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Abstracts of Recent Cases

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had concerned a less serious crime, or the method of the investigation had been more reprehensible, then much could be said in favour of disregarding the evidence which was a probable consequence of the illegal proceeding. The likely result would then have been to disregard all evidence obtained after the unlawful behaviour of the police, because in practice it was not possible to make a distinction.

I also believe that elastic rules should be applicable to the taking of a deposition where the police have failed to clarify the witness's right of exemption. It is hardly practical to lay down an either-or regulation.

VIII.

To sum up, in Norway it does not seem practicable to lay down an absolute rule in one direction or the other concerning evidence obtained in an unlawful manner, but the problem must be solved according to the circumstances in each separate case. Certain guiding principles for the decision can be put forward:

The exclusion of evidence would be difficult to support in the more excusable forms of illegality, for instance, when there is an inadvertent breach

of rules or an overstepping of the bounds of legal forms prescribed for obtaining evidence.

The exclusion of evidence would also be difficult to support where there is a danger that the accused would be likely to commit dangerous crimes if allowed to go free. Generally speaking, there also seems to be little reason to exclude evidence obtained through the unlawful action of a private individual. The same applies to evidence acquired through an offence against a third party (and not directly against the accused); however, in exceptional cases consideration for the third party may require the exclusion of evidence.

There are strong reasons for excluding evidence obtained through gross, deliberate, illegal action against the accused, especially if this action has been directed against his person in the form of cruelty or other especially improper treatment. But it may be assumed that in Norway such cases will seldom occur in practice. One reason for this is that the public prosecutor will be most hesitant to offer evidence obtained by such a procedure. One may conceive of an exception where the dangerous character of the defendant speaks in favour of conviction, but in such cases the arguments for admission of the evidence would be very strong.

ABSTRACTS OF RECENT CASES

Carolyn B. Jaffe*

Abstractor

Arrest—Uniform Arrest Act—De Salvatore v. State, 163 A.2d 244 (Del. 1960). Defendant was convicted of drunken driving. On appeal, he contended that the Uniform Arrest Act (in effect in Delaware) is unconstitutional because it authorizes detention for two hours on mere suspicion without probable cause. The Supreme Court affirmed, holding that the Uniform Arrest Act is constitutional, since the "reasonable ground to suspect" required for detention under the Act is in context equivalent to the "reasonable ground [or probable cause] to believe" which is constitutionally required to support either detention, arrest without warrant, or a complaint on which a search or arrest warrant may be issued.

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Arrest, Search and Seizure—Mapp v. Ohio, 29 U.S.L. WEEK 4798, 81 Sup. Ct. 1684 (1961). Defendant was convicted of knowingly having in her possession and control lewd and lascivious books, pictures, and photographs. On appeal, she contended that the statute under which she was convicted violated her Fourteenth Amendment rights against state action in derogation of free thought and expression; she also contended that although Ohio until now has been a "non-exclusionary rule" state, the Fourteenth Amendment should be construed to require exclusion in state courts of evidence illegally seized by state officers, and hence admission of such evidence at her trial was a denial of due process. The Supreme Court, speaking through Mr. Justice Clark, reversed and

remanded, holding that contrary to interpretations of the federal exclusionary rule which considered it to be a judicial rule of evidence and as such not applicable to the states (*Wolf v. Colorado*, 338 U.S. 25 (1949)), the rule not only is an "essential ingredient" of the Fourth Amendment, and thus constitutionally required of federal courts, but also must be followed by state courts by virtue of the Fourteenth Amendment, since "to hold otherwise would be to grant the right but in reality to withhold its privilege and enjoyment." The Court further held that the entire Fourth Amendment, rather than its "core" as determined by the "shocks-the-conscience" test, is applicable to the states through the due process clause. Mr. Justice Douglas concurred in the opinion of the Court but emphasized as practical reasons for this decision the inadequacy of alternative remedies and the "working arrangement" travesty encouraged by the federal-state "double standard" on exclusion which existed prior to the present decision. Mr. Justice Black also concurred, reasoning that the Fourth Amendment in combination with the Fifth, rather than the Fourth alone, constitutionally compels adherence by all courts to the exclusionary rule, citing *Boyd v. United States*, 116 U.S. 616 (1886). Mr. Justice Stewart concurred only in result, not reaching the exclusionary rule issue decided by the majority, but agreeing with defendant's contention that the obscenity statute violated her Fourteenth Amendment rights protecting free thought and expression against state action. Justices Harlan, Frankfurter, and Whittaker dissented, contending that since defendant's main argument concerned the alleged unconstitutionality of the statute, five members of the Court had "simply reached out to overrule *Wolf*"; that even if the Fourth Amendment requires federal courts to exclude evidence seized in violation of that Amendment, the exclusionary rule is not necessarily required of state courts by the Fourteenth Amendment; and that since within the requirements of due process the states are free to determine the specifics of trial procedure, the Court has no right to impose the exclusionary rule on state courts.

Arrest, Search and Seizure—*Keiningham v. United States*, 287 F.2d 126 (D.C. Cir. 1960). Defendants were convicted of violating gambling laws. On appeal, they contended that the trial court erred in denying their motion to suppress

evidence seized by officers pursuant to an illegal entry. The Court of Appeals reversed and remanded, holding that "breaking and entering" includes any entry without permission, whether with or without force; that the officers, in entering through an unlocked door, *without proper announcement*, the house adjoining one for which they had a valid search warrant, and to which they had been admitted after making proper announcement, illegally entered that house, since the authority to search was limited to the place described in the warrant; and that since the entry was illegal, the subsequent search was invalid, and thus the trial court should not have admitted the evidence that defendants sought to suppress. The court indicated, however, that proper announcement would have rendered valid the entry and search without a warrant.

Arrest, Search and Seizure—*DiBella v. United States*, 284 F.2d 897 (2d Cir. 1960). Defendant's pre-indictment motion to suppress evidence seized in his apartment pursuant to his arrest by federal narcotics agents was denied. On appeal, he contended that since the complaint on which the warrant for his arrest was issued was based on personal belief rather than probable cause for belief, it did not support the warrant, and that consequently neither his arrest nor the search made pursuant thereto was valid. Although the Court of Appeals agreed that the complaint was insufficient to support the warrant, it affirmed denial of defendant's motion, holding that the arresting officers by virtue of observations of defendant's activities, though these were made six months prior to his arrest, had reasonable grounds to believe that he had violated federal narcotics laws, and thus could validly arrest him without a warrant under federal statute; and that since the arrest was lawful and valid, narcotics seized in a reasonable search made pursuant thereto were admissible as evidence.

Arrest, Search and Seizure—*Wong Sun v. United States*, 288 F.2d 366 (9th Cir. 1961). See Confessions, *infra*.

Attempt—*People v. Anderson*, 10 Cal. Rptr. 64 (Dist. Ct. App. 1960). See Larceny, *infra*.

Civil Rights Act—*Monroe v. Pape*, 81 Sup. Ct. 473 (1961). Dismissal of petitioner's complaint against Chicago police officers and City of Chicago

for violation of Civil Rights Act, providing to injured party civil remedy against any person who, under color of state statute, ordinance, etc., subjects him to deprivation of federally guaranteed rights, privileges, or immunities, was affirmed by the Court of Appeals for the Seventh Circuit. On certiorari, petitioner contended that his complaint—alleging that Chicago policemen, without warrant for search or arrest, and under color of city and state law, broke into and ransacked his home in the early morning, that they took him to the police station where he was questioned for ten hours, that he was not taken before a magistrate or permitted to call his family or attorney, and that he was released without criminal charges being preferred against him—stated a cause of action under the Civil Rights Act (42 U.S.C. §1983). The Supreme Court affirmed dismissal of the complaint against the city, holding that a municipal corporation was not a "person" within the meaning of the Act, but reversed as to the officers, holding that since individuals are protected against unreasonable searches and seizures by state officers by the due process clause of the Fourteenth Amendment, since "under color" of state law includes both action pursuant to state law and action not pursuant thereto but made possible because the wrongdoer is apparently clothed with authority of state law, and since possibility of a remedy under state law does not preclude action under federal law, petitioner's complaint stated a cause of action against the officers under the Civil Rights Act. Justice Frankfurter dissented as to the reversal, holding that only acts authorized by state law are covered by the Act, since injury due to authorized acts cannot be remedied by state courts.

Confessions—*Coppola v. United States*, 81 Sup. Ct. 884 (1961). Defendant's conviction of bank robbery was affirmed by the Court of Appeals for the Second Circuit. On certiorari, he contended that although he was arrested solely by New York officers, a "working arrangement" existed between state and federal officers, and consequently statements he made in a state jail, while being interrogated by federal officers during a period of detention illegal under both New York and federal standards, were improperly admitted at the trial. The Supreme Court, per curiam, affirmed, holding that the facts of defendant's case were not within the "working arrangement" rule of *Anderson v.*

United States, 318 U.S. 350 (1942). Justice Douglas dissented, stating that although defendant's arrest and detention ostensibly were attributable only to state officers, allowing admission of statements made by defendant to federal officers during his illegal detention undermines the *McNabb-Mallory* exclusionary rule, since in substance though not in form, the federal officers violated Federal Rule 5(a), which was designed to minimize secret interrogation by federal officers, and thus the per curiam decision permitted federal officers to "flout the federal law so long as they let the accused stay in a state jail."

Confessions—*Rogers v. Richmond*, 81 Sup. Ct. 735 (1961). After petitioner was convicted of murder by a Massachusetts court, a federal district court's denial of his petition for writ of habeas corpus was affirmed by the Court of Appeals for the Second Circuit. On certiorari, petitioner contended that since a confession which he did not voluntarily make had been admitted in evidence, his conviction was constitutionally invalid, and consequently he was entitled to a writ of habeas corpus from a federal court. The Supreme Court, speaking through Mr. Justice Frankfurter, reversed and remanded, holding that since the trial court determined the admissibility of defendant's confession by use of a criterion of probable truth or falsity, rather than that of "whether the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined" without regard to truth or falsity, which is required by due process of law, defendant was not constitutionally tried and convicted; and that even though his confession might not have been coerced, the state court's determination of the issue of coercion by unconstitutional standards automatically rendered his conviction invalid, since the federal court will not redetermine the issue by applying the correct standard to the facts on the record because facts determined in the framework of erroneous legal standards cannot be expected to lead to correct conclusions if and when a correct standard is later applied to them; and that an alternative procedure of allowing the federal district court to conduct a hearing *de novo* on the issue of coercion, available on habeas corpus proceeding but not on direct review, will not be adopted since it adequately protects neither the rights of defendants nor those of the states. Justices Stewart and

Clark dissented, stating that since the writ can be granted only if defendant is in custody in violation of the Federal Constitution, the question is whether a confession was admitted which was in fact involuntary under Fourteenth Amendment standards, not whether the state court resolved the issue by means of a constitutionally inadequate test.

Confessions—*Jackson v. United States*, 285 F.2d 675 (D.C. Cir. 1960). After defendant's conviction was reversed by the Court of Appeals on the ground that his confession was obtained during illegal detention prior to arraignment and before he was informed of his rights, defendant was retried and again convicted. On appeal, he contended that his confession, originally inadmissible by the *McNabb-Mallory* exclusionary rule, could not be validated by any subsequent reaffirmation. The Court of Appeals affirmed, holding that since the reason for applying this exclusionary rule to defendant's confession was removed when he was fully informed of his rights, his reaffirmed confession was admissible if the reaffirmation was found by a jury to have been voluntarily made.

Confessions—*Wong Sun v. United States*, 288 F.2d 366 (9th Cir. 1961). Defendants were convicted of violating federal narcotics laws. On appeal, they contended that confessions made incident to their illegal arrests, and evidence obtained by virtue of information contained in pre-confession statements, were improperly admitted; and that written statements prepared by an agent after conversations with defendants were inadmissible because defendants had not signed them. The Court of Appeals affirmed, holding that although the arrests were illegal, the confessions, if voluntary, were not rendered inadmissible because they were obtained while defendants were under illegal arrest; that so long as the pre-confession statements were voluntary, they were not contaminated by defendants' illegal arrests, and the officers could use information they contained; and that since the agent could have read the written statements in evidence when called to testify about the conversations, defendants were not prejudiced by admission of the written statements themselves. Judge Hamley dissented, stating that since the "fruit of the poisonous tree" doctrine is intended to prevent lawless conduct of law enforcement officers, it should be applied to exclude information derived from voluntary statements made while officers

were acting illegally, just as it has been applied to exclude information resulting from physical objects so obtained.

Derivative Evidence—*Wong Sun v. United States*, 288 F.2d 366 (9th Cir. 1961). See *Confessions, supra*.

Discovery—Jencks Act—*Campbell v. United States*, 81 Sup. Ct. 421 (1961). During the trial at which they were subsequently convicted of bank robbery, defendants' alternative motions to have the court either order the Government to produce pretrial statements of a Government witness (one Staula) consisting of an interview report or strike the witness' testimony were denied. On certiorari, defendants contended that since the interview report was a "statement" within the scope of the Jencks Act, they were entitled to examine it for impeachment purposes; and that since the Government or the court was required to call as a witness a Government agent whose testimony would bear on determination of whether the interview report was a "statement," the trial court erred in ruling that defendants must call the witness. The Supreme Court vacated and remanded for redetermination of defendants' motions, holding that since defense counsel's cross-examination of Staula established a prima facie case of defendants' right to examine the pretrial statement, inasmuch as the agent's testimony might bring the interview report within the Jencks Act, and since a litigant does not have the burden of proving facts peculiarly within the knowledge of his adversary, the court or the Government was required to subpoena the agent. The Court ordered the trial court to reaffirm the conviction if a new inquiry conducted in accordance with the above ruling results in denial of the motions, or to grant a new trial if either of the motions is granted. Justices Frankfurter, Clark, Harlan, and Whittaker dissented in part.

Discovery—*People v. Rosario*, 173 N.E.2d 881 (N.Y. 1961). Defendant was convicted of murder in the first degree. On appeal, he contended that the trial court committed reversible error in turning over to defense counsel for impeachment purposes only such portions of prior statements made by state's witnesses as the court held to be at variance with their direct testimony. Although the Court of Appeals overruled its previous rule of procedure, identical to that used by the court

below, and substituted the Jencks Act rule, which allows defense counsel to inspect in its entirety each prior statement of a witness for the state bearing on witness' direct testimony, the Court affirmed defendant's conviction, holding that the trial court's error was not prejudicial, and that defendant's right to a fair trial was not denied, since proof of guilt was overwhelming. While the majority (in Judge Fuld's opinion of the Court) agreed in the adoption of the Jencks Act rule, reasoning that defense counsel is in a better position than is a trial judge to appraise the value of a witness' pretrial statements for impeachment purposes, three judges (in an opinion written by Judge Froessel) concurred only in the result, desiring to retain the rule of procedure followed by the trial court.

Discovery—*Hackel v. Williams*, 167 A.2d 364 (Vt. 1961). Plaintiff, a city grand juror, petitioned for a writ of prohibition to prevent defendant, a county court assistant judge, from taking, for use in a criminal case, a deposition pursuant to an affidavit and application served on plaintiff by respondent in the criminal case. Plaintiff alleged that depositions for use in criminal cases can be taken only to perpetuate testimony which might otherwise be unavailable at the trial, and that the deposition in question was intended solely to help respondent "prepare his case." Defendant contended that in addition to permitting the taking of testimony in perpetuum, the applicable statute permits the taking of depositions for the purpose of aiding a respondent to "prepare his case," and that the narrow construction advocated by plaintiff deprives a respondent of an opportunity equal to the state's in obtaining sworn testimony. Hearing the case on the pleadings, the Supreme Court of Vermont issued the writ of prohibition, holding that since the purpose of depositions in criminal cases is to guard against failure of justice due to loss of testimony by a defendant, such depositions can be taken only to perpetuate testimony and not to assist a defendant in "preparing his case"; that since a defendant knows whether or not he is guilty, while the state must decide whether or not it should prosecute, a defendant's inability to obtain depositions to help "prepare his case" does not give the state an unfair advantage; and that allowing defendants to have unlimited discovery would tend to defeat sound judicial policy.

Double Jeopardy—*Killilea v. United States*, 287·

F.2d 212 (1st Cir. 1961). Defendants were convicted of larceny of whiskey in interstate commerce. On appeal, they contended that since their convictions resulted from a trial held subsequent to a declaration of mistrial over their objection, their rights against double jeopardy had been violated. Though it reversed on other grounds, the Court of Appeals assumed for the sake of argument that the conspiracy charge for which defendants were tried on the mistrial was so closely related to the substantive offense of which they were convicted that if they could not be retried on the former, neither could they be on the latter, and held that since circumstances concerning improper communications to the jury justified the court's declaration of a mistrial even over defendants' objections, their contention that the court's purpose was to subject them "to a second prosecution by discontinuing the trial when it appears that the jury might not convict" was without merit; that the "ordeal, harassment, anxiety and insecurity" to which defendants were subjected during the eleven days of the first trial, and which the double jeopardy provision was intended to prevent, were far outweighed by the prospect of a miscarriage of justice unfavorable to defendants which might well have resulted from the first trial; and that consequently the mistrial and second trial did not subject defendants to double jeopardy in violation of their Fifth Amendment rights.

Double Jeopardy—*Commonwealth v. Burke*, 172 N.E.2d 605 (Mass. 1961). Defendant was found not guilty of second-degree murder but guilty of manslaughter on an indictment expressly charging both offenses. After the Supreme Court reversed, holding that the trial court had committed reversible error regarding admission of certain evidence, defendant filed a plea in bar, in which he pleaded autrefois acquit to the charge of second-degree murder, and moved that he could be prosecuted only on the charge of manslaughter and/or assault and battery. On a Superior Court judge's report of the plea to the Supreme Court for decision, defendant contended that Massachusetts' statutory provision against double jeopardy prohibited the state from prosecuting him for second-degree murder. The Supreme Court sustained defendant's plea in bar, holding that where separate offenses are expressly charged in a single indictment, the effect is the same as if they had been set forth in separate counts, and the verdicts must be dealt with separately; that regardless of the outcome of

the manslaughter charge, the acquittal of the murder charge is a final adjudication thereof; and that since an unrecorded verdict has no effect, defendant is statutorily entitled to have his verdict of acquittal validated by recording.

Drunken Driving—*Lee v. State Highway Comm'n. Motor Vehicle Dep't*, 358 P.2d 765 (Kan. 1961). See *Police Power, infra*.

Entrapment—*Rittenour v. District of Columbia*, 163 A.2d 558 (D.C. 1960). Defendant was convicted of committing a lewd, obscene, or indecent act in the District of Columbia. On appeal, he contended that in order to confirm the suspicion that defendant was a homosexual, the arresting officer led defendant to believe that he would acquiesce in defendant's homosexual advances. The Municipal Court of Appeals reversed, holding that when the officer led defendant to believe he would consent in order to encourage him to commit a lewd, obscene, or indecent act, defendant was entrapped, and his conviction for having committed such act cannot stand; and that the statute does not apply to an act committed in privacy in the presence of a single, consenting person. The Court further held that, in substance, defendant was convicted of being a homosexual, which in itself violates no District of Columbia law.

Entrapment—*People v. Strong*, 172 N.E.2d 765 (Ill. 1961). Defendant was convicted of selling, dispensing, and possessing heroin. On appeal, he contended that since a government employee supplied him with the heroin, he had been entrapped. The Supreme Court reversed, holding that defendant had been entrapped, since the record indicated that his only sale was of heroin supplied by an informer employed by the state, so that the state had in reality provided the *sine qua non* of the offense; and that where facts clearly suggesting entrapment have been presented at the trial, the defense of entrapment can be raised on appeal, although it was not specially pleaded below.

Habeas Corpus—*Rogers v. Richmond*, 81 Sup. Ct. 735 (1961). See *Confessions, supra*.

Insanity—*Overholser v. Lynch*, 288 F.2d 388 (D.C. Cir. 1961). The District Court granted defendant's petition for a writ of habeas corpus to order his release from a mental hospital to which

he had been committed after being acquitted, by reason of insanity, of bad check charges, unless he were duly committed in a civil proceeding within ten days. On appeal, the hospital contended that on the trial of the cause, the court properly refused to allow defendant to plead guilty; and that District of Columbia statutes authorizing a judge in a criminal case to commit a defendant to a mental hospital on certification of insanity by the superintendent, or on acquittal by reason of insanity, but not requiring civil commitment procedures, were constitutional; and consequently that defendant's commitment by the trial judge did not deprive him of any rights. The Court of Appeals reversed, holding that while a trial court *must* refuse to accept a plea of guilty made involuntarily without understanding of the nature of the charge, it has *discretion* in other cases to refuse to accept such plea; that although after treatment defendant was found competent to stand trial, the superintendent's report certifying belief that defendant's unlawful acts were the product of a mental disease or defect presented grounds for exercise of the court's discretion in order to permit litigation of the issue of defendant's culpability; that those found not guilty by reason of insanity are to be committed for treatment rather than convicted for punishment; that since the statute provides that a defendant so committed shall be released when found to be of sound mind, it is not constitutionally necessary for commitment to be based on affirmative proof of insanity such as that established in a civil commitment proceeding; and that consequently the district court should not have granted the writ, since the trial court's action was correct. Judges Fahy, Edgerton, and Bazelon dissented, holding that the district court was correct in deciding to grant the writ unless defendant were committed in a civil proceeding, since affirmative proof of insanity is required for commitment. Compare *United States v. Naples, infra*.

Insanity—*United States v. Naples*, 192 F. Supp. 23 (D.D.C. 1961). Defendant waived his right to a jury trial and pleaded not guilty by reason of insanity to charges of first and second degree murder, housebreaking, and petit larceny. The trial judge, Holtzoff, J., compared the insanity test of the Court of Appeals for the District of Columbia (one is not criminally responsible if his unlawful act was the product of a mental disease or defect, *Durham v. United States*, 214 F.2d 862 (D.C. Cir.

1954)) with that of the United States Supreme Court (one is not criminally responsible if he is not capable of distinguishing between right and wrong or not aware of the nature of his act, or if he is so aware, if his mental derangement renders him unable to control his actions, *Davis v. United States*, 160 U.S. 469 (1895)), and determined that the two are substantively identical, although a jury has more difficulty coping with the abstract terminology of the former. Although at the trial the Government (on basis of the *Davis* case) assumed the burden of proving defendant's sanity beyond a reasonable doubt once some evidence of his insanity had been introduced, and the court decided the case on that basis, Judge Holtzoff reasoned that since this procedure might permit one who is actually sane to successfully plead insanity merely because the Government is unable to prove sanity beyond a reasonable doubt, and since the applicable statute requires that one who is acquitted solely because he was insane when the crime was committed shall be confined in a mental hospital, the burden of proof of insanity must henceforth be borne by defendant, since Congress could not have intended to commit to a mental hospital persons who have not been affirmatively found insane. The court found defendant guilty on all four counts, recommending Executive clemency to commute the compulsory death penalty for first degree murder to life imprisonment, because defendant's subnormal intelligence and personality disorder would render capital punishment inhumane.

Interstate Transportation of False Securities—*United States v. Fordyce*, 192 F. Supp. 93 (S.D. Cal. 1961). Defendant was charged with violation of a statute proscribing the transportation in interstate commerce of false securities or of anything used in forging or altering securities, with criminal intent. At trial without jury, defendant admitted having transported in interstate commerce two nation-wide credit cards knowing them to be stolen, as well as charge slips issued on basis of the cards. The Court found defendant not guilty, since no "securities" were transported, holding that where Congress does not define an ordinary term, it is used in its ordinary dictionary sense, and that neither the cards nor the charge slips nor the two in combination constituted a "written instrument evidencing an indebtedness" or conferred on defendant the right to "demand and receive property not in his possession." Compare *Williams v. United States*, *infra*.

Interstate Transportation of False Securities—*Williams v. United States*, 192 F. Supp. 97 (S.D. Cal. 1961). Petitioner moved to vacate judgment of his conviction for unlawful transportation of securities in interstate commerce, citing *United States v. Fordyce*, *supra*, in support of his contention that a charge slip resulting from use of a credit card is not a "security" within purview of the statute. While the court agreed with the *Fordyce* case that a credit card itself is merely an indication of credit rating and is not a "security" covered by the statute, it denied petitioner's motion to vacate, holding that since a charge slip issued in reliance on a credit card is an "evidence of indebtedness," it is a security, and petitioner's transportation of a charge slip knowing it to have been forged was a violation of the statute.

Larceny—*People v. Anderson*, 10 Cal. Rptr. 64 (Dist. Ct. App. 1960). Defendants' convictions for grand theft and attempt to commit grand theft were based on a "confidence game" instigated in California and culminated (in one case) in Las Vegas, Nevada. On appeal, they contended that California lacked jurisdiction, since no element of either offense occurred within the state. The District Court of Appeal found that larceny by trick and device and obtaining property by false pretenses were included in the theft statute, but reversed defendants' convictions, holding that although the state's penal code provides punishment for committing a crime or part of a crime within the state, the "part of a crime" taking place within the state, to satisfy due process, must amount to an attempt, for which the requisite elements are "specific intent to commit a crime" and commission of "a direct unequivocal act [which, as opposed to mere preparation, sets in motion circumstances sufficient to culminate in commission of the crime] toward that end"; that defendants' acts in that state (consisting of baiting persons with stories of a profitable gambling scheme, intended to cause them to go to Las Vegas with defendants) were instrumental in arranging situations whereby the crimes could be consummated in Las Vegas, (i.e., mere preparation), rather than actually setting the crimes in motion without intervention of independent circumstances (i.e., unequivocal acts requisite for establishing attempt); and consequently California lacked jurisdiction to try or convict defendants.

Loitering—*People v. Merolla*, 172 N.E.2d 541 (N.Y. 1961). See *Police Power, infra*.

Police Power—*Lee v. State Highway Comm'n. Motor Vehicle Dep't*, 358 P.2d 765 (Kan. 1961). Plaintiff was unsuccessful in an action to compel reinstatement of his driver's license, which had been revoked following his refusal to submit to a blood test for determination of alcoholic content pursuant to his arrest for drunken driving. On appeal, plaintiff contended that a Kansas statute—providing that any person operating a motor vehicle on a public highway in the state is deemed to have consented to submit to a chemical test of breath, blood, urine, or saliva to determine the alcoholic content of his blood whenever arrested for any offense involving a reasonable accusation of drunken driving—is unconstitutional as requiring one to incriminate himself and violative of due process of law; or, alternatively, that he should have had his choice among the four chemical tests prescribed, since the drawing of blood is inherently "brutal and offensive." The Supreme Court affirmed, holding that the "right" to operate a motor vehicle on a public highway is a privilege subject to reasonable regulation by exercise of the State's police power in the interest of public safety; that the statute under attack neither required plaintiff to incriminate himself nor deprived him of due process of law, since it granted him both an option not to submit to the test and a hearing on the reasonableness of his failure to submit, and since a related statute gave him the right to bring action for reinstatement, all of which rights he duly exercised; that no choice among the tests need be given, since under medical supervision as provided by the statute, the drawing of blood is not "brutal and offensive"; and that tests to determine alcoholic content of the blood are in furtherance of justice, since they protect from charges of drunken driving those who are not in fact intoxicated but who either have alcohol on their breath or appear to be intoxicated due to causes beyond their control.

Police Power—*People v. Merolla*, 172 N.E.2d 541 (N.Y. 1961). Defendant's conviction of loitering near waterfront facilities in violation of the Waterfront Commission Act was affirmed by the Appellate Division. On appeal by permission, he contended that the statute was unconstitutional and void because of the vagueness and ambiguity of the terms "loitering," "without a satisfactory explanation," and "within 500 feet." The Court of

Appeals affirmed, holding that while a criminal statute prohibiting loitering per se is unconstitutional for lack of distinction between harmful and innocent conduct, one prohibiting loitering in a specified area can be definitely and clearly construed in context to prohibit only lingering about that area for a purpose unconnected with lawful business of the area; that the phrase "without a satisfactory explanation" is a procedural rather than a substantive one, and limits the scope of the statute in favor of the accused; and that although public streets might be encompassed by the statute, so that the valid, restrictive construction of "loitering" would not apply, the constitutionality of a statute must be determined as applied to the present facts, not to a hypothetical situation. Compare *People v. Munoz, infra*.

Police Power—*People v. Munoz*, 172 N.E.2d 535 (N.Y. 1961). Defendant's conviction for violating a section of the New York City Administrative Code, making unlawful the possession of sharp pointed or edged instruments by persons under 21 in public places, was affirmed by the Appellate Part of the city's Court of Special Sessions. On appeal by permission, defendant contended that since the section did not clearly indicate what persons were included or what acts prohibited, it was unconstitutional and void. The Court of Appeals reversed, holding that the section was so vague that it could be violated by the innocent carrying of a nail file or fountain pen; that although it purports to create an offense which is *malum prohibitum*, the section excepts from prosecution a minor who proves he was not actuated by purposes that were *malum in se*; and that with regard to a crime for which no criminal intent is necessary, although the legislature determines how the police power should be exercised, the courts must determine whether there is a reasonable relation between the statute which makes criminal an otherwise innocent act and the object sought to be attained. Two judges dissented, holding that the section is not unconstitutionally vague because it contains specific exceptions, and that it should be sustained as a necessary means of dealing with a desperate situation.

Receiving Stolen Goods—*Milanovich v. United States*, 81 Sup. Ct. 728 (1961). Convictions of defendants, a husband and wife, for stealing United States property, and that of the wife for receiving such property, were affirmed by the Court

of Appeals for the Fourth Circuit. On certiorari, the husband contended that the trial court's cautionary instructions to Government witnesses were erroneous; and the wife contended that the court erred in not instructing that she could be found guilty either of stealing or receiving the goods, but not both. The Supreme Court, finding no merit in the husband's contention, affirmed his conviction, but reversed and remanded as to the wife, holding that one cannot be convicted of receiving from himself; that although defendant was a principal to the larceny by statutory definition rather than by being an active participant, she could not be found guilty of both offenses, since Congress, by providing punishment both for stealing and receiving, intended to reach a new group of offenders; and that defendant wife was entitled to have a new trial on both counts, rather than to have the trial judge set aside sentence on either, since it was impossible to say what verdict might have been returned had the jury been properly instructed. Justices Frankfurter, Clark, Harlan, and Whittaker dissented as to the wife, holding that while an individual cannot be found guilty of both stealing and receiving where the two offenses are component parts of a single, merged transaction, defendant perpetrated the offenses in two clearly separable transactions; and that even if defendant could be found guilty in law of only one of the two counts, remanding the case for resentencing by the trial judge, rather than for a new trial, would have been sufficient since the evidence supported verdicts of guilty on both counts.

Right to Counsel—*Ferguson v. Georgia*, 81 Sup. Ct. 756 (1961). Defendant's conviction for murder was affirmed by the Supreme Court of Georgia. On appeal, he contended that a Georgia statute permitting defendants to make unsworn statements without assistance of counsel, in context with a statute making defendants incompetent to testify on their own behalf, violated the due process clause of the Fourteenth Amendment. While not passing on the constitutionality of the incompetency statute (the sole persisting codification of a once universal common-law rule), the harshness of which the unsworn statement statute was designed to ameliorate, the United States Supreme Court reversed and remanded, holding that defendant's right to be heard by counsel, applicable in state courts through the due process clause, had been denied by Georgia when his counsel was not

permitted to question him in order to elicit his unsworn statement. Justices Frankfurter and Clark concurred in the result, stating that their decision was based not on the unconstitutionality of the unsworn statement statute, but on that of the incompetency statute which, in their opinion, violated due process.

Right to Counsel—*McNeal v. Culver*, 81 Sup. Ct. 413 (1961). After petitioner was convicted of assault to murder in the second degree, the Supreme Court of Florida denied his habeas corpus petition without a hearing and remanded petitioner to custody. On certiorari, he contended that since his petition alleged facts and circumstances which, when considered together with the record, rendered his trial fundamentally unfair, the Florida Supreme Court should have granted him a hearing. The Supreme Court of the United States reversed, holding that although Florida law requires appointment of counsel only in capital cases, due process of law required the court to provide petitioner with counsel, since in light of his inability to effectively conduct his defense, denial of counsel rendered the trial fundamentally unfair, if the facts concerning petitioner's lack of education, mental illness, and unfamiliarity with court procedure as alleged in his petition are true; and that petitioner was entitled to a hearing by the Florida Supreme Court to determine the truth of his allegations. Justices Brennan and Douglas concurred, agreeing that if his allegations were true, petitioner's trial was not fundamentally fair, but stating in addition that the rule requiring a state court to appoint counsel for an indigent defendant in a criminal case only where denial of counsel would result in a trial lacking "fundamental fairness" (*Betts v. Brady*, 316 U.S. 455 (1942)) is itself unfair, since it permits rich men to have counsel in any case, while indigent ones are granted counsel only if the requirements of the rule are met.

Search and Seizure—*Silverman v. United States*, 81 Sup. Ct. 679 (1961). Defendants' convictions for gambling offenses were affirmed by the Court of Appeals for the District of Columbia. On certiorari, they contended that the trial court erred in admitting testimony of officers concerning what they had heard by means of a "spike mike," since use of this listening device violated defendants' Fourth Amendment rights. The Supreme Court reversed, holding that since use of the "spike mike"

entailed penetration of the wall of defendants' premises and usurpation of part of the premises (the heating system) without their knowledge or consent, defendants' Fourth Amendment rights were violated, and hence testimony growing out of the use of the device was improperly admitted. While the majority distinguished this case from those in which eavesdropping accomplished without unauthorized physical encroachment was held not to violate the Fourth Amendment, [e.g., *Olmstead v. United States*, 277 U.S. 438 (1932)], Justice Douglas, concurring, advocated overruling those cases, since in his view the criterion should be whether the privacy of the home has been invaded, not whether it has been invaded by an actual physical penetration.

Search and Seizure—*Chapman v. United States*, 81 Sup. Ct. 776 (1961). Defendant's conviction for illegal operation of a distillery was affirmed by the Court of Appeals for the Fifth Circuit. On certiorari, he contended that the federal district court erred in admitting, after his motion to suppress, evidence seized without a warrant by state officers. The Supreme Court reversed, applying federal standards (as had the trial court) to the conduct of state officers under the *Elkins* rule, holding that even though probable cause existed and the search was conducted at the request of defendant's landlord, there was no reason for not obtaining a warrant, and thus the officer's search of defendant's leased premises without a warrant violated his Fourth Amendment rights; and that since the search was unlawful, the evidence so obtained should not have been admitted at the trial. Justice Clark dissented, reasoning that the search was legal inasmuch as under Georgia law, a landlord may repossess premises being wasted [or used for criminal purposes]; thus the defendant's lease was forfeited when his landlord exercised that option, and when the officers broke into the premises, they were merely aiding the landlord to repossess.

Search and Seizure—*People v. Hammond*, 9 Cal. Rptr. 233 (1960). Defendant was convicted of possessing and selling heroin. On appeal, he contended that his conviction of the possession charge was not supported, since the only evidence thereof was obtained through an unlawful search. The Supreme Court of California affirmed, holding that although the search in question was conducted without a warrant, without requesting permission

to enter, and prior to defendant's arrest, the criterion of whether a search is lawful is its reasonableness; that since the officers had reasonable cause to believe defendant was in possession of narcotics, that he had a gun, and was under influence of heroin, they could have first validly arrested him and then lawfully searched the premises for the fruits of the crime; that although a search without warrant prior to arrest is generally unlawful, in light of circumstances known to them, the officers in good faith could conclude that if they demanded admission before breaking in, defendant might destroy the narcotics and/or fire at them; that in such circumstances, strict compliance with statutory provisions for arrests and searches pursuant thereto is not required; and consequently, the fact that defendant was arrested without the formality required by statute did not require the exclusion of evidence seized in ensuing search, since in light of all the circumstances, the search was reasonable.

Self-Incrimination—*Stewart v. United States*, 81 Sup. Ct. 941 (1961). Defendant was convicted and sentenced to death for felony murder after the Court of Appeals for the District of Columbia Circuit had reversed two prior convictions for the same murder. On certiorari, defendant contended that the trial court erred in refusing to grant his motion for a mistrial on the ground that the Government, in cross-examining defendant, had informed the jury of his failure to testify at each of the earlier trials. The Supreme Court reversed, holding that although it is not prejudicial to allow comment on failure to testify at a previous trial for the purpose of impeaching specific testimony, such comment for the purpose of impeaching defendant's "demeanor-evidence," consisting of his gibberish testimony from which insanity could have been inferred, was prejudicial, and consequently the trial court's denial of his motion for a mistrial was reversible error, even though the defense made no request for cautionary instructions. Justices Clark, Whittaker, Frankfurter, and Harlan dissented, stating that the comment was not prejudicial when viewed in light of the trial in its entirety.

Self-Incrimination—*Sandrelli v. Commonwealth*, 172 N.E.2d 449 (Mass. 1961). Defendant, a grand jury witness, invoked the privilege against self-incrimination during a homicide hearing, and was