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# Abstracts of Recent Cases

ing of shoplifting are shared with other authors. Some thefts are in response to an acute neurotic *or* realistic need to act as a providing father or mother. "Sometimes the description of an act or a theft gives the impression that it is a substitute act of sexual character."[5] Faure and Rappard speak of "le raptus vol" in petit larceny.[6] Faure and Rappard also include interesting reflections on the Potlach implicit in some "Vols Mélancholiques." The Clinic has not seen this aspect of larceny, but has been aware of several Samson-like "bring the temple down on myself and everyone else" fantasies. Bowlby's "Forty-Four Juvenile Thieves"[7] are of interest in that of his four who have had "severe and well-defined depressions," one has just lost a mother to death, and two their mothers to serious illness, while the fourth had been double-promoted at school out of her original class. The author attributes her depression to difficulty in excelling in the higher grade. Like Laignel-Lavastine's Maurice,[8] the Clinic shoplifters are sometimes "deplorably brought up," but many are actually competent, capable individuals who are in crisis and who are by no means universally from broken homes. They display talents and strengths that have led to the thought that their low repeat rate may be due to a greater personality strength than the average Municipal Court misdemeanant's. The crime may be a symptom of an acute emotional crisis which is then limited by the misdemeanant's strength as well as by the impact of court and clinic.

[5] Christiansen, *Theft With a Typical Motive*, 21 ACTA PSYCHIATRICA ET NEUROLOGICA 195 (1946).

[6] Faure & Rappard, *Vol et Melancolie: De la Perte a la recuperation de l'object*, CAHIERS PSYCHIATRIQUES 96 (Supp. 11 to Strasbourg Med. 1956).

[7] Bowlby, *Forty-Four Juvenile Thieves: Their Characters and Home Life*, 25 INT'L J. PSYCHOANALYSIS 19, 107 (1944).

[8] Laignel-Lavastine, *Du Crime au Criminel*, 72 ARCHIVES INTERNATIONALES DE NEUROLOGIE 110 (Paris 1953).

### SUMMARY AND CONCLUSIONS

In summary the following conclusions are possible:

(1) The convicted Cincinnati shoplifter seems less likely to repeat the misdemeanor than the other types of court misdemeanants.

(2) The shoplifter who is convicted but arouses the judge's interest sufficiently for a referral to the Municipal Court Psychiatric Clinic and thence to subsequent agencies seems even less likely to repeat the misdemeanor than the unreferred convicted shoplifter.

(3) The shoplifter evidently suffers from depression significantly more than other misdemeanants.

(4) A theft may be a way of coping with a critical personal loss.

(5) The theft may also be a means of seeking attention, revenge, sexual gratification, and carrying out hostile impulses.

(6) The shoplifter's relative personality strength and passage through a nice balance of punishment and restitution may be important factors in the low rate of recidivism.

## ABSTRACTS OF RECENT CASES

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**Abstractor**

**Attorney-Client Privilege**—*United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). Defendant, an accountant, was convicted of criminal contempt for refusal to answer questions before a grand jury. On appeal, defendant contended that since he was acting as agent for an attorney when he gained the information in issue from the attorney's client, the attorney-client privilege extended to the communications, and hence defendant should not have been held in contempt for failure to disclose them. The Court of Appeals for the Second Circuit vacated judgment and remanded for further hearing, holding that the attorney-client privilege extends to communications made by a client to an accountant hired by an attorney, if such communications are made incident to the client's obtaining of legal advice from the attorney; and since absence of evidence

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relating to the circumstances under which the client's communications reached defendant was attributable to the trial judge's fixed view against defendant's claim of privilege and to uncertainty at the trial as to the applicable legal principle, the cause must be remanded for determination of those circumstances.

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**Bigamy**—*People v. Dunn*, 19 Cal. Rptr. 835 (Dist. Ct. App. 1962). Defendant was convicted of bigamy [CAL. PEN. CODE §281]. On appeal, defendant contended that California lacked jurisdiction to punish him for a bigamous marriage solemnized outside the state. The District Court of Appeal affirmed, holding that the statute, as applied to defendant, punished not the foreign offense of solemnization but rather the flaunting of California's sovereignty by cohabitation, an essential requisite of marriage, within its territorial jurisdiction, after celebration of the bigamous marriage outside the state; and that such cohabitation constituted the offense of bigamy even where the first marriage as well as the second was solemnized outside California.

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**Coerced Plea of Guilty**—*Rogers v. State*, 136 So. 2d 331 (Miss. 1962). Defendant was convicted of murder. On appeal from the Circuit Court's dismissal of his petition for writ of error coram nobis, defendant contended that his plea of guilty was induced by the trial judge, and hence that it was involuntary and not binding on defendant. Sustaining the petition for writ of error coram nobis, the Supreme Court of Mississippi reversed and remanded, holding that in making promises of lenient treatment, the trial judge actively participated in persuading defendant to plead guilty to the extent that the plea was not voluntarily made and consequently was not binding on defendant. The court noted that while the judge did not act corruptly or from any bad motive, his actions were indiscreet and at variance with traditional standards of judicial decorum.

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**Confessions**—*People v. Nemke*, 179 N.E.2d 825 (Ill. 1962). Defendant, aged 17, was convicted of murder and sentenced to death. On writ of error, defendant contended that the trial court erred in overruling his motion to suppress alleged confessions and in admitting them into evidence. The Supreme Court of Illinois reversed and remanded, holding that when the trial judge restricted defense counsel in his interrogation of defendant as to why he had confessed, refused to permit defendant's mother to testify as to her telephone conversations with a police officer, and failed to require the state to produce or explain the absence of material witnesses to the voluntariness of defendant's confessions, the judge thereby unduly restricted the scope of the preliminary hearing and thus did not have before him all the relevant circumstances necessary to making an adequate judgment with regard to the competency [voluntariness] of the confessions.

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**Confessions**—*State v. Fauntleroy*, 177 A.2d 762 (N.J. 1962). Defendant was convicted of first degree murder. On appeal, defendant contended that coerced confessions had been received in evidence. The Supreme Court of New Jersey reversed and remanded, holding that where the trial court's ruling that defendant's confessions were admissible was based on finding only that there had been no misrepresentation or physical brutality, the standard of admissibility used was erroneous, since it disregarded the concept that a man's will may be overborne by means other than misrepresentation or physical violence; and that defendant's conviction must therefore be set aside for failure of the trial court to apply a constitutionally proper standard in determining admissibility of the confessions.

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**Confessions**—*Collins v. State*, 352 S.W.2d 841 (Tex. Crim. App. 1961). Defendant was convicted of murder. On appeal, defendant contended that the confession used against him was inadmissible as a matter of law, having been obtained in violation of due process. The Court of Criminal Appeals of Texas affirmed, holding that where no promises were made to defendant, no physical violence was inflicted or threatened, and defendant was not denied the right of consultation with his family or attorney, was not questioned for an unreasonable length of time, was not mentally defective, and had a twelfth grade education, defendant failed to prove that the confession had been obtained in violation of state and

federal due process even though, before confessing, he was arrested without a warrant, was not taken forthwith before a magistrate, was incarcerated in an out-of-town jail under an assumed name, and was given a lie detector test.

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**Demeanor Evidence**—*McBride v. State*, 368 P.2d 925 (Alaska 1962). See **Right to Confrontation**, *infra*.

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**Habitual Criminal Acts**—*Oyler v. Boles*, 82 Sup. Ct. 501 (1962). Petitioners were sentenced to life imprisonment under West Virginia's habitual criminal statute [W. VA. CODE ANN. §6130 (1961)], and the Supreme Court of Appeals of West Virginia denied their separate petitions for writs of habeas corpus. On certiorari, petitioners contended that the statute had been applied without advance notice and to only a minority of those subject to its provisions, in violation of the due process and equal protection clauses of the Fourteenth Amendment. Speaking through Mr. Justice Clark, the United States Supreme Court affirmed, holding that since petitioners had assistance of counsel and conceded the applicability of the statute to their cases, their right to due process was not violated by failure to notify them of the habitual criminal charges until after conviction of the substantive offense; and that absent evidence that selective enforcement of the statute was deliberately based on an unjustified standard [*i.e.*, race or religion], the mere fact that penitentiary records indicated that a high percentage of those subject to the statute had not been proceeded against thereunder failed to establish denial to petitioners of equal protection of the laws. Mr. Justice Harlan joined in the Court's opinion and also filed a separate opinion comparing the instant case and *Chewning v. Cunningham*, 82 Sup. Ct. 498 (1962) [See **Right to Counsel**, *infra*]. Mr. Justice Douglas, with whom Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan concurred, dissented on the ground that petitioners had not been afforded adequate notice of the recidivist charges as required by the procedural aspect of due process.

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**Habitual Criminal Acts**—*Smith v. State*, 181 N.E.2d 530 (Ind. 1962). Defendant was convicted of forgery and was sentenced to life imprisonment as an habitual criminal. On appeal from the trial court's overruling of his motion for new trial, defendant contended that the state had failed to prove beyond a reasonable doubt that he had been convicted of two prior felonies, and therefore the evidence did not support the verdict finding that defendant was an habitual criminal. The Supreme Court of Indiana reversed with instructions to grant defendant's motion for new trial, holding that the requirement of proof beyond a reasonable doubt extends to the alleged former convictions relied on in a prosecution under the Habitual Criminal Act [IND. ANN. STAT. §9-2208 (1956)]; that evidence consisting of properly certified copies of two judgments of conviction and two sets of commitment papers bearing the same or similar name as defendant's, without any other evidence to identify defendant as the person named in the judgments and commitment papers, was insufficient to establish the alleged prior felony convictions beyond a reasonable doubt; and since proof of two such convictions is an essential element of the offense of being an habitual criminal, defendant's conviction must be reversed.

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**Insanity**—*Tremblay v. Overholser*, 199 F. Supp. 569 (D.D.C. 1961). Petitioner was found not guilty of intoxication by reason of insanity and was committed to St. Elizabeths Hospital. On petition for writ of habeas corpus, petitioner contended that when the trial court refused to accept her plea of guilty and instead committed her as criminally insane on finding her not guilty on the ground of insanity, her right to due process of law was violated. The District Court sustained the writ and ordered that petitioner be released, holding that because a District of Columbia statute makes mandatory the commitment to St. Elizabeths Hospital of one acquitted by reason of insanity, the trial court's action constituted a violation of due process where petitioner had not advanced a plea of insanity.

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**Insanity**—*Chase v. State*, 369 P.2d 997 (Alaska 1962). Defendant was convicted of second degree murder. On appeal, he contended that the trial court erred in refusing to instruct the jury, as to his insanity defense, in terms of the *Durham* ruel

[see *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954)] and of the "irresistible impulse" test; but that even if it correctly chose to give a *M'Naghten* instruction [see *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843)], the trial court erred by failing to require the state to prove insanity beyond a reasonable doubt and by incorrectly stating the *M'Naghten* rules. Noting that the present state of development in the science of psychiatry did not provide a persuasive basis for a change in the existing law, the Supreme Court of Alaska affirmed, holding that in light of the invariably great technicality and complexity of evidence concerning responsibility and in lack of a scientifically precise definition of responsibility, the *M'Naghten* rules would be retained as the criteria of criminal responsibility in Alaska, since these rules provide the jury with clearer and simpler principles upon which to base their decision as to criminal accountability than do any of the other tests; that since sanity is a quality of one who commits a crime rather than an element of the crime itself, the state was not required to prove defendant's sanity beyond a reasonable doubt, but rather defendant must overcome the very strong presumption of sanity by proving insanity by a preponderance of the evidence; and that use in the instruction of conjunctive rather than disjunctive wording (". . . incapable of knowing the nature and quality of his act *and* of distinguishing between right and wrong . . . ") was not erroneous even though the *M'Naghten* rules are phrased in the disjunctive, inasmuch as to hold otherwise would necessitate the illogical inference, unsupported by scientific principles, that the intellect is divisible into two distinct parts. Justice Arend dissented from the majority's approval of the conjunctive phraseology.

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Insanity—*People v. Roth*, 181 N.E.2d 440 (N.Y. 1962). Defendant was convicted of murder. On appeal, he contended that receipt in evidence of a report concerning his ability to stand trial, prepared by two psychiatrists pursuant to direction of the trial court, constituted reversible error. The Court of Appeals of New York reversed and ordered a new trial, holding that unless the report had been offered by defendant, its admission would constitute reversible error, for the reasons that a statute [N.Y. CODE CRIM. PROC. §622] prohibits the admission of such reports, that such reports invariably contain admissions by a defendant, and that the standard used in determining whether a defendant is capable of standing trial is substantively different from that used in determining whether he is legally accountable for his acts; that since it was not connected with Bellevue Hospital records which had been offered by defendant, the report was not offered by him even though it was physically incorporated with the hospital records; and that consequently receipt of the report constituted reversible error.

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Lie Detector Evidence—*State v. Anderson*, 113 N.W.2d 4 (Minn. 1962). Defendant was convicted of third degree burglary. On appeal from denial of his motion for new trial, defendant contended that the trial court's refusal to permit his counsel to comment on his willingness to submit to a lie detector test constituted reversible error. The Supreme Court of Minnesota affirmed, holding that comments on either refusal or willingness to take lie detector tests are improper, since results of such tests are inadmissible as evidence.

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Obscenity—*People v. Marler*, 18 Cal. Rptr. 923 (Super. Ct. App. Dep't 1962). Defendant was convicted of giving obscene films in violation of a city ordinance. On appeal, defendant contended that the trial court erred in instructing the jury that if the films were obscene, as admitted by defendant, they could find him guilty regardless of the purposes for which the films had been given. The Appellate Department of the Superior Court of San Bernardino County, California, reversed and remanded, holding that since under some circumstances material which is clearly obscene by average standards can be put to lawful use, the trial court's instruction incorrectly stated the law, and that since there was some evidence that the films were placed in transit to a medical technologist for the purpose of experimental use in a hospital, the jury should have been instructed that material "obscene" by average standards can be lawfully "given" when in good faith it is to be used exclusively within a professional group pursuing legitimate professional purposes, where it is not probable that the material will appeal to the prurient interests of average members of that group, and where the material is not likely to fall into the hands of persons outside the group.

**Prejudicial Publicity**—*United States v. Smith*, 200 F. Supp. 885 (D. Vt. 1961). Petitioner was convicted of arson causing death, equivalent under Vermont law to first degree murder. On petition for writ of habeas corpus, petitioner contended that Vermont had deprived him of due process by failing to accord him a fair trial by a panel of impartial jurors. The district court granted the writ and discharged petitioner, allowing the State, within a reasonable time, either to correct the defects which rendered discharge necessary or to appeal from the judgment, holding that where members of the jury read newspaper publicity highly prejudicial to petitioner, some of which was directly attributable to disclosures to the press by the State, the jury was not sufficiently impartial to satisfy federal constitutional requirements even though each juror disclaimed any prejudice or partiality, since the combination of facts disclosed by the record and a realistic view of human nature required the district court to disregard their declarations. (Subsequently, the State elected to appeal from the judgment, and the district court issued a certificate of probable cause, denied Vermont's motion for stay of judgment, and admitted petitioner to $5,000 bail pending the State's appeal.)

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**Prejudicial Publicity**—*State v. Rideau*, 137 So. 2d 283 (La. 1962). Defendant was convicted of murder. On appeal, he contended that the trial court erred in refusing to allow challenges for cause of three jurors on the ground that because they had seen defendant confess on television (as they had testified on voir dire), it was impossible for them to be fair and impartial. The Supreme Court of Louisiana affirmed, holding that so long as the jurors testified that they could lay aside any opinions as to guilt and base their decisions solely upon the evidence regardless of anything they may have heard, seen, or read of the case, the fact that the jurors saw the television program did not disqualify them, and the trial court correctly refused to allow the challenges for cause.

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**Prejudicial Publicity**—*People v. Genovese*, 180 N.E.2d 419 (N.Y. 1962). Defendant was convicted of acting as a prize fight manager without a license, and the Appellate Division affirmed. On appeal by permission, defendant contended that the trial court erred in denying his motion for mistrial on the ground that adverse newspaper publicity prejudiced jurors against him. The Court of Appeals of New York affirmed, holding that in light of the fact that two jurors were excused when it appeared to the trial court that what they had read might influence their verdict, six had not read the articles, and six who had read them declared that they nonetheless could render an impartial verdict based solely on evidence received in court, denial of defendant's motion for mistrial did not constitute an abuse of discretion. The court noted that the problem of obtaining truly impartial jurors is made more difficult "in a society where crime and corruption are exploited by the press." Chief Judge Desmond dissented, stating that jurors exposed to such publicity cannot reasonably be expected to "wipe it off their minds."

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**Promises of Leniency**—*Machibroda v. United States*, 82 Sup. Ct. 510 (1962). After petitioner was convicted on two charges of bank robbery, the district court denied, without hearing, his motion to vacate and set aside the sentence [under 28 U.S.C. §2255 (1959)], and the Court of Appeals for the Sixth Circuit affirmed. On certiorari, petitioner contended that the district court had violated FED. R. CRIM. P. 32(a) by failing to inquire if petitioner wished to speak in his own behalf before sentence was imposed, and that his guilty pleas were not voluntary, having been induced by promises of leniency made by an assistant United States prosecutor. In an opinion written by Mr. Justice Stewart, the United States Supreme Court vacated and remanded for hearing on the petition, holding that the district court's failure to inquire at the time of sentencing whether petitioner wished to make a statement in his own behalf did not constitute error raisable on a §2255 motion, for the reasons stated by the Court in *Hill v. United States*, 82 Sup. Ct. 468 (1962) [see Sentencing, *infra*]; but since petitioner's factual assertions, while improbable, were not wholly incredible, and the issues raised thereby could not be resolved without resort to material outside the files and records of the trial, the district court should have granted a hearing on petitioner's motion in order to best serve the purposes of §2255. Justices Warren, Black, Douglas, and Brennan dissented in part, disagreeing with the

Court's treatment of petitioner's first contention for the reasons set out in their dissent in the *Hill* case. Justices Frankfurter and Harlan joined in the dissenting opinion of Mr. Justice Clark, which stated that the conclusion of the majority repre-represented an unwarranted restriction of the summary disposition provision of §2255 as well as a failure to give due deference to the inferences drawn by the district court and the Court of Appeals.

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**Remarks by Prosecutor**—*State v. Gridley*, 353 S.W.2d 705 (Mo. 1962). Defendant was convicted of burglary and stealing. On appeal, defendant contended that the trial court erred in failing to sustain his objection to an argument of the prosecutor that the jury should make an example of defendant. The Supreme Court of Missouri affirmed, holding that the prosecutor was entitled to argue that the jury should convict and assess a punishment against defendant in order to make an example of him to others for the protection of the community, since that is one of the reasons for inflicting punishment upon those who violate the law.

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**Right of Presence at Trial**—*State v. Vance*, 124 S.E.2d 252 (W. Va. 1962). Defendant was convicted of statutory rape. On writ of error, defendant contended that his absence from the trial for four or five minutes while instructions were being discussed constituted a violation of a statute [W. VA. CODE ch. 32, art. 3, §2 (1931)] requiring that one indicted for a felony be personally present during the trial, and that his conviction must therefore be reversed. The Supreme Court of Appeals of West Virginia reversed, set aside the verdict, and awarded a new trial, holding that since the statute prescribed a mandatory requirement, judgment of conviction entered pursuant to a trial at which the statute was even technically violated could not stand; and that defendant's short absence, since it occurred during his felony trial, constituted a violation of the statute, even though the absence was voluntary and resulted in no prejudice to defendant's rights.

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**Right to Confrontation**—*McBride v. State*, 368 P.2d 925 (Alaska 1962). Subsequent to his first trial, at which the jury failed to reach a verdict, defendant was retried and convicted of burglary and petty larceny. On appeal, defendant contended that the trial court committed reversible error in allowing the jury to hear an electronic recording of testimony of one Carr, who had been a state's witness at the first trial and was unavailable at the second trial, on the grounds that defendant was thereby deprived of his rights to be confronted by Carr and to have the jury observe his demeanor. The Supreme Court of Alaska affirmed, holding that inasmuch as the essential purpose of the state and federal constitutional right to confrontation is to secure the right of cross-examination, use of the recorded testimony at the second trial did not deprive defendant of his constitutional right, since he had cross-examined Carr at the first trial, and this cross-examination was included in the recording heard by the convicting jury; and that the use of electronically recorded testimony of the unavailable witness preserved that portion of demeanor which related to his voice, whereas no demeanor evidence at all would have been preserved, had the former testimony been manually reported. The court noted that the Alaska court system has employed electronic recorders to the exclusion of manual reporters since its inception in 1960.

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**Right to Confrontation**—*Minturn v. State*, 136 So. 2d 359 (Fla. Dist. Ct. App. 1962). Defendant was convicted of rape. On appeal, defendant contended that the trial court erred in refusing to require a state's witness to produce, for purposes of cross-examination, a notebook to which the witness had referred during direct examination as a means of refreshing his recollection. The District Court of Appeal reversed and remanded, holding that failure to require that the notebook be made available to the defense during cross-examination constituted prejudicial error, since to hold otherwise would allow the circumvention of defendant's right to full and fair cross-examination of witnesses, which must be preserved in order to enforce the constitutional guarantee that the accused be confronted by his accusers.

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**Right to Counsel**—*Chewning v. Cunningham*, 82 Sup. Ct. 498 (1962). After petitioner was

sentenced to 10 years imprisonment as a third felony offender under Virginia's recidivist statute [VA. CODE ANN. §53-296 (1950)], the Supreme Court of Appeals of Virginia refused a writ of error to review the Law and Equity Court's denial of petitioner's application for writ of habeas corpus. On certiorari, petitioner contended that he was tried and convicted without benefit of counsel, although he had requested one. In an opinion written by Mr. Justice Douglas, the United States Supreme Court reversed, holding that since a trial on a charge of being an habitual criminal is so serious, the issues presented under Virginia's statute are so complex, and the potential prejudice resulting from absence of counsel is so great, the rule concerning appointment of counsel in other types of criminal cases was equally applicable to petitioner's case; and that denial of counsel in the recidivist proceeding, where petitioner had specifically requested counsel, entitled him to release on habeas corpus. Mr. Justice Harlan concurred only in the result, reasoning [in his concurring opinion in *Oyler v. Boles*, 82 Sup. Ct. 501 (1962), see Habitual Criminal Acts, *supra*, in which opinion he discussed both the *Oyler* and the *Chewning* cases] that denial of counsel constituted a violation of procedural due process only because of want of adequate notice prior to hearing on the habitual criminal charge.

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Right to Counsel—*Solomon v. State*, 138 So. 2d 79 (Fla. Dist. Ct. App. 1962). Defendant was convicted of unlawful possession of moonshine whiskey. On appeal, defendant contended that in trying and convicting him within 24 hours of the time he was informed of the charge against him, the trial court deprived defendant of his constitutional right to be heard by counsel. The District Court of Appeal set aside the judgment and remanded, holding that while defendant was not entitled to appointment of counsel, he did have a right to be represented by a lawyer of his own procurement, which necessarily carried with it the additional right to have a fair and reasonable opportunity to procure counsel and prepare for trial, and that the trial court's action in requiring defendant to go to trial in such a short period of time denied him such opportunity.

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Scientific Evidence—Blood Grouping Tests—*Bowden v. State*, 137 So. 2d 621 (Fla. 1962). Defendant was convicted of incest. On appeal, defendant contended that the trial court committed reversible error in refusing to order blood grouping tests which defendant requested in order to impeach the veracity of his daughter, the prosecutrix, by conclusively disproving his paternity of her child. The District Court of Appeal affirmed, holding that although there was no specific statute on the subject, Florida trial courts have inherent authority to order blood grouping tests, in their sound discretion, in criminal cases; that if paternity were the determinative factual issue in a criminal case, a trial court's refusal to order such tests at a defendant's request would amount to an abuse of discretion and a practical denial of due process; but since in the instant case paternity was not a determinative issue, and, aside from any proof that defendant was the father of his daughter's child, there was sufficient evidence to support the incest verdict, the trial court's refusal to order the tests was not reversible error.

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Search and Seizure—*DiBella v. United States*, *United States v. Koenig*, 82 Sup. Ct. 654 (1962). The Court of Appeals for the Second Circuit ruled that the district court's denial of defendant DiBella's pre-indictment motion to suppress was appealable, while the Fifth Circuit Court of Appeals decided that the Government could not appeal from the district court's order granting defendant Koenig's pre-indictment motion to suppress. Not having previously passed upon the question, the United States Supreme Court granted certiorari in the two cases to resolve the conflict among the circuits as to whether a ruling on a pre-indictment motion to suppress evidence constitutes an appealable "final decision" within the meaning of 28 U.S.C. §1291 (1959). In an opinion written by Mr. Justice Frankfurter, the Court affirmed the judgment in the *Koenig* case and vacated and remanded the *DiBella* case with instructions to dismiss the appeal, holding that a ruling on a pre-indictment motion to suppress is not an appealable "final decision," because appeal from such a motion, which is not fairly severable from the context of the impending trial, would seriously disrupt the conduct of the proceedings, and further because the legality of a search often cannot be determined until the evidence at the trial has brought all circumstances to light.

Search and Seizure—*Hall v. Warden*, 201 F. Supp. 639 (D. Md. 1962). Petitioner was sentenced to death on a state conviction of first degree murder, and the Court of Appeals of Maryland (on July 8, 1960) affirmed; subsequently, the Circuit Court denied his application for post-conviction relief, the Maryland Court of Appeals denied leave to appeal, and the United States Supreme Court denied certiorari. At the hearing on his petition for writ of habeas corpus, petitioner contended that his constitutional rights were violated because illegally seized material was used both to procure damaging admissions from him and as evidence at his trial, and that *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), required that relief be granted. The District Court denied relief, holding that *Mapp v. Ohio*, which compels the states to follow the exclusionary rule, was not intended to require that one convicted in a state court must be granted relief on the ground that illegally seized evidence was used against him, where the point was not raised at the trial and the state court judgment had become final before the United States Supreme Court's decision in the *Mapp* case. In reaching its conclusion that *Mapp* was not meant to be retroactively applied, the District Court relied on Mr. Justice Clark's frequent use, in the *Mapp* opinion, of such words as "then," "today," and "no longer," and on the reasons for the United States Supreme Court's previous refusal to impose the exclusionary rule on the states.

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Search and Seizure—*People v. Handy*, 19 Cal. Rptr. 409 (Dist. Ct. App. 1962). Defendant was convicted of possessing marijuana. On appeal, defendant contended that since officers had reasonable cause [based on information from a reliable informer] to arrest defendant on February 22, and, at that time, to conduct a reasonable search pursuant thereto, their search of his premises without a warrant on February 28 was rendered unlawful by the unreasonable lapse of time; and consequently defendant's conviction, supported by narcotics seized in the search, must be reversed. The District Court of Appeal affirmed, holding that since police officers, experienced in narcotics matters, believed reasonably and in good faith that defendant would still be in possession of narcotics on the 28th, and since the test of lawfulness of a search is whether the search was reasonable rather than whether it was reasonable to procure a search warrant, the search on the 28th was lawful in spite of the fact that it could lawfully have been conducted on the 22d, where the delay was due to the pressure of other police responsibilities.

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Search and Seizure—*State v. Trumbull*, 176 A.2d 887 (Conn. Cir. Ct. 1961). Defendant was charged with counterfeiting labels. Moving for the suppression and return of evidence, defendant contended that the material had been seized as the result of an unconstitutional search. The Circuit Court of Connecticut granted the motion to suppress, but refused to return the evidence. It held that defendant's acquiescence in the demands of the searching officers, who told him that they had a right to see the articles, did not amount to consent, and hence the evidence seized must be suppressed, since defendant did not waive his constitutional rights against a warrantless search; but lacking an appropriate procedure, the articles could not be returned. The court construed and applied *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), and noted that *Mapp* changed Connecticut search and seizure law.

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Search and Seizure—*Leveson v. State*, 138 So. 2d 361 (Fla. Dist. Ct. App. 1962). Defendant was convicted of bookmaking, possession of lottery tickets, and aiding in setting up, promoting, or conducting a lottery. On appeal, defendant contended that the trial court erred in denying his motion to suppress, because the court erroneously found that defendant lacked standing to contest the validity of the search and seizure. The District Court of Appeal reversed and remanded, holding that although Florida courts were under no compulsion to follow federal decisions as to standing to move for the suppression of illegally seized evidence, federal decisions relating to search and seizure are generally accepted as authority for similar rulings by Florida courts, inasmuch as the Fourth Amendment to the United States Constitution and section 22 of the Declaration of Rights of the Constitution of Florida are the same in meaning and almost identical in wording; that the applicable federal decision [*Jones v. United*

*States*, 362 U.S. 257 (1960)] holds that one legitimately on the premises searched is entitled to object to the validity of the search; and that consequently the trial court should have adjudicated the merits of defendant's motion to suppress, since although the lease to the apartment which was searched was taken in the name of his "girl friend," defendant, who paid the rent for and possessed a key to the premises, was legitimately on the premises and thus had standing to make the motion.

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Search and Seizure—*Belton v. State*, 178 A.2d 409 (Md. 1962). Defendant was convicted of possession and control of a narcotic drug and narcotic paraphernalia on the basis of evidence obtained as a result of an admittedly unlawful search and seizure. On appeal, defendant contended that *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), decided after his conviction, required Maryland to apply the exclusionary rule to his case, and that as an invitee on the searched premises, he had standing to object to the admissibility of the evidence in question. The Court of Appeals of Maryland reversed and remanded, holding that although defendant was convicted before the *Mapp* decision, judgment on the verdict was not entered until after *Mapp* was decided, and therefore the exclusionary rule must be applied in the instant case; that since the exclusionary rule is now imposed upon the states, in applying that rule the states must necessarily use the federal standard regarding standing to object; and that consequently defendant had standing to object, since the federal standard, as stated in *Jones v. United States*, 362 U.S. 257 (1960), is that the right to object to the admission of illegally seized evidence is available to anyone legitimately on the searched premises. The Court of Appeals noted that this federal standard is more liberal than that applied in Maryland prior to the *Mapp* decision.

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Search and Seizure—*State v. Masi*, 177 A.2d 773 (N.J. Super. Ct. 1962). Defendant made a pre-trial motion to suppress evidence. He contended that the material in question, obtained as a direct result of an unreasonable search without a warrant, was inadmissible by virtue of *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), even though *Mapp* had not yet been decided at the time of the search. The Law Division of the Superior Court of New Jersey granted the motion, holding that although a statutory change in settled law operates only prospectively, a change established by judicial decision is retrospective; and consequently the *Mapp* rule, which requires states to adhere to the exclusionary rule, must be applied to defendant's case, and likewise to every case in which the search and seizure issue was properly raised, regardless of the law existing at the time of the search and seizure.

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Search and Seizure—*State v. Long*, 177 A.2d 609 (N.J. Essex County Court 1962). Defendant was convicted of bookmaking and of keeping a gambling resort, at a trial in which illegally seized evidence was admitted. After the Appellate Division affirmed, defendant moved the County Court for a new trial on the ground that *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), decided after his conviction and requiring the states to apply the exclusionary rule, constituted newly discovered evidence, and that it should be given retroactive effect. The County Court denied defendant's motion, holding that a subsequent legal decision does not constitute newly discovered evidence so as to justify the granting of a new trial; and that language in the *Mapp* case regarding the necessity of respecting state procedural requirements (367 U.S. at 659 n.9) supported denial of defendant's motion solely on the ground that he failed to make timely objection to admission of the illegally seized evidence. Although the question of the applicability of *Mapp* thus was not necessary to decision of the instant case, the court noted that in light of the need for stability in the administration of law, *Mapp* should not be given retroactive effect.

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Search and Seizure—*People v. Loria*, 179 N.E.2d 478 (N.Y. 1961). Defendant was convicted of narcotic laws violations in January, 1961, and on June 13, 1961, his conviction was affirmed by the Appellate Division. On appeal, defendant contended that since *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C & P.S. 292 (1961) (decided on June 19, 1961), requires that illegally seized evidence be held inadmissible in a state

court, his conviction, based on such evidence, must be reversed. The Court of Appeals reversed and remanded for determination of the issue of probable cause, holding, in accord with the general rule of deciding cases on appeal under the law as it exists at the time of such decision, that the *Mapp* rule must be applied in deciding appeals from pre-*Mapp* convictions, even where, as in the instant case, an intermediate appellate court had affirmed before *Mapp* was decided; and that since the record did not establish whether police officers had probable cause to search the premises without a warrant (because the then existing law did not require such proof), the case would be remanded to enable the state to prove, if it could, the legality of the search.

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**Sentencing—Defendant's Right to be Heard**—*Hill v. United States*, 82 Sup. Ct. 468 (1962). Petitioner was convicted of transporting a kidnapped person and a stolen automobile in interstate commerce. On certiorari after the Court of Appeals for the Sixth Circuit affirmed the district court's denial of his motion to vacate sentence [under 28 U.S.C. §2255 (1959)], petitioner contended that he had been denied the right conferred by FED. R. CRIM. P. 32(a) to have the opportunity to make a statement in his own behalf before being sentenced, and that this alone constituted grounds for successful collateral attack of the judgment and sentence on a §2255 motion. Speaking through Mr. Justice Stewart, the Supreme Court of the United States affirmed, holding that in light of the legislative history of §2255, which shows that it was intended to grant the same rights as those available on habeas corpus, mere failure of the district court explicitly to afford petitioner an opportunity to make a statement at the time of sentencing [i.e., mere failure to comply with the formal requirements of Rule 32(a)] did not furnish grounds for successful §2255 attack, since such failure constituted neither jurisdictional nor constitutional error nor a fundamentally unfair defect and was not of itself an error of the character or magnitude cognizable under a writ of habeas corpus; and that even if the §2255 motion were treated as a motion to correct an illegal sentence under FED. R. CRIM. P. 35, petitioner was entitled to no relief, since the narrow function of Rule 35 is to permit correction of an illegal sentence [i.e., one imposed in excess of the limits prescribed, or in violation of the prohibition against double jeopardy], not to re-examine errors occurring prior to imposition of sentence. In a dissenting opinion in which Justices Warren, Douglas, and Brennan joined, Mr. Justice Black reasoned that petitioner should have been granted relief under Rule 35, since a sentence imposed in a prohibited manner, as was petitioner's, is just as "illegal" within the meaning of that rule as is one meted out in a clearly unauthorized amount or form.

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**Sentencing—Defendant's Right to be Heard**—*Machibroda v. United States*, 82 Sup. Ct. 510 (1962). See **Promises of Leniency**, *supra*.

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**Sex Offenses**—*In re Lane*, 18 Cal. Rptr. 33 (1962). Petitioner was convicted on two counts of violating §41.07 of the Los Angeles Municipal Code, which deemed criminal all sexual intercourse between persons not married to each other, and the Appellate Department affirmed. On petition for writ of habeas corpus, petitioner contended that the state had preempted the field of regulating the criminal aspects of sexual activity, and hence that the ordinance was void. The Supreme Court of California discharged petitioner, holding that when the state legislature expressly provided criminal penalties for a large number of sexual activities without making fornication a crime, it determined by implication that such conduct should not be criminal in California; and consequently the municipal ordinance, which attempted to make such conduct criminal, was void for being in conflict with state law.

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**Sunday Closing Laws**—*State v. Katz Drug Co.*, 352 S.W.2d 678 (Mo. 1961); *State v. Hill*, 369 P.2d 365 (Kan. 1962). The Supreme Courts of two states recently have ruled on the constitutionality of their almost identical Sunday closing laws and have reached opposite results. Both statutes punished as a misdemeanor the sale or exposure for sale of any merchandise on Sunday, but excepted from punishment "the sale of any drugs or medicines, provisions, or other articles of immediate necessity." [MO. REV. STAT. §§563.720–30 (1959); KAN. GEN. STAT. ANN. §§21–955 & 56 (Supp. 1959)] Reversing the conviction in *State v. Katz Drug Co.* on other grounds, the Supreme