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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

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Accomplice Witnesses—*Namet v. United States*, 83 Sup. Ct. 1151 (1963). Petitioner was convicted of violating federal wagering tax laws, and the Court of Appeals for the First Circuit affirmed. On certiorari, petitioner contended that prejudicial error occurred when the trial court allowed the prosecutor to ask two accomplice witnesses questions as to which he knew they would claim their Fifth Amendment privilege. Noting that "no constitutional issues of any kind are presented" and that "all that this case involves . . . is a claim of evidentiary trial error," the United States Supreme Court, per Stewart, J., affirmed, holding that since both the accomplice witnesses had pleaded guilty to the offenses for which petitioner was on trial, both possessed non-privileged information (since as to those charges they could incriminate themselves no further) that could be used to corroborate the Government's case, and therefore, even though the prosecution knew they intended to invoke the privilege and even though the witnesses retained and exercised valid privilege claims as to related matters, the prosecution did not call the witnesses in bad faith, hoping to build its case out of impermissible inferences from their use of the Fifth Amendment privilege; that since the few valid claims of privilege by the accomplice witnesses were at most cumulative support for an inference of petitioner's guilt already well established by the non-privileged portion of their testimony, the privilege claims did not add "critical weight" to the prosecution's case in a form not subject to cross-examination, and therefore did not unfairly prejudice petitioner; and consequently, petitioner's conviction must be affirmed. The Court noted that the theories of reversal in such cases, as applied by the Circuit Courts, were bad faith on the part of the prosecution and unfair addition of crucial inferences against a criminal defendant not subject to cross-examination. The Court also stated that petitioner had failed to object to or try to cure any prejudicial effects of the procedure complained of. Justices Black and Douglas dissented.

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Appellate Procedure—*People v. Kelly*, 189 N.E.2d 477 (N.Y. 1963). See Search and Seizure, *infra*.

Arrest, Search and Seizure—*Ker v. California*, 83 Sup. Ct. 1623 (1963). Petitioners' convictions for possessing marijuana in violation of California law were affirmed by the California District Court of Appeal, 15 Cal. Rptr. 767 (1961), abstracted at 53 J. CRIM. L., C. & P.S. 65 (1962), and the California Supreme Court denied a petition for hearing. On certiorari, petitioners contended that evidence seized pursuant to arrests without warrants and illegal for lack of probable cause was admitted against them in violation of their Fourteenth Amendment rights as declared in *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961). In an opinion written by Mr. Justice Clark, the United States Supreme Court affirmed, holding that constitutionally grounded federal standards of reasonableness must govern in determining whether an arrest, search or seizure is constitutionally valid for purposes of deciding whether evidence must be excluded under *Mapp* in a state criminal case. The above holding is the only true "holding" of this case, since it is the only element of the case in which a majority of the Court concurred. Justice Harlan alone disagreed with the imposition of this standard on the states, preferring to continue judging the legality of state action in this area by the "basic to a free society" test, equivalent to the "core" doctrine of *Wolf v. Colorado*. Under this older test, Justice Harlan found the evidence admissible, and thus voted for affirmance. The remainder of Justice Clark's opinion, joined by Justices Black, Stewart, and White, concluded that the contested arrests and seizures did comply with federal standards of reasonableness, and they therefore voted to affirm. In a separate opinion written by Justice Brennan, in which

Justices Warren, Douglas, and Goldberg joined, these Justices agreed with the test enunciated in Justice Clark's opinion, but, upon applying that test to the facts of this case, concluded that the contested state action did not comply with federal standards of reasonableness, and would therefore reverse. Thus, the eight Justices who agreed upon the standard to be applied were evenly divided as to that standard's effect upon disposition of the instant case. The point of difference was whether state police officers who had probable cause under federal standards to arrest petitioners violated federal concepts of reasonableness when, for the purpose of making the arrests, they entered petitioners' premises by means of a key without first demanding admittance and announcing their purpose. CAL. PEN. CODE §844 requires demand and announcement, but California decisional law allows noncompliance in certain circumstances, including cases where, as here, the officers believed at the time that compliance would lead to the destruction of evidence. Justices Clark, Black, Stewart, and White found the judicial exceptions to the statutory command consistent with federal concepts of reasonableness, while Justices Brennan, Warren, Douglas, and Goldberg would require demand and announcement as a federal standard unless the occupant actually knew of the officers' presence, on the ground that to hold otherwise does violance to the presumption of innocence.

[Since this is the first United States Supreme Court case to consider questions of arrest, search and seizure with regard to the application of *Mapp* to state prosecutions since that case was decided, the opinions should be read for the purpose of discerning the positions of the Justices and the present climate of the Court.]

Arrest, Search and Seizure—*United States v. Viale*, 312 F.2d 595 (2d Cir. 1963). Defendants were convicted of federal wagering and income tax offenses. On appeal, all but one defendant contended that they were unlawfully arrested by internal revenue officers without warrants, and thus the ensuing seizure of their incriminating personal effects could not be justified as incident to lawful arrest, and the effects were therefore improperly admitted as evidence against them. The Court of Appeals for the Second Circuit affirmed as to the defendant who did not contest the validity of his arrest, reversed and dismissed the indictment as to one of the other defendants, one Faliero, and affirmed as to the rest, holding that since no federal statute authorized internal revenue officers to arrest without warrant, the law of New York, the state where the arrests occurred, would determine the validity of defendants' arrests; that since the federal officers were not "peace officers" within N.Y. CODE CRIM. PROC. §177, relating to arrests by peace officers, because §154 of that Code limits the definition of "peace officers" so as to exclude all federal agents, the applicable New York provision was §183 of the Code, relating to arrests by private persons; that since the indictment charged defendants' offenses as misdemeanors, the law of §183 as it applied to misdemeanors must be used, even though under another federal revenue statute the offenses could have been charged as felonies; that a private person as well as a peace officer could conduct a valid search incident to a lawful arrest; and consequently, that defendant Faliero's arrest was unlawful and the evidence seized pursuant thereto inadmissible, while the arrests of the other contesting defendants were lawful and the evidence admissible, since §183 authorized a private person to arrest for a misdemeanor committed or attempted in his presence, and all the contesting defendants except Faliero were committing or attempting to commit misdemeanors in the revenue officers' presence when the arrests took place. [See Search and Seizure—*Sirimarco v. United States*, 315 F.2d 899 (10th Cir. 1963).]

Arrest, Search and Seizure—*United States v. Burke*, 215 F. Supp. 508 (D. Mass. 1963). See Confessions, *infra*.

Arrest, Search and Seizure—*People v. Haven*, 31 Cal. Rptr. 47 (1963). Defendant was convicted of possession of marijuana and was sentenced as a second offender. On appeal, defendant contended that evidence seized pursuant to an illegal search was admitted against him. The Supreme Court of California reversed, holding that the prosecution had the burden of showing proper justification for the search and seizure, inasmuch as defendant made out a prima facie case of illegality when he established lack of a warrant; that where the testimony of the officers that they "received information" that defendant had narcotics at his residence did not detail the information received, the trial court could not determine whether that

information would justify a reasonable belief in defendant's guilt, and the officers' testimony that, during a period of surveillance of the house, they observed four or five known or suspected narcotics dealers enter and leave, did not supply grounds for probable cause; that the prosecution thus failed to prove that the officers had probable cause to arrest defendant when they entered his house; that one officer's entry through the partially open front door of the house without making defendant aware of his presence and the entry of four other officers a few minutes later were unlawful; that since the officers' presence in the house was unlawful, they could not rely on defendant's "consent" to search, inasmuch as the voluntariness of his apparent consent, in the context of sudden confrontation by five officers who entered without right or permission, could not be proved; and that since the officers' entry was illegal, all products of that illegality, including defendant's apparent consent and evidence seized at defendant's apartment were inadmissible and could not be relied on to sustain the judgment. [The Court cited *Wong Sun v. United States*, 371 U.S. 471, abstracted at 54 J. CRIM. L., C. & P.S. 189 (1963), as support for the proposition that the products (fruits) of the unlawful entry, including defendant's consent, were inadmissible.]

Arrest, Search and Seizure—*People v. Coffey*, 191 N.E.2d 263 (N.Y. 1963). See Informers, *infra*.

Burglary—*Smart v. State*, 190 N.E.2d 650 (Ind. 1963). Defendant was convicted of first degree burglary. On appeal, defendant contended that the building he allegedly burglarized was not a "dwelling house or other place of human habitation" within the meaning of the first degree burglary statute [BURNS' IND. STAT. §10-701 (1956 Replacement)]. The Supreme Court of Indiana reversed with instructions to sustain defendant's motion for new trial, holding that a "dwelling house" was a home and remained such even if left empty temporarily; that a "place of human habitation" was a place where humans actually make their abode, and such a place thus became a place other than a place of human habitation upon being vacated, even though only temporarily; that since the building allegedly burglarized by defendant was a summer cottage used for weekends and a 2 or 3 week vacation, and was unoccupied at the time he broke in, the cabin was then neither a "dwelling" nor a "place of human habitation"; and consequently, defendant was improperly convicted of first degree burglary.

Change of Venue—*Rideau v. Louisiana*, 83 Sup. Ct. 1417 (1963). See Prejudicial Publicity, *infra*.

Confessions—*Haynes v. Washington*, 83 Sup. Ct. 1336 (1963). Petitioner was convicted of robbery, and the Supreme Court of Washington affirmed. On certiorari, petitioner contended that since a written and signed confession resulted from psychological coercion, its use as evidence against him constituted a denial of due process of law. The United States Supreme Court, per Goldberg, J., vacated and remanded, holding that where petitioner's testimony, to the effect that police officers held him incommunicado and promised to let him telephone his wife only if he would cooperate, was not contradicted by the officers, petitioner's version of the circumstances would be accepted, inasmuch as the officers could have denied the testimony, if honestly able to do so; that a concession of voluntariness contained in the contested confession could not be given conclusive import, since if the confession itself was coerced, the officials would have had little, if any, trouble securing the concession; and that "given the unfair and inherently coercive context"—the threats of continued incommunicado detention and promises to be allowed to call his wife—in which petitioner's choice to make and sign the written confession was made, "that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment." The Court noted that since prior to the coercive situation petitioner had already made oral confessions, the oppressive official conduct here utilized could not be rationalized, as it sometimes is, as being "essential to the detection or solution of the crime or to the protection of the public." Justices Clark, Harland, Stewart, and Whittaker dissented in an opinion written by Justice Clark, stating that two oral confessions made by petitioner before the alleged coercion began, identical in all relevant details to the confession involved in the instant decision, were admitted at the trial without objection; and that the contested confession was not coerced in light of petitioner's matur-

ity and experience with the enforcement of criminal law.

Confessions—*Rideau v. Louisiana*, 83 Sup. Ct. 1417 (1963). See Prejudicial Publicity, *infra*.

Confessions—*Coleman v. United States*, 313 F.2d 576 (D.C. Cir. 1962). Defendant was convicted of second degree murder. On appeal, defendant contended that the confession used as evidence against him was obtained during a period of unnecessary delay in violation of FED. R. CRIM. P. 5(a). The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that where defendant was arrested at 6:45 p.m., was questioned from 7:30 to 8:00 p.m., was left alone from 8:00 to 8:45 p.m., confessed orally at 8:50 p.m. after five minutes of questioning, was "booked" at 10:50 p.m. after the confession had been reduced to writing, and was brought before a magistrate at 10:00 a.m. the next day, the confession was obtained during a period of unnecessary delay, inasmuch as a magistrate was available 24 hours a day and since the time between arrest and confession was not consumed only by such necessary matters as booking, transportation, and the like; and that since the confession was so obtained, its admission constituted reversible error under the *McNabb-Mallory* rule. Judge Bastian dissented, stating that the delay (6:45 to 8:50 p.m. the same evening) between arrest and confession was necessary within the meaning of Federal Rule 5(a), since that time was taken up with transportation, questioning, and checking the plausibility of defendant's alibi; and that even if the interval between arrest and arraignment constituted an unnecessary delay, defendant's confession, which was made during a period of necessary delay, was admissible.

Confessions—*Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962). Defendant was convicted of manslaughter. On appeal, defendant contended that the trial court erred in denying his post-trial motions for judgment of acquittal notwithstanding the verdict or for new trial, *United States v. Killough*, 193 F. Supp. 905 (D.D. C.), abstracted at 52 J. CRIM. L., C. & P.S. 424 (1961), inasmuch as the oral confession he made in absence of counsel after he had been taken before a committing magistrate should not have been admitted against him, since this confession was a repetition of a prior confession inadmissible for being obtained during a period of detention unlawful under FED. R. CRIM. P. 5(a). The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that even though defendant's contested second confession was made after he had been arraigned and informed of his constitutional rights, including his rights of assistance of counsel and to remain silent, this repetition of the prior confession which was inadmissible under the *McNabb-Mallory* rule must also be held inadmissible as the fruit of the earlier confession, since to admit the repetition would in substance and effect admit the earlier, inadmissible confession, and thus would defeat the rule of exclusion. While five judges concurred in this holding, four distinguished the instant case from prior D.C. Circuit cases [*Jackson v. United States*, 285 F.2d 675 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 941 (1961), abstracted at 52 J. CRIM. L., C. & P.S. 295 (1961), and *Goldsmith v. United States*, 277 F.2d 335 (D.C. Cir.), *cert. denied*, 364 U.S. 863 (1960)] holding that post-arraignment repetitions of confessions inadmissible because of *McNabb* were admissible where the repetitions were made after the *actual* advice of counsel, noting that in the instant case defendant had *knowledge* of his right to counsel but not *actual* assistance of counsel before the repetition. In a separate concurring opinion, the fifth judge (Judge Wright) stated that *Jackson* and *Goldsmith* should be overruled rather than distinguished, and added that the test of admissibility—whether the subsequent confession is the fruit of the first rather than the product of an intervening act of free will—should be administered by means of a presumption, rebuttable by the prosecution, that it was induced by the prior confession. Four judges dissented.

Confessions—*United States v. Burke*, 215 F. Supp. 508 (D. Mass. 1963). Three defendants, indicted for robbing the mails and conspiracy to rob the mails, moved to suppress, contending that the evidence in question was obtained by means of illegal seizures from defendants Leo and John Burke. The District Court denied the motions, holding that although the arrest of Leo Burke without a warrant and without probable cause was illegal, Leo's conversation with the arresting officers and his surrender to them of two marked $20 bills, after having been arrested and advised

of his constitutional rights, were voluntary and the result of an intervening, independent act of free will, rather than under compulsion of the illegal arrest, and the conversation and bills were therefore admissible; that the evidence was not obtained in violation of FED. R. CRIM. P. 5(a), since Leo's intoxication made delay in arraignment necessary; that there was no illegal search or seizure at defendant John Burke's home, because he voluntarily took the officers to his home, and after being fully advised of his rights, voluntarily talked with them and gave the evidence to them; and consequently, the motions to suppress must be denied. The District Court stated that *Wong Sun v. United States*, 371 U.S. 471, abstracted at 54 J. CRIM. L., C. & P.S. 189 (1963), rendered statements or surrender of property following illegal arrest inadmissible only when made under compulsion of the illegal arrest, and that, in deciding a motion to suppress such statements or property, the trier of fact should suppress unless there is clear and convincing evidence that the admission or surrender was the product of an intervening independent act of free will.

Confessions—*People v. Escobedo*, 190 N.E.2d 825 (Ill. 1963). Defendant was convicted of murder. On writ of error, defendant contended that his confession should not have been used as evidence against him, since it was not voluntarily made, and because even if voluntarily made, it was obtained after defendant requested and was denied assistance of counsel during police interrogation. The Supreme Court of Illinois affirmed, holding that under the circumstances disclosed by the record, there was no reason for disturbing the trial court's finding that the confession was voluntarily made; that denial of request for counsel by a suspect during interrogation is not in and of itself a violation of due process; and in view of the right of the police to interrogate suspects, which right would effectively be precluded were counsel present at that stage, the Court would not formulate a rule of evidence preventing the use of a confession where defendant's request for counsel was denied during the interrogation which produced the confession. The Court noted that presence of counsel would prevent effective police interrogation even though the questioning be fair, and stated that if the police abuse their right to interrogate, confessions so obtained would be excluded by existing standards.

Confessions—*State v. Woodruff*, 130 S.E.2d 641 (N.C. 1963). Defendant was convicted of premeditated murder. On appeal, defendant contended that confessions introduced as evidence against him were involuntary, having been induced by promises made to defendant by the County Sheriff. The Supreme Court of North Carolina ordered a new trial, holding that where as a condition to giving information regarding the murders defendant requested that the Sheriff consolidate several charges against him for forgery and have his cousin transferred from the Women's Prison to the County Jail, and the Sheriff obtained approval for both requests, and thereafter arranged for defendant's temporary parole in order that he might help the Sheriff solve the killings, during which parole he housed defendant and gave him spending money, defendant had every right to believe that the Sheriff had substantial influence with court officials and others in places of authority; and consequently, the Sheriff's statement that if defendant would help him solve the killings, the Sheriff would try to help him if it developed that he was involved, induced defendant to make the confessions in question, and therefore the confessions were not free and voluntary and should not have been admitted as evidence.

Confessions—*Grove v. State*, 365 S.W.2d 871 (Tenn. 1963). Defendants were convicted of armed robbery. On appeal, defendants contended that coerced confessions were improperly used as evidence against them, and that the trial court improperly refused to allow defendants to introduce contemporaneously made confessions of many unrelated crimes, which defendants could prove they could not have committed, for the purpose of showing that the confessions used against them were coerced. Noting that the "confessions of other crimes" point was one of first impression in the state, the Supreme Court of Tennessee affirmed, holding that in view of the conflicting evidence as to physical coercion of defendants, the findings of the trial court and jury would not be disturbed; that since proof of the impossibility that defendants committed the other crimes to which they confessed would prove nothing more than that those particular confessions were false, the trial court properly refused the proffered confessions; and consequently, defendants' convictions must be affirmed.

Conspiracy—*United States v. Zuideveld*, 316 F.2d 873 (7th Cir. 1963). Defendants and others were convicted of conspiracy to use the U.S. mails for the transmission of obscene materials. On appeal, defendants contended that the evidence was insufficient to sustain their convictions. The Court of Appeals for the Seventh Circuit affirmed, holding that where defendant husband and wife, who published two magazines which were not legally obscene but which appealed to male homosexuals, established through advertisements in the magazines a male pen pal club (known as the Adonis Club), defendants were proved guilty of conspiring to transmit through the mails the admittedly obscene letters written between some club members, since permissible inferences from the evidence established that defendants had reason to know and intended that the club they established would lead to use of the mails to transmit obscene letters between members. Judge Swygert dissented, stating that all the evidentiary facts from which the Court of Appeals permitted the inference to be drawn that defendants knew and intended that club members would indulge in obscene correspondence merely tended to prove the admitted fact that defendants knew the Adonis Club was composed primarily of homosexuals; and therefore the proof of defendants' knowledge and intent rested on the impermissible assumption that homosexuals as opposed to heterosexuals will inevitably indulge in obscenity if invited to correspond with one another. Judge Swygert added that this unwarranted assumption destroyed the First Amendment right of homosexuals to associate together in a correspondence club.

Cruel and Unusual Punishment—*State v. Margo*, 191 A.2d 43 (N.Y. 1963). See Narcotics, *infra*.

Discovery—*Brady v. Maryland*, 83 Sup. Ct. 1194 (1963). See Due Process of Law, *infra*.

Discovery—*State v. Cocheo*, 190 A.2d 916 (Conn. Cir. 1963); *State v. Clement*, 190 A.2d 867 (N.J. 1963). Two state courts have recently considered questions of discovery in criminal cases. Their decisions indicate a growing willingness on the part of the courts to at least permit, even if not to compel, discovery by criminal defendants.

The defendant in *State v. Cocheo* contended that the trial court erred in denying his request to see, for purposes of cross-examining a witness, a statement previously given by the witness to the police, and that he was entitled to the statement as a matter of right. The Appellate Division of the Connecticut Circuit Court affirmed, holding that discovery in criminal cases, as in civil cases, was within the sound discretion of the trial court. The Court noted that since a criminal defendant's constitutional safeguards against self-incrimination preclude the prosecution from compulsory discovery, the principle of reciprocity prevented a defendant from having a right to discovery. The Court stated, however, that if a defendant has reason to believe a witness has made a prior inconsistent statement, defendant may request that it be produced for examination by the court, its further use, if any, being within the court's discretion.

In *State v. Clement*, defendant sought pre-trial inspection of his testimony before the grand jury. The Supreme Court of New Jersey reversed and remanded the lower court's denial of the motions, holding that since none of the reasons for grand jury secrecy applies to a case where a defendant seeks to view his own grand jury testimony, there was "no good reason to deny defendant a fair opportunity to prepare for trial."

Discovery—Jencks Act—*Campbell v. United States*, 83 Sup. Ct. 1356 (1963). Petitioners were convicted of bank robbery, and the Court of Appeals for the First Circuit affirmed. On certiorari, the United States Supreme Court vacated and remanded to the District Court for determination of whether petitioners had improperly been denied access to an FBI report [365 U.S. 85, abstracted at 52 J. CRIM. L., C. & P.S. 295 (1961)], and the District Court determined there had been no improper denial. The Court of Appeals held these findings inadequate, and remanded for further hearing and findings. 296 F.2d 527 (1st Cir. 1961), abstracted at 54 J. CRIM. L., C. & P.S. 78 (1963). On remand, the District Court made additional findings, and the Court of Appeals affirmed petitioners' convictions. On certiorari, petitioners contended that they had been improperly denied access to an FBI report for use as a "prior statement" to impeach a Government witness, since the report was properly producible under the Jencks Act [18 U.S.C. §3500 (1958)]. The United States Supreme Court vacated and

remanded in an opinion by Mr. Justice Brennan, holding that where the findings of fact on the last remand to the District Court were that one Staula, a key Government witness, was interviewed by one Toomey, a federal agent, that Toomey recited to Staula the substance of the interview notes and Staula told Toomey that this account was, to the best of his knowledge, what had happened, that Toomey then rearranged his notes, dictated an Interview Report from the notes and from memory, checked the transcribed report against the notes, and then destroyed the notes, the District Court's finding that there was no material variance between the Interview Report sought by petitioners and the notes was not clearly erroneous; that since Staula orally approved Toomey's reading of the notes, the Interview Report, which did not materially vary from the notes, constituted "a written statement made by said witness and . . . adopted . . . by him" within §3500(e)(1) of the Jencks Act and thus was producible; and consequently, the Court of Appeals erred in affirming petitioners' convictions in the face of the District Court's not clearly erroneous findings. Justices Clark, Harlan, and Stewart dissented, stating that in order to be a "written statement" under the section applied by the Court, the statement must be written by the witness; or, if not reduced to writing by the witness, must at least be approved by him in final written form.

Double Jeopardy—*Downum v. United States*, 83 Sup. Ct. 1033 (1963). Petitioner was convicted of stealing from the mail and forging government checks so stolen, and the Court of Appeals for the Fifth Circuit affirmed. 300 F.2d 137 (5th Cir.), abstracted at 53 J. CRIM. L., C. & P.S. 492 (1962). On certiorari, petitioner contended that the trial at which he was convicted constituted double jeopardy, since he had been placed in jeopardy for the same offenses by a former trial at which the jury was discharged due to absence of a material prosecution witness. Speaking through Mr. Justice Douglas, the United States Supreme Court reversed, holding that where the prosecutor, knowing the witness had not been found, allowed the original panel to be selected and sworn, discharge of the jury, over petitioner's objection, on motion of the prosecution constituted jeopardy barring the subsequent prosecution for the same offenses two days later, even though no proceedings were had at the first trial other than selecting and swearing the jury. The Court noted that the Government objected to petitioner's motion, denied by the trial court, to dismiss for want of prosecution those two of the six counts against him which were dependent on the testimony of the missing witness and to proceed to try him on the remaining counts. The Court adopted as a governing principle that enunciated in *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931)—entering upon trial without sufficient evidence to convict because of absence of a material witness is essentially no different from discovering the insufficiency of evidence during trial—and implied that granting mistrial in either type of case on motion of the prosecution amounts to harassment by successive prosecutions to afford a more favorable opportunity to convict, which is exactly what the prohibition against double jeopardy was intended to prevent. Justices Harlan, Stewart, and White joined in Justice Clark's dissent, stating that petitioner was in no way prejudiced by the situation, since the trial two days after the first jury was discharged did not result in continued or prolonged anxiety, added expense, embarrassment, or deprivation of rights.

Due Process of Law—*Brady v. Maryland*, 83 Sup. Ct. 1194 (1963). Petitioner and one Boblit were convicted of felony (first degree) murder, and were sentenced to death. After the Court of Appeals of Maryland affirmed, petitioner moved the trial court for a new trial on the basis of newly discovered evidence. The Maryland Court of Appeals dismissed petitioner's appeal from denial of this motion without prejudice to relief under the Maryland Post Conviction Procedure Act. The trial court then dismissed petitioner's application for post-conviction relief, and the Maryland Court of Appeals remanded for retrial on the issue of punishment. 174 A.2d 167 (Md. 1961), abstracted at 53 J. CRIM. L., C. & P.S. 230 (1962). On certiorari, petitioner contended that, in limiting his retrial to the issue of punishment, the Maryland Court of Appeals deprived him of federal constitutional rights. In an opinion written by Mr. Justice Douglas, the United States Supreme Court affirmed, holding that where petitioner and Boblit were jointly charged with felony murder and petitioner denied the actual killing, suppression by the prosecution of Boblit's confession that he, not petitioner, had done the actual

killing, constituted a denial of due process when suppression was effected despite petitioner's requests that Boblit's statements be given to him, since due process is denied whenever the prosecution fails, on request, to produce evidence in its possession favorable to the accused, regardless of the good or bad faith of the prosecution; but since the highest court of Maryland had determined that nothing in Boblit's confession could reduce petitioner's offense below first degree murder, that court's decision to remand on the issue of punishment but not on that of guilt did not deprive petitioner of due process or equal protection. Mr. Justice White, concurring in result, stated that the majority's statement that such suppression of evidence is a denial of due process was unnecessary to decision of this case, since the only question pertinent to disposition was whether Maryland denied petitioner equal protection by granting him a new trial only on the issue of punishment; and that the majority's unnecessary determination of the due process question constituted formation of "a broad rule of criminal discovery," which task is properly for the legislative, not the judicial, process. Justices Harlan and Black dissented, stating that since Maryland criminal case juries are, by state law, the triers of law as well as fact, the majority's assumption—that the Maryland Court of Appeals' holding (that Boblit's confession could not reduce petitioner's offense) rested on that court's implicit ruling that the confession would not be admissible on the issue of petitioner's guilt—may be incorrect, the judgment should be vacated and the case remanded to the Maryland Court of Appeals to determine the basis for its holding, because petitioner was denied equal protection of the laws when the Maryland Court remanded only on the issue of punishment unless the majority's assumption is correct.

Due Process of Law—*Norvell v. Illinois*, 83 Sup. Ct. 1366 (1963). See Equal Protection of the Laws, *infra*.

Due Process of Law—*Rideau v. Louisiana*, 83 Sup. Ct. 1417 (1963). See Prejudicial Publicity, *infra*.

Due Process of Law—*United States ex rel. Von Cseh v. Fay*, 313 F.2d 620 (2d Cir. 1963). Petitioner was convicted of forgery by a New York state court. After he exhausted his state remedies, petitioner's application for habeas corpus was denied by the United States District Court for the Southern District of New York. On appeal from this denial, petitioner contended that the State's delay in bringing his case to trial constituted a denial of due process of law. The Court of Appeals for the Second Circuit affirmed, holding that the due process clause does not make the "speedy trial" provision of the Sixth Amendment directly applicable to state action; that four factors—length of delay, reason for delay, prejudice to defendant, and waiver by defendant—are relevant in determining whether state denial of a speedy trial assumes due process proportions; and that although the delay here complained of (3 years and 7 months from indictment to trial) was quite extensive, and though petitioner, who raised the claim of undue delay at every opportunity, did not waive his right to protest the delay, petitioner's right to due process was not violated, inasmuch as the reason for the delay (principal prosecution witness was in India, beyond the State's power to compel his return) was valid, and petitioner was not prejudiced by the delay. The Court noted that in this context "prejudice" meant only that the delay caused the issues to be incapable of fair determination, and did not refer to such matters as petitioner's mental anguish or his inability to maintain gainful employment.

Electronic Eavesdropping—*Lopez v. United States*, 83 Sup. Ct. 1381 (1963). Petitioner was convicted of attempted bribery of an Internal Revenue Agent, and the Court of Appeals for the First Circuit affirmed. On certiorari, petitioner contended that the District Court improperly admitted as evidence testimony as to his conversation with the agent and a recording of that conversation, since both were obtained in violation of his Fourth Amendment rights. In an opinion written by Mr. Justice Harlan, the United States Supreme Court affirmed, holding that where the agent, one Davis, falsely represented to petitioner that he was willing to accept a bribe, Davis was nonetheless in petitioner's office with petitioner's consent, and while there did not violate petitioner's privacy, since what he "seized" by use of his powers of hearing was petitioner's voluntary conversation with him; that Davis' testimony of the conversation was therefore properly admitted in evidence; and consequently, since the recording of the conversation, which was made by means of

a pocket wire recorder concealed on Davis' person, was not evidence of a conversation the Government could not have heard without use of an electronic device, but was merely corroborative and the "most reliable evidence possible of a conversation in which the . . . agent was a participant and which that agent was fully entitled to disclose," the admittedly accurate recording was also admissible. The Court rejected the further argument that, even if petitioner's Fourth Amendment rights had not been violated, the Court should exercise its supervisory power over the lower federal courts to formulate a rule of exclusion in this case, stating that use of this power was unwarranted in the absence of "manifestly improper conduct by federal officials." Chief Justice Warren, concurring in the result, would limit the use of recorded evidence to allow it only when corroborative of a witness who was a party to the conversation, as in the instant case. By citing *On Lee v. United States*, 343 U.S. 747 (1952), he went on, the Court reaffirmed that case *sub silentio* and thus would not so limit the use of recordings. Justices Brennan, Douglas, and Goldberg dissented in an opinion by Justice Brennan, stating that *On Lee* should be overruled, since although persons assume the risk that those they choose as confidantes may betray them by telling what has been revealed, they do not assume the risk that those persons will secretly use electronic devices to secure independent evidence of conversations. The dissenting Justices further stated that *On Lee* and the instant case strike a blow not only at Fourth Amendment freedoms but also at the First Amendment freedoms of speech and expression.

Electronic Eavesdropping—*Clinton v. Commonwealth*, 130 S.E.2d 437 (Va. 1963). Defendant was convicted of feloniously receiving money from the earnings of a prostitute. On writ of error, defendant contended that evidence obtained in violation of her rights against unlawful search and seizure, by means of a mechanical listening device stuck in the wall separating defendant's apartment from the adjoining apartment, was admitted at her trial. The Supreme Court of Appeals of Virginia affirmed, holding that since the only evidence as to any penetration of the party wall was that the device was merely "stuck in" rather than driven into the wall, it was "reasonable to assume that the penetration was very slight such as one made by a thumb tack to hold the small device in place"; and consequently, in absence of proof of unauthorized physical encroachment, evidence in the form of words seized by use of the device did not violate defendant's federal constitutional rights, and the evidence was therefore properly admitted against her.

Equal Protection of the Laws—*Brady v. Maryland*, 83 Sup. Ct. 1194 (1963). See **Due Process of Law**, *supra*.

Equal Protection of the Laws—*Norvell v. Illinois*, 83 Sup. Ct. 1366 (1963). Petitioner was convicted of murder in an Illinois state court in 1941. He did not appeal. Thereafter, *Griffin v. Illinois*, 351 U.S. 12 (1956), was decided, requiring states to furnish free transcripts to indigent defendants for purposes of appeal. Pursuant to *Griffin*, the Illinois Supreme Court adopted Rule 65-1, providing free transcripts to every indigent convicted of crime, whether convicted before or after *Griffin* was decided, unless furnishing a transcript is impossible. Petitioner moved the trial court to furnish a transcript, the motion was denied, and the Illinois Supreme Court affirmed. On certiorari, petitioner contended that Illinois could not avoid the Fourteenth Amendment obligation declared by *Griffin* even though failure to provide petitioner a transcript was without fault of the State. Speaking through Mr. Justice Douglas, the United States Supreme Court affirmed, holding that where the indigent petitioner was represented by counsel at the trial, and, though petitioner did not appeal, there was no evidence that he could not have had the lawyer's services for purposes of appeal, Illinois did not violate petitioner's Fourteenth Amendment rights by later failing to provide him with a transcript because the court reporter had died, no one could transcribe his shorthand notes, and an effort to reconstruct the transcript through testimony of persons who attended the trial proved futile. Justice Harlan concurred in the result without opinion. Justices Goldberg and Stewart dissented on the ground that, since *Griffin* is retroactive, the constitutional violation alleged occurred in 1941, when petitioner could not have obtained a then available transcript because of indigence, rather than in 1956, when he could not obtain it due to factors unrelated to indigence.

Evidence—Suppression of—*Brady v. Maryland*,

83 Sup. Ct. 1194 (1963). See Due Process of Law, *supra*.

Felony Murder—*People v. Austin*, 120 N.W.2d 766 (Mich. 1963). Defendants were charged with first degree murder, and the trial court granted their motion to quash the information. On appeal by the State, defendants contended that the felony murder doctrine did not render them guilty of first degree murder for the killing of a co-felon by the intended victim of their attempted robbery. The Supreme Court of Michigan affirmed, holding that since the killing of the co-felon was justifiable homicide as to the intended robbery victim who actually shot him, it could not by any rationale be murder as to defendants. In reaching this result, the Court stated that the applicable statute, MICH. CONSOL. LAWS §750.316 (1948), deems "all murder" perpetrated in designated ways to be first degree murder, and that the statute did not apply to this case, since the killing in the first instance was not murder but justifiable homicide. Two of the seven judges dissented, arguing that the defendants feloniously set in motion a chain of circumstances such that killing was reasonably foreseeable, and that they therefore should be held criminally responsible for any death resulting from the circumstances flowing from their initial criminal act.

Freedom of Association—*United States v. Zuideveld*, 316 F.2d 873 (7th Cir. 1963). See Conspiracy, *supra*.

Freedom of Religion—*Williford v. California*, 217 F. Supp. 245 (N.D. Cal. 1963). Plaintiff Williford, a state prisoner, brought an action under the Federal Civil Rights Act against defendants, the people of California, the State Prison Warden, and others, seeking damages for harassment in the exercise of his religion and for being prohibited from exercising his religious beliefs in violation of his First Amendment rights, and seeking an injunction to prevent the continuance of such violation. Defendants moved to dismiss the complaint and for summary judgment. The District Court granted defendants' motion to dismiss and dismissed plaintiff's complaint, holding that even though plaintiff, a Black Muslim, had an inviolable constitutional right whether in or out of jail to believe whatever religious doctrine he chose, the State, by preventing all Muslim activity in the prisons in the exercise of its powers of control over prison facilities, could constitutionally prevent plaintiff from exercising his freedom to act pursuant to his religious belief, in light of the Department of Corrections' determination that Muslim activities constituted a threat to peaceable and orderly behavior within the prisons; and consequently, plaintiff's complaint failed to state a claim on which relief could be granted.

Hearsay Evidence—*Crosby v. Commonwealth*, 130 S.E.2d 467 (Va. 1963). See Scientific Evidence—Radar, *infra*.

Homicide—*People v. Austin*, 120 N.W.2d 766 (Mich. 1963). See Felony Murder, *supra*.

Homicide—*Aven v. State*, 152 So. 2d 924 (Miss. 1963). See Self-Defense, *infra*.

Homicide—*Flippen v. State*, 365 S.W.2d 895 (Tenn. 1963). Defendants were convicted of involuntary manslaughter. On appeal, defendants contended that the evidence failed to support the verdict. The Supreme Court of Tennessee affirmed, holding that where the evidence established that a car driven by defendant Stalling, and in which defendant Flippen was a passenger, hit the car in which decedent, a little boy, was a passenger and knocked it off the road into a lake where the little boy drowned, the jury was warranted in finding defendant Stalling guilty of involuntary manslaughter; that when after the admitted impact defendant Flippen looked back and did not see the other car, he had a duty, which he failed to discharge, to warn defendant Stalling that something serious must have happened and to go back and assist; and that since defendant Flippen, though only a passenger in the lethal car, participated in the crime by failing to go back and assist and by aiding defendant Stalling later to hide the car, he too was properly convicted.

Immunity From Prosecution—*State v. Crow*, 367 S.W.2d 601 (Mo. 1963). Defendant was convicted of burglary and stealing. On appeal, defendant contended that he had been promised immunity from prosecution by the County Sheriff in consideration for defendant's giving the Sheriff information which in fact solved 37 other crimes. The Supreme Court of Missouri affirmed, holding that since defendant was not within any state immunity

statute, his convictions must be affirmed, since the Sheriff had no standing or authority to grant immunity from prosecution.

Improper Conduct by Prosecutor—*Pekar v. United States*, 315 F.2d 319 (5th Cir. 1963). See Juries, *infra*.

Informers—*People v. Coffey*, 191 N.E.2d 263 (N.Y. 1963). Defendant's motion to suppress was denied after hearing in the trial court, and the Appellate Division affirmed. On appeal by permission, defendant contended that failure of the prosecution to reveal the identity of an informer destroyed the reliability of the proof of probable cause to arrest defendant, and that therefore the evidence obtained through a search without a warrant incident to the arrest should be suppressed. The New York Court of Appeals affirmed, holding that since the principal elements of the informer's story were checked out and found plausible before defendant was arrested, the arresting officer had knowledge at the time of arrest sufficient to constitute probable cause; that since the arresting officer had probable cause, the prosecution's refusal to name the informer would be error only if it made impossible a fair hearing on defendant's motion to suppress; and inasmuch as the informer was merely a transmitter of information rather than a competent witness to the crime, and information supplied by him was fully corroborated, defendant was not prejudiced by inability to cross-examine the informer. The Court noted that the prosecution's reasons for concealment were a promise to the informant, possible danger to him, and full corroboration of the information he supplied.

Insanity—*McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962). Defendant was convicted of manslaughter. On appeal, defendant contended that the District Court erred in failing to submit to the jury among other alternative verdicts that of not guilty because of insanity, and in failing *sua sponte* to give a *Lyles* instruction informing the jury that, if acquitted by reason of insanity, defendant would be confined in a mental hospital until it was determined that he could safely be returned to society [*Lyles v. United States*, 254 F.2d 725, 728 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958)]. The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that since defendant had introduced some evidence of mental disorder, he was entitled to have the issue of insanity submitted to the jury; that under the *Durham* rule the jury should be instructed that a " 'mental disease or defect' includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls"; and that because defendant did not affirmatively waive the *Lyles* instruction concerning the disposition of one acquitted by reason of insanity, his conviction must be reversed although he did not request the instruction, since the *Lyles* instruction is mandatory in all cases where the issue of insanity must be submitted to the jury unless waiver of the instruction appears affirmatively on the record. Three judges (two concurring in result and one dissenting in part) stated that the *Lyles* instruction need be given only if affirmatively requested. [The implication of the Court's proferred instruction *re* what constitutes a "mental disease or defect," when considered in the context of this case, is that subnormal intelligence alone may suffice. Defendant's IQ was 68.]

Insanity—*Williams v. United States*, 312 F.2d 862 (D.C. Cir. 1962). Defendant was convicted of second degree murder and carrying a dangerous weapon without a license. On appeal, defendant contended that the District Court should have directed a verdict of acquittal by reason of insanity. The Court of Appeals for the District of Columbia Circuit affirmed, holding that a District Court should direct a verdict of acquittal by reason of insanity only if, as a matter of law, the evidence failed to establish beyond a reasonable doubt that the offenses charged were not the product of a mental disease or defect; and that where, of eleven psychiatrists who gave expert testimony at defendant's trial, only six characterized his mental condition as a "mental disease or defect" and, of these six, only three said the offenses were the product of the mental disorder, reasonable men were not, as a matter of law, required to entertain a reasonable doubt as to defendant's legal responsibility for his acts, and therefore the District Court was correct in failing to direct the verdict.

Insanity—*State v. Poulson*, 381 P.2d 93 (Utah 1963). Defendant was convicted of first degree murder and sentenced to death. On appeal, defendant contended that the trial court erred in

refusing to grant his requested instruction on the issue of criminal responsibility, patterned after the *Durham* rule. The Supreme Court of Utah affirmed, holding that the instruction given, which embodied both the M'Naghten Rule and the "irresistible impulse" test was a correct statement of Utah law, and adequately protected defendant's interests; and that neither the *Durham* rule nor the proposed A.L.I. rule would be adopted in lieu of the law as stated in the insanity instruction given.

Juries—*Pekar v. United States*, 315 F.2d 319 (5th Cir. 1963). Defendant was convicted on six counts of an indictment charging possession of goods which he knew had been stolen after having been in possession of an interstate common carrier. On appeal, defendant contended that the District Court erred in overruling his motion for mistrial on the ground that, during a recess, the Assistant United States Attorney who was prosecuting the case had a conversation with one of the jurors, and that the court erred in admitting illegally seized evidence against him. The Court of Appeals for the Fifth Circuit reversed and remanded, holding that even though the conversation complained of did not concern defendant's case, his conviction must be reversed since the conversation established a social contact between the juror and the prosecutor, and possibly prejudicial private communications between jurors and third persons compel reversal unless harmlessness is shown; and consequently the District Court erred in refusing to grant defendant's motion for mistrial. Although the Court did not have to reach defendant's second contention—that illegally seized evidence was used against him—in light of the above holding, it commented on this point because a new trial would be had. The Court concluded that the evidence should have been suppressed, inasmuch as the facts that defendant reluctantly permitted FBI agents to enter and "look around" as a result of being motivated by their "superior position," that he was told the agents wanted to talk to him about an investigation, not that they wanted to search his room, and that he refused to sign a search waiver, all convinced the Court that defendant had not consented to the search.

Jurisdiction of the Subject Matter—*Commonwealth v. Thomas*, 189 A.2d 225 (Pa. 1963). Defendant was convicted of felony murder. On appeal, defendant contended that since the conspiracy between defendant and two co-conspirators which resulted in the felony murder was formed and plotted entirely outside Pennsylvania, and since defendant had never until trial been within Pennsylvania, the Pennsylvania courts lacked jurisdiction to try defendant for this offense even though the felony murder took place in Pennsylvania. The Supreme Court of Pennsylvania affirmed, holding that the law imposes upon a conspirator full responsibility for the natural and probable consequences of acts committed by his co-conspirators if such acts are done in furtherance of the common purpose of the conspiracy; that one is criminally liable in a given jurisdiction for acts committed outside that jurisdiction if his acts have criminal consequences within that jurisdiction; and consequently, the Pennsylvania courts had jurisdiction to try defendant for felony murder, since the purpose of the conspiracy was to effect a robbery in Pennsylvania, and the felony murder was a natural and probable consequence of the conspiracy.

Juvenile Proceedings—*Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963). See Sentencing, *infra*.

Narcotics—*People v. Wallace*, 30 Cal. Rptr. 449 (1963). Defendant was convicted of possessing heroin in violation of CAL. HEALTH & SAFETY CODE §11500, and a prior conviction under the same section was proved. On appeal, defendant contended that the trial court erred in holding, as a matter of law, that because defendant had a prior conviction, the court could neither grant probation nor consider application of CAL. PEN. CODE §6451 (providing for civil commitment of narcotics addicts). The Supreme Court of California reversed and remanded with directions, holding that under the applicable statute, CAL. HEALTH & SAFETY CODE §11715.6, defendant was not eligible for probation because of his prior conviction; but that the trial judge erred in concluding, as a matter of law, that the prior conviction precluded him from exercising discretion under CAL. PEN. CODE §6451; and consequently, although he was not compelled to act under this section, the trial judge should have an opportunity to exercise his discretion as to defendant, inasmuch as the judge erroneously believed at defendant's trial that he had none to exercise.

Narcotics—*State v. Margo*, 191 A.2d 43 (N.Y. 1963). Defendant was convicted of being under the influence of a narcotic drug in violation of N.J. STAT. §2A:170-8. On appeal by certification, defendant contended that the statute constituted cruel and unusual punishment under the doctrine of *Robinson v. California*, 370 U.S. 660, abstracted at 53 J. CRIM. L., C. & P.S. 492 (1962), insofar as it punishes for being "under the influence" of a narcotic as distinguished from the act of using a drug. The Supreme Court of New Jersey affirmed, holding that if a person can constitutionally be punished for using a drug, there was no reason why he could not be punished for being under its influence, since being under the influence of a drug was itself antisocial behavior and was a voluntarily induced active state capable of endangering society.

Obscenity—*United States v. Zuideveld*, 316 F.2d 873 (7th Cir. 1963). See Conspiracy, *supra*.

Prejudicial Publicity—*Rideau v. Louisiana*, 83 Sup. Ct. 1417 (1963). Petitioner was convicted of murder, and the Supreme Court of Louisiana affirmed. *State v. Rideau*, 137 So. 2d 351 (La.), abstracted at 53 J. CRIM. L., C. & P.S. 351 (1962). On certiorari, petitioner contended that the trial court's denial of his motion for change of venue, grounded on impossibility of obtaining a fair trial in Calcasieu Parish due to television broadcast of his confession, constituted denial of due process of law. The United States Supreme Court, per Stewart, J., reversed, holding that where a motion picture of petitioner's pre-arraignment interview, which lasted 20 minutes and consisted of interrogation by the sheriff and detailed admissions of the crime by petitioner, was broadcast over a local TV station on three consecutive days to an aggregate of some 97,000 viewers, denial of petitioner's motion for change of venue denied him due process, since "due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' " The Court noted that, although local law enforcement officials apparently instigated the broadcast plan, "the question of who originally initiated the idea . . . is . . . a basically irrelevant detail." While mentioning that the convicting jury included three jurors who stated on *voir dire* that they had seen and heard the "interview" at least once, the Court reached its result "without pausing to examine a particularized transcript of the *voir dire* examination of members of the jury," thus apparently resting the holding on prejudice presumed from the extensiveness of the broadcast. Justice Clark wrote a dissenting opinion in which Justice Harlan joined, stating that no causal connection was established between the broadcasts and petititioner's trial, and that to compel reversal, prejudice to petitioner caused by the publicity must be established rather than presumed.

Presumption of Innocence—*State v. Robbins*, 189 N.E.2d 641 (Ohio Ct. App. 1963). See Right to a Fair Trial, *infra*.

Reasonable Doubt—*State v. Robbins*, 189 N.E.2d 641 (Ohio Ct. App. 1963). See Right to a Fair Trial, *infra*.

Recordation of Trial Proceedings—*Parrott v. United States*, 314 F.2d 46 (10th Cir. 1963); *Brown v. United States*, 314 F.2d 293 (9th Cir. 1963). See Right to a Fair Trial—Violation of Statutory Mandate to Record Proceedings, *infra*.

Right to Counsel—*Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962). See Confessions, *supra*.

Right to Counsel—*United States ex rel. Ormento v. Warden*, 216 F. Supp. 609 (D. Kan. 1963). Petitioner was convicted by the United States District Court for the Southern District of New York of conspiring to violate federal narcotics laws. On petition for writ of habeas corpus in the United States District Court for the District of Kansas, within which district petitioner was then incarcerated, petitioner, whose appeal to the Court of Appeals for the Second Circuit was pending, contended that he was confined in a federal penitentiary so far from his lawyers that he was being denied the effective assistance of counsel. Taking judicial notice of Federal Bureau of Prisons regulations requiring censorship of all mail to and from inmates of the U.S. Penitentiary at Leavenworth, wherein petitioner was confined, the District Court issued the writ, ordering respondent to deliver petitioner to the U.S. Marshal for the District of Kansas, and directing this Marshal to deliver petitioner to the custody of the U.S. Marshal for the Southern District of New York, holding that

since petitioner, who elected not to commence service of sentence pending disposition on appeal and was not admitted to bail, was confined about 1500 miles from New York, where resided the attorneys who represented him at trial and were continuing as his counsel on the pending appeal, petitioner's Sixth Amendment right to assistance of counsel was violated in light of the prison's mail censorship regulations; and consequently, petitioner must be transferred and held at such place as will not unreasonably interfere with his right to confer with his attorneys.

Right to Counsel—*Commonwealth ex rel. Craig v. Banmiller*, 189 A.2d 875 (Pa. 1963); *Roy v. Wainwright*, 151 So. 2d 825 (Fla. 1963). The Supreme Courts of two states have recently had an opportunity to discuss the retroactivity of *Gideon v. Wainwright*, 83 Sup. Ct. 792, abstracted at 54 J. CRIM. L., C. & P.S. 193 (1963), which held that all defendants are entitled to assistance of counsel in state criminal prosecutions as a requirement of Fourteenth Amendment due process.

In *Commonwealth ex rel. Craig v. Banmiller*, the Supreme Court of Pennsylvania refused to apply *Gideon* to the case of petitioner, who pleaded guilty without assistance of counsel more 30 years before *Gideon* was decided. The Court did not detail its reasons for reaching this conclusion, but merely stated, "A reading of Gideon indicates that its application is *prospective* rather than *retroactive* and its requirement is that in the future all defendants in [state] criminal prosecutions . . . are entitled to the appointment of counsel."

The holding of the Florida Supreme Court in *Roy v. Wainwright* was simply that petitioner's post-conviction application for habeas corpus based on alleged denial of counsel at his trial must be dismissed without prejudice to his rights to proceed under Criminal Procedure Rule No. 1, since that newly promulgated rule governed the relief sought by petitioner. The significance of this case, however, lies in the Florida Supreme Court's view, as expressed in the opinion, that *Gideon* applies retroactively. The Court stated that the reason it promulgated the rule under its state constitutional rule-making power was the expected post-*Gideon* increase in original habeas corpus petitions on denial of counsel grounds filed in that Court, as predicted from statistics as to the number of presently incarcerated prisoners who lacked counsel at trial. The Court obviously would not have entertained this concern unless it believed *Gideon* was retroactively applicable. The rule, copied almost verbatim from 28 U.S.C. §2255, was designed to provide a simplified, expeditious and efficient post-conviction procedure in the court which imposed sentence, and thus to limit the number of original habeas corpus petitions filed in the Florida Supreme Court.

Right to Counsel—*People v. Escobedo*, 190 N.E.2d 825 (Ill. 1963). See **Confessions**, *supra*.

Right to a Fair Trial—*Rideau v. Louisiana*, 83 Sup. Ct. 1417 (1963). See **Prejudicial Publicity**, *supra*.

Right to a Fair Trial—*State v. Robbins*, 189 N.E.2d 641 (Ohio Ct. App. 1963). Having waived his right to trial by jury, defendant was convicted of arson by a statutory three-judge court. On appeal, defendant contended that his constitutional rights were violated because his conviction rested upon a concurrence of only two of the three judges. The Court of Appeals of Ohio reversed and remanded, holding that when defendant waived "trial by jury" he did not also waive "a trial," and therefore he retained all the constitutional and statutory rights of a defendant on trial before a jury with the exception of the jury; that among the rights thus retained were the presumption of innocence and the requirement of proof beyond a reasonable doubt; that the presumption of innocence was overcome only upon proof beyond a reasonable doubt; that the existence of a difference of opinion as to defendant's guilt among the reasonable and experienced trial judges in and of itself injected a reasonable doubt into the case; and consequently defendant's conviction must be reversed, since the presumption of innocence and requirement of proof beyond a reasonable doubt demand that the verdict of a three-judge court be unanimous in order to be valid.

Right to a Fair Trial—Violation of Statutory Mandate to Record Proceedings—*Parrott v. United States*, 314 F.2d 46 (10th Cir. 1963); *Brown v. United States*, 314 F.2d 293 (9th Cir. 1963). Two of the federal circuits have recently decided cases involving failure of the trial court reporter to record all proceedings in criminal cases had in open court as required by 28 U.S.C. §753(b)(1).

In *Parrott v. United States*, defendant contended

that he was prejudiced when the trial judge during the *voir dire* examination stated in the presence of the jury that three other like charges were pending against defendant. The Court of Appeals for the Tenth Circuit reversed and remanded for new trial, holding that unavailability of a full transcript due to failure of the court reporter to record the *voir dire* examination in violation of the statute made it impossible to determine whether the admitted error (the trial judge's remark) was harmless or prejudicial.

Defendant in *Brown v. United States* did not suggest any error that may have occurred in the prosecutor's summation, but rather urged that the court reporter's violation of the statute by failing to record the summations in itself required reversal and new trial. Stating that unless the prosecutor's closing argument contained error affecting defendant's substantial rights, failure to record those arguments would be mere harmless error, the Court vacated and remanded to the District Court for a hearing [presumably one at which persons present during the summation would attempt to reconstruct it] to determine whether defendant was prejudiced by the error of failing to record the arguments.

Scientific Evidence—Lie Detector Evidence—*Looper v. State*, 381 P.2d 1018 (Okla. Crim. App. 1963); *Commonwealth v. Fatalo*, 191 N.E.2d 479 (Mass. 1963); *State v. Green*, 121 N.W.2d 89 (Iowa 1963); *People v. Zazzetta*, 189 N.E.2d 260 (Ill. 1963). The courts of four states in three different contexts have recently considered the question of admissibility of polygraph evidence in a criminal case.

In both *Looper v. State* and *Commonwealth v. Fatalo*, the issue was whether a defendant could complain of the trial court's refusal to admit results of a lie detector test. The Oklahoma Court of Criminal Appeals and the Supreme Judicial Court of Massachusetts, respectively, replied in the negative and affirmed. Both courts rested their decisions on the ground that the polygraph lacked general scientific recognition. [The Massachusetts case, *Fatalo*, was one of first impression in that state.]

The Supreme Court of Iowa, in deciding *State v. Green*, held that the prosecutor's reference in his opening statement to defendant's agreement to take a lie detector test and the prosecutor's subsequent attempts to inject the matter into the trial constituted reversible error where no evidence was introduced that defendant had submitted to such test, even though cautionary instructions were given, inasmuch as evidence of and reference to lie detector tests were inadmissible, and because it appeared through affidavit that at least one juror during deliberations had considered defendant's failure to live up to his agreement to take the test.

The defendant in *People v. Zazzetta* contended that admission in evidence of the results of his polygraph test was reversible error even though he had requested the test and had orally stipulated in open court that the results be introduced in evidence. The Illinois Supreme Court, which had not previously decided the general question whether results of lie detector tests are admissible, reversed and remanded without having to face that question, holding that regardless of the view adopted as to scientific reliability, "the expertise of the operator and interpreter has substantial bearing on the reliability of the polygraph," and consequently the evidence in question was improperly admitted despite defendant's stipulation, since the expert was not available for cross-examination and there was no evidence regarding the method of testing and the qualifications of the operator. The Court stated that binding a criminal defendant by a stipulation as to the trustworthiness of scientific opinion far beyond his knowledge was manifestly unfair.

Scientific Evidence—Radar—*Crosby v. Commonwealth*, 130 S.E.2d 467 (Va. 1963). Defendant was convicted of speeding as determined by radar. On writ of error, defendant contended that the tests for accuracy of the radar machine were not correctly proved at the trial. The Supreme Court of Appeals of Virginia reversed and remanded, holding that tests for accuracy must be carried out on radar machines before and after they are used, and in a subsequent prosecution for speeding such tests must be proved by proper evidence; that where the machine in question was tested by one police officer driving through the radar zone at various speeds while another officer read the radar meter, it was hearsay for the officer who drove through the radar zone to testify as to what the reading was on the radar machine, since the radar readings were observed by the other officer out of the presence of the witness; and since the improper admission of hearsay evidence deprived defendant of his opportunity to examine both officers as to the sufficiency

of the test, defendant must be afforded a new trial. The Court noted that although a statute [VA. CODE §46.1-198 (1950)] provides that radar checks are prima facie evidence of speed, the Commonwealth retained the burden of proving the machine's accuracy.

Search and Seizure—*Irby v. United States*, 314 F.2d 251 (D.C. Cir. 1963). Defendant appealed from the District Court's ruling in favor of the validity of the search warrant authorizing a search which yielded illicit narcotics. Defendant contended that the affidavits upon which the warrant was issued failed to set forth probable cause for belief that criminal acts were being committed on the premises in question. The Court of Appeals for the District of Columbia Circuit affirmed, holding that where the affidavit set forth direct knowledge of affiants, experienced narcotic squad officers, that on one occasion seven known narcotics addicts were in front of the premises, which were occupied by a convicted narcotic seller, and statements made to the affiants on another occasion by a "special employee" (informer) that the informer had purchased drugs on the premises and had been told that the drug peddler who lived there had been away "capping" heroin, the facts set forth in the affidavit constituted probable cause for an experienced narcotic squad officer to believe that illegal narcotics were concealed on the premises; and consequently the warrant was properly issued. Judge Wright dissented because the policemen waited over six weeks after the first incident and eight days after the second before obtaining the warrant.

Search and Seizure—*Pekar v. United States*, 315 F.2d 319 (5th Cir. 1963). See Juries, *supra*.

Search and Seizure—*Sirimarco v. United States*, 315 F.2d 699 (10th Cir. 1963). Defendant was convicted of uttering and possessing counterfeit Federal Reserve Notes. On appeal, defendant contended that the notes received in evidence which he was convicted of possessing were illegally seized by a federal officer without a warrant after defendant had been arrested by a Colorado officer for violation of state law (passing a counterfeit note). The Court of Appeals for the Tenth Circuit affirmed, holding that although the federal search could not be justified as incident to the state arrest, the federal officer's knowledge of the reason for defendant's state arrest constituted probable cause to believe that defendant had committed a federal offense and that defendant had used his car in connection with the transportation of counterfeit money; that the federal officer's seizure of defendant's car without a warrant was lawful, since under 49 U.S.C. §783 (1958) probable cause to believe that a vehicle has been used to transport contraband justifies the vehicle's seizure; and since a vehicle seized under authority of §783 may be searched without warrant or consent, the evidence was properly admitted. The Tenth Circuit denied defendant's post-affirmance petition for rehearing, Judges Murrah and Hill dissenting from denial on the ground that since the special rule justifying search and seizure of a vehicle upon probable cause that it is being used to transport contraband is conditioned on the impracticality of securing a search warrant due to the vehicle's ease of mobility, that rule should not have been applied to the instant case, where defendant was incarcerated, the vehicle was parked next to the County Sheriff's office, and there was no reason for failure to obtain a search warrant. [See Arrest, Search and Seizure—*United States v. Viale*, 312 F.2d 595 (2d Cir. 1963). Regarding the principle enunciated in *Sirimarco* that a federal search cannot be justified as incident to a state arrest, *Viale* is not conflicting. In *Sirimarco*, the arrest was made by state officers and the search by federal officers, whereas in *Viale*, although the legality of arrest was determined by state law, both arrest and search were made by federal officers.]

Search and Seizure—*Walker v. Peppersack*, 316 F.2d 119 (4th Cir. 1963). Petitioner was convicted in a Maryland state court of armed robbery. On appeal from the federal District Court's denial of his application for habeas corpus, petitioner contended that his federal constitutional rights were violated by use of illegally seized evidence against him. The Court of Appeals for the Fourth Circuit reversed and remanded with directions that the District Court should afford the State of Maryland a reasonable opportunity to retry petitioner, and in default, should order his release, holding that petitioner had sufficiently exhausted his state remedies to petition for federal habeas corpus under 28 U.S.C. §2254, since none was presently available to him; that under *Hall v. Warden*, 313 F.2d 483 (4th Cir.), abstracted at 54 J. CRIM. L., C. & P.S. 342 (1963), *Mapp v. Ohio* applied retro-

actively to petitioner's conviction, even though he failed to object to admission of the evidence at the trial and to raise the question on direct appeal in the state courts, since to do so would have been futile under the then existing law of Maryland; that the state trial court's denial of petitioner's post-admission motion to strike the evidence on the ground that petitioner was not in control of the premises—the Maryland test for standing to object to a search—was incorrect, since petitioner was lawfully on the premises—the requisite standing under federal decisional law—, and the federal test controlled; and since the search and seizure under attack were made without a warrant, without consent, and not incident to lawful arrest, the evidence was unconstitutionally seized and, by authority of the *Mapp* case, should not have been admitted, and petitioner's application for habeas corpus must therefore be granted.

Search and Seizure—*Castaneda v. Superior Court*, 30 Cal. Rptr. 1 (1963). Petitioner, charged with possession of heroin, sought prohibition to prevent his trial, contending that evidence to be used against him was obtained through unlawful search and seizure. The California Supreme Court issued the writ and vacated a lower court judgment denying relief, 26 Cal. Rptr. 364 (Dist. Ct. App. 1962), abstracted at 54 J. CRIM. L., C. & P.S. 195 (1963), holding that since the search and seizure complained of were without a warrant and too geographically removed from the place of petitioner's lawful arrest to be justified as incident thereto, the search and seizure would be valid and the evidence admissible only if petitioner had given consent; and that where petitioner was under arrest and handcuffed, and was not asked to nor did he express consent to the search of his home, petitioner could not be deemed to have consented to the search, even though before the officers searched his home, where the incriminating evidence was found, petitioner had attempted to mislead the officers by taking them to the homes of various relatives. The Court noted that petitioner's deceptive tactics were not unlawful, since petitioner was under no duty to assist the officers in securing evidence against him.

Search and Seizure—*People v. Williams*, 190 N.E.2d 303 (Ill. 1963). Defendants were charged with state gambling offenses. The trial court granted defendants' motion to quash the search warrant and to suppress gambling paraphernalia which had been seized thereunder. On interlocutory appeal by the State, defendants contended that the complaint on which the warrant was issued was based on unreliable hearsay statements of an informer and thus that the complaint failed to establish probable cause for issuance of the warrant. The Supreme Court of Illinois reversed and remanded with directions to overrule the motion to quash and suppress, holding that since the complaint on which the warrant was issued established the credibility of the informer by means of the affiant's statements that the informer was known to him and had in the past supplied him with reliable information with regard to illegal gambling, the complaint established probable cause and the warrant was properly issued, because hearsay evidence alone can constitute probable cause where, as in this case, the reliability of the informer was shown.

Search and Seizure—*People v. Kelly*, 189 N.E.2d 477 (N.Y. 1963). Defendants' criminal convictions (the nature of which is not stated in the opinion) were reversed by the Appellate Part of the New York Court of Special Sessions. On the State's appeal by permission, the State contended that failure to except at the trial to the admission of the allegedly illegally seized evidence complained of on appeal constituted waiver of that point of law. The Court of Appeals of New York affirmed the Appellate Part's reversal, holding that, although failure to bring the illegal evidence issue to the attention of the trial court renders that point unavailable in the Court of Appeals, an intermediate appellate court may reverse in the interests of justice regardless of waiver for failure to raise objections or exceptions, and in arriving at its conclusion as to "interests of justice" may take into account the circumstance that illegally seized evidence was used at the trial.

Search and Seizure—*Villasino v. Maxwell*, 190 N.E.2d 265 (Ohio 1963). Petitioner was convicted of receiving or concealing stolen goods and possessing hypodermic needles. On petition for writ of habeas corpus, petitioner contended that his incarceration was based on illegally obtained evidence and thus was void under the constitutional principles enunciated in *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961). Assuming arguendo that an illegal search and seizure did produce evidence against petitioner, the Supreme Court of Ohio affirmed, holding that

since *Mapp v. Ohio* appears to be directed as a deterrent against unconstitutional methods of law enforcement, it applied prospectively only and thus would not be applied to petitioner's case, since he was sentenced before *Mapp* was decided, at a time when illegally seized evidence was admissible in Ohio state criminal proceedings; but that in any event, petitioner could not claim that he was convicted on illegally obtained evidence, because he pleaded guilty and there was thus no trial and no evidence admitted against him.

Search and Seizure—*Commonwealth v. Wright*, 190 A.2d 709 (Pa. 1963). Defendant, under indictment for murder, petitioned the trial court to suppress money as evidence, and the court granted the petition. On appeal by the Commonwealth, defendant contended that his wife did not give valid consent to a search of their apartment so as to waive defendant's right not to have the evidence so obtained used against him. The Supreme Court of Pennsylvania affirmed the order of suppression, holding that where police officers falsely represented to defendant's wife that defendant (who was then under arrest) had admitted the crime and had sent them for the "stuff," the wife's compliance with their demands did not constitute consent, since consent cannot be gained through deceit or misrepresentation; and even though the officers conducted no search, their seizure of the money produced by the wife was gained through deceit and misrepresentation, and this vitiated the seizure as effectively as if a search had been involved.

Search and Seizure—*Clinton v. Commonwealth*, 130 S.E.2d 437 (Va. 1963). See Electronic Eavesdropping, *supra*.

Self-Defense—*Aven v. State*, 152 So. 2d 924 (Miss. 1963). Defendant was convicted of manslaughter. On appeal, defendant contended that the trial court erred in refusing to grant his motion for directed verdict of not guilty and his requested written instruction directing the jury to find him not guilty. The Supreme Court of Mississippi reversed and ordered defendant discharged, holding that since defendant was the only eye-witness to the homicide, his version should have been accepted as true, inasmuch as it was not substantially contradicted in material particulars by the evidence against him; and since defendant's testimony showed a clear case of self-defense which was not contradicted directly or by fair inference, defendant was entitled to a directed verdict of not guilty.

Self-Incrimination—*Namet v. United States*, 83 Sup. Ct. 1151 (1963). See Accomplice Witnesses, *supra*.

Self-Incrimination—*Redfield v. United States*, 315 F.2d 76 (9th Cir. 1963); *Redfield v. May*, *ibid.* Defendant was convicted of attempted income tax evasion by a jury in the U.S. District Court for the District of Nevada. After conviction defendant moved the Nevada District Court to have the sentence vacated, set aside, or corrected, and also applied for habeas corpus in the U.S. District Court for the Southern District of California, within which district he was then incarcerated. Defendant's appeals from the Nevada District Court's denial of his alternative motions and from the California court's denial of his application for habeas corpus were consolidated for argument and disposition. On appeal, defendant contended that the trial court violated his privilege against self-incrimination by advising him of his right to take the witness stand, suggesting that he take the stand, and cross-examining him, all in the presence of the jury. The Court of Appeals for the Ninth Circuit affirmed, holding that since defendant, while purporting to act in the role of counsel, voluntarily and persistently testified throughout his trial, though not under oath, in disregard of the trial court's admonishments and orders not to testify without being sworn, defendant effectively waived his privilege against self-incrimination; and consequently, the trial court's actions did not violate defendant's Fifth Amendment privilege. The Court noted that defendant rejected offers of appointment of counsel, electing to serve the dual role of defendant and counsel; that the trial court's actions in advising him of his right to testify and suggesting that he take the stand were for the purpose of preventing defendant from testifying not under oath; and that the court's "cross-examination" of defendant occurred after defendant's waiver of the privilege and while defendant was cross-examining a prosecution witness.

Self-Incrimination—*United States v. Sobell*, 314 F.2d 314 (2d Cir. 1963). Defendant was convicted in 1951 of conspiring with his co-defendants, Julius and Ethel Rosenberg, to violate 50 U.S.C.

§32(a) (1946), which made it a crime to reveal to a foreign government information relating to the national defense. On appeal from the District Court's denial of his post-conviction motion for relief under 28 U.S.C. §2255, *inter alia*, defendant contended that for purposes of determining the credibility of exculpatory answers by Mrs. Rosenberg to certain questions at their trial, the jury was allowed to consider the fact that she had claimed her privilege against self-incrimination with regard to the same matters before the grand jury; that Mrs. Rosenberg's testimony, if believed, tended to establish defendant's innocence; and that under the rule of *Grunewald v. United States*, 353 U.S. 391 (1957)—declaring that while a defendant's prior claim of privilege has probative value as to his credibility, this value is outweighed by the possible impermissible impact on the jury—defendant's §2255 motion should have been granted, inasmuch as the jury in determining his guilt was allowed to consider the inadmissible evidence of Mrs. Rosenberg's prior claim of privilege. The Court of Appeals for the Second Circuit affirmed, holding that a §2255 motion could be granted in this case only if the sentence was imposed in violation of the Constitution or laws of the United States; that the U.S. Supreme Court in *Grunewald* was creating a rule of evidence in exercise of that Court's supervisory power over the lower federal courts rather than enforcing a constitutional claim; that even if *Grunewald* was constitutionally grounded, any constitutional implications would be limited to the person whose claim of privilege was later used against him, since the privilege is that of the witness, not of another, such as the party on trial; and consequently, even if the jury's consideration of Mrs. Rosenberg's privilege claim constituted error as to defendant Sobell which would have been grounds for reversal on direct appeal, this error was not constitutional as to him so as to authorize granting of a §2255 motion. The Court noted that allowing the jury to consider Mrs. Rosenberg's privilege claim was not error under the law existing in the Second Circuit at the time of trial.

Sentencing—*Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963). Petitioner was convicted of stealing personal property within a federal enclave. On appeal from the District Court's summary denial of his petition for post-conviction relief under 28 U.S.C. §2255, petitioner contended that after he pleaded guilty in reliance on the trial judge's representation that the maximum penalty was five years imprisonment, the judge sentenced him to a term of 60 days to six years under the Federal Youth Corrections Act. The Court of Appeals for the Fourth Circuit reversed and remanded with direction to the District Court to conduct a hearing on the petition, holding that a §2255 petition can be dismissed without a hearing only if the allegations and record conclusively show that the petitioner is entitled to no relief; that petitioner's sentence under the Youth Offender Act constituted a deprivation of liberty even though such confinement was aimed at correction and rehabilitation rather than punishment, and thus constituted a penalty greater than that which petitioner was informed was the maximum which could be imposed; that petitioner's allegation that he relied on the trial judge's representation, if true, would entitle him to relief; and consequently petitioner was entitled to a hearing on his petition. The Court of Appeals relied on *Jones v. Cunningham*, 83 Sup. Ct. 373, abstracted at 54 J. CRIM. L., C. & P.S. 190 (1963) (parolee in "custody" for habeas corpus purposes) in concluding that the six year youth sentence was in fact a greater penalty than the five year adult sentence.

Speedy Trial—*United States ex rel. Von Cseh v. Fay*, 313 F.2d 620 (2d Cir. 1963). See **Due Process of Law**, *supra*.

Statutory Construction—*Smart v. State*, 190 N.E.2d 650 (Ind. 1963). See **Burglary**, *supra*.