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Evidence—Admissibility of an Offer to Plead Guilty Made for Bargaining Purposes: *People v. Hamilton*, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963), *cert. denied*, 389 U.S. 921 (1967)

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EVIDENCE—Admissibility of an Offer to Plead Guilty Made for Bargaining Purposes—*People v. Hamilton*, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963), *cert. denied*, 389 U.S. 921 (1967).

INTRODUCTION

Defendant was charged with the murder of his ex-wife and one Lorenzo Bernard, who, at the time of the killings, were together in defendant's wife's bedroom under compromising circumstances. Estella, the defendant's wife, was shot by the defendant. However, the cause of her death was a combination of the gunshot wound and the laceration of her neck when she either fell or was pulled through the glass pane of the bedroom window. Lorenzo Bernard died of gunshot wounds inflicted by the defendant. Defendant contended that he killed Bernard in self-defense, and that Estella's death was accidental.¹

While defendant was in custody he sent a note to an inspector in the district attorney's office requesting a meeting. The inspector met and talked with the defendant in a room on the mezzanine of the county jail. Faced with a possible death penalty, the defendant said something to the effect that he would plead guilty upon certain conditions to be met by the prosecution's office. In short he attempted to plea bargain on his own behalf.² The inspector was allowed to testify and recount this offer of compromise to the jury. Before the inspector's evidence was introduced, but while the inspector was on the stand, the defendant asked for an offer of proof by the prosecutor out of the jury's presence. The request was denied. Defendant's motion to strike the evidence, after it had been admitted, was also denied.

In his first trial the petitioner was sentenced to death on both counts of murder. The California Supreme Court reversed the conviction.³

¹ Defendant claimed that he had gone to Estella's home at her request but he was detained and that Bernard arrived in the interim. Because of Bernard's presence Estella allegedly did not want defendant to enter. But defendant, in a fit of rage, kicked in the bedroom window and stepped inside. Bernard attacked him with a knife and defendant shot Bernard in self-defense. He also claimed that in the scuffle Estella was accidentally shot and fell into the broken window.

² Defendant was apprehended on May 21, 1959. It appears that he was not represented by counsel at the time he made the offer to plead guilty to the inspector. However, *Johnson v. New Jersey*, 384 U.S. 719 (1966), held that neither *Escobedo v. Illinois*, 378 U.S. 478 (1964), nor *Miranda v. Arizona*, 384 U.S. 436 (1966) were to be applied retroactively.

³ *People v. Hamilton*, 55 Cal. 2d 881, 362 P.2d 473, 13 Cal. Rptr. 649 (1961).

At his second trial he again was found guilty on both counts of murder and was sentenced to death on one and life imprisonment on the other. The California Supreme Court upheld the convictions and the life sentence, but reversed the death penalty. Subsequently, petitioner was sentenced to life imprisonment on both counts. Two subsequent habeas corpus petitions filed in the California Supreme Court were denied. Petitioner filed a writ of certiorari with the Supreme Court of the United States which was denied with three justices filing a dissenting opinion.⁵

California uses a bifurcated method of criminal trial in cases in which the penalty is in the alternative of death or life imprisonment. Using this procedure, evidence concerning the guilt or innocence of the accused is presented and a verdict is rendered solely on that issue. Then the penalty phase of the trial is commenced with the sole issue being that of punishment.⁶ The California court, in the last action, analyzed both the guilt phase of the trial and the penalty phase. The court concluded that although in the guilt phase several serious errors occurred, none warranted reversal, as the evidence overwhelmingly indicated the guilt of the defendant. However, in the penalty phase of the trial, the court was of the opinion that "very serious errors also occurred,"⁷ thus mandating a reversal of the death penalty. In view of the novelty of the two-stage trial and its apparent effectiveness,⁸ this casenote will first discuss the issues arising from the "guilt phase" of the trial and secondly, the issues arising from the "penalty

⁴ *People v. Hamilton*, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963).

⁵ *People v. Hamilton*, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963), *cert. denied*, 389 U.S. 921 (1967).

⁶ CAL. PEN. CODE § 190.1 (West Supp. 1967): "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty."

⁷ *People v. Hamilton*, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963).

⁸ The bifurcated trial approach is thought to be effective in that it somewhat relaxes the rules of evidence at the penalty phase of the trial and self-incrimination problems become less troublesome since the guilt issue has already been determined. This method works particularly well in insanity cases. In theory, at the penalty stage the defendant should no longer be concerned with incriminating himself since by statutory definition he has already been found guilty, thus theoretically the court has a free ear to hear any evidence which might work to mitigate the sentence.

stage." It will then articulate those issues which Justices Fortas, Douglas, and Marshall thought militated for the granting of certiorari. Fourth, this casenote will analyze the effect of this decision on the law as it exists today.

THE GUILT PHASE

Appellant claimed that it was error to allow the prosecution to introduce into evidence an offer of a compromise made by him to a member of the District Attorney's office prior to the trial.⁹ The California Supreme Court agreed.¹⁰

In discussing the reasons for this decision, the court conceded that *in absence of statute* the law in California was that an offer to plead guilty is admissible¹¹ in evidence as is also the case with a plea of guilty, later withdrawn;¹² the theory being that by his plea or offer to plead guilty the defendant has made an admission of guilt. However, the court cites the California Penal Code sections 1192.1 through 1192.4 (enacted in 1955 and 1957) which sections, they hold, change the law in California.¹³ Via these provisions the

⁹ *People v. Hamilton*, 60 Cal. 2d 105, 112, 383 P.2d 412, 415-16, 32 Cal. Rptr. 4, 8 (1963).

¹⁰ *Id.* at 113, 383 P.2d at 416, 32 Cal. Rptr. at 8.

¹¹ *People v. Hamilton*, 60 Cal. 2d 105, 113, 383 P.2d 412, 416, 32 Cal. Rptr. 4, 8 citing *People v. Boyd*, 67 Cal. App. 292, 302-03, 227 P. 783, 786-87 (1924); *People v. Cooper*, 81 Cal. App. 2d 110, 117-18, 183 P.2d 67, 72 (1947).

¹² *People v. Hamilton*, 60 Cal. 2d 105, 113, 383 P.2d 412, 416, 32 Rptr. 4, 8 citing *People v. Ivy*, 163 Cal. App. 2d 436, 329 P.2d 505 (1958).

¹³ CAL. PEN. CODE § 1192.1 (West Supp. 1967): "Upon a plea of guilty to an information or indictment accusing the defendant of a crime divided into degrees when consented to by the prosecuting attorney in open court and approved by the court, such plea may specify the degree thereof and in such event the defendant cannot be punished for a higher degree of the crime than the degree specified."

CAL. PEN. CODE § 1192.2 (West Supp. 1967): "Upon a plea of guilty before a committing magistrate as provided in Section 859a of this code, to a crime divided into degrees, when consented to by the prosecuting attorney in open court and approved by such magistrate, such plea may specify the degree thereof and in such event, the defendant cannot be punished for a higher degree of the crime than the degree specified."

CAL. PEN. CODE § 1192.3 (West Supp. 1967): "Upon a plea of guilty to an information or indictment for which the jury has, on a plea of not guilty, the power to recommend, the discretion of imposing, or the option to impose a certain punishment, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty. Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant

court reasoned that if a plea of guilty to a lesser degree of crime is not admissible, it would be absurd to argue that an offer to plead guilty to a lesser degree is.¹⁴ In its analysis of this issue the court fortified its position by reasoning that the obvious purpose of sections 1192.1 through 1192.4 is to promote the public policy of encouraging the settlement of criminal cases without the necessity of a trial.¹⁵ The court also analogized offers to plead guilty to a lesser charge to offers of compromise in civil cases which in California have been inadmissible for many years.¹⁶ This issue will be dealt with more extensively when Justice Fortas' dissenting opinion in the denial of certiorari is reviewed.

The second major issue concerning the guilt phase of the trial revolved around numerous instances of misconduct on the part of the prosecution.¹⁷ The petitioner assigned as error overemphasis of the prosecution's theory,¹⁸ an improper attempt to impeach his own witness,¹⁹ and that the prosecutor went far afield to discredit witnesses in question with no attempt to prove the truth of the matters asserted in the question.²⁰ The petitioner also assigned as error that the court exerted undue influence on the jury by the use of repetitive instructions.²¹ The California Supreme Court set out its displeasure with the actions of the prosecution. After pointing out how often it had been called upon to exercise the course of

cannot be sentenced to a punishment more severe than that specified in the plea."

CAL. PEN. CODE § 1192.4 (West Supp. 1967): "If the defendant's plea of guilty pursuant to Section 1192.1, 1192.2 or 1192.3 of this code be not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The pleas so withdrawn may not be received in evidence in any criminal, civil or special action or proceeding of any nature, including proceedings before agencies, commissions, boards and tribunals."

¹⁴ *People v. Hamilton*, 60 Cal. 2d 105, 114, 383 P.2d 412, 416, 32 Cal. Rptr. 4, 8 (1963).

¹⁵ *Id.* at 114, 383 P.2d at 416, 32 Cal. Rptr., at 8 citing *C. McCORMICK, EVIDENCE* (1954) § 251, p. 543.

¹⁶ See CAL. EVID. CODE § 1154 (West 1965) and CAL. EVID. CODE § 1152 (West Supp. 1967).

¹⁷ "It would be an impeachment of the legal learning and intelligence of counsel for the People to intimate that he did not know that such conduct on his part was wholly unjustifiable and calculated to unduly prejudice the jury against the accused. To indulge a contrary view is to ignore human experience and the dictates of common sense." *People v. Hamilton*, 60 Cal. 2d 105, 119-20, 383 P.2d 412, 420, 32 Cal. Rptr. 4, 12 (1963).

¹⁸ *Id.* at 118-19, 383 P.2d at 419-20, 32 Cal. Rptr. at 11-12.

¹⁹ *Id.* at 114, 383 P.2d at 417, 32 Cal. Rptr. at 9.

²⁰ *Id.* at 116, 383 P.2d at 418, 32 Cal. Rptr. at 10.

²¹ *Id.* at 118, 383 P.2d at 419, 32 Cal. Rptr. at 11.

action applicable in the *Hamilton* case,²² the court invoked the applicable article of the California Constitution,²³ and held that "the errors committed on this phase of the trial, whether considered singly or in combination, were of minor import when viewed in the light of the overwhelming evidence that appellant committed these premeditated murders."²⁴ It was obvious that the court was quite displeased with errors committed and the way the prosecution handled the trial. The court strongly inferred that in the future, such abuses by the prosecution would be handled more severely.

THE PENALTY PHASE

If the court went out of its way not to reverse the guilt phase of the trial, this was not the case in the penalty phase. Here the court not only found the errors serious, but also prejudicial.²⁵

The first error concerns the actions of the trial court in discharging one of the regular jurors and substituting an alternate during the trial of the penalty issue.

Since the trial court felt that the trial would be a protracted one, two alternate jurors were selected and seated near the regular jurors. The trial of the issue of guilt proceeded with the regular twelve jurors and a verdict of first degree murder resulted. The alternates *did not* participate. During the "guilt" deliberation the jury twice returned for further instructions on which occasion several jurors asked questions indicating that they were giving serious consideration to a verdict of second degree murder.

A subsequently replaced juror was among this group. In the course of the trial this juror mentioned that during her lunch recess she had been casually reading the California Penal Code.²⁶ In the following recess the prosecution moved to dismiss this juror on the ground that: (1) she had read and misunderstood the Penal Code; (2) she had formed certain views which she would retain and urge on the other jurors; and (3) she had disclosed her opposition to a verdict which would result in the death penalty.²⁷ The

²² *Id.* at 120, 383 P.2d at 420, 32 Cal. Rptr. at 12.

²³ CAL. CONST. art. VI, § 4½.

²⁴ *People v. Hamilton*, 60 Cal. 2d 105, 121, 383 P.2d 412, 421, 32 Cal. Rptr. 4, 13 (1963).

²⁵ *Id.* at 122, 383 P.2d at 421, 32 Cal. Rptr. at 13.

²⁶ An interrogation of the juror by the judge in his chambers disclosed the fact that the juror had read the California Penal Code in its entirety during the noon recess throughout the trial because she felt that a person should be as well informed as possible.

²⁷ *Id.* at 123, 383 P.2d at 422, 32 Cal. Rptr. at 14.

court replaced the juror with one of the alternate jurors.²⁸ The applicable code section sets forth four distinct grounds for discharging a juror and submitting an alternate.²⁹ The defense contended that the matters which resulted in the dismissal did not constitute "good cause" (as contemplated by the statute) in that: reading the Penal Code would not indicate that the juror is unable to perform her duty. Mere confusion caused by a prior reading of the code does not indicate that the juror has formulated an opinion as to what the law is or should be and it does not indicate that she had urged any preconceived views on other members of the jury. Furthermore, the defense contended that the court's discretion is not sufficiently broad to legitimately authorize the court to make any such determination from the facts; and finally that the legislative history of the section indicates a consistent refusal by the legislature to authorize unrestricted substitution.³⁰

The court agreed with the petitioner's contentions³¹ and distinguished a line of cases³² which held such a dismissal of a juror to be error but not prejudicial. The court reasoned that in the instant case the error *was* prejudicial in that the juror's dismissal was

²⁸ The court relied on CAL. PEN. CODE § 1089 (West Supp. 1967): "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefore, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box... as though he had been selected as one of the original jurors," for the necessary authority. (emphasis added).

²⁹ The four are (1) death, (2) illness, (3) a finding on good cause shown that the juror is unable to perform his duty, or (4) upon the juror's request. In the instant case obviously only one of the above grounds is applicable, namely number (3). CAL. PEN. CODE § 1089 (West Supp. 1967).

³⁰ *People v. Hamilton*, 60 Cal. 2d 105, 125, 383 P.2d 412, 423-24; 32 Cal. Rptr. 4, 15 (1963).

³¹ "There is merit in appellant's position. Certainly, the mere reading of the Penal Code, for the sole purpose of becoming better informed, cannot, without more, be either misconduct or an act which results in inability to perform the duties of a juror. If the juror had given any indication that she would substitute her knowledge (gained from reading the code) for the instructions of the court, or would convey such knowledge to the other jurors, then it might have been said that she was incapable of performing her duties. But there was no such indication." *Id.* at 125, 383 P.2d at 424, 32 Cal. Rptr. at 15.

³² See *People v. Howard*, 211 Cal. 322, 295 P. 333 (1930); *People v. Abbott*, 47 Cal. 2d 362, 303 P.2d 730 (1956); *People v. Taylor*, 139 Cal. App. 2d 490, 11 Cal. Rptr. 480 (1961); *People v. Green*, 47 Cal. 2d 209, 302 P.2d 307 (1956); and *In re Devlin*, 139 Cal. App. 2d 810, 294 P.2d 466 (1956).

favorable to the prosecution.³³ The court felt that this error alone might well warrant reversal, however, when they coupled this error with the cumulative effect of the other errors they felt that the sum total was clearly prejudicial.

Another important issue was whether or not the legislature in its provision for the type of evidence that may be presented during the penalty phase of a trial, intended to relax the ordinary rules of competency.³⁴ The court looked to *People v. Purvis*³⁵ which held that evidence of an earlier crime must meet the rules of admissibility governing proof of that crime or must be otherwise properly admissible in the penalty phase of a bifurcated trial.³⁶ The court concluded that the admission of evidence of extrajudicial admissions, allegedly made by petitioner, confessing the commission of, or participation in, prior crimes as to which no other evidence was produced was also error. The court summed up its quandary by stating:

Thus, on the penalty phase of the trial, serious and substantial errors were committed. The trial court erroneously removed a qualified juror who...had indicated some doubts as to whether the death penalty should be imposed. In addition, a considerable amount of inadmissible evidence was admitted, and the prosecutor was guilty of serious misconduct that must be held to have been intentional and premeditated. The errors as to the admissibility of evidence and misconduct all directly related to the character of the defendant. On the other hand, there is ample evidence that defendant was a man of bad character and had a long line of previous convictions. That evidence would have justified the jury in imposing the death penalty.

Under these circumstances were these errors prejudicial within the meaning of Article VI, section 4½, of the California Constitu-

³³ "While it has been said repeatedly, in the cases cited above, that a defendant is not entitled to be tried by a jury composed of any particular individuals, but only by a jury composed of qualified and impartial jurors, this does not mean that either side is entitled to have removed from the panel any qualified and acting juror who, by some act or remark made during the trial has given the impression that he favors one side or the other. It is obvious that it would be error to discharge a juror for such a reason, and that, if the record shows (as it does here), that, based on the evidence, that juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side." *People v. Hamilton*, 60 Cal. 2d 105, 128, 383 P.2d 412, 425, 32 Cal. Rptr. 4, 17 (1963).

³⁴ CAL. PEN. CODE § 190.1 (West 1956).

³⁵ 52 Cal. 2d 871, 881, 346 P.2d 22, 27 (1959).

³⁶ *People v. Hamilton*, 60 Cal. 2d 105, 130, 383 P.2d 412, 426, 32 Cal. Rptr. 4, 19 (1963).

tion? How should that article be applied to the penalty phase of the trial?³⁷

The court first concludes, in answering the above questions, that the proper test to use in the "guilt phase" is the "miscarriage of justice test" included within the California Constitution.³⁸ On the other hand the court had a harder time deciding what test to use in deciding the effect of errors on the penalty phase. They apply the strict test of "any substantial error occurring during the penalty phase of the trial that results in the death penalty, since it reasonably may have swayed a juror, must be deemed prejudicial."³⁹ The court reasons that:

But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error the death penalty would not have been imposed.⁴⁰

Thus, on the penalty phase of the trial the court held that the errors and misconduct were substantial and prejudicial and consequently they reversed the lower court.

THE DENIAL OF CERTIORARI

On October 23, 1967 the Supreme Court of the United States denied certiorari in *Hamilton v. California*.⁴¹ However, Justice Fortas filed a dissenting opinion in which Justice Marshall and Justice Douglas concurred. These Justices felt that there were some important issues to be decided.

³⁷ *Id.* at 136, 383 P.2d at 426, 32 Cal. Rptr. at 22. "Article VI, section 4½, of the Constitution (California) provides that a reversal shall not follow because of error 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" *Id.* at 135, 383 P.2d at 430, 32 Cal. Rptr. at 22.

³⁸ "That a miscarriage of justice should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Id.* at 136, 383 P.2d at 430, 32 Cal. Rptr. at 22.

³⁹ *Id.* at 136, 383 P.2d at 430, 32 Cal. Rptr. at 23.

⁴⁰ *Id.* at 136, 383 P.2d at 430, 32 Cal. Rptr. at 23.

⁴¹ *Cert. denied*, 389 U.S. 921 (1967).

The first issue which Fortas felt mandated resolution by the court was the admissibility of a plea made for the purpose of bargaining or compromise. He draws an analogy between the general rule in a civil suit where such evidence would not be admissible,⁴² no matter how little money is at stake.

Second, the opinion suggests that grave constitutional problems may be involved whenever such evidence is admissible. Accordingly, where the complaint is murder and the possible penalty is death, does not the admission of evidence of an offer to bargain seriously jeopardize the accused's right to a fair trial? The opinion also indicates that although the California Supreme Court agreed that it was error; they held that it was "harmless error," and hence the guilt conviction was not reversed.⁴³ The dissenters felt that the admission of this evidence was of critical importance to the trial and that it *could not* be considered harmless under the standards announced by the California Supreme Court in *Chapman v. State of California*.⁴⁴

Finally, the three justices would decide the issue of whether or not a separate hearing is required on the question of voluntariness when a prosecutor uses an offer to plead guilty as he would use

⁴² 4 J. WIGMORE, EVIDENCE §§ 1061-1062 (3d ed. 1940). See also Fed. R. Civ. P. 68; and 7 J. MOORE, FEDERAL PRACTICE §§ 68.01-68.06 (1966). In Nebraska, an offer to compromise or settle a disputed claim is privileged and inadmissible in an action upon that claim. However, for some unknown reason, this rule is qualified in that any offer of compromise, in order to fall within the exclusionary rule, must be one in which the offeror denies or only *hypothetically* assumes liability for the purpose of the offer in order to induce and effect a settlement. Express admission of existing liability, or the conceding of the existence of a fact, is admissible even though it is embraced in an offer of compromise. The deciding fact, according to the Nebraska Supreme Court, is "whether or not the party making the admission intended to concede a fact hypothetically in order to induce and effect a settlement, or to declare the existence of a fact." *Brown v. Hyslop*, 153 Neb. 669, 677, 45 N.W.2d 743, 748 (1951). Certainly, public policy dictates that settlement of controversy be encouraged. However, the existing law in Nebraska undermines this policy by inducing counsel, when in compromise negotiations, to talk only in "hypotheticals." For obvious policy reasons, Counsel should be free, if not encouraged, to carry on discussions concerning compromise without fear that such discussions could reflect adversely on their client's case. See also, NEB. REV. STAT. § 25-901 (Reissue 1964); *Callen v. Rose*, 47 Neb. 638, 66 N.W. 639 (1896); *Eldridge v. Hargreaves*, 30 Neb. 638, 46 N.W. 923 (1890); *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745, 73 N.W. 291 (1897); *Kierstead v. Brown*, 23 Neb. 595, 37 N.W. 471 (1888); *Wright v. Moore*, 53 Neb. 3, 73 N.W. 211 (1897).

⁴³ *Hamilton v. California*, cert. denied, 389 U.S. 921 n. 4 (1967).

⁴⁴ 386 U.S. 18 (1967).

a confession. They would also decide whether the procedures outlined in *Jackson v. Denno*⁴⁵ and *Sims v. State of Georgia*⁴⁶ are required.

There is some existing case law on whether or not admissions made either for bargaining purposes or against one's own interest are "confessions."⁴⁷ In *State v. Snell*,⁴⁸ a Nebraska case, defendant made a voluntary statement at a preliminary examination before a magistrate. The court held the statement admissible as an "admission" or a "confession" at the subsequent trial.

The cases involving admissibility of prior guilty pleas, offers to plea bargain, etc., are hopelessly in conflict.⁴⁹ But the trend, as evi-

⁴⁵ 378 U.S. 368 (1964).

⁴⁶ 385 U.S. 538 (1967). *Sims* provides that the trial judge must first determine if any confession was freely and voluntarily given before it is admitted to the jury. Also, when the confession is submitted to the jury after the trial judge has determined that it was freely and voluntarily given, the jury may give it absolutely no weight in determining the guilt or innocence of a defendant.

⁴⁷ See generally *Monroe v. United States*, 320 F.2d 277 (5th Cir. 1963); *Moreland v. United States*, 270 F.2d 887 (10th Cir. 1959); *Pugh v. State*, 42 Ala. App. 499, 169 So. 2d 27, (1964); *Roach v. State*, 39 Ala. App. 271, 97 So. 2d 837 (1957); *Williams v. State*, 214 Md. 143, 132 A.2d 605 (1957); *State v. Snell*, 177 Neb. 396, 128 N.W.2d 823 (1964).

⁴⁸ 177 Neb. 396, 128 N.W.2d 823 (1964). In this case, a patrolman was allowed to testify, over objection, that defendant had pleaded guilty to driving while under the influence of intoxicating liquor and leaving the scene of a personal injury accident. Specifically, the Nebraska Supreme Court held that: "Under the previous decisions of this court, the testimony in question would be admissible. A voluntary statement made by the defendant at a preliminary examination before a magistrate is admissible as an admission or confession at a subsequent trial. *Adams v. State*, 138 Neb. 613, 294 N.W. 396. Evidence that the defendant admitted that he was driving under the influence of intoxicating liquor at the time the accident occurred would be admissible as a circumstance tending to show a reason for not stopping at the scene of the accident." *Id.* at 400, 128 N.W.2d at 826-27. The Court reversed *Snell's* conviction however, holding that *White v. State of Maryland*, 373 U.S. 59 (1963) required that a defendant be represented by counsel when brought before a magistrate for a preliminary hearing. *Snell* was not represented by counsel at the hearing.

⁴⁹ See generally *Monroe v. United States*, 320 F.2d 277 (5th Cir. 1963); *Roach v. State*, 39 Ala. App. 271, 97 So. 2d 837 (1957); *State v. Downs*, 185 Kan. 168, 341 P.2d 957 (1959); *Commonwealth v. Devlin*, 335 Mass. 555, 141 N.E.2d 269 (1957); *Williams v. State*, 214 Md. 143, 132 A.2d 605 (1957); *State v. Jackson*, 221 Or. 315, 351 P.2d 439 (1960); *Goodlet v. Goodman*, 34 N.J. 358, 169 A.2d 140 (1961); *People v. Spitaleri*, 212 N.Y.S.2d 53, 9 N.Y.2d 168, 173 N.E.2d 35 (1961); *People v. Bevilacqua*, 170 N.Y.S.2d 423, 12 Misc. 2d 558 (1957); *Christesson v. State*, 172 Tex. Crim. 27, 353 S.W.2d 218 (1962).

denced by Justice Fortas' dissent,⁵⁰ may be towards not admitting them into evidence.

However, as mentioned before, Nebraska recently reaffirmed the admissibility of such evidence.⁵¹ Perhaps the problems as suggested by Justice Fortas and his companion dissenters foreshadow constitutional problems forthcoming in this area. Nebraska and other states which have interpreted these pre-trial admissions as confessions, might, in the near future, have to apply the *Jackson v. Denno*⁵² and *Sims v. Georgia*⁵³ safeguards.

CONCLUSION

California changed its common law when by statute it made attempts to plea bargain inadmissible.⁵⁴ It would be only naive, given the present status of our criminal justice system, to maintain that the practice of "plea bargaining" can, should, or will be eliminated in the near future.⁵⁵ Although the practice gives rise to serious problems,⁵⁶ there are important arguments for preserving it. Pragmatically, our already overtaxed criminal justice system simply cannot provide the number of judges, prosecutors, and defense counsel necessary to operate a system in which most defendants go to trial. Present programs to expand appointment of counsel for indigents promise to strain available resources for some

⁵⁰ *Hamilton v. California*, 389 U.S. 921 (1967) (dissenting opinion).
32 Cal. Rptr. 4 (1963).

⁵¹ *State v. Snell*, 177 Neb. 396, 128 N.W.2d 823 (1964).

⁵² 378 U.S. 368 (1964).

⁵³ 385 U.S. 538 (1967).

⁵⁴ CAL. PEN. CODE §§ 1192.1 and 1192.4 (West Supp. 1967).

⁵⁵ "The question of guilt or innocence is not contested in the overwhelming majority of criminal cases. A recent estimate is that guilty pleas account for 90% of all convictions; and perhaps as high as 95% of misdemeanor convictions. But the Commission has found it difficult to calculate with any degree of certainty the percentage of cases disposed of by guilty plea, since reliable statistical information is limited. Clearly it is very high." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967).

⁵⁶ A fundamental problem is the propriety of offering the defendant an inducement to surrender his right to a trial. There is always the possibility that the deal offered might be attractive enough to induce an innocent defendant to plead guilty because he felt the risk of going to trial was too high. Overburdened prosecutors may compromise cases which call for severe sanctions. The practice itself seems to arouse to a greater sense of unease and suspicion. Along with all of the above there is no judicial review of the propriety of the bargain, and no check of the amount of pressure exerted on the defendant to plead guilty. Finally, there is no guarantee that the judge will comply with the bargain. See, Task Force Reports: The Courts at 9, 10.

time to come. At best, our adversary system is an imperfect method of factfinding. Plea negotiation is an inherent facet of prosecutorial discretion, which discretion is vitally needed when one considers the myriad possible fact situations that could possibly fall under a particular statute or statutes.

This writer is of the view that the increasing use of the sixth amendment should somewhat ease this problem. Certainly, evidence of *defense counsel's* plea negotiation would not be admissible. Thus, when evidence is admitted of an offer to compromise made by an unrepresented indigent, along with discouraging defendant cooperation, aren't we adding insult to injury for had he been adequately represented, as is now constitutionally required, the issue wouldn't have arisen?⁵⁷

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⁵⁷ The Advisory Committee On The Criminal Trial of The American Bar Association Project On Minimum Standards For Criminal Justice has concluded that: "(a) A defendant should not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for appointment of counsel, until counsel has been appointed or waived. A defendant with counsel should not be required to enter a plea if his counsel makes a reasonable request for additional time to represent the defendant's interests. (b) A defendant without counsel should not be called upon to plead to a serious offense until a reasonable time, set by rule or statute, following the date he was held to answer. When a defendant without counsel tenders a plea of guilty or nolo contendere to a serious offense, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, set by rule or statute, following the date the defendant received the advice from the court required in section 1.4." A.B.A. Advisory Committee On The Criminal Trial, Standards Relating To Pleas Of Guilty Sec. 1.3 at 6, 7 (1967). The A.B.A. Project also concludes that: "Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings." *Id.*, Sec. 3.4 at 12.