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# CONSTITUTIONAL LAW-DUE PROCESS OF LAW-ADMISSIBILITY OF CONFESSIONS UNDER THE FOURTEENTH AMENDMENT

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## COMMENTS

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ADMISSIBILITY OF CONFESSIONS UNDER THE FOURTEENTH AMENDMENT—The Supreme Court announced in 1936 that under certain circumstances the admission of a confession into evidence by a state court could amount

to a denial of due process as guaranteed by the Fourteenth Amendment.[1] Since that time there has been an increasing number of appeals seeking reversal of a conviction upon that ground and an expansion by the Court of the types of factual situations which will render a confession inadmissible.[2] That this expansion reached its apex with the case of *Watts v. Indiana*[3] and companion cases[4] decided in 1949 appears probable in the light of a recent denial of certiorari[5] on facts similar to the *Watts* case.[6] Considering this factor and also the intervening change in court personnel,[7] it seems appropriate to re-examine the issue of admissibility of confessions under the Fourteenth Amendment.

## *I. Theoretical Bases of Exclusion*

When reversing a trial court conviction for error in the admission of a confession into evidence, the Supreme Court usually assigns the reason that the confession was not made voluntarily.[8] In order to understand this test, i. e., to know when a confession will be deemed voluntary, it is necessary to probe beneath the facts which give rise to an inference of coercion and to examine the underlying theory. This is true because three distinct concepts seem to be merged in the term "involuntary," viz., (1) an involuntary confession is unreliable; (2) a con-

[1] Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936). The defendants, uneducated Negroes, were subjected to the most brutal forms of violence and torture. The convictions were reversed.

[2] In Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921 (1944), the conviction was reversed because the defendant was relentlessly interrogated in a situation "inherently coercive." In Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302 (1948), five hours of questioning was held to render inadmissible the confession of a fifteen-year-old Negro boy. See McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 TEX. L. REV. 239 (1946).

[3] 338 U.S. 49, 69 S.Ct. 1347 (1949). See 25 IND. L.J. 76 (1949); 1 SYRACUSE L. REV. 313 (1950); 25 NOTRE DAME LAWYER 164 (1949).

[4] Turner v. Pennsylvania, 338 U.S. 62, 69 S.Ct. 1352 (1949) and Harris v. South Carolina, 338 U.S. 68, 69 S.Ct. 1354 (1949).

[5] Agoston v. Pennsylvania, 340 U.S. 844, 71 S.Ct. 9 (1950).

[6] The Court was explicit in denying that a refusal of certiorari indicates any opinion as to the merits of the case. However, there was a vigorous dissent by Justice Douglas, which would indicate that the merits were considered if not decided.

[7] Justice Murphy died on July 19, 1949; Justice Clark took the oaths of office on August 24, 1949. Justice Rutledge died on Sept. 10, 1949; Justice Minton took the oaths of office Oct. 12, 1949.

[8] Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347 (1949); Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302 (1948); Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781 (1945); Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921 (1944); Ward v. Texas, 316 U.S. 547, 62 S.Ct. 1139 (1942); White v. Texas, 310 U.S. 530, 60 S.Ct. 1032 (1940); Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472 (1940); Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936). Confessions were held to be voluntary in Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208 (1944) and in Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280 (1941).

fession should not be admitted in evidence if extorted from the suspect in violation of the principles against self-incrimination; and (3) a confession which is the product of illegality in procedure should not be utilized as evidence.

*A. The Trustworthiness Theory.* Professor Wigmore is the outstanding proponent of the theory that confessions are to be excluded when elicited under conditions which are likely to produce a false confession.[9] It is urged that judicial experience demonstrates that in certain circumstances—usually described as a promise or a threat[10]—a person may falsely admit guilt. Thus, when these circumstances are present, the confession is not trustworthy and should be excluded for lack of probative value.

This theory of exclusion has found some judicial expression by the Supreme Court. In *Haley v. Ohio,*[11] Justice Burton said that the sole issue was credibility. Justice Jackson, concurring in *Watts v. Indiana,*[12] further elucidated this view saying:

> "Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body."

The use of the term "involuntary" to denote the principle of exclusion because of untrustworthiness has been criticized by Professor Wigmore.[13] It is a confusing word since all conscious verbal utterances are and must be voluntary,[14] and it rings of the privilege against self-in-

[9] 3 WIGMORE, EVIDENCE §822 (1940).

[10] 3 WIGMORE, EVIDENCE §825 (1940). Wigmore disapproves of this rule of thumb since it is not made to depend upon the measure of the force which the threat or promise might have in causing falsity of confession.

[11] 332 U.S. 596, 68 S.Ct. 302 (1948).

[12] 338 U.S. 49 at 59-60, 69 S.Ct. 1347 (1949).

[13] 3 WIGMORE, EVIDENCE §826, §843 (1940). "The first objection to this test is of course (1) that the fundamental question for confessions is whether there is any danger that they may be untrue and that there is nothing in the mere circumstance of compulsion to speak in general . . . which creates any risk of untruth. (2) Another argument against it is that the privilege against self-crimination assumes . . . in its very existence that statements made without using it are admissible. . . . (3) There is, however, a third way of dealing with this doctrine; and that is to accept its principle—*i.e.* that a statement not voluntary is to be excluded, irrespective of its truth or falsity,—but to deny that there can be any compulsion in the mere facts of custody . . . because the person is always at liberty to refuse to speak." 3 WIGMORE, EVIDENCE 285-286 (1940).

[14] Justice Jackson dissenting in Ashcraft v. Tennessee, 322 U.S. 143 at 156, 64 S.Ct. 921 (1944), said that arrest itself is inherently coercive, and so is detention. This does not of itself make it bad. *Accord,* 3 WIGMORE, EVIDENCE §824 (1940).

crimination.[15] However, it is this inapt shorthand term which is ordinarily applied by the courts as the test of admissibility, and usually, without reference to the question whether the utterance was so "involuntary" as to create a fair risk of falsity.[16]

*B. The Privilege Against Self-Incrimination Theory.* Although the distinction between the privilege against self-incrimination as contained in the Fifth Amendment[17] and the rule of exclusion which renders some confessions inadmissible in evidence under the Fourteenth Amendment[18] is clearly recognized by the Supreme Court,[19] there is much language which hints of some kind of a relationship between the two.[20] The opinion of Justice Frankfurter in a recent case is illustrative:

> "Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.'"[21]

Professor Wigmore rejects this theory as a basis for the exclusion of confessions obtained through what is popularly known as "third degree" methods.[22] He contends that the two theories are distinct— historically[23] and in application.[24] There are few who would deny this asser-

[15] The privilege against self-incrimination protects against a compulsory disclosure in certain circumstances. Thus, in speaking of this privilege, judges often use the phrase "involuntary confession."

[16] Cf. 3 WIGMORE, EVIDENCE §826 (1940).

[17] U.S. CONST., Amendment 5 provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[18] See note 1 supra.

[19] Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14 (1908); Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672 (1947).

[20] See McCormick, "The Scope of Privilege in the Law of Evidence," 16 TEX. L. REV. 447 at 451-457 (1938).

[21] Watts v. Indiana, 338 U.S. 49 at 54, 69 S.Ct. 1347 (1949). See also Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280 (1941) where Justice Roberts, speaking for the majority, said that the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.

[22] 3 WIGMORE, EVIDENCE §823 (1940); 8 WIGMORE, EVIDENCE §2266 (1940).

[23] ". . . the history of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents. . . ." 8 WIGMORE, EVIDENCE 387 (1940). See 3 WIGMORE, EVIDENCE §818 and 8 WIGMORE, EVIDENCE §2250 (1940).

[24] "(a) The confession-rule is broader, because it may exclude statements which are obtained without compulsion; (b) Where the privilege is waived or not claimed, the confession-rule may still operate to exclude; . . . (d) Where testimony, though given under oath, does not violate the confession-rule, it may still involve a violation of the privilege; (e) The privilege applies to witnesses as such, in civil and in criminal cases, but the confession-rule is concerned only with party-defendants in criminal cases. . . ." 8 WIGMORE, EVIDENCE 387 (1940).

tion, but the repetition of statements with overtones of privilege concepts is at least indicative of a feeling that the two exclusionary rules have much in common.[25]

*C. Protection Against Illegality in Procedure Theory.* The purpose of an arrest is to take a person suspected of a crime into custody in order that he may be present to answer a specific charge.[26] It is ordinarily provided that the suspect must be taken before a committing magistrate promptly, or without unreasonable delay, after arrest.[27] When a suspect is arrested and interrogated by enforcement officials after a reasonable time for arraignment has expired, it has been suggested that any confession obtained during the period of unlawful detention should be excluded without regard to the voluntary nature of the confession.[28] The purpose of such a rule is to prevent police misconduct.

Use of exclusionary rules of evidence to promote this objective has been severely criticized by most authorities.[29] The foundation of this criticism is the lack of a necessary relationship between police abuses and the trustworthy character of the confession.[30] Upon the assumption that confessions are excluded only when there is likelihood of falsity, this criticism is sound.[31] However, if exclusion is viewed from the privilege standpoint, the privilege may well be extended to include protection against police abuses resulting in a confession. Recognition of a privilege against the use of the confession would provide the per-

[25] "It well may be that the adherence of the courts to this form of statement of the confession-rule in terms of 'voluntariness' is prompted not only by a liking for its convenient brevity, but also by a recognition that there is an interest here to be protected closely akin to the interest of a witness or of an accused person which is protected by the privilege against compulsory self-crimination. . . . It is significant that the shadow of the rack and the thumbscrew was part of the background from which each rule emerged." McCormick, "The Scope of Privilege in the Law of Evidence," 16 TEX. L. REV. 447 at 452-453 (1938). See 3 WIGMORE, EVIDENCE §§856-859 (1940).

[26] "The purpose of arrest, under our law, is not the sequestration of a suspected person or his interrogation, but the insurance of his responding to a criminal charge." 11 U.S. COMMISSION ON LAW OBSERVANCE (Wickersham Commission), "Lawlessness in Law Enforcement" 33 (1931). For a lucid summary of the rules governing arrest see, Waite, "The Law of Arrest," 24 TEX. L. REV. 279 (1946). See also DAX AND TIBBS, ARREST, SEARCH AND SEIZURE (1946).

[27] 2 R.C.L. 466 (1914). This is largely a matter of statute. It is ordinarily provided that the person arrested be produced before a magistrate "promptly" or "forthwith" or "without delay."

[28] See Civil Rights Committee of the American Bar Association, "Memorandum on the Detention, etc.," pp. 17 et seq. (1944).

[29] 42 MICH. L. REV. 679 and 909 (1944); 3 WIGMORE, EVIDENCE 318-320 (1940).

[30] Professor Waite urges against freeing the criminal in order to discipline law enforcement officers. See 42 MICH. L. REV. 679 and 909 (1944).

[31] The fact that the police have interrogated or have failed promptly to arraign the suspect does not per se mean that the confession was coerced although it may be strongly suggestive of such a conclusion.

son arrested an effective remedy for violations of the right to prompt arraignment and the right to be free from abusive interrogation.[32]

The Supreme Court has often denied enforcement agencies the use of the fruits of their illicit methods. Justice Douglas contended that this principle is applicable to confessions obtained during an unlawful detention in *Watts v. Indiana*:

> "We should unequivocally condemn . . . [detention without arraignment] and stand ready to outlaw . . . any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country."[33]

## *II. Application of the Bases of Exclusion*

The extent of interference with state law enforcement practice varies according to which of the three bases of exclusion is adopted. Therefore, it is important to consider the scope of review and the nature of the evil sought to be remedied by exclusion of certain confessions.

*A. Scope of Review.* If the trustworthiness theory is adopted, the sole issue becomes one of credibility. Thus the finding of the trial court and jury that the confession was voluntary becomes entitled to great weight since they are in a position to observe the behavior of the witnesses. The issue on appeal to the Supreme Court is whether there was substantial evidence upon which the trial court and jury might reasonably have made a finding of voluntariness.[34]

Review under the theory of privilege seems to be more extensive. The fact of voluntariness, although primarily for state determination, is determinative of a constitutional right. The state court's finding is accepted only so far as is necessary to resolve a conflict in the testimony concerning the coercion. The effect of the activities alleged on appeal

[32] See 48 MICH. L. REV. 1028 (1950). See also the concurring opinion of Justice Frankfurter in Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302 (1948), and the dissenting opinion of Justice Douglas in Agoston v. Pennsylvania, 340 U.S. 844, 71 S.Ct. 9 (1950). Cf. 3 WIGMORE, EVIDENCE 319-320 (1940) and 1949 Supp., §851 (1949). See Inbau, "The Confession Dilemma in the United States Supreme Court," 43 ILL. L. REV. 442 (1948).

[33] 338 U.S. 49 at 57, 69 S.Ct. 1347 (1949).

[34] See the dissenting opinion of Justice Burton in Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302 (1948). Chief Justice Vinson and Justices Reed and Jackson concurred. These same four justices dissented in Turner v. Pennsylvania, 338 U.S. 62, 69 S.Ct. 1352 (1949) and in Harris v. South Carolina, 338 U.S. 68, 69 S.Ct. 1354 (1949) and all except Justice Jackson dissented in Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347 (1949).

to have coerced the confession is for the Supreme Court to determine anew.[35]

Penetrating even deeper into state procedural practices is the rule of exclusion based upon illegality leading to the confession. This rule would seem to require reversal of the conviction on the ground that state procedure must measure favorably to a standard set by the Supreme Court.[36] For this reason it is of greater threat to the delicate balance between state and federal powers.

*B. Nature and Extent of Abuses by Law Enforcement Officials.* The Wickersham Commission submitted an extended report to President Hoover on the subject of "Lawlessness in Law Enforcement" in 1931.[37] The report indicates that, "the employment of methods which inflict suffering, physical or mental, upon a person, in order to obtain . . . information about a crime"[38]—or "third degree"—is widespread, and that detentions in violation of prompt arraignment statutes and detentions incommunicado are common.[39] These abuses of the administrative process are likely to fall on the poor, the uninfluential, the racial minorities, and those of subnormal mentality.[40] Nor is the "third degree" limited to the obviously guilty or to those eventually found guilty.[41]

Several reasons have been advanced in justification of the use of "third degree" and unlawful detention. It has been argued that these methods are necessary to obtain the facts.[42] The criminal must be

[35] See the opinion of Justice Frankfurter in Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347 (1949).

[36] The state law respecting length of time within which a suspect must be taken before the committing magistrate could not bind the Supreme Court in its determination of whether the suspect had been accorded due process of law, but state laws are suggestive of a standard of fairness.

[37] 11 U.S. COMMISSION ON LAW OBSERVANCE (Wickersham Commission), "Lawlessness in Law Enforcement" (1931).

[38] This is the definition of "third degree" adopted by the Commission. See p. 3 of the report.

[39] 11 U.S. COMMISSION ON LAW OBSERVANCE (Wickersham Commission), "Lawlessness in Law Enforcement," p. 3 (1931).

[40] Chapter 3, pp. 156-161, of the report states that of the 106 appellate cases, 6 involved women or girls. Of the 36 appellate decisions in which an age was given, in 23 the victim was under 25. The field investigators reported that "third degree" practices were particularly harsh in the case of Negroes. Of the 106 appellate cases, 7 involved mental defectives. The likelihood of abuse is less when the prisoner is in contact with an attorney. The poor and uninfluential are less apt to be so represented. Five Supreme Court decisions have involved Negroes.

[41] 11 U.S. COMMISSION ON LAW OBSERVANCE (Wickersham Commission), "Lawlessness in Law Enforcement," pp. 161-164 (1931).

[42] Id. at pp. 174-176. The criminal law enforcement record of Great Britain is very good and in that country answers to questions put by an officer to a person in custody are not admissible. See 3 WIGMORE, EVIDENCE 292 (1940).

persuaded to talk, and he must be kept away from his lawyer who will either advise him to remain silent or will secure his release.[43] It has also been suggested that lax and inefficient prosecutors require the police to build up a solid case prior to arraignment or see the prisoner elude conviction and perhaps even prosecution.[44] In addition, arrests must in some cases be secret to permit the rest of the "gang" to be apprehended; and organized criminals cannot be detected unless one of the group can be persuaded to give information about the others.[45]

In rebuttal it is said that detention and interrogation of suspects for these purposes encourages inadequate investigation by the police and prosecutor since a confession makes their task so much simpler.[46] Also, these practices impair the efficient administration of criminal justice in the courts by raising collateral issues concerning the admissibility of the confession,[47] and lower public esteem and confidence in the law enforcement system.[48]

Other arguments to sustain exclusion of confessions have been built around certain substantive rights contained in state statutes and constitutions, e. g., the accused's right to a writ of habeas corpus is unlawfully suspended,[49] his right to bail is denied,[50] and his right to be free from being compelled to give evidence against himself is violated.[51] These arguments appear to have merit from the standpoint of an effective guarantee of such rights. However, it has not as yet been held that detention for an unlawful length of time or coercive interrogation per se raise issues under the Fourteenth Amendment,[52] even though

[43] If efficient law enforcement is impossible so long as these rights exist, they should be removed by statute or constitutional amendment rather than simply ignored or abused.

[44] The solution indicated would seem to be better prosecution, not more violent arrest and detention.

[45] It is significant that no gangs have been involved in cases before the Supreme Court under the Fourteenth Amendment. The Fourteenth Amendment cases have involved non-professional crimes committed by unorganized groups and usually single individuals.

[46] 11 U.S. COMMISSION ON LAW OBSERVANCE (Wickersham Commission), "Lawlessness in Law Enforcement" 187-189 (1931).

[47] Id. at 189-190.

[48] There is also the grave danger of false confessions. This objection was considered earlier under the theoretical bases of exclusion.

[49] The federal right to a writ of habeas corpus extends to a prisoner only when he is in custody in violation of the Constitution or a law or treaty of the United States. 28 U.S.C. (1948) §2241. Thus it is necessary to show that the detention prior to trial is a violation of the Fourteenth Amendment in order to obtain a release. It would seem that in a harsh case, the writ might extend. The prisoner is ordinarily granted adequate pre-trial protection by the state courts.

[50] Practically all states guarantee the right to bail.

[51] See note 19 supra.

[52] If we accept the view of Justice Black that the Fourteenth Amendment incorporates the first eight amendments as expressed in Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672 (1947), it could be argued that detention incommunicado is violative of the right to

there is just as much a deprivation of liberty as there is when an accused is sentenced under a verdict resting upon his coerced confession.

## III. *Conclusion*

It is apparent from the type of argument which any consideration of "third degree" and unlawful detention raise that the problem is essentially local in character.[53] It seems that the Supreme Court should, therefore, reverse a conviction only when the trial court and state appellate court show some want of proper standards of decision which is of sufficient gravity to amount to a fundamental unfairness.[54] This fundamental unfairness is found when a defendant faces forfeiture of his life[55] through a verdict resting upon insufficient evidence, this insufficiency being due to the fact that an untrustworthy confession was admitted in evidence and relied upon by the jury—at least in part.[56]

That this is the trend of recent decisions in the Supreme Court is evidenced somewhat by the recent denial of certiorari[57] on facts similar[58] to the *Watts* case.[59] It is believed that the change in Court per-

counsel. However, even if it is conceded that this right is protected under the Fourteenth Amendment, the most sweeping dicta goes no further than to assert that the right exists from the time of arraignment. Powell v. Alabama, 287 U.S. 45 at 69, 53 S.Ct. 55 (1932). Therefore, it seems that denial of counsel from the moment of arrest is but a factor to be weighed in considering whether the confession was the product of coercion. Cf. Ward v. Texas, 316 U.S. 547, 62 S.Ct. 1139 (1942), where Justice Byrnes asserts that detention incommunicado without advice of friends or counsel is a sufficient cause for reversal.

[53] "The real remedy lies in the will of the community. If the community insists upon higher standards in police, prosecutors, and judges, the third degree will cease to be a systematic practice." 11 U.S. COMMISSION ON LAW ENFORCEMENT (Wickersham Commission), "Lawlessness in Law Enforcement" 191 (1931). See Kauper, "Judicial Examination of the Accused—A Remedy for the Third Degree," 30 MICH. L. REV. 1224 (1932).

[54] "If the right of interrogation be admitted, then it seems to me that we must leave it to [the] trial judges and juries and state appellate courts to decide individual cases, unless they show some want of proper standards of decision." Jackson concurring in Watts v. Indiana, 338 U.S. 49 at 61, 69 S.Ct. 1347 (1949).

[55] The confession cases which have reached the Supreme Court under the Fourteenth Amendment have involved capital crimes.

[56] In Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936), Chief Justice Hughes said that the trial is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence.

[57] Agoston v. Pennsylvania, 340 U.S. 844, 71 S.Ct. 9 (1950).

[58] The defendant was arrested on Dec. 17, 1947. He was questioned for three hours at that time, taken to dinner, and questioned until 11:30 p.m. He was detained for the night, taken to lunch on Dec. 18, and questioned in the cellar of the police station until 5:00 p.m. He then said that he was willing to talk and was taken to the council room. He was showed his bloody clothing and became hysterical. A doctor was summoned. At 10:00 p.m. he confessed the shooting. He was arraigned on the 21st. Held, the confession is admissible since it was voluntary. Commonwealth v. Agoston, 364 Pa. 464, 72 A. (2d) 575 (1950).

[59] 338 U.S. 49, 69 S.Ct. 1347 (1949).

sonnel since the *Watts* case[60] contributed in some measure to the Court's refusal to grant certiorari. On these premises, the conclusion seems justified that the Supreme Court is moving to a position of greater deference to the state court's finding of voluntariness with respect to confessions.[61] This position is well taken for it accords with the trustworthiness theory of exclusion and recognizes that state appellate benches, too, are normally possessed of refined concepts of "civilized standards."

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[60] Justices Murphy and Rutledge concurred in the opinion of Justice Frankfurter in Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347 (1949), in reversing the conviction. See United States v. Rabinowitz, 339 U. S. 56, 70 S.Ct. 430 (1950) where Justice Minton, writing for the majority, extended the definition of "reasonable" to sustain a conviction attacked under the Fourth Amendment. Justices Clark, Reed, Burton, and the Chief Justice joined.

[61] See note 34 supra.