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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

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Arrest, Search and Seizure—*Wong Sun v. United States*, 83 Sup. Ct. 407 (1963). See Confessions, *infra*.

Arrest, Search and Seizure—*Hurst v. California*, 211 F. Supp. 387 (N.D. Cal. 1962). Petitioner was convicted of possession of narcotics in a California state court. On petition for writ of habeas corpus, petitioner contended that he was convicted on the basis of illegally seized evidence. The District Court issued the writ and ordered petitioner's discharge from custody, holding that *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), decided after petitioner's conviction, must be given retroactive effect because of the constitutional nature of the decision; that *Mapp* required not only that illegally seized evidence be excluded by state courts but also that federal standards be used to determine whether the contested evidence was illegally seized; that although prior California decisions permitted a search without a warrant *followed* by a valid arrest to be deemed incident to the arrest in order to uphold its validity, the federal law demanding that a valid arrest *precede* a search without a warrant before the search could be found valid as incident to arrest must now be applied in determining the legality of seizure of evidence sought to be admitted in California state courts; that applying this federal test, the evidence complained of was seized illegally where the arrest which preceded it was invalid, since it was a "fruit" of a prior warrantless search which followed no arrest; and, finally, that habeas corpus would lie to effect petitioner's release where the judgment of conviction rested on illegally seized evidence.

Arrest, Search and Seizure—*United States v. Tate*, 209 F. Supp. 762 (D. Del. 1962). Defendant was convicted of possessing a sawed-off shotgun on which the federal tax had not been paid as required by 26 U.S.C. §5821 (1958). On timely motion, after verdict, for judgment of acquittal, defendant contended that the shotgun admitted against him was obtained as the result of a search and seizure which violated his Fourth Amendment rights. The District Court granted defendant's motion, holding that where a Delaware State Highway Trooper, having arrested defendant without a warrant for speeding following a 100 mile an hour chase and subsequent resistance by defendant, handcuffed him and placed him inside the police car and then proceeded to search defendant's car, the search was unlawful as a general, exploratory search, because the trooper could not have been looking for fruits of the crime, since the crime of speeding has no fruits, or for weapons which might aid defendant to escape, since he was secured in the trooper's car; and hence the shotgun, which was found under the front seat of defendant's car during the search and which was the basis of his conviction, should have been excluded as evidence at his trial, and the conviction therefore could not stand.

Arrest, Search and Seizure—*Moore v. State*, 146 So. 2d 734 (Ala. App. 1962). Petitioner was convicted of robbery in 1952. On appeal from the Circuit Court's denial of his application for habeas corpus, petitioner contended that his conviction was based on evidence obtained by unlawful arrest and illegal search and seizure. Noting that no state or federal decision prevented conviction brought about by illegal search and seizure in 1952, the Court of Appeals of Alabama affirmed, holding that *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), had no retrospective effect in Alabama. (The Court cited *Petition of Dirring*, 183 N.E.2d 300 (Mass. 1962), abstracted at 54 J. CRIM. L., C. & P.S. 83 (1963), as authority for its holding; such reliance appears ill-advised, since *Dirring* was decided on procedural grounds without regard to whether *Mapp* was retroactive.)

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Arrest, Search and Seizure—*Schaffer v. State*, 184 A.2d 689 (Del. 1962). Defendants were convicted of third degree burglary. On appeal, defendants contended that since police custody is inherently coercive, defendants could not as a matter of law have authorized by voluntary consent the otherwise unreasonable search and seizure which produced evidence used against them. The Supreme Court of Delaware affirmed, holding that the rationale that consent to search or seizure as a matter of law cannot be given by one in police custody would not be followed in Delaware, because such a holding "would seriously jeopardize police inquiry and investigation long considered both lawful and necessary"; and that where there was evidence that a $20 bill was voluntarily produced by defendant Schaffer, the trial court properly "tentatively" admitted it into evidence with appropriate instructions which left to the jury the ultimate determination of consent to the search and seizure.

Arrest, Search and Seizure—*Beale v. State*, 186 A.2d 213 (Md. 1962). Defendant was convicted, as a second offender, of unlawful possession of narcotics and equipment for administering narcotics. On appeal, defendant contended that narcotics equipment admitted against her, which was taken from the back yard of the house in which she lived, was obtained by means of an illegal search and seizure. The Court of Appeals of Maryland reversed and remanded, holding that where defendant threw the equipment from her second story apartment into the yard because of actions of the police officers in attempting to enter her apartment without a warrant, seizure of the equipment by Officer Davis, who was then trespassing in the yard, was illegal; that when Officer Robinson forcibly entered defendant's apartment because of information from Officer Davis that defendant was or had been committing a misdemeanor, Robinson too became a trespasser, since Davis discovered the information while trespassing; and that even if defendant's arrest without a warrant was lawful, the seizure could not be deemed lawful as incident thereto, since it preceded arrest.

Arrest, Search and Seizure—*State v. Goff*, 118 N.W.2d 625 (Neb. 1962). Defendant was convicted of unlawful possession of narcotic drugs and was sentenced as an habitual criminal. On appeal, defendant contended that the trial court erred in failing to grant his motion to suppress evidence unlawfully seized pursuant to an arrest without a warrant by an Iowa policeman in Nebraska. The Supreme Court of Nebraska reversed and remanded, holding that since the Iowa policeman's arrest and search of defendant in Nebraska did not result from "fresh pursuit" of defendant for a crime believed to have been committed by him in Iowa, the warrantless arrest and unreasonable search and seizure violated defendant's rights under the United States Constitution and under Nebraska law; and consequently the trial court should have granted defendant's motion to suppress.

Arrest, Search and Seizure—*State v. Michaels*, 374 P.2d 989 (Wash. 1962). Defendant was convicted of illegal possession of gambling devices. On appeal, defendant contended that the trial court erroneously denied his motions to suppress evidence obtained through illegal search and seizure. The Supreme Court of Washington reversed and remanded, holding that since defendant was in his wife's car with her permission at the time of the arrest and search, he had standing to complain that his constitutional rights had been violated by an unlawful seizure from the car, by authority of *Jones v. United States*, 362 U.S. 257 (1960); and that where police officers, who had been alerted to look for the car in which defendant was riding but lacked probable cause to arrest defendant, arrested him for failing to signal for a left turn, the arrest was a mere pretext for searching the car; and inasmuch as the ensuing search was neither for evidence of the crime of failing to signal nor for tools aiding in defendant's escape, it was not incident to the arrest and consequently was unlawful.

Assault—*Commonwealth v. Slaney*, 185 N.E.2d 919 (Mass. 1962). Having waived trial by jury, defendant was convicted of assault and battery by the trial court. On appeal, defendant contended that the trial court erred in refusing to find him not guilty of assault as a matter of law in the absence of sufficient proof of the essential element of fear on the part of the alleged victim. The Supreme Judicial Court of Massachusetts affirmed, holding that whether or not the evidence supported the judge's specific finding of such fear was immaterial, since fear by the victim need not be proved to establish the crime of assault, inasmuch as the

purpose of criminal law—preservation of the public peace—would best be served by determining guilt in the case of assault entirely upon what a defendant does rather than upon what a victim apprehends.

Civil Defense—*State v. Congdon*, 185 A.2d 21 (N.J. Super. 1962). See Police Power, *infra*.

Comment on Failure to Testify—*DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). See Self-Incrimination, *infra*.

Comment on Failure to Testify—*Chatman v. State*, 145 So. 2d 707 (Miss. 1962). Defendant was convicted of rape. On appeal, defendant contended that the trial court's overruling of his objection to the district attorney's comment on defendant's failure to testify and its subsequent failure to declare a mistrial on that ground constituted reversible error. The Supreme Court of Mississippi reversed and remanded, holding that where there was no evidence that anyone other than the prosecutrix and defendant were present when the alleged rape occurred, the district attorney's remark in his closing argument that the evidence against defendant was undisputed amounted to improper comment on defendant's failure to testify.

Concealing Stolen Property—*People v. Tatum*, 25 Cal. Rptr. 832 (Dist. Ct. App. 1962). After having been acquitted on a charge of stealing a house trailer, defendant was convicted of knowingly concealing it. On appeal, defendant contended that the trial court erred in giving an instruction under which the jury could find defendant guilty of concealing property which he himself had stolen. The District Court of Appeal reversed, holding that CAL. PEN. CODE. §496(1), under which defendant was convicted, was directed not at thieves themselves but at those who knowingly deal with thieves and stolen goods, since theft necessarily involves initial concealment, and hence only if the facts indicated a complete divorcement of the concealment charged from the initial concealment by a thief of property stolen by him could that thief be convicted of violating §496(1); and consequently, in absence of evidence of concealment by defendant independent of that involved in the theft, the instruction complained of was incorrect, and defendant's conviction must be reversed. The Court noted that, irrespective of the construction given §496(1), §654, which bars prosecution under one of several provisions applicable to a single act after a defendant has been acquitted under another such provision with regard to that act, would prevent defendant's conviction for immediate concealment of the stolen property.

Confessions—*Cleary v. Bolger*, 83 Sup. Ct. 385 (1963). The District Court enjoined petitioner, a state waterfront detective, from testifying against respondent in state criminal proceedings regarding statements made by respondent while illegally detained by federal officers with whom petitioner had cooperated, *Bolger v. United States*, 189 F. Supp. 237 (S.D.N.Y. 1960), abstracted at 52 J. CRIM. L., C. & P.S. 425 (1961), and the Court of Appeals for the Second Circuit affirmed, *Bolger v. Cleary*, 293 F.2d 368 (2d Cir. 1961), abstracted at 53 J. CRIM. L., C. & P.S. 66 (1962). On certiorari, petitioner contended that the injunction interfered with the state's right to enforce independently its criminal law. In an opinion written by Mr. Justice Harlan, the United States Supreme Court reversed, holding that *Rea v. United States*, 350 U.S. 214 (1956), did not support the courts below because its rationale was not applicable to state officers; and that even if the injunction as to the federal officers (not here in issue) were valid pursuant to federal court supervisory power over such officers as authorized by *Rea*, the injunction against petitioner could not be upheld as necessary to make that against the federal officers effective, where petitioner was merely a witness to and did not participate in their illegal conduct, was not used by them as a shield to avoid federal requirements, and did not gain the information with regard to which he was enjoined in violation of a federal court order, since, absent the above factors (the presence of which, the opinion indicates, might compel a different result), upholding the injunction would constitute a "direct intrusion in state processes" which "does not comport with proper federal-state relationships." Mr. Justice Goldberg, concurring specially, did not reach the question of applicability of *Rea* to non-federal officers, stating that since recent New York state cases construing and applying *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), strongly indicated that New York courts would exclude the evidence covered by the

injunction, its issuance was unnecessary. Justices Douglas, Brennan and Warren dissented.

Confessions—*Wong Sun v. United States*, 83 Sup. Ct. 407 (1963). Petitioners were convicted of illegal transportation and concealment of narcotics, and the Court of Appeals for the Ninth Circuit affirmed, *Wong Sun v. United States*, 288 F.2d 366 (9th Cir.), abstracted at 52 J. CRIM. L., C. & P.S. 295 (1961). On certiorari, petitioners contended that confessions made pursuant to their illegal arrests and evidence discovered by virtue of information contained in their pre-confession statements were erroneously admitted against them in violation of their Fourth Amendment rights. The United States Supreme Court, per Brennan, J., reversed and remanded, holding that, as had been found by the Court of Appeals, the warrantless arrests complained of were illegal for lack of probable cause; that petitioner Toy's statements were suppressible as "fruits" of the unlawful arrest as having resulted therefrom notwithstanding their verbal, intangible nature, since both the holding in *Silverman v. United States*, 365 U.S. 505, abstracted at 52 J. CRIM. L., C. & P.S. 300 (1961), expanding the Fourth Amendment's protection to verbal statements as well as to "papers and effects," and the policies underlying the exclusionary rule, abrogated any heretofore recognized distinction between verbal as opposed to tangible "fruits" of illegal conduct by federal officers for purposes of exclusion; and that although petitioner Wong Sun's statement was not the fruit of his illegal arrest, his conviction too must be reversed, since the court below may have improperly considered, as requisite corroboration for the statement, Toy's statement to the extent that it implicated Wong Sun, inasmuch as post-arrest extrajudicial declarations may not be used at the trial against the declarant's co-defendant. The majority opinion treats the issue of validity of the arrests in great detail, shedding much light on the Court's current attitude toward the requirements for probable cause. Mr. Justice Douglas concurred, stating that even if probable cause were found, the arrests would be invalid for failure to obtain a warrant where there was time to do so. Mr. Justice Clark dissented in an opinion in which Justices Harlan, Stewart and White joined, finding probable cause for valid arrests without warrants under the facts of the case.

Crime by Telephone—*State v. Protopapas*, 184 A.2d 558 (Conn. Cir. 1962); *State v. Robinson*, 184 A.2d 188 (Conn. Cir. 1962). The Appellate Division of the Circuit Court of Connecticut recently decided two cases involving the criminality of threatening and obscene communications by telephone. In *State v. Protopapas*, defendant made numerous telephone calls to various persons in which she used abusive, indecent and threatening language. The Court affirmed her conviction of breach of the peace under CONN. GEN. STAT. REV. §53-174 (1958), holding that "peace" referred to that of individuals as well as that of the general public, and hence a finding that the public repose was disturbed by defendant's conduct was not requisite to her conviction. The Court in *State v. Robinson* set aside the judgment finding defendant guilty of disorderly conduct and remanded with direction to render a judgment of not guilty, holding that obscene phone calls made by defendant from his own home to the homes of three female complainants did not constitute disorderly conduct under CONN. GEN. STAT. REV. §53-175 (1958), since the statute's proscription of "annoyance or interference with any person in any place" extended only to any *public* place.

Cruel and Unusual Punishment—*State v. Bridges*, 360 S.W.2d 648 (Mo. 1962). Defendant was convicted of having become addicted to a narcotic drug. On appeal, defendant contended that he was imprisoned for being afflicted with the disease of narcotic addiction in violation of the Eighth Amendment's ban against cruel and unusual punishment, applicable to the states through the Fourteenth Amendment's due process clause. On authority of *Robinson v. California*, 370 U.S. 660, abstracted at 53 J. CRIM. L., C. & P.S. 492 (1962), the Supreme Court of Missouri reversed, holding that the portion of the statute [MO. REV. STAT. §195.020 (1959)] making it a crime "to be or become addicted to any narcotic drug" was unconstitutional as inflicting cruel and unusual punishment. The Court noted that "becoming an addict"—of which defendant was convicted—was not legally distinguishable from "being an addict"—which was involved in *Robinson*—since "being" is necessarily preceded by "becoming"; and that the state legislature intended, by use of the phrase "being or becoming," to make the status of addiction a criminal offense.

Derivative Evidence—*Wong Sun v. United States*, 83 Sup. Ct. 407 (1963). See Confessions, *supra*.

Double Jeopardy—*People v. Tatum*, 25 Cal. Rptr. 832 (Dist. Ct. App. 1962). See Concealing Stolen Property, *supra*.

Due Process—*People v. Clemmons*, 25 Cal. Rptr. 467 (Dist. Ct. App. 1962). Defendant was convicted of administering narcotics to a minor. On appeal, defendant contended that he was denied due process when the trial court, through use of its contempt power, coerced the testimony of the minor witness for the prosecution. The District Court of Appeal affirmed, holding that since coercion of the witness was an issue only between that witness and the state, defendant lacked standing to complain.

Freedom of Religion—*State v. Congdon*, 185 A.2d 21 (N.J. Super. 1962). See Police Power, *infra*.

Gambling—*In re Allen*, 27 Cal. Rptr. 168 (1962). Petitioner was convicted of permitting a game of chance to be played in her home for money in violation of a Los Angeles County ordinance. On original petition for writ of habeas corpus, petitioner contended that bridge is a game of skill rather than of chance, and hence that the conduct with which she was charged failed to constitute an offense. The Supreme Court of California granted the writ and discharged petitioner from custody, holding that the test of whether a game is one of chance or skill is not whether it contains an element of one or the other but rather which factor is the dominant determinant of the result of the game; and that the predominant element in bridge is skill even though the game does involve some chance. The Court cited, inter alia, texts on bridge by Goren and Culbertson, noting that the existence of such a large amount of literature designed to increase the skill of bridge players was a persuasive indication favoring the holding.

Guilt by Association—*Ball v. State*, 375 P.2d 340 (Okla. Crim. App. 1962). See Right to a Fair Trial, *infra*.

Habeas Corpus—*Jones v. Cunningham*, 83 Sup. Ct. 373 (1963). Petitioner was convicted as a third offender by a Virginia state court of an offense requiring imprisonment in the state penitentiary. The District Court dismissed a petition for habeas corpus, and shortly before his appeal was argued before the Fourth Circuit, petitioner was paroled by the Virginia Parole Board. The Court of Appeals for the Fourth Circuit dismissed the case as moot, since petitioner was no longer in the custody of respondent Superintendent of the Virginia State Penitentiary, and refused to permit petitioner to add as respondents members of the Virginia Parole Board, because they lacked physical custody of petitioner. On certiorari, petitioner contended that as a parolee, he was "in custody" for purposes of invoking federal habeas corpus jurisdiction under 28 U.S.C. §2241 (1958). The United States Supreme Court, per Mr. Justice Black, unanimously reversed and remanded to the Court of Appeals with directions to grant petitioner's motion to add the members of the parole board as respondents and to proceed to a decision on the merits, holding that although petitioner's parole released him from immediate physical imprisonment, it nevertheless constituted "custody" within the meaning of the habeas corpus statute, inasmuch as conditions imposed on petitioner by the terms of his parole [*e.g.*, petitioner must, inter alia, live in a specified house, receive permission to drive a car, be temperate, and report periodically to his parole officer], regardless of the importance of such restrictions to the rehabilitative process, significantly confined petitioner and restrained his liberty "to do those things which in this country free men are entitled to do."

Habeas Corpus—*Thomas v. Morrow*, 361 S.W.2d 105 (Ky. 1962). See Insanity, *infra*.

Habitual Criminal Acts—*United States ex rel. Pennise v. Fay*, 210 F. Supp. 277 (S.D.N.Y. 1962). See Right to Counsel, *infra*.

Improper Conduct by Defense Counsel—*DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). See Self-Incrimination, *infra*.

Improper Conduct by Defense Counsel—*State v. Reddick*, 184 A.2d 652 (N.J. Super. 1962). After defendant's first trial for robbery resulted in a mistrial due to the jury's failure to agree, defendant was retried and convicted. On appeal, defendant contended that his own counsel's remarks in sum-

mation were so prejudicial that he was denied a fair trial. The Appellate Division of the New Jersey Superior Court reversed and ordered a new trial, holding that where defendant's counsel, in an attempt to persuade the jury that defendant was too accomplished and sophisticated a criminal to indulge in the poorly planned robbery with which he was charged, characterized him as one who was accustomed to mugging women, "your wives and mine, our sisters," and leaving them to bleed to death, fundamental justice demanded that defendant be afforded a new trial in light of the certain enormity of the impact of these comments, since the principle that a defendant is bound by his counsel's trial tactics would not be applied where defendant's right to a fair trial would otherwise be abrogated.

Improper Conduct by Prosecutor—*Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962). Defendant, then Mayor of Baxley, Ga., was convicted of wrongfully attempting to evade federal income tax laws under §7201 of the Internal Revenue Code of 1954. On appeal, defendant contended that the District Court erred in failing to grant his motions for mistrial predicated on prejudicial statements by the United States Attorney. The Court of Appeals for the Fifth Circuit reversed and remanded, holding that where in his opening statement the prosecutor asserted, "This case is replete with fraud and is one of the most flagrant cases we have ever tried in [this district]," and made a closing argument to the effect that the unreported funds came from "kickbacks" paid by contractors to defendant as Mayor and that all politicians take such "kickbacks", both instances were highly prejudicial; and the district court should have granted defendant's motions for mistrial, since the court's cautionary instructions that the jury should disregard the statements could not have cured the prejudice.

Insanity—*Thomas v. Morrow*, 361 S.W.2d 105 (Ky. 1962). Petitioner was convicted of robbery, and the Circuit Court granted habeas corpus, ordering his release from custody. On appeal by the Commonwealth, petitioner contended that the judgment of conviction was void due to his lack of mental capacity to plead to the indictment. The Court of Appeals of Kentucky affirmed, holding that since petitioner was mentally incompetent at the time of arraignment and sentence, the judgment of conviction was void, and habeas corpus would lie to correct the wrong. The Court relied exclusively on a federal court of appeals case, *Broadus v. Lowry*, 245 F.2d 304 (6th Cir. 1957), there apparently being no Kentucky precedent.

Insanity—*State v. White*, 374 P.2d 942 (Wash. 1962). Defendant was convicted of first and second degree murder. On appeal, defendant contended that the trial court erred in instructing the jury in terms of the M'Naghten rules of criminal responsibility instead of giving a requested instruction incorporating the American Law Institute standard; and that a psychiatrist should have been allowed to testify as to statements made by defendant while under the influence of truth serum. Examining and rejecting not only the ALI standard urged by defendant but also the *Durham* rule, the Supreme Court of Washington affirmed, holding that when the M'Naghten rules are used, all persons who might possibly be deterred, by the thought of punishment, from committing crimes are included within the sanctions of the criminal law, and consequently the rules should be retained in Washington since they serve the deterrent purpose of criminal jurisprudence far more effectively than do the ALI or *Durham* rules, which relieve from criminal responsibility those persons whose volition has been impaired by mental disease or defect; and, analogizing the reliability of truth serum evidence to that of evidence resulting from polygraph tests and hypnosis, that the trial court did not abuse its discretion in refusing to admit the psychiatrist's proffered testimony regarding statements defendant made while under the influence of truth serum, even though the evidence was sought to be admitted solely for the purpose of allowing the jury to understand the basis for the psychiatrist's expert opinion concerning defendant's sanity. The Court noted that the truth serum issue was one of first impression in Washington. Though agreeing that the M'Naghten test should be retained as the standard of criminal responsibility, Judge Hill concurred specially, wishing to allow juries in capital cases to hear evidence concerning volition, not as pertaining to guilt or innocence, but in determining punishment. Three members of the seven judge Court dissented, advancing the argument that persons who, due to impairment of volition or the capacity of free will, would be absolved of culpability under the ALI

test will not, because of that very impairment, be deterred by the possibility of punishment.

Juvenile Proceedings—*Green v. United States*, 308 F.2d 303 (D.C. Cir. 1962). See Right to a Fair Trial, *infra*.

Narcotics—*State v. Bridges*, 360 S.W.2d 648 (Mo. 1962). See Cruel and Unusual Punishment, *supra*.

Parole—*Jones v. Cunningham*, 83 Sup. Ct. 373 (1962). See Habeas Corpus, *supra*.

Parole—*People ex rel. Kubala v. Kinney*, 185 N.E.2d 337 (Ill. 1962). Petitioner was convicted of murder in 1933 and was sentenced to 100 years imprisonment. On petition for mandamus to require the Parole Board to consider his application for parole, petitioner contended that the proviso to the Sentence and Parole Act, ILL. REV. STAT. ch. 38, par. 801 (1961), making all persons eligible for parole after serving 20 years, applied to persons sentenced prior to its effective date, January 1, 1962, and that the previous requirement that a prisoner serve one-third of his sentence before becoming eligible for parole no longer applied. The Supreme Court of Illinois issued the writ, holding that since parole is an act of clemency and grace, it is not within the judicial function and the legislature has power both to change its terms and conditions and to make such changes immediately effective regardless of the date of sentencing; and inasmuch as the proviso by its terms applied to "every person sentenced to the penitentiary," and failure to apply the proviso retroactively would prevent the legislative policy therein expressed from taking effect for 20 years, the proviso would be applied to persons such as the petitioner who were sentenced prior to the effective date of the new legislation.

Police Power—*State v. Congdon*, 185 A.2d 21 (N.J. Super. 1962). Defendant students were convicted of being disorderly persons under a statute which deems anyone who refuses to obey civil defense orders a disorderly person. On appeal, defendants contended that their convictions violated their First Amendment right to religious freedom, inasmuch as their refusal to take cover during "Operation Alert 1961," a state-wide civil defense drill, was motivated by their religious beliefs. The Appellate Division of the Superior Court of New Jersey affirmed, holding that publications distributed by the anti-war organization of which defendants were members evidenced that political, philosophical or practical views, rather than religious beliefs, underlay defendants' decision to disobey the civil defense orders; but that even if defendants had been expressing valid religious beliefs, their exercise of practices pursuant thereto was properly subjected to reasonable regulation by the state in light of the public welfare.

Rape—*State v. Croteau*, 184 A.2d 683 (Me. 1962); *Commonwealth v. Maroney*, 186 A.2d 864 (Pa. Super. 1962). Two courts have recently considered the issue of sufficiency of proof of penetration in a prosecution for rape, reaching results which, though different, seem compatible in view of the facts involved. In *State v. Croteau*, the Supreme Court of Maine sustained defendant's appeal and granted a new trial for failure of proof of penetration, where the only evidence of this element of the crime consisted of the testimony of prosecutrix (defendant's daughter) that defendant had "sex relations" with her and that she had experienced "awful pain." The Court held that "sex relations" embraced a much wider sphere of activity than did "sexual intercourse" (synonymous with "carnal knowledge"), which involves penetration and must be proved to establish the crime of rape; and that due to lack of evidence as to the precise location of prosecutrix' "awful pain" and as to its cause, such pain was consistent with brutal sex relations either with or without the requisite carnal knowledge. The Superior Court of Pennsylvania, in *Commonwealth v. Maroney*, affirmed the lower court's dismissal of petitioner's application for writ of habeas corpus where prosecutrix stated, "he had intercourse with me," and that she had experienced pain caused by such intercourse, since the term "intercourse" had a common, generally understood meaning which included the necessary element of penetration.

Right to a Fair Trial—*Green v. United States*, 308 F.2d 303 (D.C. Cir. 1962). Defendant, aged 17, was convicted of robbery. On appeal, defendant contended that receipt in evidence of the Juvenile Court's waiver of jurisdiction constituted reversible error. The Court of Appeals for the District of Columbia Circuit reversed and remanded with directions to determine whether the Juvenile Court

made a full investigation prior to waiving jurisdiction, holding that since the waiver of jurisdiction on its face constituted, inter alia, a judicial finding of probable cause that defendant was guilty, his substantial rights were infringed by admitting it in evidence and by allowing it to be sent to the jury room, inasmuch as it is likely that the jury would draw the inference that a judicial officer had already concluded that defendant was, at least, probably guilty; and since utilization of the waiver was plain error affecting defendant's substantial rights, FED. R. CRIM. P. 52(b) rendered it cognizable on appeal even though no objection was made at the trial.

Right to a Fair Trial—*State v. Reddick*, 184 A.2d 652 (N.J. Super. 1962). See **Improper Conduct by Defense Counsel**, *supra*.

Right to a Fair Trial—*Ball v. State*, 375 P.2d 340 (Okla. Crim. App. 1962). Defendant was convicted of second degree burglary. On appeal, defendant contended that where the trial court permitted the state, over her objections, to adduce incompetent and prejudicial testimony, defendant was denied a fair and impartial trial. The Court of Criminal Appeals of Oklahoma reversed and remanded, holding that testimony elicited from defendant on cross-examination regarding details of her husband's present prison sentence and past criminal record had no bearing on any issue in the case, and that permitting such cross-examination was prejudicial and constituted reversible error, since it tended to depict defendant as a person condemned by association.

Right to Counsel—*Gideon v. Wainwright*, 83 Sup. Ct. 792 (1963). After petitioner was convicted in a Florida state court of the felony of breaking and entering with intent to commit a misdemeanor, the Florida Supreme Court denied his petition for habeas corpus. On certiorari, petitioner contended that the trial court's refusal to appoint counsel at his request constituted denial of a fair trial in violation of Fourteenth Amendment due process. Overruling *Betts v. Brady*, 316 U.S. 455 (1942), the United States Supreme Court unanimously reversed, holding that the right to counsel guaranteed by the Sixth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment, since representation by counsel is fundamental and essential to a fair trial. Noting that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," the Court rejected the *Betts v. Brady* qualification of right to counsel as applied to the states—that, although the state must always provide counsel in capital cases, it must do so in non-capital cases only where failure to do so would amount to fundamental unfairness—stating that *Betts* constituted an anomalous deviation from pre-1942 cases enunciating concepts of Fourteenth Amendment due process. The majority opinion was written by Mr. Justice Black; Harlan, Douglas and Clark, JJ., concurred in separate opinions. Mr. Justice Harlan noted that the instant decision did not affect all criminal cases, but only those involving substantial prison sentences. While Florida and two other states sought affirmance of petitioner's conviction, 22 states filed amicus curiae briefs, urging that *Betts v. Brady* be overruled.

See also *Douglas v. California*, 83 Sup. Ct. 814 (1963), where the Court (7-2) held that right to counsel on appeal from a state criminal conviction is absolute, striking down the California rule of criminal procedure providing that counsel be provided on appeal only if, in the appellate court's opinion, such appointment would be helpful to the defendant or the court.

Right to Counsel—*United States ex rel. Pennise v. Fay*, 210 F. Supp. 277 (S.D.N.Y. 1962). Petitioner was convicted in 1952 of first degree manslaughter by a New York state court, and was sentenced as a second felony offender. On application for writ of habeas corpus, petitioner contended that he was under illegal detention, since his first conviction, on which the sentence as a second felony offender was predicated, was obtained in violation of his right to counsel. The District Court granted the writ and remanded petitioner to custody of respondent warden pending prompt resentencing of petitioner as a first felony offender upon the 1952 conviction, holding that where petitioner, then aged 19 and unfamiliar with legal proceedings, was tried without counsel and convicted of the crime against nature in 1941 by an Idaho state court without having been advised of his right to counsel, this conviction (of which defendant had been unconditionally pardoned in 1941 by the Governor of Idaho) was obtained in violation of due process, since under the circumstances denial of counsel constituted denial of

fundamental fairness, even though petitioner was neither physically nor mentally handicapped and even though there was no claim that the charges or possible defenses to the Idaho prosecution were unduly complex; and consequently the Idaho conviction could not be used by the New York state court for the purpose of increasing petitioner's punishment as a second offender.

Scientific Evidence—Fingerprints—*People v. Abner*, 25 Cal. Rptr. 882 (Dist. Ct. App. 1962). Having waived jury trial, defendant was convicted by the trial court of rape, assault with intent to commit rape, oral copulation, five counts of burglary, and three counts of robbery. On appeal, defendant contended that the fingerprint expert's inability to enumerate 12 points of similarity between defendant's fingerprints and those found at the scenes of the crimes denied defendant the right to cross-examination and rendered proof of his identification insufficient. The District Court of Appeal affirmed, holding that since the fingerprint expert's failure to answer questions on cross-examination pertaining to the basis for his opinion as to his fingerprint identification of defendant resulted from inability to recall the points of similarity rather than from refusal to answer, defendant was not deprived of his right to cross-examine, especially since defendant made no request that the expert study the fingerprints again and return for further cross-examination; that the expert's inability to enumerate the 12 points of similarity went only to the weight of his testimony; and that even if the identification of defendant by one of his alleged victims was weak, the fingerprint expert's identification was sufficient to support the trial court's finding. The Court noted that "fingerprints . . . are the strongest evidence of identity."

Scientific Evidence—Lie Detector Evidence—*State v. Emory*, 375 P.2d 585 (Kan. 1962); *State v. Mottram*, 184 A.2d 225 (Me. 1962). The highest courts of two states have recently considered the admissibility of evidence of refusal to take a lie detector test. In *State v. Emory*, the Supreme Court of Kansas reversed defendant's conviction and granted a new trial where testimony regarding his refusal to take a polygraph test had been admitted over his objection. The Court held that this evidence was inadmissible since results of such tests are inadmissible, and that erroneous admission of the evidence effectively deprived defendant of a fair trial by precluding the jury from giving fair consideration to his alibi defense. The Supreme Judicial Court of Maine took a more comprehensive view of the issue in *State v. Mottram*, where the defendant complained of the trial court's failure to admit evidence that a key witness for the state had refused to take a lie detector test. Noting by way of dictum that evidence of such refusal would be admissible as bearing on the credibility of a witness or consciousness of guilt of a defendant if the proponent laid a proper foundation by showing that the witness or defendant believed that the test was trustworthy or dependable, the Court overruled defendant's exceptions and dismissed the appeal, since such a foundation had not been laid in the instant case.

Scientific Evidence—Truth Serum—*State v. White*, 347 P.2d 942 (Wash. 1962). See Insanity, *supra*.

Search and Seizure—*People v. Norton*, 25 Cal. Rptr. 676 (Dist. Ct. App. 1962). *Cf. Bielicki v. Superior Court*, 21 Cal. Rptr. 552 (1962), and *Britt v. Superior Court*, 24 Cal. Rptr. 849 (1962), abstracted at 54 J. CRIM. L., C. & P.S. 81, 82 (1963). Defendant was convicted of violating CAL. PEN. CODE §288a. On appeal, defendant contended that the evidence upon which he was convicted was obtained by an illegal search. The District Court of Appeal affirmed, holding that where defendant, while committing the unlawful act in a doorless toilet stall of the men's room of a theater, was seen through "observation holes" in a marble partition by a police officer who had secreted himself behind the partition, the officer's conduct not only was not unlawful but was not a search at all, since defendant's activities could have been seen by any member of the public who happened to enter the restroom. The Court distinguished the instant case from *Bielicki, supra*, on the ground that the factual essence of the *Bielicki* case was the privacy of the toilet stall wherein petitioners were observed by the police, noting that the California Supreme Court in condemning the secret observation stated that no member of the public could have seen the activities. The District Court of Appeal, which decided *Norton* on October 31, failed to mention and apparently was unaware of the *Britt* case, decided by the Supreme Court of California on October 2, holding on authority of *Bielicki* that clandestine observation by police of petitioner's

act was unlawful, even though the act could have been visible to any member of the public entering the men's room; thus, *Britt* would seem to be controlling in the instant case.

Search and Seizure—*People v. Tahtinen*, 26 Cal. Rptr. 864 (Dist. Ct. App. 1962); *People v. Dickenson*, 26 Cal. Rptr. 601 (Dist. Ct. App. 1962); *People v. Erickson*, 26 Cal. Rptr. 546 (Dist. Ct. App. 1962). Two districts of the District Court of Appeal of California have recently decided three cases concerning the legality of forcible removal of narcotics from the mouth or throat of a defendant, reaching divergent results. In the *Tahtinen* case, Division 1 of the Second District held that where arresting officers who were violently resisted by defendant held defendant's head forward and downward to prevent him from swallowing a package which they reasonably believed contained heroin, and did not choke defendant, who eventually spit out the package, their conduct was lawful, since in light of defendant's violence they did not use unreasonable force and because defendant "had no constitutional right to swallow . . . the evidence of his crime." The Fourth District, in *People v. Dickinson*, held that where following a lawful arrest without a warrant, police officers first held defendant's Adam's apple to keep him from swallowing a rubber contraceptive filled with heroin and then, believing him to be in danger of choking to death when he began to gag and turn blue in his attempt to swallow it, removed the contraceptive from his throat, the officers' conduct was reasonable and lawful. The Courts in both *Tahtinen* and *Dickenson* noted that the officers' acts were not at all comparable to the conduct which the United States Supreme Court found brutal and shocking in *Rochin v. California*, 342 U.S. 165 (1952). Division 4 of the Second District reached the opposite result on facts very similar to those of the cases discussed above in *People v. Erickson*, where a police officer choked defendant until he spit out a capsule of heroin. The Court reversed defendant's conviction even though the issue of the legality of the seizure had not been raised prior to appeal, indicating that the issue was not how hard an officer might choke a defendant but whether he could choke him at all. While in *Erickson* the officer's conduct with regard to defendant was characterized as "choking", that part of the officer's testimony reproduced in the opinion implies that it was the same type of Adam's-apple-holding that was condoned in *Dickenson*.

Search and Seizure—*Castaneda v. Superior Court*, 26 Cal. Rptr. 364 (Dist. Ct. App. 1962). Petitioner sought prohibition to restrain the trial court from proceeding against him on an information charging him with possession of a narcotic, contending that evidence to be used against him was obtained by means of an unlawful search and seizure, and that the trial court erred in excluding a certified copy of a United States District Court order suppressing, in a federal prosecution, identical evidence obtained by the same search and seizure. The District Court of Appeal denied the writ, holding that California courts are not bound by decisions of lower federal courts, even on due process questions; and since *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), did not preclude the states from adjudicating the reasonableness of searches and seizures, the trial court was correct in finding that petitioner had consented to the search complained of in view of his failure to object at the time of the search, despite the federal court's ruling.

Search and Seizure—*State v. Doyle*, 186 A.2d 499 (N.J. Super. 1962). Defendants were convicted of criminal abortion. On appeal, defendants contended that evidence obtained by unlawful search and seizure was erroneously used against them. The Appellate Division of the New Jersey Superior Court affirmed, holding that *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), applied retroactively even if no objection to admission of the evidence was made before or during trial, since such objection was futile in New Jersey prior to the *Mapp* decision; but that defendants' convictions would nonetheless be affirmed, since even if the evidence in question was unlawfully obtained, its admission constituted harmless error, inasmuch as the evidence was merely cumulative and was not "of a stature sufficient to have influenced the result . . . ."

Search and Seizure—*Commonwealth v. One 1958 Plymouth Sedan*, 186 A.2d 52 (Pa. Super. 1962). The Quarter Sessions Court of Philadelphia County dismissed the Commonwealth's petition for forfeiture of a car used for illegal transportation of non-tax paid liquor. On appeal by the Commonwealth, the owner of the car contended that the

liquor had been discovered in the car by unreasonable search and seizure. The Superior Court of Pennsylvania reversed and ordered forfeiture, holding that where the seizing officers had reason to believe that a car answering the description of the car in question was being used for illegal transportation of liquor from New Jersey to Pennsylvania, and the car seized was "quite low in the rear," stopping and searching the car was reasonable under all the circumstances, particularly since it took place immediately after the officers saw the car enter Pennsylvania from New Jersey. The Court apparently based its decision not on a finding of probable cause but on the principle that "a state should have the right to stop a traveler coming into the state and to search his belongings to ascertain whether he is bringing into the state any property upon which a state tax is due." Three of the seven judges dissented, stating that the majority opinion encroached upon the freedom to travel between states without visa or barrier.

Search and Seizure—*Commonwealth v. Mancini*, 184 A.2d 279 (Pa. Super. 1962). Petitioner was convicted of burglary on June 19, 1961. On appeal from the trial court's denial of his post-conviction petition to quash search warrants and suppress evidence seized thereunder, petitioner contended that the warrants were invalid and that *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. &. P.S. 292 (1961), decided on the very same day on which petitioner was convicted, required suppression of the evidence. The Superior Court of Pennsylvania affirmed, holding that where nothing in the record indicated that the apparently lawful warrants were invalid and the question of legality of the search was not raised before or during trial, *Mapp* would not apply. By way of dictum, the Court added: "[T]he sudden change of the law by the Supreme Court of the United States as to the exclusionary rule is a disturbing exercise of judicial power and should not have retroactive effect with respect to criminal proceedings in this Commonwealth . . . ."

Search and Seizure—*Holt v. State*, 117 N.W.2d 626 (Wis. 1962). Defendant was convicted of first degree murder for placing her newborn child in a furnace. On appeal, defendant contended that police officers gained admittance to her home and searched it in violation of her constitutional rights. The Supreme Court of Wisconsin affirmed, holding that since the officers were permitted to enter the home by defendant's husband, who had authority to admit persons, defendant's constitutional rights were not infringed by the officers' entry; and since defendant thereafter allowed the officers to search the premises, voluntarily answered their questions and complied with their requests, and stated that they "treated her courteously," the trial court's finding that defendant consented to the search was reasonable under all the circumstances. One judge dissented, stating that defendant's acts were as consistent with peaceful submission to officers of the law as with voluntary consent to the search.

Self-Incrimination—*DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). Defendant was convicted of narcotics violations. On appeal, defendant contended that he was denied a fair trial when the District Court, over objection, permitted his co-defendant's counsel to comment on defendant's failure to testify. Noting that it found no case directly in point, the Court of Appeals for the Fifth Circuit reversed and remanded, holding that although the repeated references of co-defendant's counsel to defendant's failure to testify (*e.g.*, that co-defendant "was honest enough and had courage enough to take the stand" while "you haven't heard a word from [defendant]) were justified, considering the case from co-defendant's point of view, since under the circumstances the duty of co-defendant's counsel to his client required the drawing of such inferences, the references in context of the trial constituted a violation of the Fifth Amendment and of 18 U.S.C. §3481 (1958) (providing that a defendant may be a witness, but that failure to do so "shall not create any presumption against him") since, even though the comments were not made by any agent of the federal government, the district judge's refusal to disapprove the attorney's conduct and to take steps to prevent defendant from being penalized for relying on his constitutional right to remain silent amounted to prohibited federal participation in or sanction of the comments. The majority opinion, written by Circuit Judge Wisdom, contains a comprehensive study of the development of the Fifth Amendment privilege. An alternative holding seems to be that the comment rendered defendant's trial unfair because of its effect upon the jury, rather than because federal action was found. Judge Bell concurred specially, stating that the right of a defendant, recognized by the major-

ity, to comment on his co-defendant's failure to testify will create intolerable procedural problems; *e.g.*, it will result, as a practical matter, in elimination of joint trials.

Sentencing—*State ex rel. Nelson v. Ellsworth*, 375 P.2d 316 (Mont. 1962). After petitioner's conviction was reversed by the Supreme Court of Montana, petitioner was retried and again convicted. On original petition for writ of mandamus or other remedial writ directed to respondent Warden of the State Prison and respondent State Board of Prison Commissioners, petitioner contended that he was entitled to require respondents to allow credit on his second sentence for time served during imprisonment pursuant to the original conviction which had been reversed. Noting that the case was one of first impression in the state, the Supreme Court of Montana dismissed the cause, refusing to grant relief, holding that since MONT. REV. CODES ANN. §94-7602 (1947) provided that the granting of a new trial places the parties in the same position as if no trial had occurred, §94-4717 states that imprisonment under a judgment begins to run only upon delivery to the prison, and §94-8003 directs respondent warden to detain petitioner until the full second sentence has been served, the Court was precluded by statutory law from granting the requested relief. Observing that petitioner's only relief would be through commutation, pardon or parole, the Court stated that the legislature may wish to consider adopting a statute to cover such situations.

Sex Offenses—*Reynolds v. State*, 146 So. 2d 85 (Ala. 1962). Defendant was convicted of violating ALA. STAT. tit. 14, §398 (1940), which proscribes carnal knowledge of, or abuse in the attempt to have carnal knowledge of, a girl under 12 years of age. On appeal from the trial court's denial of his motion for new trial, defendant contended that the evidence was insufficient to support the verdict. The Supreme Court of Alabama reversed and remanded, holding that since "carnal knowledge" means "sexual intercourse" and thus necessarily involves the sexual organs of both parties, the evidence against defendant, which showed abuse or injury of the girl's rectum but not of her genital or sexual organs, failed to support the charge against him.

Sex Offenses—*State v. Croteau*, 184 A.2d 683 (Me. 1962); *Commonwealth v. Maroney*, 186 A.2d 864 (Pa. Super. 1962). See Rape, *supra*.

Theft—*People v. Tatum*, 25 Cal. Rptr. 832 (Dist. Ct. App. 1962). See Concealing Stolen Property, *supra*.

Wiretapping—*Ferguson v. United States*, 307 F.2d 787 (10th Cir. 1962). Defendants were convicted of purchase and sale of narcotics and conspiracy to violate narcotics laws. On appeal, defendants contended that recordings of telephone conversations obtained in violation of both §605 of the Federal Communications Act of 1934 [47 U.S.C. §605 (1948)] and an Oklahoma statute [OKLA. STAT. tit. 21, §1757 (1951)] were erroneously admitted as evidence against them. The Court of Appeals for the Tenth Circuit affirmed, holding that since one of the parties to the intercepted telephone conversations, a special government employee hired for the purpose of obtaining evidence in this case, consented to interception and recordation, §605 was not violated; and that illegality of the interception under Oklahoma law had no bearing on disposition of defendants' appeal, since "the course of a federal criminal prosecution cannot be controlled by state law."

Withdrawal of Plea of Guilty—*Caves v. State*, 147 So. 2d 632 (Miss. 1962). Defendant was convicted of grand larceny on his plea of guilty, and the trial court denied his post-conviction motion for leave to withdraw the plea and enter a plea of not guilty. On appeal from denial of the motion defendant contended that the trial court erroneously accepted the guilty plea. The Supreme Court of Mississippi reversed and remanded, holding that where defendant was illiterate and of questionable mental competence, the trial court's acceptance of his plea of guilty, without first advising defendant of his basic rights and determining that the plea was voluntary and that defendant understood its nature and consequences, was incorrect; and consequently the order denying defendant's motion to withdraw the plea must be reversed.

Witnesses—Coercion—*People v. Clemmons*, 25 Cal. Rptr. 467 (Dist. Ct. App. 1962). See Due Process, *supra*.