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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

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Abstractor

Accomplice Testimony—*People v. Gullick*, 11 Cal. Rptr. 566 (1961). Defendants were convicted of burglary and of assault with a deadly weapon. On appeal from the judgments and from orders denying their motions for a new trial, defendants contended that the trial court erred in refusing to instruct the jury that if it found witness to be an accomplice, his testimony should be viewed with distrust and would require corroboration to support a conviction. The Supreme Court of California reversed the judgments and orders, holding that since the witness's testimony may have been crucial, the trial court committed reversible error in refusing to grant the requested instruction. Although Justice Schauer agreed that the instruction should have been given, he dissented on the ground that the error was not prejudicial.

Appeal by the Government—*United States v. Koenig*, 290 F.2d 166 (5th Cir. 1961). See **Search and Seizure**, *infra*.

Arrest, Search and Seizure—*Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961). Defendants Hair and Burroughs were convicted of housebreaking and robbery, and defendant Burroughs was convicted of rape. On appeal, defendants contended that after denying defendant Hair's pretrial motion to suppress, the trial court admitted evidence seized under an invalid search warrant. The Court of Appeals for the District of Columbia reversed and remanded the housebreaking and robbery convictions but affirmed the rape conviction, holding that a warrant to search defendant Hair's home issued on the basis of observations made by police officers during an entry unlawful for failure to announce their authority and intention to arrest him was invalid, and consequently evidence seized under its authority was inadmissible against defendant Hair; that although one challenging the legality of a search or seizure ordinarily must be the victim of the alleged invasion of privacy, defendant Burroughs' housebreaking and robbery convictions would be reversed, since denial of defendant Hair's motion to suppress was prejudicial to defendant Burroughs inasmuch as the evidence was essential to conviction and would not have been available at the trial had the motion been granted; but that since the evidence complained of was not a major aspect of the Government's proof of the rape charge against defendant Burroughs, failure to suppress was not so prejudicial as to warrant reversal of his rape conviction.

Arrest, Search and Seizure—*People v. Privett*, 12 Cal. Rptr. 874, 361 P.2d 602 (1961). Two defendants were convicted respectively of burglary and receiving stolen property. On appeal, they contended that the trial court erred in admitting over their objection evidence obtained as a result of an unlawful search without a warrant. The Supreme Court of California reversed, holding that officers who observed defendants and a known burglar going in and out of defendant's house and saw the lights of the house go out as soon as they knocked on the door and identified themselves lacked probable cause for arrest without a warrant, and consequently their ensuing search was illegal.

Arrest, Search and Seizure—*People v. Vegazo*, 13 Cal. Rptr. 22 (Dist. Ct. App. 1961). Defendant's motion to set aside the information charging him with unlawful possession of marijuana was sustained by the Superior Court. On appeal by the state, defendant contended that the marijuana offered in evidence had been obtained by an unlawful search and seizure. The District Court of Appeal reversed, holding that a telephoned "tip" from an informer of unknown reliability that defendant was smoking marijuana in informer's apartment together with defendant's furtive actions in rolling a cigarette into a ball when officers were admitted to the apartment constituted probable cause to arrest him, and consequently evidence obtained as a result of a reason-

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able search pursuant to the arrest was lawfully seized.

Attempt—*People v. Rojas*, 10 Cal. Rptr. 465 (1961). See **Receiving Stolen Goods**, *infra*.

Confessions—*Culombe v. Connecticut*, 81 Sup. Ct. 1860 (1961). Defendant's conviction of first degree murder was affirmed by the Supreme Court of Errors of Connecticut. On certiorari, defendant contended that oral and written confessions admitted as evidence over his objection had been extracted from him by police methods which amounted to coercion. The United States Supreme Court reversed, holding that where defendant was questioned repeatedly but intermittently during the five days he remained in custody prior to his confession, was denied counsel during this detention, was not brought before a magistrate with reasonable promptness as required by state law, was confronted pursuant to police arrangements by his wife who urged him to confess, and was not informed of his rights before he confessed, the whole interrogation proceeding was an effective instrument designed to extort from defendant unwilling admissions of guilt; that in light of the facts that defendant's mental age was approximately nine years and that he was suggestible and subject to intimidation, his confessions were coerced inasmuch as the procedure caused his will to be overborne; and that the use of coerced confessions at his trial deprived defendant of due process of law. Announcing the judgment of the Court, Mr. Justice Frankfurter's opinion included a set of working principles to be applied to coerced confession cases, derived from a thorough analysis of the relevant case law and a discussion of the proper place of effective police interrogation in our accusatorial system.

Confessions—*Reck v. Pate*, 81 Sup. Ct. 1541 (1961). Denial of petitioner's application for writ of habeas corpus to test the validity of his detention pursuant to a 1936 Illinois conviction of murder was affirmed by the Court of Appeals for the Seventh Circuit. On certiorari, petitioner contended that he was deprived of his Fourteenth Amendment right to due process of law when the trial court admitted confessions which he had been coerced into making. The Supreme Court of the United States, speaking through Mr. Justice Stewart, vacated and remanded with instructions to allow the state, if it wished, to retry petitioner within a reasonable time, holding that where petitioner, a nineteen-year-old youth of subnormal intelligence and devoid of experience with the police, was subjected to repeated six or seven hour stretches of constant interrogation during the four days of his incommunicado detention which preceded the first of his two confessions, was physically weakened from lack of adequate food, and was in intense pain due to an undiagnosed internal ailment, the total combination of the circumstances which existed without interruption through the time of his second confession was so inherently coercive that petitioner's will must have been overborne at the time he made each confession; that in light of the totality of the circumstances, the fact that his first confession followed confrontation with the confessions of his companions had little independent significance; and that since his confessions were coerced, petitioner was being detained in violation of his federally guaranteed right to due process and was entitled to be freed from such detention. Justices Clark and Whittaker dissented, stating that in their opinion, confrontation with the confessions of his confederates alone made petitioner speak.

Confessions—*United States v. Killough*, 193 F. Supp. 905 (D.D.C. 1961). After being convicted of manslaughter, defendant moved for judgment of acquittal notwithstanding the verdict or for a new trial. Defendant contended that since his original confession was inadmissible, having been made during a period of unlawful detention in violation of Federal Rule 5(a), his subsequent repetition of the confession in absence of counsel was also inadmissible, even though he was taken before a committing magistrate prior to repetition. The District Court denied defendant's motions, holding that the proper test of admissibility of the subsequent reaffirmation of an originally inadmissible confession is whether the reaffirmation occurred after time for deliberate reflection and was independent of the original confession; that sufficient time had elapsed between defendant's inadmissible confession and his repetition thereof to render the second independent of the first; and that while consultation with counsel prior to repetition is a factor in determining the necessary independence of the second confession, lack of counsel alone would not render defendant's second confession inadmissible. See also **Confessions**—*Jackson v. United States*, 285 F.2d 675 (D.C. Cir. 1960), abstracted at 52 J. CRIM. L., C.&P.S. 295 (1961).

Confessions—*Bolger v. United States*, 189 F. Supp. 237 (S.D. N.Y. 1960). Plaintiff brought an action against United States Customs agents and a waterfront detective to enjoin them from testifying in state criminal proceedings as to evidence and statements obtained from plaintiff during a period of illegal detention by defendants, and from producing such evidence. The District Court granted the requested relief, holding that since evidence resulting from violation of Federal Rules of Criminal Procedure by federal agents is inadmissible in both state and federal criminal proceedings, the District Court was obliged to enjoin the Customs agents who had violated Federal Rule 5(a); and that although the waterfront detective was not a federal agent, he too would be enjoined since he was present when Customs agents questioned plaintiff by virtue of information from the Customs Service, a federal agency.

Contempt of Court—*Rees v. United States*, 193 F. Supp. 861, 864 (D. Md. 1961). See **Juries**, *infra*.

Contributing to the Delinquency of a Minor—*State v. Gonzales*, 129 So.2d 796 (La. 1961). Defendant was convicted of contributing to the delinquency of a female child. On appeal, he contended that the minor was married at the time the alleged sexual acts were committed and consequently not a "child" within purview of the statute. The Supreme Court of Louisiana annulled and set aside the conviction and sentence, holding that although the jurisdiction of juvenile courts in Louisiana extends to all children under the age of seventeen, including those emancipated by marriage, the amendment which enlarged their jurisdiction did not affect the criminal statute under which defendant was convicted, and that the word "child" as used therein did not include married persons under the age of seventeen.

Double Jeopardy—*Gori v. United States*, 81 Sup. Ct. 1523 (1961). Defendant's conviction of having knowingly received and possessed goods stolen in interstate commerce was affirmed by the Court of Appeals for the Second Circuit. On certiorari, defendant contended that the trial court erred in denying his motion to dismiss on a plea of former jeopardy. In an opinion written by Mr. Justice Frankfurter, the Supreme Court affirmed, holding that since a trial judge is under a duty to exercise sound discretion to protect the criminally accused and to see that justice is done, a mistrial declared by the trial court of its own motion in the sole interest of defendant but without his express consent did not constitute former jeopardy and was not a bar to his second trial. Chief Justice Warren and Justices Douglas, Black, and Brennan dissented.

Due Process of Law—*Powell v. Wiman*, 287 F.2d 275 (5th Cir. 1961). Petitioner was convicted of robbery by the State of Alabama. After the Court of Appeals for the Fifth Circuit affirmed denial of his application for a writ of habeas corpus, the United States Supreme Court vacated and remanded to the District Court for a full hearing. On appeal from a second adverse ruling, petitioner contended that the state suppressed vital evidence at his trial. The Court of Appeals reversed and remanded, holding that where the state had in its possession prior written statements of an accomplice witness inconsistent with his testimony, and knowledge of his history of insanity, petitioner's trial was fundamentally unfair, since he could not have been convicted without witness' testimony and since the suppressed evidence was crucial to the jury's consideration of witness' credibility.

Embezzlement—*State v. Tauscher*, 360 P.2d 764 (Ore. 1961). Defendant's demurrer to an indictment for embezzlement was sustained by the Circuit Court. On appeal by the state, defendant contended that since only tangible property capable of being technically possessed could be embezzled, she did not commit the crime of embezzlement by drawing checks on her principal's account without authority and for her own purposes. The Supreme Court of Oregon affirmed, holding that although the principal's checking account was in defendant's care, the checks were intangible choses in action incapable of being technically possessed either while in defendant's possession or upon delivery and presentment to the bank, and as such could not be the subject of embezzlement.

Equal Protection of the Laws—*Smith v. Bennett*, 81 Sup. Ct. 895 (1961). See **Habeas Corpus**, *infra*.

Felony-Murder—*Commonwealth v. Hart*, 170 A.2d 850 (Pa. 1961). See **Homicide**, *infra*.

Habeas Corpus—*Smith v. Bennett*, 81 Sup. Ct. 895 (1961). After petitioners were convicted of breaking and entering, the Supreme Court of

Iowa denied them leave to appeal from the [state] District Court's refusal to docket their petitions for writ of habeas corpus. On certiorari, the indigent petitioners contended that in requiring by statute the payment of a $4 filing fee before a writ of habeas corpus will be docketed, the State of Iowa had denied them equal protection of the laws in contravention of their Fourteenth Amendment rights. Speaking unanimously through Mr. Justice Clark, the United States Supreme Court vacated and remanded, holding that the federal writ of habeas corpus is the highest remedy in law for any man imprisoned, and must be maintained unimpaired and unsuspended; and that when an equivalent right is granted by a state, "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."

Habitual Criminals—*People v. Denno*, 172 N.E.2d 663 (N.Y. 1961). Defendant was convicted of attempting to sell narcotics, and received a sentence of from fifteen years to life imprisonment as a third felony offender. On appeal from the Appellate Division's ruling on his petition for writ of habeas corpus seeking resentencing as a first felony offender, defendant contended that not one of his prior crimes, which were federal drug convictions, would have constituted a felony had it been committed in New York. The New York Court of Appeals reversed the ruling and remanded defendant for resentencing as a first felony offender, holding that a federal conviction entered on defendant's plea of guilty to an information charging the commission of several acts, some of which would not have amounted to felonies had they been committed in New York, was not a prior felony for purposes of enhanced punishment, even though the clerk in calling the case had stated only that defendant was charged with an act which would have constituted a felony in New York, since the crime to which defendant pleaded guilty and of which he was convicted was that described in the information.

Homicide—*Commonwealth v. Hart*, 170 A.2d 850 (Pa. 1961). Defendant was sentenced to life imprisonment upon conviction of first degree murder. On appeal from the judgment and sentence, he contended that in order for a killing committed during the perpetration of a robbery to amount to first degree murder under the felony-murder rule, PA. STAT. tit. 18, §4701 (1945), the intent to rob must have been formed before the beginning of the fatal assault. The Supreme Court of Pennsylvania affirmed, holding that so long as the homicide occurred while defendant was perpetrating a robbery, proof that the intent to rob originated prior to the commission of the homicide was not necessary to bring defendant's act within the felony-murder rule. Justice Cohen dissented, stating that since malice must be imputed to defendant to raise his killing to first degree murder under the rule, it was necessary to show that malice [*i.e.* intent to commit the robbery] was present at the time of the killing.

Homicide—*Commonwealth v. Root*, 170 A.2d 310 (Pa. 1961). Defendant's conviction of involuntary manslaughter was affirmed by the Superior Court. On allocatur, defendant contended that his unlawful and reckless conduct, consisting of accepting decedent's challenge to engage in an automobile race which resulted in decedent's death (when decedent crashed head-on into an oncoming truck), was not a sufficiently direct cause of death to constitute criminal homicide. Noting that the case was one of first impression in Pennsylvania, the Supreme Court reversed and granted defendant's motion in arrest of judgment, holding that while unlawful or reckless conduct is a necessary element of the crime of involuntary manslaughter, a second essential element is that such conduct be the *direct* cause of death; and that although defendant might be held liable in a civil action for negligence, more direct causal connection than that satisfying the tort liability concept of proximate cause is required to establish criminal liability.

Insanity—*United States v. Currens*, 290 F.2d 751 (3rd Cir. 1961). Defendant was convicted of a violation of the Dyer Act. On appeal, he contended that the trial court erred in instructing the jury on the issue of criminal responsibility in terms of the *M'Naghten* rule, and that it should have granted his request for an instruction based on the *Durham* formula. Speaking through Chief Judge Biggs, the Court of Appeals for the Third Circuit reversed and ordered a new trial, holding that in light of increased scientific knowledge and of the basic aims of criminal justice, the *M'Naghten* "right-and-wrong" test is both archaic and unworkable; that the Court of Appeals is free to adopt a new test of criminal responsibility, since although the relevant

United States Supreme Court decisions *approve* the use of the *M'Naghten* test in federal courts, none of these *compel* its use or prohibit the use of some other test; that the objectives to be fulfilled by a proper test are (1) to allow expert witnesses to present the whole picture of an accused in terms of his entire relevant symptomatology, and (2) to verbalize the relationship between mental disease and the concept of mens rea; that although the *Durham* rule satisfies the first objective, its "product" aspect does not adequately fulfill the second; and that these objectives are best satisfied by the following test: A defendant is not criminally responsible if the jury is satisfied that "at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." Since Judge Hastie dissented on other grounds, the new test, based on that of the Model Penal Code, was unanimously accepted by the court.

Insanity—*Blocker v. United States*, 288 F.2d 853 (D.C. Cir. 1961). After the Court of Appeals reversed and remanded his conviction of first degree murder, defendant was retried and again convicted. On appeal, he contended that the trial court erroneously instructed the jury that the defense had the burden of proving defendant's insanity. The Court of Appeals for the District of Columbia, Edgerton, J., reversed and remanded, holding that the instruction constituted reversible error even though it was preceded and followed by instructions properly placing the burden on the prosecution to establish that defendant was sane, since under the circumstances it was impossible to assume that all the jurors acted upon the correct instructions. Concurring only in result, Judge Burger stated that the "capacity for choice and control" [*i.e.* free will] is the "basic postulate" of the proper test for determining criminal responsibility, and should be incorporated into the substance of the *Durham* rule and be fully explained in jury instructions. Judge Burger mentioned the Model Penal Code's rule (Model Penal Code §4.01 (Tent. Draft No. 4, 1955)), as a possible alternative to the present *Durham* rule. Judges Miller and Bastian agreed with Judge Burger that a change in the test for determining criminal responsibility was necessary, but dissented on the ground that this view did not require reversal of defendant's conviction.

Insanity—*O'Beirne v. Overholser*, 193 F. Supp. 652 (D.D.C. 1961). Petitioner applied for a writ of habeas corpus for release from St. Elizabeth's mental hospital, to which the trial court committed him according to statute when he was found not guilty of petit larcency by reason of insanity. He contended that the superintendent was arbitrarily and capriciously withholding a certificate, necessary for his unconditional release, to the effect that petitioner had recovered his sanity and would not be dangerous in the reasonable future by reason of a mental disease or defect. In an opinion by Judge Holtzoff, the District Court sustained the writ and ordered petitioner's unconditional release, holding that since he no longer suffered from a mental disease or defect but possessed a sociopathic [psychopathic] personality which might tend to make him an habitual petty criminal, and since a person with a sociopathic personality is not subject to commitment in a civil proceeding, the superintendent's refusal to grant the certificate on the ground that a month after petitioner entered the hospital an "administrative policy change" caused a sociopathic personality to be regarded as a mental disease lacked rational basis and hence was arbitrary and capricious.

Insanity—*State v. Andrews*, 357 P.2d 739 (Kan. 1960). Defendant was sentenced to death on three counts of first degree murder for killing his mother, father, and sister. On appeal, he contended that the *M'Naghten* rule, the test of criminal responsibility under which he was found sane, should be replaced in Kansas by the more enlightened *Durham* rule. The Supreme Court of Kansas affirmed, holding that since the broad scope of the *Durham* rule could conceivably render virtually all defendants criminally irresponsible, the *M'Naghten* rule, by specifically defining that degree of mental illness which relieves one of culpability, best protects society and would be retained in Kansas.

Internal Revenue—*James v. United States*, 81 Sup. Ct. 1052 (1961). Defendant's conviction of wilfully evading federal income taxes was affirmed by the Court of Appeals for the Seventh Circuit. On certiorari, defendant contended that funds which he had embezzled did not constitute taxable income within the scope of §22(a) of the Internal Revenue Code of 1939, inasmuch as *Commissioner v. Wilcox*, 327 U.S. 404 (1946), established that funds are taxable only if the taxpayer has a claim of right thereto. Overruling *Commissioner v.*

Wilcox, the Supreme Court reversed and remanded with directions to dismiss the indictment, holding that although defendant lacked any legal claim of right to the embezzled funds and was under an unconditional obligation to repay them, such funds constituted a taxable gain since defendant had complete dominion over the funds and had their economic use and benefit; but that since specific intent to wilfully evade federal income taxes was necessary to support his conviction and could not be proven inasmuch as the *Wilcox* case was controlling at the time the alleged crime was committed, defendant's conviction could not stand. Concurring in the result only, Justices Black, Douglas, and Whittaker stated that the "claim of right" test adopted in *Wilcox* should remain the proper test of taxability. Although Justices Clark, Harlan, and Frankfurter agreed that *Wilcox* should be overruled, Justice Clark would affirm on the ground that defendant placed no reliance on that case, and Justices Harlan and Frankfurter would reverse and remand to adjudicate the question of specific intent.

Juries—*Irvin v. Dowd*, 81 Sup. Ct. 1639 (1961). Dismissal of petitioner's application for writ of habeas corpus to test the validity of his Indiana conviction of murder and sentence of death was affirmed by the Court of Appeals for the Seventh Circuit. On the Supreme Court's remand for a decision on the merits, the Court of Appeals denied the writ. On certiorari, petitioner contended that the jury which tried and convicted him was not impartial in accordance with constitutional requirements. The United States Supreme Court, speaking through Mr. Justice Clark, vacated and remanded with instructions to allow the state to retry petitioner within a reasonable time, holding that although the due process clause does not require the states to provide trial by jury in criminal cases, it does require that a state which does provide trial by jury must provide an impartial jury; that unless each member of a jury can set aside his opinion as to the guilt or innocence of the accused and render an impartial verdict based solely on the evidence presented in court, that jury is not sufficiently impartial to satisfy due process; and that where eight members of the jury stated, on voir dire, that they thought petitioner was guilty, and some of them even stated that it would take evidence to overcome their belief, petitioner's conviction and sentence of a crime which had been extensively reported prior to the trial by newspapers, radio, and television in a manner extremely adverse to petitioner could not stand, since in light of the circumstances the jury could not be found to meet constitutionally required standards of impartiality. Noting that such "anticipatory trial by newspapers instead of trial in court before a jury" is unfortunately not the exception to the rule, Mr. Justice Frankfurter in his concurring opinion stated that "this Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. . . ."

Juries—*United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961). Defendant was convicted of bank robbery. On appeal, he contended that the verdict was coerced on the ground that the trial court instructed the deadlocked jury with an incorrect paraphrase of the "Allen charge." (See *Allen v. United States*, 164 U.S. 492 (1896)). The Court of Appeals reversed and remanded, holding that the instruction reminding jurors of their duty to agree but failing to admonish that no juror should yield his conscientious conviction was a one-sided, erroneous statement of the "Allen charge" and was likely to have been coercive, since the jurors in the minority might well have construed it to require deferential surrender to the majority view; and since the instruction was immediately followed by the verdict of a previously hopelessly deadlocked jury, defendant was entitled to a new trial.

Juries—*Rees v. United States*, 193 F. Supp. 861 (D. Md. 1961). (See also Search and Seizure—*United States v. Rees*, 193 F. Supp. 849 (D. Md. 1961), *infra*.) After being found guilty of violating 18 U.S.C. §1201(a) and (b) by a jury not recommending the death penalty, defendant moved for a new trial or mistrial, or to set aside the verdict, and to subpoena all members of the jury. He contended that where a television program on which nine of the twelve jurors reenacted their deliberations had been video-taped after the verdict was returned and was broadcast the night before the court was to impose sentence, all without knowledge of court or counsel until the broadcast, he had been prejudiced in that the court might be influenced by arguments in favor of capital punishment; and that some jurors had discussed on the program evidence not adduced at his trial. The District Court, Thomsen, C.J., denied the

motions, holding that nothing said on or in connection with the telecast had influenced the court in determining what sentence should be imposed; and that the testimony of jurors cannot be used to impeach their verdict where the facts sought to be shown essentially adhere in the verdict rather than relate to the existence of extraneous influences.

Rees v. United States, 193 F. Supp. 864 (D. Md. 1961). After handing down the opinion discussed above, the court appointed two members of the bar to study the matter and report their opinion as to whether the acts of persons responsible for the program amounted to contempt of court. Accepting the contents of the report and stating that such a program is against the public interest, the District Court, Thomsen, C.J., held that since the applicable statute, (18 U.S.C. §401) as interpreted by the United States Supreme Court, makes punishable only those acts affecting the orderly conduct of a trial which are committed in the presence of the court or so near as to disturb order and decorum in the courtroom, the responsible persons could not be held in contempt even though the broadcast clearly interfered with the orderly processes of justice. The court referred the matter to the President of the Maryland State Bar Association for consideration of whether disciplinary proceedings should be instituted against counsel for the television station, on whose advice the program was broadcast.

Kidnapping—*People v. Oliver*, 12 Cal. Rptr. 865 (1961). Defendant was convicted of lewd conduct with a child and of kidnapping. On appeal, he contended that the trial court erred in instructing that no specific intent or purpose was essential to the crime of kidnapping under the statute. (CAL. PEN. CODE §207 (1955)). The Supreme Court of California affirmed the conviction for lewd conduct but reversed the kidnapping judgment, holding that in many instances the forcible transporting of a person incapable of giving consent because of infancy or mental condition may be entirely innocent, and the legislature could not have intended the statute to apply to such cases; and consequently that while forcible moving without specific intent constitutes the crime of kidnapping if the victim is conscious and capable of giving consent, specific criminal intent must be proved where the victim is unconscious or incapable in law of giving consent.

Lie Detector Evidence—*Mattox v. State*, 128 So.2d 368 (Miss. 1961). Defendant was convicted of murder. On appeal, he contended that the trial court erred in admitting as evidence testimony tending to establish the fact that the state's key witness had taken a lie detector test. The Supreme Court of Mississippi reversed and remanded, holding that knowledge of the fact that a witness has taken a lie detector test may tend unduly to increase the jury's estimation of his credibility, and that, consequently, facts tending to prove the taking of such a test, as well as its results, are inadmissible.

Obscenity—*Marcus v. Search Warrants*, 81 Sup. Ct. 1709 (1961). Condemnation of all copies of 100 publications owned by defendant purveyors was affirmed by the Supreme Court of Missouri. On appeal, defendants contended that Missouri's procedures authorizing the search for and seizure of allegedly obscene publications operated to deprive defendants of the right to legitimate expression guaranteed them by the Fourteenth Amendment. (MO. REV. STAT. §§542.380(2), 542.400–420 (1949); MO. RULES 33.01). Speaking through Mr. Justice Brennan, the Supreme Court reversed and remanded, holding that "under the Fourteenth Amendment a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech," and that operation of procedures [including provisions whereby warrants for the seizure of "obscene publications" could be, and in this case were, issued on the assertions of a single officer without scrutiny of the allegedly obscene materials by the judge] which resulted in the condemnation of 100 publications but permitted the seizure of and suppression from the market for over two months of all copies of 180 publications belonging to defendants which were eventually found not to be obscene "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. . . ." Not reaching the issue decided by a majority of the Court, Justices Black and Douglas concurred on the ground that the seizure was effected by execution of a general warrant failing to describe specifically the things to be seized, in violation of the Fourth and Fourteenth Amendments.

Prejudicial Remarks by Prosecutor—*Pennington v. State*, 345 S.W.2d 527 (Crim. App. Tex. 1961). Defendant was convicted of robbery by assault. On appeal, he contended that the trial court erred in refusing to instruct the jury not to consider the following statement made by the district attorney in his closing argument: "The people of Nueces County expect you to put this man away." The Court of Criminal Appeals reversed and remanded, holding that the remark was clearly improper inasmuch as its effect was to ask for a conviction upon public sentiment rather than upon the evidence, and that it prejudiced defendant to the extent that the trial court's denial of his request to instruct the jury to disregard it was reversible error.

Receiving Stolen Goods—*People v. Rojas*, 10 Cal. Rptr. 465 (1961). Defendants were convicted of receiving stolen goods. On appeal, they contended that they could not have committed the substantive offense, since the goods had been recovered by state officers before being received by defendants. The Supreme Court of California reversed and remanded with directions to enter judgment or probation order, as the court below should decide, for the crime of *attempting* to receive stolen goods, holding that although commission of the substantive offense was impossible in law, since the goods ceased to be "stolen" when recovered by officers, defendants nonetheless were guilty of attempting to receive stolen goods, since they had specific intent to commit the substantive offense and did those acts which they reasonably believed were necessary to consummate it.

Res Judicata—*United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961). Defendant was convicted of conspiring to burglarize United States post offices and to receive stolen goods, and of the substantive offense of receiving stolen goods. On appeal, he contended that admission of evidence tending to prove his participation in burglaries of which he had been acquitted at a prior trial was error under the principle of collateral estoppel [res judicata]. The Court of Appeals, Friendly, J., reversed with directions to enter judgment of acquittal on two counts charging conspiracy to burglarize, and reversed and remanded the convictions of receiving and conspiracy to receive with directions to exclude all evidence showing defendant to be a principal or an aider and abetter in the burglaries, holding that in light of the record of his first trial, the verdict of "not guilty" of the substantive burglary offenses conclusively determined that defendant was not responsible for the burglaries, and hence introduction of such evidence at a subsequent trial for other offenses arising from the same transaction was reversible error, since although the Government may "charge an acquitted defendant with other crimes claimed to arise from the same or related conduct . . . it may not prove the new charge by asserting facts necessarily determined against it on the first trial . . ."; that although in theory an acquittal of the substantive charges was not inconsistent with conviction of conspiracy to burglarize, "the core of the prosecutor's case was in each case the same" (citing *Sealfon v. United States*, 332 U.S. 575 (1948), and noting that the instant case is its converse), and consequently the court would direct judgments of acquittal on those counts; but since evidence other than that barred by collateral estoppel sufficed for submission to a jury of the counts charging receiving and conspiracy to receive stolen goods, those counts would be reversed and remanded with directions to exclude at the new trial the evidence complained of.

Right to Counsel—*People v. Waterman*, 175 N.E.2d 445 (N.Y. 1961). Defendants' convictions of first degree robbery, second degree larceny, and assault were reversed on the law by the Appellate Division. On appeal by the state, defendants contended that the trial court erred in admitting incriminating statements made by defendant Waterman during post-indictment interrogation in absence of counsel and without having been informed of his rights. The Court of Appeals affirmed, holding that although a defendant need not be informed of his rights prior to indictment, admission of the post-indictment statements made by defendant Waterman was reversible error where he was not first advised of his right to counsel, since this right accrues when the criminal cause begins [*i.e.*, upon indictment]; and that erroneous admission of defendant Waterman's confession, which implicated defendant Devine, warranted reversal of defendant Devine's conviction in the interest of justice. The court noted that denial of counsel after indictment and before trial may well be more damaging than denial during the trial itself. Compare *People v. Noble*, Self-Incrimination, *infra*.

Search and Seizure—*United States v. Koenig*, 290 F.2d 166 (5th Cir. 1961). Defendant's pre-indictment motion to suppress was granted by the District Court. On appeal by the United States, defendant contended that the order was not appealable. The Court of Appeals affirmed, holding that defendant's motion made after a complaint and commitment hearing but before indictment was an early stage of the criminal case against him; and since an order to suppress evidence is appealable only if the motion to suppress was made in an independent civil proceeding, the United States could not appeal from the order.

Search and Seizure—*United States v. Rees*, 193 F. Supp. 849 (D. Md. 1961). Defendant was convicted of interstate transportation of a kidnapped woman for the purpose of sexual gratification and beating and killing her, and of interstate transportation of the woman's kidnapped child for the purpose of beating and killing her and avoiding detection. On alternative motions for judgment of acquittal or for a new trial, defendant contended that evidence was illegally seized from his parents' home and hence should not have been admitted at the trial. The District Court denied both motions, holding that a revolver was admissible since it was an instrument of the crime which the officers were investigating and since it was found in defendant's parents' home, no part of which was reserved for defendant's exclusive use, during a search authorized by the parents; and that although seizure during the same search of obscene papers which were not admitted at the Trial was illegal in light of the Fourth and Fifth Amendments considered together, since they were neither instruments nor fruits of the crime and had not been abandoned by defendant, the obscene material would not be returned to him since it contained an autobiographical account of the crimes which might be admissible in subsequent proceedings arising therefrom.

Search and Seizure—*Aday v. Superior Court*, 13 Cal. Rptr. 415 (1961). Petitioners' application for writ of mandamus to compel return of property seized under an allegedly invalid search warrant in connection with an obscenity charge was denied by the District Court of Appeal. On appeal, petitioners contended that the warrant was invalid because it did not particularly describe all the things to be seized. The Supreme Court of California issued a peremptory writ directing the return of all property seized under the warrant with the exception of two books, holding that except for specific references to these books, the description in the warrant consisted of a list of broad, general categories not sufficiently specific to satisfy California's constitutional requirement, but that the warrant was severable and not invalid with respect to the specified iterms.

Search and Seizure—*People v. Bly*, 12 Cal. Rptr. 542 (Dist. Ct. App. 1961). Defendant was convicted of conspiring to commit forgery and of forgery of fictitious names. On appeal, he contended that his conviction was based on evidence obtained as the result of an illegal search. The District Court of Appeal affirmed, holding that inasmuch as bundles of checks found in a trash can had been discarded, they could not be the object of an illegal search and seizure, and that similar bundles found on defendant's front stoop and in bushes near his house were not obtained by any kind of search, since they were in open view and not within the house.

Search and Seizure—*Marcus v. Search Warrants*, 81 Sup. Ct. 1709 (1961). See **Obscenity**, *supra*.

Self-Incrimination—*People v. Noble*, 175 N.E.2d 451 (N.Y. 1961). Defendants Barber and Noble were convicted of first degree murder. On appeal, they contended that defendant Noble's written confession, necessary to support both convictions, was obtained in violation of his privilege against self-incrimination. The Court of Appeals reversed and remanded, holding that although mere *failure* to warn a defendant of his rights during police investigation prior to indictment is not error, the Assistant District Attorney's *flat refusal* to answer defendant Noble when the latter asked whether he had to speak before consulting counsel, violated defendant's privilege against self-incrimination, since it could reasonably have led defendant to believe that he was compelled to answer; that the use at defendant Noble's trial of the confession thus procured "violated the fundamental fairness essential to the concept of justice"; and that in the interest of justice, defendant Barber's judgment of conviction would also be reversed and remanded.

Self-Incrimination—*Johns v. State*, 109 N.W.2d 490 (Wis. 1961). Defendant was convicted of

armed robbery and first degree murder. On appeal, he contended that the trial court should have instructed the jury that defendant's failure to testify raised no presumption against him. Noting that the case was one of first impression in Wisconsin, the Supreme Court affirmed, holding that although a statute provides that failure to testify in his own behalf creates no presumption against a defendant, the trial court was under no duty to so instruct in the absence of a request by defendant.

Sodomy—*People v. Randall*, 174 N.E.2d 507 (N.Y. 1961). Defendant's conviction of attempted sodomy in the second degree, a felony, was reduced by the Appellate Division to attempted sodomy as a misdemeanor. On cross appeals, defendant contended that since the statute (N.Y. PEN. LAWS §15 (1950)) does not apply to the passive party to an act of sodomy, he committed no crime when he allowed an infant to attempt voluntarily to perform an act of anal intercourse with him. The Court of Appeals affirmed, holding that although defendant as a passive party to the act was guilty of no crime described by the sodomy statute, he was a principal to the crime of attempting to commit sodomy as a misdemeanor since he aided and abetted his active partner, whose act amounted to that crime.

Speedy Trial—*United States v. Lane*, 193 F. Supp. 395 (N.D. Ind. 1961). Petitioners were convicted of first degree murder in 1936, and in 1954 were convicted of second degree murder at a second trial held after their motion for new trial was granted in 1953. On petition for writ of habeas corpus, petitioners contended that by deliberately preventing them from obtaining a timely appellate review of their original conviction, and by retrying them for the same offense nearly eighteen years later, the State of Indiana denied petitioners a speedy trial in violation of their federal Fourteenth Amendment rights. Noting that the petition presented an unprecedented issue, the District Court granted the writ and ordered that petitioners be discharged and released from custody, holding that their failure to seek habeas corpus in a federal court until now did not prejudice petitioners in this action; and that since Indiana State Prison officials prevented petitioners from mailing letters necessary to effect a timely appeal of their original sentence, and since no procedural method for obtaining belated appellate review existed until a state court decision in 1948, Indiana deprived petitioners of their right to both a speedy and fair trial in violation of the Indiana constitution and of the equal protection clause of the Fourteenth Amendment when it retried them in 1954.

Wiretapping—*Pugach v. Klein*, 193 F. Supp. 630 (S.D. N.Y. 1961). Petitioner, a state prisoner awaiting trial, applied for a writ of mandamus to compel the United States Attorney to prosecute a New York City policeman, an Assistant District Attorney, and a County Judge for alleged violations of the Federal Communications Act of 1934, for a writ of habeas corpus, and for warrants for the arrest of the three aforementioned persons. Petitioner contended that these persons violated and conspired to violate §605 of the Act, (47 U.S.C. §605 (1934)), and that evidence obtained by such violation and conspiracy was to be used at his impending trial. The District Court denied all applications, holding that it refused to interfere in a preliminary stage of a state criminal prosecution, since the information gained as a result of the wiretapping was admissible in the proceeding under New York law consistent with petitioner's federal right to due process, and since any other course of action by the District Court would embarrass, impede, and obstruct the state criminal proceeding in a manner repugnant to our system of dual sovereignty.

Witnesses—*People v. Gullick*, 11 Cal. Rptr. 566 (1961). See **Accomplice Testimony**, *supra*.