenses. Third conviction for felony - If less than capital, punishment shall be imprisonment for life. Second conviction of capital offense - shall not be less than life imprisonment.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
Art. 1391 (residence at nighttime). Penalty: shall be imprisoned for any term not less than five years. Art. 1397. Penalty: shall be imprisoned not less than two nor more than 12 years.	Art. 1421. (Felony theft). Penalty: shall be imprisoned for not less than two nor more than 10 years.	Art. 1534. See Larceny.	Art. 1189. Penalty: shall be punished by death or imprisoned for life, or for any term not less than five years.	Art. 483 Penalty: shall be fined not less than $100 nor more than $500 or by imprisonment in jail for not less than one month, nor more than one year.

UTAH

Utah Code

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 76-30-4 1st Degree: Death or life imprisonment on recommendation of jury, in discretion of court. 2nd Degree: Shall be imprisoned not less then 10 years, and which may be for life.	§ 76-30-6 Punishable by imprisonment not less then 1 nor more than 10 years.	§ 76-51-2 Punishable by imprisonment for not less than 5 years, and may be for life.	§ 76-7-6 (with deadly weapon) Punishable by imprisonment not exceeding 5 years, or by fine not exceeding $1,000, or both.	§ 76-6-1 Shall be imprisoned for not less than 2 nor more than 20 years.	§ 76-1-18 Whoever has been twice previously convicted of a felony is a habitual criminal - shall be imprisoned for not less than 15 years (other than murder).

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§76-9-2. Penalty: First Degree - punishable by imprisonment for not less than 25 years nor more than 40 years. Penalty: 2nd Degree -/punishable by imprisonment for not less than one nor more than 20 years.	§76-38-6. Penalty: pnishable by imprisonment for not less than one year nor more than 10 years, and by a fine not less than $50 nor more than $1,000, or by imprisonment only.	§76-17-11. Same as Larcency.	§76-53-18. (under 13 years) Penalty: imprisoned for not less than 20 years, and may be for life. (others). Penalty: imprisonment not less than 10 years.	§§76-23-4; 76-1-16. Penalty: punishable by imprisonment in county jail not exceeding 6 months or by a fine in any sum less than $300, or both.

VERMONT

Vermont Statutes Ann., Title 13

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 2303 1st Degree: Shall be death or life imprisonment as jury shall determine. 2nd Degree: Shall be imprisonment for life or such term as court shall order.	§ 2304 Shall be imprisoned for not more than 15 years or for not less than 1 year or fined not more than $1,000	§ 603 (Armed) Shall be imprisoned not more than 20 years and fined not more than $1,000.	§ 605 (With weapon, intent to rob) Shall be imprisoned not more than 10 years nor less than 3 years.	§ 502 1st Degree: Shall be imprisoned for not more than 10 years nor less than 2 years or fined not more than $2,000. § 503 2nd Degree: Shall be imprisoned not more than 5 years nor less than 1 year or fined not more than $1,000.	§ 11 Fourth conviction of felony may be sentenced to imprisonment for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§1201. (nighttime). Penalty: shall be imprisoned not more than fifteen years or fined not more than $1,000, or both. §1202. (daytime). Penalty: shall be imprisoned not more than 10 years or fined not more than $1,000.	§2501. Penalty: shall be imprisoned not more than 10 years or fined not more than $500, or both.	§2531. Penalty: shall be imprisoned not more than 10 years or fined not more than $500, or both.	§3201. Penalty: shall be imprisoned for not more than 20 years or fined not more than $2,000, or both.	§4003. Penalty: shall be imprisoned not more than 2 years or fined not more than $200, or both.

VIRGINIA

Code of Virginia

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 18.1-22 1st Degree: Shall be death or by imprisonment for life, or for any term not less than 20 years. § 18.1-23 2nd Degree: Shall be imprisoned not less than 5 nor more than 20 years.	§ 18.1-24 Shall be imprisoned for not less than 1 nor more than 5 years.	§ 18.1-88 Housebreaking with intent to rob, etc. Shall be imprisoned for not less than 1 nor more than 20 years. § 18.1-91 (deadly weapon) Shall be death or imprisoned for life or for any term not less than 5 years.	§ 18.1-65 Shooting, stabbing, etc. with intent to inflict bodily harm, Shall be imprisoned for not less than 3 nor more than 20 years.	§ 18.1-75 (nighttime) Shall be death, or in discretion of court or jury, imprisonment for life or term not less than 5 years. (daytime) Shall be imprisoned not less than 3 nor more than 10 years.	§ 53-296 Permits further confinement not exceeding 5 years for previous offender. If he has been twice sentenced the court may give additional time as the case may deem proper.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§18.1-86. (nighttime) Penalty: shall be death, or in discretion of court or jury imprisonment for life or any term not less than 5 years.	§18.1-100. Penalty: shall be imprisoned not less than one nor more than 20 years, or in discretion of jury or court, imprisonment in jail not exceeding 12 months, or by fine not exceeding $1,000, or both.	§18.1-109. deemed Larceny	§18.1-44. Penalty: shall be death or imprisoned for life or for any term not less than five years, in discretion of the court or jury.	§18.1-269. Penalty: shall be fined not less than $20 nor more than $500 and in the discretion of jury or court imprisoned in jail for not more than 12 months.

WASHINGTON

Revised Code of Washington

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 9.48.030 1st Degree: Shall be imprisoned for life unless jury finds that the punishment be death. 2nd Degree: § 9.48.040 Shall be imprisoned for not less than 10 years.	§ 9.48.060 Punishable by imprisonment for not more than 20 years, or in county jail for not more than 1 year, or fine not more than $ 1,000, or both.	§ 9.75.010 Shall be imprisoned for not less than 5 years.	§ 9.11.010 (deadly weapon) 1st Degree: Shall be imprisoned for not less than 5 years. 2nd Degree: Shall be imprisoned for not more than 10 years or fine not more than $1,000 or both.	§ 9.09.010 1st Degree: Shall be imprisoned for not less than 5 years. § 909.020 2nd Degree: Shall be imprisoned for not more than 10 years, or by fine not more than $5,000, or both.	§ 9.92.090 General provisions providing imprisonment for not less than 10 years for three misdemeanors to life imprisonment for three felonies and four misdemeanors which fraud or intent to defraud is an element.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§9.19.010 1st degree - (nighttime) Penalty: shall be imprisoned for not less than five years. §9.19.020. Penalty: 2nd degree- shall be imprisoned for not more than 15 years.	§9.54.090 Penalty: shall be imprisoned for not more than 15 years.	no specific provisions found, covered by larcency provisions.	§9.97.010. Penalty: shall be imprisoned for not less than five years.	§9.41.160. Penalty: a fine of not more than $500 or imprisonment for not more than one year in county jail, or imprisonment in State Prison for not less than one year nor more than 10 years.

WEST VIRGINIA

West Virginia Code

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§§ 5917, 6204 1st Degree: Shall be death or imprisonment for life in discretion of jury. 2nd Degree: Shall be imprisoned not less than 5 nor more than 18 years.	§ 5919 Shall be imprisoned not less than 1 nor more than 5 years.	§ 5927 (armed) Shall be imprisoned for not less than 10 years. (Unarmed) Shall be imprisoned for not less than 5 years nor more than 18 years.	§ 5924 (Malicious Assault) Shall be imprisoned not less than 2 nor more than 10 years.	§ 5951(1) 1st Degree: Shall be imprisoned for not less than 2 nor more than 20 years. § 5951 (2) 2nd Degree: Shall be imprisoned for not less than 1 nor more than 20 years.	§ 6130 2nd Offenses: Shall add 5 years to maximum for such offense. 3rd Offense: Shall be imprisoned for life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§5952. Penalty: shall be imprisoned for not less than one nor more than 15 years.	§5954. Penalty: shall be imprisoned for not less than one nor more than ten years.	§5961. generally made guilty of Larceny.	§5930. Penalty: shall be death or confinement for life in discretion of court. If jury recommends mercy shall be imprisoned not less than five nor more than 20 years.	§6043. Penalty: shall be confined in county jail not less than 6 months nor more than 12 months for first offense. second or subsequent offenses shall be imprisoned not less than one nor more than five years and fined not less than $50 nor more than $200 in discretion of court.

WISCONSIN

West's Wisconsin Statutes Ann.

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 940.01 1st Degree: Shall be imprisoned for life. § 940.02 2nd Degree: May be imprisoned not less than 5 nor more than 25 years.	§ 940.05 May be imprisoned not more than 10 years.	§ 943.32 May be imprisoned not more than 10 years.	§ 940.22 (Aggravated battery) May be fined not more than $2,500 or imprisoned not more than 5 years, or both.	§ 943.02 May be imprisoned not more than 15 years.	§ 939.62 Provides a scale of increased penalties for habitual offenders, ranging to 10 years.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§943.10. Penalty: may be imprisoned for not more than 10 years.	§943.20. (theft) Penalty: Penalties range in a scale from a fine not exceeding $200 or imprisonment for not more than 6 months if value of property is not more than $100 to a fine not more than $10,000 or imprisonment for not more than 15 years or both if value of property exceeds $2,500.	No general provisions See larcency.	§944.01. Penalty: may be imprisoned not more than 30 years.	§941.23. Penalty: may be fined not more than $500 or imprisoned in county jail not more than one year, or both.

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WYOMING

Wyoming Statutes

Murder	Manslaughter	Robbery	Aggravated Assault	Arson	Habitual Offenders
§ 6-54 1st Degree: Shall be imprisoned for life. § 6-55 2nd Degree: Shall be imprisoned for not less than 20 years, or during life.	§ 6-58 Shall be imprisoned for not more than 20 years.	§ 6-65 Shall be imprisoned not more than 14 years.	§ 6-70 Shall be fined not more than $1,000 or imprisoned in county jail not more than 1 year, or both.	§ 6-121 1st Degree: Shall be imprisoned not less than 2 nor more than 20 years. § 6-122 2nd Degree: Shall be imprisoned for not less than 1 nor more than 10 years.	§ 6-9 Felony, 3 convictions: Shall be imprisoned not less than 10 years nor more than 50 years. § 6-10 4th Conviction: Shall be imprisoned for not less than life.

Burglary	Grand Larceny	Embezzlement	Rape	Carrying Dangerous Weapons
§6-129. Penalty: may be imprisoned not more than 14 years.	§6-132. Penalty: shall be imprisoned not more than 10 years.	§6-141. Penalty: shall be imprisoned for not more than 14 years.	§6-63. Penalty: shall be imprisoned for any term not less than one year, or during life.	§6-239. Penalty: shall be fined not exceeding $100.

SUPREME COURT OF THE UNITED STATES

No. 521.—October Term, 1956.

Andrew R. Mallory, Petitioner, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 24, 1957.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Petitioner was convicted of rape in the United States District Court for the District of Columbia, and, as authorized by the District Code, the jury imposed a death sentence. The Court of Appeals affirmed, one judge dissenting. 236 F. 2d 701. Since an important question involving the interpretation of the Federal Rules of Criminal Procedure was involved in this capital case, we granted the petition for certiorari. 352 U. S. 877.

The rape occurred at six p. m. on April 7, 1954, in the basement of the apartment house inhabited by the victim. She had descended to the basement a few minutes previous to wash some laundry. Experiencing some difficulty in detaching a hose in the sink, she sought help from the janitor, who lived in a basement apartment with his wife, two grown sons, a younger son and the petitioner, his nineteen-year-old half-brother. Petitioner was alone in the apartment at the time. He detached the hose and returned to his quarters. Very shortly thereafter, a masked man, whose general features were identified to resemble those of both petitioner and his two grown nephews, attacked the woman. She had heard no one descend the wooden steps that furnished the only means of entering the basement from above.

Petitioner and one of his grown nephews disappeared from the apartment house shortly after the crime was committed. The former was apprehended the following afternoon between two and two-thirty p. m. and was taken, along with his older nephews, also suspects, to police headquarters. At least four officers questioned him there in the presence of other officers for thirty to forty-five minutes, beginning the examination by telling him, according to his testimony, that his brother had said that he was the assailant. Petitioner strenuously denied his guilt. He spent the rest of the afternoon at headquarters, in the company of the other two suspects and his brother a good part of the time. About four p. m. the three suspects were asked to submit to "lie detector" tests, and they agreed. The officer in charge of the polygraph machine was not located for almost two hours, during which time the suspects received food and drink. The nephews were then examined first. Questioning of petitioner began just after eight p. m. Only he and the polygraph operator were present in a small room, the door to which was closed.

Following almost an hour and one-half of steady interrogation, he "first stated that he could have done this crime, or that he might have done it. He finally stated that he was responsible. . . ." (Testimony of polygraph operator, R. 70.) Not until ten p. m., after petitioner had repeated his confession to other officers, did the police attempt to reach a United States Commissioner for the purpose of arraignment. Failing in this, they obtained petitioner's consent to examination by the deputy coroner, who noted no indicia of physical or psychological coercion. Petitioner was then confronted by the complaining witness and "[p]ractically every man in the Sex Squad," and in response to questioning by three officers, he repeated the confession. Between eleven-thirty p. m. and twelve-thirty a. m. he dictated the confession to a typist. The

next morning he was brought before a Commissioner. At the trial, which was delayed for a year because of doubt about petitioner's capacity to understand the proceedings against him, the signed confession was introduced in evidence.

The case calls for the proper application of Rule 5 (a) of the Federal Rules of Criminal Procedure, promulgated in 1946, 327 U. S. 821. That Rule provides:

> "(a) APPEARANCE BEFORE THE COMMISSIONER. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

This provision has both statutory and judicial antecedents for guidance in applying it. The requirement that arraignment be "without unnecessary delay" is a compendious restatement, without substantive change, of several prior specific federal statutory provisions. (*E. g.*, 20 Stat. 327, 341; 48 Stat. 1008; also 28 Stat. 416.) See Dession, The New Federal Rules of Criminal Procedure I, 55 Yale L. J. 694, 707. Nearly all the States have similar enactments.

In *McNabb* v. *United States*, 318 U. S. 332, 343–344, we spelled out the important reasons of policy behind this body of legislation:

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. . . . The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated

> process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime."

Since such unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of "the third degree," the Court held that police detention of defendants beyond the time when a committing magistrate was readily accessible constituted "wilful disobedience of law." In order adequately to enforce the congressional requirement of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention.

In *Upshaw* v. *United States*, 335 U. S. 410, which came here after the Federal Rules of Criminal Procedure had been in operation, the Court made it clear that Rule 5 (a)'s standard of "without unnecessary delay" implied no relaxation of the *McNabb* doctrine.

The requirement of Rule 5 (a) is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforce-

ment. Provisions related to Rule 5 (a) contemplate a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate. Rule 4 (a) provides: "If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue. . . ." Rule 4 (b) requires that the warrant "shall command that the defendant be arrested and brought before the nearest available commissioner." And Rules 5 (b) and (c) reveal the function of the requirement of prompt arraignment:

> "(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.
>
> "(c) PRELIMINARY EXAMINATION. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it,

> the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules."

The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.

The circumstances of this case preclude a holding that arraignment was "without unnecessary delay." Petitioner was arrested in the early afternoon and was detained at headquarters within the vicinity of numerous committing magistrates. Even though the police had ample evidence from other sources than the petitioner for regarding the petitioner as the chief suspect, they first questioned him for approximately a half hour. When this inquiry of a nineteen-year-old lad of limited intelligence produced no confession, the police asked him

to submit to a lie-detector test. He was not told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent and "that any statement made by him may be used against him." After four hours of further detention at headquarters, during which arraignment could easily have been made in the same building in which the police headquarters were housed, petitioner was examined by the lie-detector operator for another hour and a half before his story began to waver. Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him.

We cannot sanction this extended delay, resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard. In every case where the police resort to interrogation of an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him. Against such a claim and the evil potentialities of the practice for which it is urged stands Rule 5 (a) as a barrier. Nor is there an escape from the constraint laid upon the police by that Rule in that two other suspects were involved for the same crime. Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

Reversed and remanded.

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