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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

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Abstractor

Admissions—*People v. Rand*, 21 Cal. Rptr. 89 (Dist. Ct. App. 1962). Having waived trial by jury, defendant was convicted by the trial court of possession of marijuana. On appeal, defendant contended that the trial court erred in admitting an involuntary statement made by defendant at the place of his arrest. The District Court of Appeal reversed, holding that where defendant's admission that certain marijuana cigarettes were his was made after police officers threatened to take defendant and his wife to jail and possibly his children to "juvenile," the statement was involuntary since it resulted from improper pressure; that since the reasons for excluding involuntary confessions apply equally to all involuntary statements by an accused relative to the offence charged, defendant's involuntary admission should not have been admitted as evidence; and since it was impossible to determine how much, if any, weight the trial court gave to the statement, defendant's conviction must be reversed. Inasmuch as there was some question as to whether or not defendant had made timely objection to admission of the statement, the court noted that defendant could claim error on appeal even if he had not made timely objection, "because to hold otherwise would be to sanction a denial of due process of law."

Arrest—False Arrest—*Alvarez v. Reynolds*, 181 N.E.2d 616 (Ill. App. 1962). Plaintiff sued defendant Chicago police officers for false arrest and imprisonment, and judgment on a verdict of $10,000 was entered in his favor. On appeal, defendants contended that since they had reasonable grounds to arrest plaintiff without a warrant, the arrest was legal and thus plaintiff could not maintain the action; and that even if the arrest was unlawful, defendants were not liable for damages due to unlawful detention of plaintiff after they turned him over to detectives. The Appellate Court of Illinois reversed and remanded, holding that the arrest without a warrant for a crime not committed in defendants' presence would be lawful only if a crime in fact had been committed and defendants had reasonable grounds to believe that plaintiff had committed it; that where the evidence showed that one Thomas stated that he had been robbed, identified a man as one of the robbers, signed a complaint, and appeared at two arraignment hearings, and where no evidence to the contrary was offered, the evidence showed that a crime had been committed; that where evidence as to whether Thomas was sober, whether he definitely identified plaintiff, and whether plaintiff's location when seen and arrested was consistent with Thomas' story, was in dispute, the issue of probable cause was properly submitted to the jury; but that since defendants' duties as police officers ceased when they turned plaintiff over to the investigating detectives, instructions as to statutory provisions relating to defendants' duty to bring plaintiff before a judge were erroneous, inasmuch as defendants could not be held liable for acts committed by those to whom they properly delivered plaintiff, even on the theory that the detectives' acts constituted a foreseeable consequence of the arrest.

Arrest—Road Blocks—*Commonwealth v. Mitchell*, 355 S.W.2d 686 (Ky. 1962). Defendant was charged with driving a motor vehicle without an operator's license. On appeal by the Commonwealth from the Quarterly Court's dismissal of the charge, the Circuit Court affirmed. On certification of the law by request of the attorney general, defendant contended that her arrest, which resulted from a road block set up for the purpose of requiring drivers to display operators' licenses, was unconstitutional, and consequently evidence that defendant did not have a license should be suppressed on the basis that it arose out of the illegal road block. The Court of Appeals of Kentucky certified the law, holding that since the purpose of the road block was to ascertain whether there were violations of the law requiring every motorist to

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have an operator's license in his possession while driving, and since driving is a privilege subject to reasonable regulation by the Commonwealth, the road block was a proper exercise of police power in the enforcement of a statute designed to promote public welfare and safety; and consequently defendant's arrest was lawful and the evidence was admissible. The court noted that the case did not concern admissibility of evidence of other offenses resulting from the search of a vehicle intercepted for the purpose of examining the license of the driver, and that the decision did not sanction a stopping of cars actuated by motives not related to the licensing requirement.

Arrest, Search and Seizure—*People v. McLaine*, 22 Cal. Rptr. 72 (Dist. Ct. App. 1962). Defendant was convicted of first degree robbery. On appeal from the judgment and from an order denying his motion for new trial, defendant contended that since police officers had illegally stopped his car and illegally arrested him, evidence obtained as a consequence of the arrest should not have been admitted against him. The District Court of Appeal affirmed, holding that a standard less strict than that of probable cause is required to justify interrogation of a person outdoors at night; that this standard is that the circumstances be such as would indicate to a reasonable police officer that interrogation is necessary in the discharge of his duties; that this right to interrogate includes the right to stop the automobile in which the person to be interrogated happens to be riding, and such stopping and interrogating does not constitute an arrest; that since the officers had received a report of a robbery nearby, including a description of the participants, and since one of the occupants of the car in which defendant was riding repeatedly turned around in apparent observation of the police car, the officers had enough information to satisfy the standard required to warrant stopping the automobile for the purpose of interrogating its occupants; that since the gun taken from the car was in plain sight once the car was lawfully stopped, it was not seized as the result of a search; and that discovery of the gun, in conjunction with the aforementioned circumstances, constituted probable cause to arrest defendant.

Arrest, Search and Seizure—*People v. Walker*, 21 Cal. Rptr. 692 (Dist. Ct. App. 1962). Defendant was convicted of possession of marijuana. On appeal, defendant contended that he was illegally arrested and that the marijuana cigarette used as evidence against him was obtained as a direct result of the arrest. The District Court of Appeal affirmed, holding that although defendant's arrest without a warrant for misdemeanors relating to driving committed outside the arresting officer's presence was illegal, since an arrest without a warrant for a misdemeanor is lawful only if the misdemeanor is committed in the presence of the arresting officer, the seizure of the marijuana was lawful and was not a product of defendant's illegal arrest, inasmuch as the cigarette was discovered when defendant, at the county hospital for a blood alcohol test, removed it from his pocket voluntarily; and that since the arresting officer had reasonable cause [type of cigarette, defendant's apparent intoxication, and his denial of intoxication] to believe that the cigarette contained marijuana, *i.e.*, that an offense was being committed in his presence, the cigarette was lawfully seized and thus was properly admitted as evidence at the trial.

Arrest, Search and Seizure—*People v. Symons*, 20 Cal. Rptr. 400 (Dist. Ct. App. 1962). Defendant was convicted, as a third offender, of illegal possession of heroin. On appeal, defendant contended that a jar of heroin obtained as the result of an illegal search should not have been admitted into evidence. The District Court of Appeal affirmed, holding that when, during surveillance of defendant's home, the arresting officer without means of sound amplifying devices repeatedly overheard conversations in the jargon of narcotics addicts concerning the obtaining and using of heroin, and once through a window observed someone heating a spoon with a match, he had probable cause to arrest defendant without a warrant, since the applicable standard justifying arrest without a warrant was not whether a reasonable ordinary man, knowing what the officer knew, would have probable cause to believe defendant was committing a felony, but whether a reasonable, experienced narcotics division officer, knowing what the officer knew, would have such probable cause; that since the arrest was lawful, the fact that the arresting officer had ample time to secure a warrant was immaterial; and even though the search preceded the valid arrest, it was lawful as incident thereto.

Arrest, Search and Seizure—*People v. Baranko*, 20 Cal. Rptr. 139 (Dist. Ct. App. 1962). Defendant was convicted of bookmaking. On appeal, de-

fendant contended that his arrest and that of a co-defendant were unlawful for lack of probable cause, and that evidence seized during a search incident to the arrests should not have been admitted. The District Court of Appeal affirmed, holding that where the arresting officer had reliable information from a fellow officer that bookmaking activities were being conducted upon certain premises, that defendant had left his home, bought a scratch sheet, and gone to those premises on three separate occasions, and that the fellow officer had discovered betting markers in defendant's handwriting behind the premises, and where the arresting officer, who had a police photograph of defendant, had personally observed him go to these premises, he had probable cause to believe that defendant was on the premises and was there committing the felony of bookmaking, and thus lawfully entered the premises and arrested defendant without a warrant; that the ensuing search and seizure of bookmaking paraphernalia was lawful as incident to the valid arrest; and that even if there was no probable cause to arrest the co-defendant, this would not taint the lawful character of defendant's arrest and the subsequent search and seizure.

Arrest, Search and Seizure—*Matthews v. State*, 179 A.2d 892 (Md. 1962). Defendant was convicted of keeping a disorderly house. On appeal, defendant contended that his arrest without a warrant and the search incident thereto were illegal. The Court of Appeals of Maryland affirmed, holding that when a police officer and policewoman were assigned a room in a house leased by defendant without inquiry as to their marital status and without being asked to register, they had probable cause to believe that the misdemeanor of keeping a disorderly house was being committed in their presence; that when defendant admitted the premises were under his control, the officers arrested him lawfully without a warrant; and that the search of the premises was lawful as incident to the valid arrest.

Burden of Proof—*State v. Adams*, 355 S.W.2d 21 (Mo. 1962). See **Insanity**, *infra*.

Civil Rights Act—*Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962). Plaintiff sued defendant Los Angeles police officers under a provision of the Civil Rights Act, 42 U.S.C. §1983 (1958), for damages caused by alleged unreasonable searches and seizures in violation of his Fourteenth Amendment right to due process of law. On appeal from the District Court's dismissal of the complaint on the ground that it failed to state a claim upon which relief could be granted, Plaintiff contended that an allegation that the unauthorized acts, committed under color of state authority, which deprived him of a constitutional right, were committed for the purpose of discriminating between persons or classes of persons or for the purpose of depriving plaintiff of any federal right, was not necessary for the statement of a claim under §1983. The Court of Appeals for the Ninth Circuit reversed and remanded, holding that under its reading of *Monroe v. Pape*, 365 U.S. 167 (1961), abstracted at 52 J. CRIM. L., C. & P.S. 593 (1961), no allegation of specific intent is necessary to support a claim, based on violation of the due process clause of the Fourteenth Amendment, for damages under the Civil Rights Act. The court noted that cases holding otherwise concerned either criminal penalties or claims predicated on violation of the Fourteenth Amendment's equal protection clause.

Comment on Failure to Testify—*Bisno v. United States*, 299 F.2d 711 (9th Cir. 1962). See **Husband-Wife Privilege**, *infra*.

Confessions—*Gallegos v. Colorado*, 82 Sup. Ct. 1209 (1962). Petitioner was convicted of first degree murder, and the Supreme Court of Colorado affirmed. On certiorari, petitioner contended that a coerced confession constituted the crucial evidence against him. In a four to three decision, the United States Supreme Court reversed, holding that where petitioner, aged 14, was confined for five days without being allowed to see his parents and without advice of counsel or any friendly adult advisor before making a formal confession, the totality of the circumstances showed that the confession was obtained in violation of due process, and hence petitioner's conviction, which may have rested upon the formal confession, must be reversed. The Court reached this result even though petitioner had informally confessed to a police officer on the day after his arrest, noting that petitioner was then unaware of his constitutional rights due to his immaturity and lack of adult advice.

Confessions—*United States ex rel. Noia v. Fay*, 300 F.2d 345 (2d Cir. 1962). See **Habeas Corpus**, *infra*.

Confessions—*Kasinger v. State*, 354 S.W.2d 718 (Ark. 1962). Defendants were convicted of burglary. On appeal, the defendants, who were youths in their late teens, contended that they were convicted on the basis of involuntary confessions. The Supreme Court of Arkansas reversed and remanded, holding that where defendants were arrested without a warrant, were confined for three days in a cold cell with inadequate cover before they confessed, were without counsel, did not see their parents, observed the condition of the face of a co-defendant who had been beaten and were told he had been beaten by one of the officers, saw blood in the co-defendant's cell, and were threatened with the same treatment received by the co-defendant if they did not confess, the jury should not have been permitted to consider the confessions; and that although the coercive facts described above had no effect on the earlier confession of one of the defendants, his conviction must also be reversed, since his second confession, procured under the stated conditions, was not voluntary and may have contributed to his conviction. The court pointed out that its holding was not that the confessions were involuntary, but rather that their voluntariness was not established.

Confessions—*People v. Wright*, 180 N.E.2d 689 (Ill. 1962). Defendant was convicted of burglary and rape. On writ of error, defendant contended that an involuntary confession had been admitted against him. The Supreme Court of Illinois reversed and remanded, holding that where defendant testified that physical harm and threats of further physical harm had been used by police officers to coerce him to confess, and the State failed to call or explain the absence of three police officers who were present during the alleged chain of coercion, the State had failed to satisfy its burden of proving the voluntariness of defendant's confession, since this burden is discharged only when all material witnesses connected with the challenged confession are produced, including those absent at the actual time of confession but present when the alleged illegal conduct took place; and since the voluntariness of defendant's confession was not established, it should not have been admitted at the trial.

Cruel and Unusual Punishment—*Robinson v. California*, 82 Sup. Ct. 1417 (1962). Defendant was convicted of being a narcotics addict, and the judgment was affirmed by the Appellate Department of the Los Angeles County Superior Court (the highest state court to which defendant could take his case). On appeal, defendant contended that the statute under which he was convicted was unconstitutional because it made a crime of the status of being a narcotics addict. The United States Supreme Court reversed, holding that the California statute [CAL. HEALTH & SAFETY CODE §11721], which made it a criminal offense to be a drug addict, was unconstitutional as inflicting a cruel and unusual punishment in violation of the Fourteenth Amendment, since the characterization of drug addiction as an illness compels that no one be criminally punished for having such status. The Court noted that while compulsory treatment for drug addicts would not offend due process, the statute involved criminal sanctions only with no pretense at treatment. The concurring opinion of Mr. Justice Douglas contains many references to authorities which treat drug addiction as an illness, and compares recent developments in attitudes toward drug addiction with those concerning insanity.

Derivative Evidence—*United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962). See Search and Seizure, *infra*.

Derivative Evidence—*People v. Walker*, 21 Cal. Rptr. 692 (Dist. Ct. App. 1962). See Arrest, Search and Seizure, *supra*.

Double Jeopardy—*Downum v. United States*, 300 F.2d 137 (5th Cir. 1962). Defendant was convicted of stealing, forging, and passing government checks, and of conspiracy to commit these acts. On appeal, defendant contended that the trial court erred in proceeding with the trial over his plea of former jeopardy, since he had been placed in jeopardy for the same offenses by a former trial at which the jury was discharged because of the absence of a material prosecution witness. The Court of Appeals for the Fifth Circuit affirmed, holding that where the jury at the former trial had been impaneled and sworn but no evidence had been offered or heard, defendant was not then placed in jeopardy so as to bar his subsequent trial, inasmuch as defendant was not prejudiced in any way by being tried two days after the former trial, and since the trial court did not abuse its discretion by discharging the jury in

the public interest in light of the fact that the former trial could not proceed without the missing witness.

Double Jeopardy—*Seiterle v. Superior Court*, 20 Cal. Rptr. 1 (1962). Defendant pleaded guilty to two counts of murder, two counts of kidnaping for purposes of robbery with bodily harm, and conspiracy to commit murder in the first degree, and in a jury trial on the sole issue of penalty was sentened to death on the murder charges and to life imprisonment for each of the other offenses. The Supreme Court of California reversed the judgment as to the death sentences because of prejudicial error committed by the trial court, and affirmed the judgment as modified by adding the words "without possibility of parole" to that portion of the judgment sentencing defendant to life imprisonment. On application for writ of prohibition to restrain respondent court from retrying the issue of penalty on the murder counts, defendant contended that since he had been convicted and sentenced of kidnaping, CAL. PEN. CODE §654 [providing in part that an acquittal or conviction and sentence under one of several provisions making a single act punishable bars a prosecution for the same act under another applicable provision] barred further prosecution, *i.e.*, retrial on the issue of penalty, of the murder charges, which involved the killing of the kidnap victims. The Supreme Court of California denied the writ, holding that since the offenses were not incident to a single intent or objective of defendant and since the record did not compel the conclusion that the murders represented the culmination of an indivisable transaction, §654 was not properly applicable and respondent court could proceed.

Double Jeopardy—*Atkinson v. Parsekian*, 179 A.2d 732 (N.J. 1962). The Acting Director of New Jersey's Division of Motor Vehicles suspended for one year the licenses of two drivers after each had been involved in a fatal automobile accident. Defendant drivers' consolidated appeals to the Appellate Division of the Superior Court were certified to the Supreme Court on its own motion. Defendants contended that since one had been acquitted and one convicted of criminal charges arising out of the same accidents as those for which their respective licenses were subsequently suspended, the suspension proceedings before the Acting Director subjected them to double jeopardy. The Supreme Court of New Jersey affirmed, holding that since the proceedings before the Acting Director were designed to promote safety on the highway rather than to impose criminal punishment, they were administrative rather than criminal or quasi-criminal; and therefore defendants' rights against double jeopardy were not violated, inasmuch as the double jeopardy clause prohibits only successive criminal punishments for the same offense.

Due Process of Law—*Beck v. Washington*, 82 Sup. Ct. 955 (1962). See **Prejucidial Publicity**, *infra*.

Electronic Eavesdropping—*Lanza v. New York*, 82 Sup. Ct. 1218 (1962). Petitioner's conviction for refusing to answer questions before a state legislative committee was affirmed by the Appellate Division of the New York Supreme Court, and affirmed as modified by the New York Court of Appeals. On certiorari, petitioner contended that the state electronically intercepted and transcribed a conversation in jail between petitioner and his brother without their knowledge in violation of petitioner's due process rights against unreasonable search and seizure, and consequently New York denied him due process by convicting him for failure to answer questions based on that conversation. The United States Supreme Court affirmed, holding that although surreptitious electronic eavesdropping under certain circumstances may amount to an unreasonable search and seizure, interception of the conversation between petitioner and his brother, who was then in jail, did not violate the Fourth Amendment as applied to the states through the Fourteenth Amendment, inasmuch as a jail, with its necessary tradition of official surveillance, is not a constitutionally protected place. The majority noted that its judgment could rest on the fact that petitioner's refusal to answer questions unrelated to the intercepted conversation supported the New York judgment as modified. In two separate opinions, Chief Justice Warren and Justices Brennan and Douglas stated that the majority had thus decided a constitutional question not properly before the Court, and challenged the correctness of its decision of that issue.

Equal Protection of the Laws—*Beck v. Washing-*

ton, 82 Sup. Ct. 955 (1962). See **Prejudicial Publicity**, *infra*.

Extrajudicial Evidence—*People v. Wallenberg*, 181 N.E.2d 143 (Ill. 1962). Having waived his right to trial by jury, defendant was convicted of robbery by the trial court. On writ of error, defendant contended that the trial court considered matters not properly in the record to rebut his alibi defense. The Supreme Court of Illinois reversed and remanded, holding that where defendant's alibi was that at the time of the robbery he was on a street corner in Chicago 79 blocks from the tavern where the robbery occurred and that he had proceeded for some distance before stopping after his tire became soft because there were no available gas stations along the route on which he was travelling, and where during pronouncement of the guilty verdict the trial court commented, "[Defendant] told me there were no gas stations. . . . I happen to know different. I don't believe his story," the trial court's determination that defendant's alibi was false constituted a denial of due process of law, since due to a lack of any evidence in the record to rebut the alibi, the determination was based upon the court's private knowledge and thus was untested by cross-examination or the rules of evidence; and that although it is presumed that a trial court as trier of fact considers only admissible evidence, the trial court's statement quoted above, incorporated in the record, rebutted this presumption.

Federal Communications Act—*United States v. Fuller*, 202 F. Supp. 356 (N.D. Cal. 1962). Defendant moved to dismiss an information charging him with violations of the Federal Communications Act of 1934, 47 U.S.C. §605 (1958). Defendant contended that §605, making punishable the interception and divulgence or publication, to any person by any unauthorized person, of any wire or radio communication, was not applicable to a newsgathering agency which intercepted and divulged to a radio station newsworthy portions of police short wave broadcasts. The District Court denied the motion, holding that the First Amendment did not prohibit application of §605 to a newsgathering agency, since freedom of the press is not absolute; that a provision in the Federal Communications Act, 47 U.S.C. §154(o) (1958), which deals with securing maximum effectiveness from public safety radio services, indicated that Congress intended that such services, which include police radio broadcasts, be protected by §605 from interception and divulgence by any unauthorized person, including the press; and that the pre-trial motion proceeding was not the proper time at which to determine whether the intercepted broadcasts were made for the use of the general public, since there was no evidence on the issue at this stage of the proceedings. [The last clause of §605 provides that the section does not apply to communications made for the use of the general public.]

Freedom of Speech—*Wood v. Georgia*, 82 Sup. Ct. 1364 (1962). Petitioner was convicted on three counts of contempt. After the Georgia Court of Appeals affirmed two counts and reversed the third, the Georgia Supreme Court declined to review the convictions. On certiorari, petitioner contended that use of the contempt power to punish his out-of-court statements, which were published in a newspaper of general circulation, violated his right to freedom of speech. The United States Supreme Court reversed, holding that statements by petitioner, a county sheriff, criticizing the judge presiding at a grand jury hearing on possible election frauds on the ground that his charge to the grand jury constituted a political attempt to intimidate negroes, could not constitutionally be punished as contempt of court, since upon independent scrutiny of the evidence, the Court found that under the circumstances the statements did not present a danger to the administration of justice so clear and present as to vitiate petitioner's constitutional right to freedom of expression.

Habeas Corpus—*United States ex rel. Noia v. Fay*, 300 F.2d 345 (2d Cir. 1962). Petitioner was convicted of felony murder in a New York state court in 1942. On appeal from the District Court's denial of his application for writ of habeas corpus, petitioner contended that he had been convicted solely on the basis of a coerced confession. The Court of Appeals for the Second Circuit reversed and remanded to the District Court with instructions to issue the writ and to order that petitioner's conviction be set aside and that he be discharged from custody unless retried forthwith by New York, holding that since exceptional circumstances existed which made it obvious without detailed

inquiry that petitioner had been deprived of the substantial federal right not to be convicted by means of a coerced confession, the fact that petitioner had failed to utilize a state remedy which once was available to him would not preclude the federal courts from vindicating his federal rights by use of habeas corpus. [The circumstances were that petitioner's two co-defendants who, unlike petitioner, had exhausted their state remedies, were free, because their confessions, obtained under the same conditions as that of petitioner, were found to be coerced.] The opinion of the court, written by Judge Waterman, contains a thorough analysis of the federal writ of habeas corpus, including detailed treatment of the "adequate, independent non-federal ground" concept.

Habitual Criminal Acts—*Reynolds v. Cochran*, 138 So. 2d 500 (Fla. 1962). After completing a sentence for grand larceny and being discharged from custody, petitioner was convicted of being a second offender on the basis of the grand larceny conviction and a prior felony conviction. On petition for writ of habeas corpus, petitioner contended that since he had completed all lawful sentences imposed against him before being proceeded against as an habitual criminal, the second offender sentence was null and void. The Supreme Court of Florida discharged petitioner from custody, holding that since the habitual criminal act [FLA. STAT. §§775.09 and 775.11 (1959)] prescribes a longer sentence for second or subsequent offenses and does not make it a crime to have been convicted more than once, and since the enhanced punishment provided by the act is an incident to only the last offense, petitioner, who had fully satisfied the judgment imposed against him pursuant to conviction for his last offense, could not be sentenced to enhanced punishment. The court indicated that a contrary result might well lead to a finding that the habitual criminal act violates constitutional guarantees against double jeopardy.

Habitual Criminal Acts—*State v. Kiddoo*, 354 S.W.2d 883 (Mo. 1962). Defendant was convicted by a jury of attempted burglary and sentenced by the trial court as an habitual criminal. On appeal, defendant contended that although the prior conviction relied on by Missouri in invoking the enhanced punishment of the habitual criminal act was a felony in the state where it occured, it would have amounted only to a misdemeanor had it been committed in Missouri, and hence the habitual criminal act was improperly applied. The Supreme Court of Missouri reversed and remanded, holding that the statute [MO. REV. STAT. §§556.280 and 556.290 (1959)] could be invoked on the basis of an out-of-state conviction only if the offense would be punishable in Missouri by "imprisonment in the penitentiary," *i.e.*, would be a felony if committed in Missouri; and that since defendant was improperly sentenced his conviction would be reversed and remanded for proper sentencing, even though the habitual criminal sentence was shorter than the maximum sentence which could have been imposed without the enhanced punishment, inasmuch as when the habitual criminal act is not applicable the jury, not the judge, determines punishment, and defendant was entitled to have a jury, rather than the trial court, fix the penalty.

Husband-Wife Privilege—*Bisno v. United States*, 299 F.2d 711 (9th Cir. 1962). Defendant was convicted of knowingly and fraudulently concealing from a trustee in bankruptcy property belonging to a bankrupt estate. On appeal, defendant contended that the trial court erred in refusing to give an instruction that the jury should draw no inferences against defendant from his failure to call his wife to testify. The Court of Appeals for the Ninth Circuit affirmed, holding that where defendant's wife's testimony was reasonably expected to have been favorable to defendant, and where the government had no right to call her as a witness over defendant's objection, defendant had it peculiarly within his power to produce his wife; that defendant's failure to call her under the circumstances was proper subject for comment by the government; that while defendant's wife, if called by either party, could have exercised her privilege not to testify, defendant could not rely on a privilege personal to his wife in order to defeat adverse comment by the government; and consequently the trial court's refusal to give the requested instruction was not error.

Improper Remarks by Trial Judge—*People v. Lewerenz*, 181 N.E.2d 99 (Ill. 1962). Defendant was convicted of conspiracy to violate narcotics laws and of substantive offenses. On writ of error, defendant contended that there was no evidence to

sustain the conspiracy convictions, and that remarks of the trial judge in the presence of the jury were so prejudicial that defendant was denied a fair trial. The Supreme Court of Illinois reversed the conspiracy judgments on confession by the People that they were not sustained by any evidence, and reversed and remanded as to the substantive offenses, holding that where on sixteen occasions during trial the trial judge characterized as "speeches" defense counsel's efforts in making normal and brief objections to evidence, ruled that "the speech is stricken," and in some instances admonished counsel not to "make any speeches to me before the jury," the trial judge's constant disparagement of counsel for his conscientious effort to fulfill his duties as an advocate was inconsistent with the court's duty to uphold defendant's right to a fair trial; and in light of the fact that jurors place great reliance on the trial court, the judge's remarks conveyed an impression to the jury which constituted prejudicial error.

Insanity—*Lynch v. Overholser*, 82 Sup. Ct. 1063 (1962). Although petitioner did not plead insanity, he was found not guilty by reason of insanity of cashing checks with knowledge that he had insufficient funds, and was committed to St. Elizabeths Hospital under the District of Columbia's compulsory commitment statute, D.C. CODE ANN. §24-301(d) (1961). The District Court ordered petitioner's release and issued a writ of habeas corpus, but the Court of Appeals for the District of Columbia Circuit reversed the judgment. On certiorari, petitioner contended that the compulsory commitment statute was unconstitutional since it authorized the commitment of one found not guilty by reason of insanity even if he protested that he was presently sane and that his crime was not the product of a mental illness. The United States Supreme Court reversed and remanded, holding that the statute was not applicable to persons such as the petitioner, who had not pleaded not guilty by reason of insanity, since the statute must be so construed in light of the District of Columbia policy [to allay fears as to possible inroads upon public safety due to the *Durham* rule] responsible for its enactment and because of the rule that a statute should be construed so as to free it from substantial constitutional doubts. [The question whether one who pleads not guilty by reason of insanity but asserts his present sanity may constitutionally be committed under the statute remains as yet unanswered by the Court.]

Insanity—*State v. Adams*, 355 S.W.2d 21 (Mo. 1962). Defendant was convicted of first degree murder. On appeal, defendant contended that an instruction that the jurors must find that insanity was "established to [their] reasonable satisfaction" before they could acquit on that ground was prejudicially erroneous. The Supreme Court of Missouri reversed and remanded, holding that an insanity defense must be proved by a preponderance of the evidence, rather than to the jury's satisfaction; and although two other instructions properly stated the law and burden of proof of insanity, defendant's conviction must be reversed, since the instruction containing an erroneous standard constituted an affirmative misdirection and was not cured by the others which set out the proper standard.

Juries—*People v. Kangas*, 113 N.W.2d 865 (Mich. 1962). Defendant was convicted of manslaughter. On appeal from the trial court's denial of his motion for new trial, defendant contended that the trial court erred in authorizing instructions to the jury through a sheriff, after the jury had requested instructions of the sheriff in jury chambers during the course of deliberation. The Supreme Court of Michigan reversed and granted a new trial, holding that in order to keep trials free from all opportunity for jury tampering and to preserve the privacy and confidence of the jury during deliberation, the rule is that all jury instructions must be given in open court; and since this rule was not followed at defendant's trial, a new trial must be granted, even though there was no evidence that the communication was prompted by improper motives or that it had influenced the jury.

Juries—*Matthews v. State*, 139 So. 2d 386 (Miss. 1962). Defendant was convicted of manslaughter. On appeal, defendant contended that the trial court interrupted the jurors and hurried them in their deliberations to the prejudice of defendant. The Supreme Court of Mississippi affirmed, holding that the trial court's inquiry of the jury as to whether or not it had reached a verdict forty minutes after it had retired and again thirty minutes later was not error, since the length of

time a jury will be kept deliberating is a matter for judicial discretion, and the fact that the verdict was not brought in until thirty minutes after the last inquiry tended to show that this discretion was not abused so as to prejudice defendant.

Juvenile Proceedings—*Dora v. Cochran*, 138 So. 2d 508 (Fla. 1962). Petitioner was convicted of armed robbery. On petition for writ of habeas corpus, petitioner contended that since he was a minor at the time of conviction, the judgment and sentence were void for failure of the State to give notice to his parents as required by FLA. STAT. §932.38 (1959). The Supreme Court of Florida set aside the robbery judgment, discharging petitioner from further detention thereunder, but remanded him to custody for service of a sentence for escape, of which petitioner was convicted after attaining majority, holding that emancipation of the then minor petitioner by virtue of his enlistment in military service did not remove him from the protection of the statute providing for notice to the parents of "any minor, not married . . . charged with any offense and brought before any of the courts . . . ."

Narcotics—*Robinson v. California*, 82 Sup. Ct. 1417 (1962). See **Cruel and Unusual Punishment**, *supra*.

Narcotics—*People v. Lott*, 181 N.E.2d 112 (Ill. 1962). Defendant was convicted of selling, possessing and dispensing a narcotic drug. On appeal, defendant contended that mature portions of the cannabis plant, commonly called marijuana, did not constitute a narcotic drug under the Uniform Narcotic Drug Act. The Supreme Court of Illinois reversed, holding that under ILL. REV. STAT. ch. 38, §192.28-2.17 (1959), mature stalks of the cannabis plant without the presence of resin did not fall within the definition of a narcotic drug; and that defendant satisfied his burden of bringing himself within the statutory exception when a Chicago Crime Detection Laboratory chemist, without referring to the presence of resin, testified on cross-examination that he tested the cigarettes sold by defendant to Chicago police officers and determined that they were composed of mature portions of the cannabis plant.

National Firearms Act—*United States v. Thompson*, 202 F. Supp. 503 (N.D. Cal. 1961). Defendants were indicted for illegal possession of an unregistered firearm in violation of the National Firearms Act of 1934, 26 U.S.C. §5841 (1958). Moving to dismiss the indictment on the ground that it failed to charge an offense, defendants contended that a sawed-off shotgun without a firing pin did not constitute a firearm within the purview of the act. The District Court dismissed the indictment, holding that in light of a stipulation that no firing pin was found on or about defendants when they were arrested, the shotgun was temporarily inoperative and could not have been immediately put into operating condition; and consequently since the shotgun as defendants possessed it could not have propelled a shot through explosive energy, it was not a firearm covered by the National Firearms Act. In reaching this conclusion, the court noted that the Federal Firearms Act, 15 U.S.C. §901 (1958) covers parts of weapons which, when whole, are within the scope of the *National* Firearms Act, and that the legislative history of the *National* Firearms Act indicated that its coverage was intended to differ from that of the *Federal* Firearms Act.

Prejudicial Publicity—*Beck v. Washington*, 82 Sup. Ct. 955 (1962). The Supreme Court of Washington affirmed petitioner's conviction of grand larceny. On certiorari, petitioner contended that since adverse publicity made it impossible for the grand jury which indicted him and the petit jury which convicted him to be impartial and unbiased, his motions for change of venue and for continuances were improperly denied and his conviction was invalid under the due process and equal protection clauses of the Fourteenth Amendment. Speaking through Mr. Justice Clark, the United States Supreme Court affirmed, holding that even if due process required a state which chose to use grand jury procedure to furnish an unbiased grand jury, petitioner failed to prove that the grand jury which indicted him was prejudiced against him; that since during the five months after indictment and before trial the amount and adverse character of the local publicity concerning petitioner lessened considerably, and since his failure to challenge any of the petit jurors for cause on ground of bias indicated his belief that they were not biased, the trial court was not compelled to disbelieve the jurors statements that they would be fair and impartial or to find bias as a matter of law; and consequently the

trial court's rulings on petitioner's motions were correct, and his conviction did not offend the Fourteenth Amendment. In an opinion with which Chief Justice Warren concurred, Mr. Justice Black dissented, stating that whether or not federal due process requires states using grand juries to provide impartial grand juries, in light of the amount of hostile publicity before and during the grand jury hearing, failure of the presiding judge to take precautions required by state statute to insure that petitioner not be indicted by a prejudiced grand jury rendered the grand jury proceedings unconstitutional under the equal protection clause, even though there was no proof that any particular grand juror was actually prejudiced. [The majority refused to deal with the equal protection issue due to petitioner's failure to include it in his petition for certiorari.] Mr. Justice Douglas dissented, stating that due process required states which use grand juries to provide impartial ones, and finding that the procedure for selecting and instructing the grand jury which indicted petitioner was not fair in light of the prejudicial publicity.

Prejudicial Publicity—*United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962). Defendant was convicted of making false income tax return statements in violation of §7206(1) of the Internal Revenue Code of 1954. On appeal, defendant contended that in light of prejudicial newspaper publicity which appeared after jury selection had begun and subsequently during the trial, the trial court's failure to grant his motions to poll the jury and for mistrial rendered the trial unfair. The Court of Appeals for the Seventh Circuit reversed and remanded, holding that the published material would have been inadmissible in evidence because of its prejudicial nature, and its effect would be no less harmful to defendant if it reached the jury through news accounts rather than in court; that the trial court's general admonitions and cautionary instructions to the jury at the beginning of jury selection, his assumption that they effectively prevented the jurors from reading or listening to news accounts of the trial, and his general inquiry of the jurors, as a group, as to whether or not they had followed his instructions failed to protect adequately defendant's constitutional right to a fair trial by an impartial jury; and that since defendant's publicity value was extremely great and since the jury separated each night, thus being exposed to the publicity, the trial court's denial of defendant's motions, which were designed to prevent conviction by prejudiced jurors, amounted to an abuse of discretion. In the opinion of the court, Judge Kiley recommended that cautionary instructions regarding the specific possibility of news accounts about the case be given prior to daily separation, and that upon publication of prejudicial news stories during a trial, the trial judge question each juror individually, out of the presence of the others, as to whether he had read the articles and their effect upon him. Judge Schnackenberg dissented, stating that in absence of proof that any of the jurors were, in fact, prejudiced, the jury's verdict should not be overturned by the mere opportunity for prejudice.

Promises of Leniency—*State v. Hingle*, 139 So. 2d 205 (La. 1962). While serving a two and one-half year sentence for attempted possession of marijuana, defendant was sentenced to twenty years at hard labor as an habitual criminal. On appeal, the Supreme Court of Louisiana annulled and remanded for proper imposition of the twenty year sentence. On rehearing, defendant contended that since he pleaded guilty to the offense of attempted possession in reliance on a promise by the prosecutor that he would not file habitual criminal charges against defendant, the agreement operated as a bar to the subsequent proceedings. The Supreme Court of Louisiana set aside the habitual criminal conviction and sentence and ordered that defendant complete service of the sentence for attempted possession, holding that where the agreement was made with the consent and approval of the trial judge, it effectively barred sentencing defendant as an habitual criminal, since to hold otherwise would allow prosecutors to repudiate bargains made with persons accused of crime who, in good faith, relinquish fundamental rights in reliance on such bargains, which would be inconsistent with the pledge of the State's public faith placed in these officers. The court indicated that this reasoning would compel the same result even if the agreement were not made with the approval of the trial judge.

Public Welfare Offenses—*State v. Kremer*, 114 N.W.2d 88 (Minn. 1962). Defendant was convicted of driving through a red flashing light in violation

of a city ordinance. On appeal, defendant contended that since the trial court found that he was unable to stop because of brake failure, that he had experienced no prior brake trouble, and that he had no knowledge of the defective condition of his brakes, the evidence did not sustain his conviction. The Supreme Court of Minnesota reversed, holding that when an act is deemed a crime without regard to criminal intent, the wrongdoer must intend to commit the act in order that his conduct be criminal; and that since defendant was unable to stop at the flashing red light because of defective brakes and was not negligent for failure to know of the defect, he did not intend to proceed through the intersection without stopping and thus did not intend to commit the act which constituted the crime.

Right to Counsel—*Carnley v. Cochran*, 82 Sup. Ct. 884 (1962). Petitioner was convicted of violating Florida's Child Molester Act, and the Florida Supreme Court denied his application for writ of habeas corpus. On certiorari, petitioner contended that he was not afforded the assistance of counsel and hence was deprived of a right guaranteed him by the Fourteenth Amendment. In an opinion written by Mr. Justice Brennan, the United States Supreme Court reversed and remanded, holding that where petitioner was illiterate, the trial court made efforts to assist petitioner but did not fully apprise him of vital procedural rights which laymen could not be expected to know, and counsel would have materially assisted petitioner by invoking special psychiatric and rehabilitory provisions of the law under which he was convicted, petitioner's case was one in which the assistance of counsel, if not waived, was guaranteed by the Fourteenth Amendment; and that since petitioner did not plead guilty and the record was silent as to waiver, petitioner could not be deemed to have waived his right to counsel, since anything less than a showing that an accused was offered counsel but intelligently and understandingly rejected the offer is not waiver. Mr. Justice Harlan concurred in the result. Concurring opinions written by Mr. Justice Black (joined by Chief Justice Warren and Mr. Justice Douglas) and Mr. Justice Douglas set forth the proposition that the Fourteenth Amendment right to counsel in a state criminal trial ought not to be limited in non-capital cases to those cases in which denial of counsel renders the trial fundamentally unfair, and advocated that *Betts v. Brady*, 316 U.S. 455 (1942), be overruled in order that the Fourteenth Amendment right to counsel in state criminal cases be made coextensive with that afforded by the Sixth Amendment in federal criminal cases. Justices Frankfurter and White took no part in the decision.

Right to Counsel—*People v. Garcia*, 20 Cal. Rptr. 856 (Dist. Ct. App. 1962). Defendant was convicted of burglary. On appeal, defendant contended that he was forced to go to trial without benefit of counsel. The District Court of Appeal reversed, holding that where defendant made it clear that he was unwilling to proceed without counsel and did not feel competent to defend himself, had unsuccessfully attempted to hire counsel the day of the trial (before which time having been financially unable to do so), and by his conduct negated any inference of waiver of his right to be represented by counsel, the trial court should not have proceeded without appointing counsel for defendant.

Right to Counsel—*Yopps v. State*, 178 A.2d 879 (Md. 1962). Defendant waived his right to trial by jury and was convicted of burglary by the trial court. On appeal, defendant contended that the trial court's failure to permit defense counsel to present a closing argument constituted prejudicial error. Noting that the case was one of first impression in the state, the Court of Appeals of Maryland reversed and remanded, holding that defendant's constitutional right to be heard by counsel necessarily included his right to have his counsel make a closing argument; that this right applied to criminal cases tried by a judge sitting without a jury as well as to those tried by a jury; and since the trial court's ruling prevented defendant from being effectively represented by counsel and deprived him of his right to subject all the facts and evidence produced at the trial to a logical analysis, his conviction must be reversed.

Search and Seizure—*Monnette v. United States*, 299 F.2d 847 (5th Cir. 1962). Defendants were convicted of possession of unregistered distilling apparatus and nontax-paid whiskey. On appeal, defendants contended that the government's evidence was obtained by an illegal search authorized by a warrant invalid for lack of probable

cause. The Court of Appeals for the Fifth Circuit affirmed, holding that an affidavit of a State Beverage agent, stating the facts that he had information that a still was being operated on certain permises, that he had observed a car owned by a known liquor law violator parked in front of the premises, and that he had smelled the odor of fermenting mash emanating from the building, set out facts constituting probable cause for the issuance of a valid search warrant; and consequently the search was lawful and defendants' motion to suppress was properly denied.

Search and Seizure—*United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962). Defendant was convicted of violations of the narcotics laws. On appeal from the District Court's denial of his pre-trial motion to suppress, defendant contended that the evidence was obtained through information discovered during an unlawful search of his apartment. The Court of Appeals for the Second Circuit reversed and remanded, holding that where Narcotics Bureau agents, during an unlawful warrantless search of premises on which defendant had a right to be, discovered information which apparently led to the seizure of heroin in a secret compartment in the walls of a cedar closet during a subsequent lawful warrantless search of the same premises, with the landlord's consent, after defendant was out of possession, the ultimate seizure was prima facie tainted by the illegality of the first search; that the seizure would be lawful and the heroin admissible only if the government had shown that its knowledge of the secret compartment came from a source other than the illegal search; and that absent such showing, failure to suppress the evidence was prejudicial error.

Search and Seizure—*United States v. Alexander*, 202 F. Supp. 209 (D. Minn. 1961). On motion to suppress, defendants contended that their Fourteenth Amendment rights were violated when obscene films were seized by FBI agents under authority of an illegal search warrant. The District Court granted the motion, holding that where on the basis of an affidavit of an FBI agent the search warrant, containing no statement whatsoever concerning the premises to be searched, was issued with the understanding that upon discovery of the location, the agent would notify the Commissioner, who in turn would authorize issuance of the warrant with insertion of the address of the premises, and where four days later a second FBI agent notified the Commissioner of the address by telephone and was authorized by him to complete the warrant, the warrant was invalid for lack of probable cause supported by oath or affirmation as to the place to be searched; and consequently the evidence seized under authority of the illegal warrant must be suppressed.

Search and Seizure—*United States v. Sims*, 202 F. Supp. 65 (E.D. Tenn. 1962). Defendant moved to suppress whiskey seized from him by agents of the Alcohol Tax Unit, contending that the search warrant under which the whiskey was seized was illegal because the information used as a basis for the issuance of the warrant was gained as the result of a civil trespass on defendant's farm. The District Court denied the motion, holding that where federal agents standing in a field owned by defendant observed his illegal activities within his curtilage through binoculars, their observations were properly used as a basis for issuing a valid search warrant, since observations of premises protected by the Fourth Amendment made from a point outside its protection do not violate it, and the Fourth Amendment protected only defendant's curtilage and not his fields, even though the fields were fenced.