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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

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Abstractor

Arrest, Search and Seizure—*Munoz v. United States*, 325 F.2d 23 (9th Cir. 1963). Defendant was convicted of narcotics offenses. On appeal, defendant contended that the trial court erred in admitting evidence obtained by unreasonable search and seizure and statements made by defendant during unlawful detention in violation of FED. R. CRIM. P. 5(a), and in denying defendant's motion to hold a courtroom demonstration of an electronic device (a "Fargo Device") which transmits voice by radio. The Court of Appeals for the Ninth Circuit reversed, holding that where the arresting officers entered defendant's room with a passkey, provided by the hotel clerk, immediately after knocking on the door and announcing their authority and purpose, the officers violated the statute [18 U.S.C. §3109] providing, *inter alia*, that an officer may break in only if refused admittance after giving notice of authority and purpose, since use of the passkey amounted to breaking open the door to defendant's room, and the instantaneous entry ignored and destroyed the reasons behind the provisions of the statute; that even if the officers had reasonable grounds to arrest defendant without a warrant, his arrest and the search of his room incidental thereto were unlawful because of the officers' illegal method of entry, and tangible evidence obtained as a result of the search and defendant's post-arrest statements should therefore have been suppressed; and that where a narcotics agent testified that he identified defendant's voice from a few words spoken over an electronic device worn by an informer during a narcotics transaction, defendant was entitled to have the jury weigh the agent's testimony on this point in the light of a courtroom demonstration of the "Fargo Device."

Arrest, Search and Seizure—*United States ex rel. Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963). Petitioner was convicted of burglary in 1959 by a Louisiana state court, and in 1960 the Louisiana Supreme Court affirmed and denied rehearing. After *Mapp v. Ohio* was decided, petitioner unsuccessfully applied for state post-conviction remedies, and his petition for certiorari was denied by the United States Supreme Court. On appeal from the federal District Court's denial of his petition for writ of habeas corpus, petitioner contended that evidence obtained by unlawful search and seizure was used against him, and that *Mapp v. Ohio* applied retroactively to subject his conviction to collateral attack. The Court of Appeals for the Fifth Circuit affirmed, holding that even if petitioner's arrest without a warrant was lawful, the search complained of was too geographically remote to be sustained as incident thereto, and was thus unconstitutional; that since the *Mapp* opinion was not clear as to whether that case should be given retroactive effect and because no subsequent Supreme Court decision has resolved the question of *Mapp*'s retroactivity, the instant court was free to make its own determination of that issue; and since the purpose of the exclusionary rule of *Mapp* was largely to enforce the right of privacy by deterring illegal official conduct, which purpose would in no way be served by applying *Mapp* to state convictions obtained before *Mapp* was decided, the rule of *Mapp* would not be applied to petitioner, whose state conviction became final before the *Mapp* decision. Noting that if the Supreme Court intended to restrict the *Mapp* case to prospective application it could have, but did not, say so, Chief Judge Tuttle dissented, stating that since the exclusionary rule is required by the Constitution, *Mapp v. Ohio* should be applied to petitioner's case by adherence to the Blackstonian view—that a court does not pronounce a new law, but maintains and expounds the old one.

Arrest, Search and Seizure—*United States v. Martin*, 223 F. Supp. 104 (E.D. La. 1963). Defendants moved to suppress evidence obtained incident to their arrests without warrants for narcotics offenses, contending that the arrests were unlawful because they were based upon information obtained in violation of defendants' constitutional

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right of privacy. The District Court for the Eastern District of Louisiana denied the motion to suppress, holding that for purposes of exclusion of evidence, the constitutional right of privacy is violated only by technical trespass; that where the arresting officers, who were in room #6 of a motel with the owner's permission, removed the control panel from a heating unit in the common wall between rooms #6 and #7 of the motel, and through this unit overheard conversations among the defendants in room #7 which constituted probable cause to believe that a narcotics offense was being committed, the officers did not commit a trespass against defendants, inasmuch as motel guests were permitted to remove the panel in order to ignite the pilot light of the heating unit; and consequently, since the grounds to arrest defendants did not result from the use of illegal means, the evidence obtained incident to their arrests would not be suppressed.

Arrest, Search and Seizure—*People v. Reeves*, 34 Cal. Rptr. 815 (Dist. Ct. App. 1963). Defendants were convicted of possessing marijuana. On appeal from the judgments of conviction and from orders denying their motions for new trial, defendants contended that marijuana obtained as the result of an unlawful search and seizure was used as evidence against them. The California District Court of Appeal noted that when the trial court overruled defendants' objection to admission of the evidence, it did not have the benefit of the subsequently decided pertinent cases of *Ker v. California*, 374 U.S. 23, abstracted at 54 J. CRIM. L., C. & P.S. 488 (1963), and *People v. Haven*, 31 Cal. Rptr. 47, abstracted at 54 J. CRIM. L., C. & P.S. 489 (1963), and that appellate determination of the instant case must be made in light of these recent cases. The California District Court of Appeal reversed, holding that where police officers, who knew that defendant Reeves was involved in litigation with his employer, induced the manager of the hotel where Reeves was registered to call him on the telephone and falsely tell him that a letter concerning the litigation was downstairs, the officers' entry into Reeves' room, effected when Reeves opened his door to go downstairs to get the nonexistent letter, was unlawful in that the entry was gained by means of fraud; that assuming *arguendo* that the officers had probable cause to arrest Reeves when they entered his room, the illegality of their entry vitiated the arrest, and consequently the ensuing search could not be sustained as incident thereto; that since the officers did not obtain consent to search from either defendant until after the unlawful entry, this consent could not be relied upon to sustain the search and seizure, inasmuch as the consent was a product of the officers' illegal conduct; and consequently, the search and seizure was "fruit of the poisonous tree" of entry gained by trick, and evidence obtained by means thereof should have been suppressed.

Arrest, Search and Seizure—*People v. Bowen*, 194 N.E.2d 316 (Ill. 1963). Defendant was convicted of unlawful possession of narcotics under two separate indictments. On writ of error to review both judgments, defendant contended that the trial court erroneously denied his motions to suppress unlawfully seized narcotics upon which both convictions were based. The Supreme Court of Illinois reversed the judgment on one indictment and affirmed judgment on the other, holding that although a search of defendant to ascertain whether he was armed, conducted when he was found in the presence of his wife who had just been lawfully arrested without a warrant, was reasonable and lawful as incident to the wife's arrest, a further, more thorough search of defendant at that time which revealed heroin in the fly of his trousers was not reasonably necessary to protect the officers from attack and thus could not be sustained as incident to the wife's arrest; that the search of defendant on another occasion was lawful as incident to his arrest without warrant, which arrest was lawful because, on the basis of information from a reliable informer [that defendant was at a certain place selling narcotics] and personal knowledge [that defendant was involved in narcotics], the arresting officer had reasonable grounds to believe that defendant was committing a crime when the officer discovered him at the location indicated by the informer; and consequently, the trial court should have granted defendant's motion to suppress the heroin found in his fly pursuant to the search of his person conducted when his wife was arrested, but correctly overruled defendant's motion to suppress the narcotics found as a result of the search incident to his arrest.

Arrest, Search and Seizure—*State v. Nelson*, 196 A.2d 52 (N.H. 1963). Defendants were convicted of murder. On exceptions to the trial court's denial of their motions for new trial, defendants con-

tended that *Mapp v. Ohio* rendered inadmissible tangible evidence taken from them while they were unlawfully detained for 54 hours and denied the right to confer with counsel for 56 hours. Noting that since *Mapp*, which changed the New Hampshire law on admissibility of illegally seized evidence, was decided after defendants' trial, their failure to object below to introduction of the evidence now complained of was understandable and would not preclude appellate consideration of the question, the New Hampshire Supreme Court overruled defendants' exceptions, holding that regardless of whether defendants' arrests and detentions were unlawful, and regardless of denial by the authorities of their requests to confer with counsel, there was no search, since the evidence complained of, consisting entirely of articles of clothing from both defendants and dirt from under the fingernails of one defendant, was readily visible and accessible to the police, and there was no seizure, since, there being no claim of official force or coercion, all the evidence was voluntarily turned over by defendants. The Court noted that the evidence in question was voluntarily relinquished physical evidence rather than oral confessions. Chief Justice Kenison dissented.

Arrest, Search and Seizure—*State v. Mercurio*, 194 A.2d 574 (R.I. 1963). Defendant husband and wife were convicted of gambling violations. On bill of exceptions, defendants contended that the trial court erroneously denied their motions to suppress tangible evidence and statements obtained following their unlawful arrests. The Supreme Court of Rhode Island sustained the exceptions and remitted to the Superior Court for new trial, holding that defendants' arrests were effected when a police officer entered their car, which was stopped at an intersection for a red light, and directed defendant husband to drive to police headquarters; that the arrests without warrant were invalid for lack of probable cause, since to the arresting officer's knowledge, no misdemeanor had been committed in his presence; that R.I. GEN. LAWS §12-7-3 (1956), which purports to authorize a peace officer to arrest for a misdemeanor without a warrant when a misdemeanor has in fact been committed in the officer's presence, whether or not the officer had reasonable cause so to believe, was an invalid legislative attempt to abrogate the common law test, which was the basis for the constitutional standard against illegal arrest, and substitute therefor an unwarranted interference with personal liberty, so the arrests could not be sustained by authority of §12-7-3; and consequently, all evidence taken and elicited from defendants at the time of their unlawful arrests—statements as well as tangible evidence—should have been suppressed. The court cited *Wong Sun v. United States*, 371 U.S. 471, abstracted at 54 J. CRIM. L., C. & P.S. 189 (1963), as authority for its ultimate holding.

Cautionary Instructions—*State v. Jones*, 124 N.W.2d 727 (Minn. 1963). See **Improper Conduct by Prosecutor**, *infra*.

Confessions—*Lee v. United States*, 322 F.2d 770 (5th Cir. 1963). Defendant was convicted of conspiracy to import and distribute heroin. On appeal, defendant contended that the District Court erroneously admitted evidence of his post-indictment confession obtained in jail during a secret police interrogation without counsel. Without determining the voluntariness of defendant's statements, the Court of Appeals for the Fifth Circuit reversed and remanded, holding that where defendant was secretly interrogated in jail 15 days after his post-indictment arrest and without having at any time conferred with counsel, the investigating officers' testimony regarding defendant's alleged oral admissions must be held inadmissible in exercise of the appellate court's supervisory power over the administration of federal criminal justice. Noting that secret questioning of one already indicted could not be justified as necessary police interrogation of a suspect, the Court stated that defendant's right to counsel arose, at the very latest, upon indictment, and that waiver of defendant's right to counsel could not be presumed from the record's silence on the issue. Judge Hutcheson voiced a vigorous dissent.

Confessions—*Munoz v. United States*, 325 F.2d 23 (9th Cir. 1963). See **Arrest, Search and Seizure**, *supra*.

Confessions—*People v. Sigal*, 34 Cal. Rptr. 767 (Dist. Ct. App. 1963). Defendant was convicted of second degree murder. On appeal, defendant contended that his involuntary confession was used as evidence against him in violation of due process. The District Court of Appeal of California reversed, holding that although the statements in question, which depicted defendant as assisting

one "George" (whose existence was not proved) to commit the crime, were intended by defendant to be exculpatory, the "George story" was in fact a confession since it was treated by the prosecution and the trial court as an admission of defendant's guilt, and must therefore be treated as a confession for purposes of determining its admissibility; that since defendant was more than a mere suspect, having been arrested for a capital offense on the basis of a warrant and a verified complaint, his interrogation by police officers was not a neutral inquiry designed to further investigation of an unsolved crime, but rather was designed to get incriminating statements from one already accused of murder; that under California law, defendant, as an "accused," had a right to counsel as of the time the interrogation commenced; and where defendant's request for counsel was denied by the interrogating officers on 20 different occasions during some 12 hours of intermittent questioning over a 60 hour period, the denial of his right to counsel in violation of due process was a "coercive circumstance without which the confession would not have been produced," and resulted in fundamental unfairness which infected defendant's subsequent trial; and consequently, use of the confession against defendant constituted a violation of his Fourteenth Amendment right to due process of law.

Confessions—*People v. Donovan*, 193 N.E.2d 628 (N.Y. 1963). Defendants Donovan and Mencher were convicted of first degree murder. On appeal, defendants contended that Donovan's written confession should not have been admitted against them, since it was obtained during Donovan's unlawful detention and after his request to confer with counsel was denied. Without decision as to the requirements imposed upon the State by the due process clause of the Fourteenth Amendment, the Court of Appeals of New York reversed and ordered a new trial as to each defendant, holding that the State's constitutional and statutory provisions regarding the privilege against self-incrimination, right to counsel, and due process demanded exclusion of Donovan's written confession, which was obtained after police interrogation while he was being detained in violation of the New York prompt arraignment statute and after the police had refused to allow his retained counsel to speak with him; that improper admission of Donovan's confession required reversal of his conviction regardless of the presence of strong, independent evidence of guilt, since it may have contributed to the verdict; and since the confession improperly before the jury implicated defendant Mencher as well, his conviction must also be reversed in the interests of justice. The Court noted that right to counsel and privilege against self-incrimination converge in the instant type of case, inasmuch as "one of the most important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self incrimination . . . ." Further, stated the Court, "Weighty though such considerations [that to permit a suspect to confer with counsel before talking to the police would preclude effective, essential police interrogation] may be, they do not permit us to ignore rights due the accused under our law." Three of the seven Judges dissented.

Confessions—*State v. Mercurio*, 194 A.2d 574 (R.I. 1963). See Arrest, Search and Seizure, *supra*.

Confessions—*Rodriguez v. State*, 373 S.W.2d 490 (Tex. Ct. Crim. App. 1963). Defendant was convicted of murder. On appeal, defendant contended that exclusion of the testimony of one Hermasillo that after being subjected to police brutality by the same officers to whom defendant confessed, Hermasillo had confessed to the same crime constituted reversible error, since his testimony tended to prove defendant's contention that his confession was coerced and should not have been used as evidence against him. The Texas Court of Criminal Appeals reversed and remanded, holding that where there was photographic and testimonial evidence that defendant had been physically coerced into confessing and where both defendant and Hermasillo had been interrogated in the same wing of the same building by some of the same officers, the similarity of the circumstances of the interrogations as related by defendant and Hermasillo was so striking that the jury could reasonably have believed that the officers followed this practice in securing confessions; and consequently, evidence of the brutality inflicted upon Hermasillo which produced an apparently false confession should have been admitted, since it would have been of utmost importance to the jury in determining whether defendant's confession was coerced.

Contributory Negligence—*State v. Harrington*, 133 S.E.2d 452 (N.C. 1963). See **Homicide—Proximate Cause**, *infra*.

Court Costs—*Commonwealth v. Giaccio*, 196 A.2d 189 (Pa. Super. Ct. 1963). Defendant was acquitted of the misdemeanor of wantonly pointing and discharging a firearm, but was sentenced to pay the costs of prosecution. On appeal by the Commonwealth from an order of the Court of Quarter Sessions of Chester County vacating the sentence to pay the costs, defendant contended that the statute authorizing a jury acquitting one of a misdemeanor to assess him for part or all of the costs [PA. STAT. tit. 19, §1222] was unconstitutional. The Superior Court of Pennsylvania reversed and reinstated the sentence to pay costs, holding that since the Pennsylvania Supreme Court had twice upheld the constitutionality of the provision in question, the Superior Court had no standing to overrule that holding; but that in any event, the statute did not violate due process, since assessment of costs is not a penalty, and because every misdemeanor defendant is on notice that costs may be imposed even if he is acquitted, has an opportunity to be heard on the question of costs, and has a right to challenge a verdict imposing costs. Justice Flood dissented, stating that the cost provision was unconstitutional, since it was, in effect, a penal statute which failed to describe the conduct which will subject an acquitted misdemeanor defendant to this penalty.

Crime by Telephone—*State v. Leonard*, 124 N.W.2d 429 (Iowa 1963). See **Obscenity**, *infra*.

Cross-Examination—*State v. Solven*, 371 S.W.2d 328 (Mo. 1963). See **Witnesses**, *infra*.

Demonstrative Evidence—*Munoz v. United States*, 325 F.2d 23 (9th Cir. 1963). See **Arrest, Search and Seizure**, *supra*.

Derivative Evidence—*Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963). Defendants were convicted of murder and robbery. On appeal, defendants contended that the District Court erred in receiving the testimony of one Holman, since the police found this eye-witness as the result of information obtained from defendants while they were being illegally detained in violation of FED. R. CRIM. P. 5(a). Noting that the District Court properly suppressed the tangible evidence and confessions obtained from defendants during their illegal detention, the Court of Appeals for the District of Columbia Circuit affirmed, holding that since an individual's personal attributes of will, perception, memory, and volition all determine what testimony he will give, mere disclosure to police of the name of a potential witness is of no evidentiary significance per se; that the proffer of a living witness whose identity was discovered during defendants' illegal detention would therefore not be equated with the proffer of illegally seized inanimate evidentiary objects for purposes of applying the "fruits of the poisonous tree" doctrine; and consequently, the District Court correctly permitted Holman to testify against defendants. Chief Judge Bazelon dissented, stating that Holman was located as a direct result of the illegal questioning of defendants, and that admission of Holman's testimony "puts a premium on violation of Rule 5(a) and provides an incentive for continuing to violate it."

Diminished Responsibility—*People v. Henderson*, 35 Cal. Rptr. 77 (1963). See **Insanity**, *infra*.

Discovery—*State v. Richards*, 124 N.E.2d 684 (Wis. 1963). Defendants were convicted of armed robbery and concealing identity. On appeal, defendants contended that the trial court's denial of their request for production of any prior statements made by a prosecution witness to police officers was prejudicial error. The Supreme Court of Wisconsin reversed and remanded, with instructions that the trial court order production of the witness's statements, if any, and determine whether they are inconsistent or at variance with her direct testimony; if they are, a new trial should be ordered so that the defense may use the prior statements to impeach the witness; if they are not, a new judgment should be entered on the guilty verdict. The Court held that the reasoning and policy underlying *Jencks v. United States*, 353 U.S. 657 (1957), would be applied, and concluded that a criminal defendant is entitled to inspect prior statements made by prosecution witnesses to the authorities, insofar as the statements concern the subject matter of the witness's direct testimony and are written or signed by the witness or given orally and stenographically or mechanically transcribed. The Court outlined a procedure by which the discovery described would be effected.

Discovery—Jencks Act—*Ogden v. United States*, 323 F.2d 818 (9th Cir. 1963). Defendant was convicted of a federal offense, and the Court of Appeals for the Ninth Circuit vacated and remanded to permit the District Court to determine whether certain notes taken by FBI agents during an interview of Government witness Glass were a "statement" within the Jencks Act, 18 U.S.C. §3500, and, if so, what became of them and what consequences should follow the Government's failure to produce them. 303 F.2d 724 (9th Cir. 1962). The District Court found that the notes were a "statement"; that after transcribing into a typed statement signed by Glass the substance of notes taken by an FBI agent during an interview with Glass, the agent destroyed the notes in good faith and in accordance with FBI practice; and that since the information contained in the notes was available to defendant in the form of the typed statement, a new trial was not required. On appeal, defendant [apparently] contended that he was entitled to the original notes under the Jencks Act. The Court of Appeals for the Ninth Circuit affirmed, holding that where the material contained in the interview notes was made available to defendant in a statement signed by the witness, destruction of the notes in accordance with normal administrative practice for normal administrative purposes unrelated to the suppression of evidence did not justify the imposition of sanctions against the Government or the granting of a new trial.

Double Jeopardy—*People v. Henderson*, 35 Cal. Rptr. 77 (1963). See Insanity, *infra*.

Double Jeopardy—*People v. Laws*, 193 N.E.2d 806 (Ill. 1963), dissenting opinion at 195 N.E.2d 393. Defendant was convicted of unlawful sale of narcotics. On writ of error, defendant contended that the trial court erroneously denied his motion for discharge on grounds of former jeopardy. The Supreme Court of Illinois reversed, holding that where, after the prosecution had rested its case, defendant's former trial for the same offense had terminated in declaration of mistrial, on motion of the prosecution and over defendant's objection, on the sole ground that defendant had never entered a plea, the trial court erred in declaring a mistrial, inasmuch as entry of a plea is not a prerequisite for a valid judgment; that since jeopardy attaches when a defendant is charged with a crime and the court begins to hear evidence, defendant's former trial constituted jeopardy; and consequently, since declaration of mistrial was improper and defendant was placed in jeopardy by the former trial, defendant's motion for discharge on ground of former jeopardy should have been granted. The Court noted that apparently neither the trial court nor the prosecution was aware of *People v. Hill*, 160 N.E.2d 779 (Ill. 1959), which held that entry of a formal plea was not essential to a valid judgment. In an opinion written by Judge Schaefer, printed at 195 N.E.2d 393, three Judges dissented, stating that since defendant was largely responsible for the "procedural snarl" that resulted in the mistrial, the convicting trial court properly overruled defendant's claim of double jeopardy.

Double Jeopardy—*Commonwealth v. Baker*, 196 A.2d 382 (Pa. 1964). Defendant was indicted for murder, and the trial court sustained his plea of double jeopardy as to the charge of murder in the first degree only, and continued the case to permit the Commonwealth to appeal. On appeal by the Commonwealth, defendant contended that since a former trial for first degree murder for the same offense terminated in a mistrial, declared by the trial judge over objection of the Commonwealth and without either consent or objection of the defendant, he could not again be tried for first degree murder for commission of the same act. The Supreme Court of Pennsylvania affirmed the order sustaining defendant's plea of double jeopardy, directing that his trial on the present indictment be limited to offenses other than first degree murder, holding that since the trial judge dismissed the jury at the first sign of disagreement after the jurors had been deliberating only a short period of time (one evening and one morning), the judge declared the mistrial before there was any absolute necessity or realistic justification to do so; that defendant's silence did not amount to consent to the discharge of the jury or constitute waiver of his right to claim double jeopardy; and therefore, since defendant did not consent to the erroneous declaration of mistrial, subsequent trial for first degree murder for the same offense must be prohibited as constituting double jeopardy. Regarding the Commonwealth's contention that defendant should nonetheless be triable for first degree murder if the penalty be limited to life imprisonment, the Court noted that under Pennsylvania law, a jury could impose the death penalty for first degree

murder irrespective of recommendation of the district attorney or the court.

Due Process of Law—*Barrett v. United States*, 322 F.2d 292 (5th Cir. 1963). Defendants were convicted on three counts relating to illegal distilling. On appeal, defendants contended that the District Court's instructions to the jury, which incorporated the statutory presumptions of guilt [26 U.S.C. §5601(b)] arising upon proof of presence at an illegal still, deprived defendants of Fifth Amendment due process. The Court of Appeals for the Fifth Circuit reversed and remanded as to Counts 1 and 2 and reversed as to Count 3, holding that where the statutory presumptions—that presence at the site of an unregistered still is presumptive evidence of possession thereof and of carrying on a distillery business without bond—provided that proof of presence alone was sufficient evidence to authorize conviction unless the defendant explained his presence to the satisfaction of the jury, these provisions in effect coerce an accused to take the stand despite the Fifth Amendment's privilege against self-incrimination and upset the scheme of criminal jurisprudence based upon burden of proof beyond reasonable doubt upon the prosecution and presumed innocence of the defendant; that regardless of the convenience afforded to the prosecuting government by a statutory presumption, such a presumption is valid under the due process clause only if proof of the fact upon which the statutory presumption is based carries a reasonable inference of the ultimate fact presumed; that the ultimate fact of guilt presumed by the provisions in question was not sufficiently related to the fact of presence to satisfy this due process test; and consequently, the District Court's incorporation of the statutory presumptions into the instruction on Counts 1 and 2 deprived defendants of their constitutional right to due process of law, and the convictions on these counts must be reversed and remanded for new trial in the interests of justice even though there was sufficient evidence notwithstanding the unconstitutional presumptions to support the verdicts, since the jury may have relied on the presumptions. The Court reversed as to the third count for lack of any evidence of the essential element of intent to defraud.

Due Process of Law—*Nelson v. State*, 387 P.2d 933 (Alaska 1964). Defendant was convicted of the misdemeanor of killing a cub grizzly bear in violation of a state game regulation promulgated by the Board of Fish and Game. On appeal, defendant contended that enforcement against him of the regulation, even when supplemented by another regulation defining "cub bear" as "young bear in their first or second year of life," deprived defendant of due process of law, since he had no way of knowing that the bear he shot was less than two years old. The Supreme Court of Alaska affirmed, holding that since it was admittedly impossible for a hunter to ascertain the precise age of a wild bear, to require proof of guilty knowledge for conviction would render the regulation unenforcible, and thus would frustrate the Board's permissible objective of providing for the protection and propagation of bear; and inasmuch as a hunter, knowing that the size of a bear is some indication of its age, will have knowingly allowed himself little margin for error in his age estimate if he shoots a relatively small bear, the fact that the hunter's fate depends on the accuracy of his estimation presents no constitutional problem.

Due Process of Law—*People v. Lewis*, 194 N.E.2d 831 (N.Y. 1963); *State v. Brown*, 196 A.2d 133 (R.I. 1963). See **Traffic Violations**, *infra*.

Equal Protection of the Laws—*Smith v. Crouse*, 386 P.2d 295 (Kan. 1963).

Expert Witnesses—*State v. Carroll*, 123 N.W.2d 659 (N.D. 1963). Defendant was convicted of arson. On appeal, defendant contended, *inter alia*, that in permitting an "expert witness" to give his opinion as to the cause of the fire, the trial court permitted an invasion of the province of the jury which constituted reversible error. The Supreme Court of North Dakota affirmed, holding that where the witness, a special agent for the National Board of Fire Underwriters with both academic study and practical experience in the investigation of fires, who was qualified as an expert in the field of investigating fires, had made a careful examination of the premises of the fire in question, his experience caused his opinion to be of appreciable help to the jury in a field where the ordinary juror needs help; and that consequently, the witness's opinion that the fire was "caused by human hands" was properly admitted in evidence.

Felony Murder—*Johnson v. State*, 386 P.2d 336 (Okla. Ct. Crim. App. 1963). Defendant was con-

victed of premeditated death, resulting from the commission of a felony. On appeal, defendant contended that since it was not established that the deceased police officer was killed by defendant or by his co-conspirator, defendant was not criminally responsible for the officer's death. The Court of Criminal Appeals of Oklahoma affirmed, holding that even if the deceased officer was killed by a bullet fired by another police officer rather than by defendant or his co-conspirator, defendant was criminally responsible for his death, inasmuch as when defendant used a gun to commit assault designed to produce injury or death of the officers who were attempting to prevent his escape from the scene of a burglary, the fact that the deceased officer may have been killed by a shot fired by his partner in spontaneous and instinctive retaliation against defendant's armed attack did not absolve defendant of criminal liability, since the retaliatory force resulting in death of the officer was not the product of any intervening cause, but rather was caused by defendant's assault; and consequently, even if the deceased officer's fellow officer fired the fatal shot, defendant was properly convicted. The Court was careful to limit the application of the decision to the facts of the instant case.

Freedom of Religion—*People v. Woody*, 35 Cal. Rptr. 708 (Dist. Ct. App. 1963). Defendant Navajo Indians were convicted of unlawful possession of peyote in violation of CAL. HEALTH & SAFETY CODE §11500. On appeal, defendants contended that the statute violated their right freely to exercise their religion, which involves the sacramental use of peyote. The California District Court of Appeal affirmed, holding that since peyote was a hallucinogen with toxic, deleterious, and intoxicating effects, it was a proper subject of regulation under the State's police power; that defendants were free to believe that peyote was of divine origin, since the statute regulated only their freedom to act upon their beliefs, not their freedom to believe; that since serious evils reasonably certain to result from the unprescribed use of peyote were apparent, a police power statute regarding peyote could constitutionally abridge defendants' right to act pursuant to their religious beliefs even if the anticipated dangers of peyote were not temporally immediate; that absence of an exclusionary provision permitting possession of peyote for religious use did not render the statute unconstitutional as not being reasonably related to the object it sought to achieve, particularly since a claim of possession for religious use would be extremely easy to make and hard to disprove; that the statute's interference with the exercise of defendants' religious practice was its incidental effect rather than intended purpose; and consequently, the statute was constitutional as a reasonable exercise of the police power which did not constitute an unconstitutional infringement upon the defendants' right to freedom of religion.

Freedom of Speech—*State v. Leonard*, 124 N.W.2d 429 (Iowa 1963). See Obscenity, *infra*.

Freedom of the Press—*State v. Hudson County News Co.*, 196 A.2d 225 (N.J. 1963). See Obscenity, *infra*.

Guilty Plea—Coercion—*Letters v. Commonwealth*, 193 N.E.2d 578 (Mass. 1963). Petitioners pleaded guilty and were convicted of various offenses. On writ of error, petitioners contended that their pleas of guilty had not been voluntarily entered. The Supreme Judicial Court of Massachusetts expunged both guilty pleas and reversed and remanded, holding that where petitioners' pleas were induced by threats by the trial judge, communicated to petitioners by their attorneys, that if they elected to stand trial and were convicted, maximum sentences to run consecutively would be imposed, the guilty pleas were coerced and must be expunged. The Court noted that the pleas were induced by threat of punishment for exercising the basic constitutional right to a trial, and that this constituted a significant invasion of that right.

Habeas Corpus—*Commonwealth ex rel. Wilson v. Rundle*, 194 A.2d 143 (Pa. 1963). See Search and Seizure, *infra*.

Homicide—Proximate Cause—*State v. Shephard*, 124 N.W.2d 712 (Iowa 1963). See Search and Seizure—Waiver by Spouse, *infra*.

Homicide—Proximate Cause—*DeVaughn v. State*, 194 A.2d 109 (Md. 1963). Defendant was convicted of first degree murder by the trial court sitting without a jury. On appeal, defendant contended that the decedent's death was caused not by defendant's shooting of him three weeks earlier but by an independent, supervening cause consisting either of negligent medical treatment or an infec-

tion or disease unrelated to the gunshot wound. Noting that the question of supervening cause was a novel one in Maryland, the Court of Appeals of Maryland affirmed, holding that even if there was evidence of improper medical treatment, defendant was not for this reason legally excused, since improper treatment is one of the possible consequences which might follow infliction of injury and which the guilty party must be deemed to have contemplated and be responsible for; and even if the victim died from the combined effects of the gunshot wound and an independent disease, defendant was not thereby relieved of responsibility, since the injury he inflicted contributed to and hence was a direct cause of death.

Homicide—Proximate Cause—*State v. Harrington*, 133 S.E.2d 452 (N.C. 1963). Defendant was convicted of involuntary manslaughter for killing two children with his car while attempting to pass another vehicle, and the trial court reinstated a former suspended sentence for a prior conviction of involuntary manslaughter. On appeal, defendant contended that the trial court's refusal to instruct the jury that a statute required pedestrians walking on a highway to yield the right of way to approaching traffic was prejudicial error. The Supreme Court of North Carolina vacated the judgment activating the suspended sentence and ordered a new trial, holding that although contributory negligence is no defense in a criminal action, defendant was entitled to the requested instruction, since the criminal act with which defendant was charged was manslaughter by reason of his alleged culpable negligence, and the negligence of the persons fatally injured was relevant and material to the question of proximate cause. The Court added that with regard to the same question, defendant was also entitled to have the jury consider whether the conduct of the driver of the vehicle he attempted to pass, either alone or in combination with any contributory negligence on the part of the persons killed, was the proximate cause of death.

Implied Consent Laws—*Walton v. City of Roanoke*, 133 S.E.2d 315 (Va. 1963). See **Self-Incrimination**, *infra*.

Improper Conduct by Prosecutor—*State v. Jones*, 124 N.W.2d 727 (Minn. 1963). Defendant was convicted of rape. On appeal, defendant contended that he was prejudiced by the trial court's refusal to declare a mistrial which he requested on the basis of the prosecutor's improper argument in summation that "Society is not safe with a man like that.... It could be your daughter,... it could be somebody else's wife.... [T]he next girl he sees might be my daughter, my wife, or somebody else's daughter or wife.... [and that if found not guilty, defendant would be able to say] 'The jury turned me loose so I can do it again.'" The Supreme Court of Minnesota reversed and granted a new trial, holding that in light of the county attorney's position of respect in the community, the argument, implying that defendant's acquittal would expose the jurors' loved ones to possible rape, was so prejudicial that its harmful effect could not have been obviated by the trial court's corrective cautionary instruction to disregard the statements.

Indictment and Information—*Dawalt v. State*, 156 So. 2d 769 (Fla. Dist. Ct. App. 1963). See **Statutory Construction—Burglary**, *infra*.

Indictment and Information—*People v. Peck*, 194 N.E.2d 245 (Ill. 1963). See **Statutory Construction—Burglary**, *infra*.

Insanity—*People v. Henderson*, 35 Cal. Rptr. 77 (1963). Defendant was convicted of first degree murder and sentenced to life imprisonment. On appeal, the District Court of Appeal reversed and remanded. On retrial, defendant was again convicted and the jury fixed the penalty at death. On automatic appeal, defendant contended that the trial court's failure to give a *sua sponte* instruction on the defense of diminished responsibility was prejudicial error, and that the prohibition against double jeopardy precluded imposition of the death sentence on retrial after the judgment sentencing him to life imprisonment for the same offense was reversed. The Supreme Court of California reversed, holding that a trial court was required to give an unrequested instruction if failure so to instruct had the effect of removing a significant issue in the trial from the jury; that the defense of mental illness not amounting to legal insanity was a significant issue in defendant's case, since under this "diminished responsibility" rule, one legally sane but suffering from a mental illness which prevented him from being capable of acting with malice aforethought cannot be convicted of first

degree murder, and there was substantial evidence raising the availability of that defense; and consequently, since defendant was deprived of the right to a jury determination of the only real issue in the case, the trial court's failure to instruct the jury on the law of diminished responsibility constituted reversible error. Noting that defendant's double jeopardy contention may arise on retrial, the Court considered the claim, stating that the State constitutional provision against double jeopardy prohibited imposition of the death penalty upon retrial after reversal of a judgment upon which only a sentence of life imprisonment was imposed, since the more severe penalty was analogous to a higher degree of crime, and the guarantee against double jeopardy prohibits conviction of a higher degree of crime upon retrial after reversal of a conviction of the lower degree. The Court specifically overruled *People v. Grill*, 91 Pac. 515 (Cal. 1907), and noted that the State had no interest in preserving erroneous judgments, and "a defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right." Two Judges dissented.

Jury's Knowledge of Possible Consequences of Their Verdict—*People v. Morse*, 36 Cal. Rptr. 201 (1964). See **Sentencing**, *infra*.

Jury's Knowledge of Possible Consequences of Their Verdict—*Burnette v. State*, 157 So. 2d 65 (Fla. 1963). See **Sentencing**, *infra*.

Mandamus—*Riley v. Garrett*, 133 S.E.2d 367 (Ga. 1963). See **Statutory Construction—Sodomy**, *infra*.

Narcotics—*People v. Zapata*, 34 Cal. Rptr. 171 (Dist. Ct. App. 1963). Defendant was convicted of possession of heroin in violation of CAL. HEALTH & SAFETY CODE §11500. On appeal, defendant contended that since the quantity of heroin which he was convicted of possessing was not large enough to indicate possession for any purpose other than for his own use and to satisfy his own compulsive craving, his conviction constituted an attempt by the State indirectly to punish him for being an addict and thus was invalid under *Robinson v. California*, 370 U.S. 660, abstracted at 53 J. CRIM. L., C. & P.S. 492 (1962) (punishment for status of being an addict violates federal constitutional guarantee against cruel and unusual punishment). The District Court of Appeal of California affirmed, holding that dictum in the *Robinson* case [*e.g.*, "A state might impose criminal sanctions . . . against . . . possessing of narcotics within its borders"] demonstrated that *Robinson* did not necessarily imply that punishment for addiction-induced possession of narcotics would constitute cruel and unusual punishment; and that even if defendant's possession was related only to his own addiction, the State could validly punish the possession, inasmuch as his overt act of possessing narcotics, not his craving, was penalized.

Obscenity—*State v. Leonard*, 124 N.W.2d 429 (Iowa 1963). Defendant was convicted of publicly using obscene language to the disturbance of the public peace and quiet in violation of IOWA CODE §728.1. On appeal, defendant contended that evidence that he said "I'll punch you in the nose, you son-of-a-bitch," in a telephone call from his home to the city clerk in the clerk's private office, failed to establish the three necessary elements of the offense. The Supreme Court of Iowa affirmed, holding that since "obscene" within the statute included not only material which aroused prurient interests but also that which was offensive, abusive, disgusting, and revolting, the phrase "son-of-a-bitch" was obscene for purposes of the statute; that even if the clerk's private office was not a public place, defendant's use of the obscene language was public within the scope of the statute, inasmuch as defendant spoke so loudly that a witness in the clerk's outer office, unquestionably a public place, overheard the obscene words; that the court could not say as a matter of law that use of the term "son-of-a-bitch" under the circumstances did not disturb the public peace and quiet; and consequently, since there was sufficient evidence to support each of the three necessary elements of the offense, defendant's conviction must be affirmed. Justice Thornton dissented, stating that under the rule of strict construction of penal statutes, "obscene" did not include that which was vulgar but did not appeal to prurient interests.

Obscenity—*State v. Hudson County News Co.*, 196 A.2d 225 (N.J. 1963). Defendants were convicted of possession with intent to sell and sale of obscene magazines, and the Appellate Division of the New Jersey Superior Court affirmed. On appeal, defendants contended, *inter alia*, that the

procedures used by the police in confiscating magazines from their warehouse constituted a prior restraint and deprived them of First and Fourteenth Amendment rights; and that an erroneous standard for determining obscenity was applied in the trial of the case. The Supreme Court of New Jersey reversed the possession convictions and vacated and remanded the convictions of sale, holding that where the seizing officers, who had a warrant to search defendants' warehouse for books of obscene nature, were provided no guide to the exercise of informed discretion but were left to their individual judgment, which of necessity was exercised on the basis of on-the-spot, *ad hoc* decisions, as to which magazines were obscene, and where, as a result of the seizures, 600 magazines not subsequently found obscene were withheld from the market for approximately three years, the procedures imposed an unconstitutional prior restraint upon defendants' First and Fourteenth Amendment rights; that because this violation permeated the proceedings under the indictment for possession, the convictions entered on that indictment must be reversed without remand; that since the First Amendment accepts for the nation as a whole the basic idea that freedom of expression is a necessary guarantee in a democratic society, the standard to be applied in holding certain expressions outside that amendment's protection cannot operate in such a way as to alter the degree of protection from locality to locality; that the "contemporary community standard" to be applied under the New Jersey obscenity statute must therefore be the national standard of the contemporary society of the United States of America at large rather than that of any specific locality; and that consequently, the trial court's instruction that the jury should consider the community standards of Hudson County as testified to by witnesses permitted the jury to convict defendants for sale of magazines not within the constitutionally permissible definition of obscenity, and the convictions for sale must be vacated and remanded for a new trial at which the national contemporary community standard must be applied. The Court noted that the unconstitutional procedure by which the material was seized was indistinguishable from that found constitutionally defective by the United States Supreme Court in *Marcus v. Search Warrant*, 367 U.S. 717, abstracted at 52 J. CRIM. L., C. & P.S. 429 (1961).

Opinion Evidence—*State v. Carroll*, 123 N.W.2d 659 (N.D. 1963). See **Expert Witnesses**, *supra*.

Pardon and Parole—*Riley v. Garrett*, 133 S.E.2d 367 (Ga. 1963). See **Statutory Construction—Sodomy**, *infra*.

Police Power—*People v. Woody*, 35 Cal. Rptr. 708 (Dist. Ct. App. 1963). See **Freedom of Religion**, *supra*.

Prejudicial Publicity—*United States v. Kline*, 221 F. Supp. 776 (D. Minn. 1963); *State v. St. Peter*, 387 P.2d 937 (Wash. 1963). Two recent cases point up a possible method for handling the problem of prejudicial publicity at the trial level without resorting to the contempt process or to subsequent reversal.

In *United States v. Kline*, defendants contended, *inter alia*, that denial of their motion for a change of venue, based upon prejudicial publicity, resulted in denial of their right to a fair trial. The District Court for the District of Minnesota denied defendants' motions for new trial or for acquittal, holding that where the pre-trial publicity complained of was published two years before trial, the court excused every prospective juror who had formed any opinion as to the guilt or innocence of defendants, and the publicity circulated during the trial, which the jurors denied having read or heard, contained no matters not admitted as evidence in court, denial of defendants' motion for change of venue was not prejudicial to their right to a fair trial by an impartial jury.

In *State v. St. Peter*, the Washington Supreme Court affirmed defendant's conviction over his contention that, due to prejudicial publicity, the trial court's denial of his motion for continuance or change of venue was prejudicial error. The court noted that all potential jurors who had read or heard of defendant were excused.

[It appears that such limitation of jurors (in *Kline*, excusing those who had formed an opinion; in *St. Peter*, those who had read or heard of defendant) is an effective, if not the only, way to guarantee a fair and impartial trial to a defendant who has received substantial press coverage.]

Right to Counsel—*Hardy v. United States*, 84 Sup. Ct. 424 (1964). After petitioner was convicted of a federal offense, his court-appointed counsel withdrew with the court's approval.

Petitioner's *pro se* petition for leave to appeal *in forma pauperis* was denied by the District Court for the District of Columbia, and the Court of Appeals for the District of Columbia Circuit, after appointing a different attorney to represent petitioner, granted leave to proceed *in forma pauperis*, but limited the transcript to be prepared at Government expense to those portions relating to the conclusory allegations formulated by petitioner *pro se*. Petitioner's subsequent application for rehearing and motion for a transcript of the balance of the trial proceedings were denied. On certiorari, petitioner contended that since his court-appointed appellate counsel did not represent him at trial, the entire transcript was required in order for counsel properly to prosecute the appeal. In an opinion, per Douglas, J., announcing the judgment of the Court, the United States Supreme Court reversed, holding that since the duty of counsel on appeal is not to serve as *amicus* to the Court of Appeals but as advocate for the appellant, and in light of the fact that under FED. R. CRIM. P. 52(b) an appellate court may notice "plain errors," the obligation of a court-appointed appellate counsel who did not represent an indigent at the trial cannot be faithfully discharged unless he can read the entire transcript; and consequently, petitioner's counsel's duty could not be discharged unless he had a transcript of all the testimony and evidence presented and of the court's charge to the jury. Justice Douglas' opinion noted that the decision rested on the federal statutory scheme rather than upon constitutional requirements. The Chief Justice and Justices Brennan and Stewart joined in Justice Goldberg's concurring opinion, stating that full transcripts should be provided without limitation to all federal indigent appellants, even if appellate counsel was also trial counsel. Justice Clark concurred in the result, and Justice Harlan dissented.

Right to Counsel—*Lee v. United States*, 322 F.2d 770 (5th Cir. 1963). See **Confessions**, *supra*.

Right to Counsel—*Anderson v. North Carolina*, 221 F. Supp. 930 (W.D.N.C. 1963). Defendant was convicted in a North Carolina state court on his plea of guilty of assault with intent to rape. On petition for writ of habeas corpus, petitioner contended that he was effectively denied his right to counsel. After holding two evidentiary hearings, the District Court for the Western District of North Carolina issued the writ, ordering that petitioner be released unless the State elects to try him for either the capital offense of rape or the lesser felony within a reasonable time, holding that where petitioner, under indictment for the capital offense of rape, had originally pleaded not guilty to rape, but later that same day had pleaded guilty to the lesser offense of assault with intent to rape after a conference with the state solicitor and members of his staff, from which conference petitioner's court-appointed counsel was absent but to which he consented, petitioner was without the assistance of counsel in negotiating a compromise with the solicitor; and since petitioner lacked counsel during the conference—a critical stage of the proceedings against him—those proceedings were constitutionally defective, and habeas corpus must issue.

Right to Counsel—*People v. Ibarra*, 34 Cal. Rptr. 863 (1963). Defendant was convicted of unlawful possession of heroin, and the District Court of Appeal affirmed. On appeal, defendant contended that illegally seized evidence was admitted against him, and that his court-appointed counsel's failure to object to its admission demonstrated such a lack of knowledge of law that representation by that counsel failed to satisfy defendant's right to effective assistance of counsel. The Supreme Court of California reversed, holding that since no objection was made to admission of the evidence now complained of, the issue of whether it was lawfully obtained could not be resolved on appeal; that in order to justify relief on the ground that counsel provided unconstitutionally ineffective representation, it must appear that counsel's lack of diligence or competence reduced the trial to a farce or sham; and where defendant's counsel, a deputy public defender, did not object to admission of heroin because he did not know of the long-standing, easily-discoverable California rule that permitted defendant to challenge the legality of the search and seizure even though he denied that the heroin was taken from him and asserted no proprietary interest in the premises entered, counsel's failure to object reduced defendant's trial to a farce and a sham, since it precluded resolution of the crucial factual issues supporting defendant's primary defense; and consequently, defendant was denied effective assistance of counsel and his conviction must be reversed.

Right to Counsel—*People v. Sigal*, 34 Cal. Rptr. 767 (Dist. Ct. App. 1963). See **Confessions**, *supra*.

Right to Counsel—*Smith v. Crouse*, 386 P.2d 295 (Kan. 1963). Defendant was convicted of second degree burglary, and the Kansas Supreme Court dismissed his *pro se* appeal. On appeal from denial by the district court of Leavenworth County of his petition for writ of habeas corpus, defendant contended that the district court's failure to appoint appellate counsel and the Kansas Supreme Court's order denying his motion for appointment of counsel constituted deprivation of his right to be represented by court-appointed counsel in his appeal from the conviction and sentence. [That appeal had been dismissed for noncompliance with certain procedures which could not be timely complied with by counsel subsequently retained by defendant.] The Supreme Court of Kansas affirmed, holding that since in 1960 when defendant's request for court-appointed appellate counsel was denied there was no state or federal statute and no rule or decision of the Kansas court or of the United States Supreme Court requiring appointment of appellate counsel for defendant, that denial complied with the then existing law; and in absence of a clear statement by the United States Supreme Court that *Douglas v. California*, 372 U.S. 353 (abstracted at 54 J. CRIM. L., C. & P.S. 193 (1963), requiring appointment of counsel on appeal for indigent defendants in state courts, was to be retroactively applied, the Kansas Court would decline so to construe that case.

Right to Counsel—*In re Palmer*, 124 N.W.2d 773 (Mich. 1963). Petitioner pleaded guilty to a charge of second degree murder, a non-capital offense, and was sentenced to life imprisonment in 1942. On petition for writ of habeas corpus and ancillary writ of certiorari, petitioner contended that he was deprived of his right to counsel at trial in violation of the due process requirement enunciated by *Gideon v. Wainwright*, 372 U.S. 335, abstracted at 54 J. CRIM. L., C. & P.S. 193 (1963). In an opinion in which two judges concurred announcing the judgment of the Court, the Supreme Court of Michigan discharged petitioner and remanded him to the Sheriff of Macomb County for further proceedings [presumably to allow the State to retry him if it wished], holding that the *Gideon* case restored the previously sound, constitutionally enunciated principle of *Powell v. Alabama*, 287 U.S. 45 (1932), by overruling the "fundamental fairness" rule of *Betts v. Brady*, 316 U.S. 455 (1942); that because the Michigan Court held, in *People v. Winterheld*, 115 N.W.2d 80 (Mich. 1962), abstracted at 54 J. CRIM. L., C. & P.S. 83 (1963), that *Mapp v. Ohio* applied retroactively and because the United States Supreme Court vacated and remanded ten pre-*Gideon* state criminal judgments for further consideration in light of *Gideon*, the *Gideon* case would be given retroactive effect in Michigan state courts; and that since waiver of the right to counsel could not be presumed from the record's silence with regard to counsel, the writ of habeas corpus must issue. The Court noted that only cases arising during the years 1942–1947 would be involved, inasmuch as since 1947 denial of counsel in felony cases in violation of state provisions constituted reversible error, and consequently the argument that retroactive application of *Gideon* would "open the jailhouse door" was not applicable in Michigan. Five Judges concurred in the result without opinion, and one concurred in the result on the ground that it was compelled by the state constitutional right to counsel provision without regard to the application of *Gideon*.

Right to Counsel—*State v. Nelson*, 196 A.2d 52 (N.H. 1963). See **Arrest, Search and Seizure**, *supra*.

Right to Counsel—*State v. Miller*, 194 A.2d 729 (N.J. 1963). After defendant, charged with murder, moved for an order permitting his court-appointed counsel to engage a private investigator at the expense of the county, the trial court denied the motion, and the Supreme Court of New Jersey granted leave to appeal. Defendant, an indigent, contended that his counsel should have the services of a private investigator to find and interview possible witnesses. The Supreme Court of New Jersey reversed with directions for entry of order in harmony with its opinion, holding that although the prosecution had been "commendably cooperative," the county should nonetheless provide defendant with a private investigator to find and interview persons who were present when the offense was allegedly committed. The Court noted that defendant's

counsel should see that the investigation was conducted within reasonable limits.

Right to Counsel—*People v. Donovan*, 193 N.E.2d 628 (N.Y. 1963). See Confessions, *supra*.

Right to Free Transcript—*Hardy v. United States*, 84 Sup. Ct. 424 (1964). See Right to Counsel, *supra*.

Right to Trial—*Letters v. Commonwealth*, 193 N.E.2d 578 (Mass. 1963). See Guilty Plea—Coercion, *supra*.

Scientific Evidence—Color Photographs—*People v. Deriso*, 35 Cal. Rptr. 134 (Dist. Ct. App. 1963); *State v. Morris*, 157 So. 2d 728 (La. 1963). Two courts have recently considered the question whether the admission in evidence of colored photographs of a homicide victim, including some depicting an autopsy, constituted prejudicial error.

In *People v. Deriso*, the California District Court of Appeal rejected defendant's contention that color photographs and slides showing the murder victims' bodies at the scene of the crime and during autopsy were improperly admitted, holding that since the photographs of the scene were used to illustrate a criminalist's testimony regarding the location and nature of blood stains and other physical evidence, and the autopsy surgeon needed the photographs of the autopsy to show the basis for his opinions concerning the wounds inflicted, the photographs complained of were properly admitted in the trial court's discretion, inasmuch as their evidentiary value outweighed their possible prejudicial effect.

The Supreme Court of Louisiana in the *Morris* case found the 15 color slides showing the victim's body prior to and while undergoing an autopsy devoid of real evidentiary value and thus reversed defendant's conviction for murder, holding that where the avowed purpose of showing the slides was to demonstrate that the deceased's various internal organs were healthy and did not contribute to his death, the slides had no probative value which would render them admissible over claim of prejudice, inasmuch as the average lay juror "would not know a healthy organ from an unhealthy one and the showing of the pictures would mean nothing to him."

Search and Seizure—*Fahy v. Connecticut*, 84 Sup. Ct. 229 (1963). Prior to the Supreme Court's decision of *Mapp v. Ohio*, petitioner was convicted in a Connecticut state court of wilfully injuring a public building by painting swastikas on a synagogue. After *Mapp* was handed down, the Connecticut Supreme Court of Errors affirmed, holding that although *Mapp* applied to cases pending on appeal in Connecticut courts when that decision was rendered, and although unconstitutionally obtained evidence was used against petitioner, admission of the evidence was merely harmless error. *State v. Fahy*, 183 A.2d 256 (Conn. 1962). On certiorari, petitioner contended that admission of the admittedly illegally seized evidence—a jar of paint and a paint brush obtained from his car—was prejudicial to him. In an opinion written by Chief Justice Warren, the Supreme Court of the United States reversed and remanded, holding that since there was a "reasonable possibility that the evidence complained of might have contributed to the conviction," admission of the illegally seized evidence constituted prejudicial error regardless of the presence of sufficient independent evidence to sustain the conviction. The Court noted that use of the illegally obtained evidence precluded petitioner from arguing below that since the illegal seizure induced his admissions and confession, these statements should have been excluded. In an opinion by Mr. Justice Harlan, Justices Harlan, Clark, Stewart and White dissented, stating that the issue presented by the case, but not reached by the majority, was simply whether the Fourteenth Amendment prevented state application of a harmless-error rule to criminal cases regarding unconstitutionally seized evidence, and that the majority avoided this issue by disregarding the finding of the highest court of Connecticut that the evidence was without prejudicial effect.

[In discussing petitioner's possible argument that his statements might be excludible if induced by confrontation with the illegally seized evidence, the majority stated that "such a line of inquiry is permissible," citing, *inter alia*, *Wong Sun v. United States*, 371 U.S. 471, abstracted at 54 J. CRIM. L., C. & P.S. 189 (1963). This indicates the inclination of five Justices to apply *Wong Sun* to the states.]

Search and Seizure—*People v. Ibarra*, 34 Cal. Rptr. 863 (1963). See Right to Counsel, *supra*.

Search and Seizure—*People v. Walker*, 195 N.E.2d 654 (Ill. 1964). Defendant's motion to quash a search warrant and suppress evidence obtained pursuant thereto was granted by the trial court. On writ of error by the People, defendant contended that the warrant was defective and the evidence inadmissible because the information upon which the warrant was issued was illegally obtained. The Supreme Court of Illinois reversed, holding that a police officer who made an illegal policy bet and at that time observed gambling paraphernalia was lawfully on the premises, inasmuch as he did not affirmatively misrepresent his identity and was under no obligation voluntarily to identify himself as a policeman; and consequently, the warrant to search those premises, which was issued the following day pursuant to the officer's observations, was valid, and the evidence lawfully obtained.

Search and Seizure—*People v. Zeravich*, 195 N.E.2d 612 (Ill. 1964). After defendant was indicted for burglary and theft, his pre-trial motion to suppress evidence obtained by an illegal search was granted. On direct appeal by the People [entertained on the ground that a construction of the constitution was involved, ILL. REV. STAT. ch. 38, par. 747 (1961)], defendant contended that a search of his person which yielded money sought to be introduced as evidence against him was unlawful, inasmuch as it was conducted without a warrant by officers who had stopped him for a minor traffic violation. The Supreme Court of Illinois reversed and remanded with instructions to overrule the motion to suppress, holding that where the officers who stopped defendant's car to ticket him for driving with obstructed vision noticed that he matched the description, received by police communique, of a suspected felon, the officers could reasonably conclude that defendant was not merely a traffic violator but a dangerous criminal as well; and consequently, under the circumstances, the officers' search of defendant's person was reasonable to insure their own safety and to prevent the possibility of an attempted escape. Justice Daily dissented, stating that the Court had no jurisdiction to entertain the direct appeal because no question of constitutional construction was presented, the only question being the factual one whether or not the search was reasonable.

Search and Seizure—*State v. Hudson County News Co.*, 196 A.2d 225 (N.J. 1963). See **Obscenity**, *supra*.

Search and Seizure—*Commonwealth ex rel. Wilson v. Rundle*, 194 A.2d 143 (Pa. 1963). After petitioner was convicted of felony murder, the Pennsylvania Supreme Court affirmed and the United States Supreme Court denied certiorari. Subsequently, *Mapp v. Ohio* was decided. On appeal from the denial without hearing by the Philadelphia County Court of Common Pleas of his application for writ of habeas corpus, petitioner contended that he was entitled to a hearing on his petition, and, *inter alia*, that evidence obtained through unreasonable search and seizure was used against him. The Supreme Court of Pennsylvania affirmed, holding that since all issues presented by petitioner's application involved either facts conceded by the Commonwealth or pure questions of law, no material questions of fact were presented and the lower court's failure to hold a hearing on the petition was not error; that the reliance of all parties in most pre-*Mapp* trials, including that of petitioner, upon *Wolf v. Colorado*, 338 U.S. 25 (1949), which permitted the states to convict on the basis of illegally seized evidence, militated against a construction of the effect of *Mapp* which would vitiate a trial conducted in compliance with what was, at the time of trial, the law of the land; and since the basic purpose of *Mapp* was deterrence of future unlawful police conduct, *Mapp's* exclusionary rule would not be retroactively applied to upset judgments which now offend the *Mapp* rule but which, like petitioner's, became final prior to the decision of *Mapp*.

Search and Seizure—*State v. Louden*, 387 P.2d 240 (Utah 1963). Defendant was convicted of second degree murder. On appeal, defendant contended that evidence obtained by an unreasonable search of his motel room was erroneously admitted against him. The Supreme Court of Utah affirmed, holding that where police officers, who were investigating a series of felonies and received a tip (the nature and source of which they would not reveal) indicating that defendant was involved, requested and received the motel proprietor's permission to enter defendant's room, wherein they found and put back an identifiably stolen pistol, and later frisked defendant for weapons

upon his return and searched his room without arresting defendant and without a search warrant but with his apparent consent, the trial court's determination that the search, which yielded other stolen goods, was reasonable would not be upset because it was not "clearly wrong." The Court noted that the question whether evidence was obtained by an unconstitutionally unreasonable search was "primarily for the trial court upon a survey of the whole situation, having in mind both the rights of citizens and the exigencies of police work." An opinion by Chief Justice Henriod, concurring in the result, severely criticizes *Mapp v. Ohio.*

Search and Seizure—Waiver by Spouse—*State v. Shephard*, 124 N.W.2d 712 (Iowa 1963). Defendant was convicted of second degree murder for killing her newborn infant. On appeal, defendant contended that her constitutional rights were violated by the trial court's failure to suppress evidence and testimony secured by means of an illegal search and seizure, and that the evidence failed to show that defendant murdered her child. The Supreme Court of Iowa affirmed, holding that the evidence supported the trial court's finding that defendant's husband freely and voluntarily consented to the search complained of; that since the Fourth and Fourteenth Amendments were designed to protect a person and his property from arbitrary and unreasonable searches and seizures rather than to help a guilty party escape the consequences of his act, if the party in possession or control of premises and property voluntarily consents to a search, the right of privacy is not invaded, and the fact that the search may yield evidence which incriminates an absent party who has an equal right to possession or control does not affect the reasonableness or legality of the search; that consequently, the search consented to by defendant's husband who was then in possession and control of the premises searched was legal and the evidence obtained by that search was properly admitted against defendant; and since, from the evidence, the jury could have found that the death of the baby was brought about by defendant's allowing it to be born at home on a cold bathroom floor under unfavorable conditions and to remain on the floor unattended for some time when excellent free medical care was available, the inference of malice essential to the conviction was justified.

Self-Incrimination—*DeLuna v. United States*, 324 F.2d 375 (5th Cir. 1963). The Court of Appeals for the Fifth Circuit denied the Government's petition for rehearing, thus adhering to its earlier holding that the Fifth Amendment prohibits all reference, even by a co-defendant's counsel, to a defendant's failure to testify. See *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962), abstracted at 54 J. CRIM. L., C. & P.S. 196 (1963).

Self-Incrimination—*People v. Donovan*, 193 N.E.2d 628 (N.Y. 1963). See **Confessions**, *supra.*

Self-Incrimination—*Walton v. City of Roanoke*, 133 S.E.2d 315 (Va. 1963). Defendant was convicted of driving while under the influence of alcohol in violation of a city ordinance. On appeal, defendant contended that since under the "implied consent" law [VA. CODE §18.1-55] defendant was compelled to give evidence, consisting of blood, against himself in violation of the state and federal constitutional privileges against self-incrimination, the trial court erred in admitting as evidence testimony concerning a chemical analysis of defendant's blood to determine its alcoholic content. [Pertinent subsections of the statute in substance provided: that anyone operating a motor vehicle upon Virginia highways is deemed to consent to, and shall be entitled to, a chemical analysis of his blood to determine alcoholic content if arrested for a state statute or city ordinance involving drunken driving; that refusal to submit to a test is not evidence and shall not be commented upon at trial; and that refusal to submit to a test constitutes grounds for revocation of driver's license.] Noting that the "right" to operate a motor vehicle on Virginia highways was a privilege subject to reasonable regulation under the State's police power in the interests of public safety and welfare, the Supreme Court of Appeals of Virginia affirmed, holding that assuming *arguendo* that, despite authority to the contrary, the Fifth Amendment privilege ["no person . . . shall be compelled in any criminal case to be a witness against himself"] applied to the states through the Fourteenth Amendment, that constitutional prohibition was restricted to oral testimony and did not preclude the use of one's body or bodily secretions and the results of their chemical analyses; that the State constitutional provision [VA. CONST. art. I, §8, providing, *inter alia*, that no person shall "be compelled in any criminal proceeding to give evidence against him-

self"] was identical in scope to the Fifth Amendment privilege, despite the use of the word "evidence" in the former provision while "witness" is used in the latter, inasmuch as the history and purpose of the state constitutional privilege so indicated; that defendant had a choice of either allowing the test to be made or refusing it; and consequently, §18.1–55 neither required defendant to take a blood test nor compelled him to give evidence against himself in violation of the federal or state privilege against self-incrimination.

Sentencing—*People v. Morse*, 36 Cal. Rptr. 201 (1964). Defendant was convicted of two counts of first degree murder and was sentenced to death. On automatic appeal, defendant contended that the trial court by specific instruction thereon allowed the jury to consider incompetent material in the penalty phase of the trial. Reversing its prior position on the issue, the California Supreme Court reversed as to penalty and affirmed in all other respects, holding that the jury's consideration of the possibility of parole by the Adult Authority, including the possibility of improper parole and statistics regarding length of time actually served by "life prisoners," tended to allow the jury to consider speculative matters outside its province and thus to prevent the jury from placing proper emphasis on the particular defendant as he is at this time; that the jury's knowledge that the trial judge and Governor had power to reduce a death sentence to life imprisonment tended to weaken the jury's sense of responsibility for the imposition of sentence; that the possible future roles of the Adult Authority, trial judge, and Governor thus have no proper bearing on the issue which the jury must decide, and therefore should not be considered in the penalty phase of a first degree murder case; and since it was reasonably probable that a result more favorable to defendant as to penalty would have been reached in the absence of the erroneous instructions calling the jury's attention to the incompetent material and allowing them to consider it, the penalty phase of defendant's conviction must be reversed.

Sentencing—*Burnette v. State*, 157 So. 2d 65 (Fla. 1963). Defendant was convicted of first degree murder without recommendation of mercy. On appeal, defendant contended that the trial court's statement to the jury, in response to their question regarding the possible consequences of a sentence of life imprisonment, that a convict is eligible to submit an application for parole after serving six months in prison, permitted the jury to consider incompetent information in determining whether or not to recommend mercy in violation of defendant's right to have the question of mercy determined in the same fair and impartial manner as the question of guilt. The Supreme Court of Florida reversed and remanded, holding that due to the gravity of the issues presented by the record, defendant's contention would be considered in the interests of justice even though defendant failed to object or except to the court's response to the jury's inquiry; that since in capital cases a Florida jury decides penalty as well as guilt or innocence, discussion of the question of parole could result in prejudice in a capital case; that matters of probation and parole are delegated by the legislature to certain state officials, and the province of the jury does not include consideration of such matters in their deliberations; and since the jurors in defendant's case probably did not know that it was improper to allow consideration of possibility of parole to affect their verdict, the court's remark would be deemed prejudicial to defendant. The Court advised that, in the future, as part of his general charge regarding recommendation of mercy in every capital case, the trial judge should admonish that provisions for probation, parole, pardon, or commutation are administered by public officials and that such considerations must not enter into the jury's determination of the question whether or not to recommend mercy.

Statutory Construction—Burglary—*Dawalt v State*, 156 So. 2d 769 (Fla. Dist. Ct. App. 1963). Defendant was convicted of entering a building with intent to commit a misdemeanor. On appeal, defendant contended that the information, which charged that he entered without breaking a telephone booth within a building with intent to commit petit larceny, failed to charge an offense. The District Court of Appeal of Florida reversed, holding that although under the pertinent statute [FLA. STAT. ANN. §810.05] a telephone booth may perhaps be a "building" if located outside another building, the booth which defendant was charged with entering was not a "building" within the statute, since it was situated inside another building; and consequently, by classifying the telephone booth rather than the building within which it was located as the building entered, the

information was defective for failure to state a crime under Florida law.

Statutory Construction—Burglary—*People v. Peck*, 194 N.E.2d 245 (Ill. 1963). Defendant's motion to quash an indictment charging him with burglary was granted by the trial court. On writ of error by the People, defendant contended that since the indictment failed to allege a specific person whose property defendant intended to steal when he unlawfully entered a building, it violated his constitutional right to know the nature and cause of the accusation against him to enable him to prepare a defense. The Supreme Court of Illinois reversed and remanded with directions to overrule the motion to quash, holding that since the burglary statute [ILL. REV. STAT. ch. 38, par. 19-1 (1961)] proscribed the unlawful entry of a building "with intent to commit therein a felony or theft," a generalized intent to commit a felony or theft rather than a particularized intent to commit such crime against a specific person must be proved to warrant conviction for burglary, and consequently, failure to allege the person from whom defendant intended to steal did not render the indictment void for failure to give him sufficient information to prepare his defense. The Court noted that *People v. Picard*, 120 N.E. 546 (Ill. 1918) was overruled to the extent that it asserts a contrary view.

Statutory Construction—Embezzlement—*Commonwealth v. Shafer*, 195 A.2d 825 (Pa. Super. Ct. 1963). Defendant's motion to quash an indictment charging him with embezzlement by a tax collector was granted. On appeal by the Commonwealth, defendant contended that the statute under which he was indicted, PA. CODE §823, which proscribed embezzlement by tax collectors, did not apply to him, a vendor required to collect sales taxes and turn them over to the Commonwealth. The Superior Court of Pennsylvania affirmed, holding that both the language and historical source of §823 indicated that the section was intended to apply to public officials duly elected or appointed to collect taxes rather than to a person such as defendant who, although charged with collecting and turning over sales taxes on items sold by the corporation of which he was president, did not thereby become a public official but rather was manifestly a taxpayer incidentally burdened with the duty of withholding and paying over taxes.

Statutory Construction—Escape—*United States v. Person*, 223 F. Supp. 982 (S.D. Cal. 1963). Defendant was indicted for escape from federal custody in violation of 18 U.S.C. §751. The District Court for the Southern District of California found defendant not guilty, holding that where defendant, who had not yet been paroled, failed to return after a five-hour night pass to the Federal Pre-Release Guidance Center, to which place he had been transferred after serving time in federal institutions and from which he was away each day to go to a job, defendant was not in "custody" within the meaning of the escape statute, and thus must be found not guilty.

Statutory Construction—Federal Kidnaping Act—Aircraft Piracy—*United States v. Healy*, 84 Sup. Ct. 553 (1964). Defendants were indicted for violating (Count 1) the Federal Kidnaping Act, 18 U.S.C. §1201, and (Count 2) the 1961 "aircraft piracy" amendment to §902 of the Federal Aviation Act, 49 U.S.C. §1472(i), by kidnaping at gunpoint the pilot of a private airplane and compelling him to transport them to Cuba. On direct appeal by the Government from the District Court's dismissal of the entire indictment, defendant contended that the Federal Kidnaping Act applied only if the kidnaping was committed for pecuniary benefit, and that the aircraft piracy provision was limited to commercial airliners. In a unanimous opinion written by Mr. Justice Harlan, the United States Supreme Court reversed and remanded with instructions to reinstate both counts of the indictment, holding that since a 1934 amendment added the words "or otherwise" to the Federal Kidnaping Act, which now encompasses the kidnaping of persons held "for ransom or reward or otherwise," nonpecuniary motive did not preclude prosecution under the statute as amended; that the aircraft piracy provision itself, making it a federal offense to exercise control by threat of force of "an aircraft in flight in air commerce," and its relation to the rest of the Federal Aviation Act, *e.g.*, §101 [49 U.S.C. §1301(4)], which defines "air commerce" in such a way as not to exclude private aircraft, as well as the legislative history of the statute, showed that both private and commercial aircraft were protected; and consequently, each count of the indictment properly charged a federal offense.

Statutory Construction—Loitering—*State v. Caez*, 195 A.2d 496 (N.J. Super. Ct. 1963). De-

fendant was convicted of loitering in violation of a city ordinance. On appeal, defendant contended that the ordinance was unconstitutionally vague and indefinite. The Appellate Division of the Superior Court of New Jersey reversed, holding that since the ordinance merely used the word "loiter" but did not define it or set forth any standard by which it could be determined whether one was "loitering" in violation of the ordinance, and since in absence of such clarification activities obviously not intended to be covered by the ordinance, *e.g.*, window shopping, would be punishable, the ordinance, so far as it punished loitering, was invalid.

Statutory Construction—Lottery—*Blackburn v. Ippolito*, 156 So. 2d 550 (Fla. Dist. Ct. App. 1963). Petitioner, a supermarket manager, was arrested for operating a lottery in violation of FLA. STAT. ANN. §849.09, and was discharged upon proceedings below for habeas corpus. On appeal by respondent county sheriff and the State, petitioner contended that while two elements of a proscribed lottery—a prize and an award thereof by chance —were present in the promotional game which he operated, the third essential element—consideration—was absent, inasmuch as the consideration required for conviction was pecuniary consideration given for a chance at a prize, and the game in question involved no pecuniary consideration. Noting that the question was one of first impression in Florida, the Florida District Court of Appeal reversed with directions to quash the writ of habeas corpus and remand petitioner, holding that the consideration essential to conviction need not be pecuniary, but need only be such as would establish a simple contract; that such consideration would exist even if no benefit accrued to petitioner so long as some detriment was suffered by the participants in the game; and where under the promotional scheme operated by petitioner persons were eligible for prizes alloted by chance drawing if they merely registered their names on cards which were punched weekly without pecuniary obligation and appeared in the supermarket parking lot 15 minutes before the weekly drawing, their conduct constituted consideration, inasmuch as they suffered a detriment of time and money in having their cards punched and appearing for the drawing, and because they were subjected to the sales appeal of petitioner's merchandise; and consequently the lower court erred in holding that petitioner's promotional scheme was not a lottery, and the order granting habeas corpus must be reversed.

Statutory Construction—Sodomy—*Riley v. Garrett*, 133 S.E.2d 367 (Ga. 1963). Petitioner, serving consecutive sentences for convictions on two counts of an indictment charging him with sodomy with a female, petitioned for mandamus to compel the Georgia State Board of Pardons and Paroles to consider his application for parole. On writ of error from the Fulton County Superior Court's denial of relief, petitioner contended that since he had served more than one-third of the minimum sentence imposed on Count 1 and the sentence imposed on Count 2 was void because the facts alleged in Count 2 did not constitute a crime under Georgia law, and since the Board erroneously refused to consider his application for parole, mandamus to compel consideration should issue. The Supreme Court of Georgia reversed and issued the writ, holding that in construing a criminal statute fairly and reasonably susceptible of two constructions, the statute must be construed strictly against the state and in favor of the accused; that under this rule of construction, the sodomy statute [GA. CODE §26–5901], defining sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman," did not proscribe the act alleged in Count 2 of the indictment under which defendant was convicted (an unnatural act of copulation between a man and a woman per linguam in vagina), since the phrase "in the same unnatural manner,"—which could refer either to the words "against the order of nature," which construction would make defendant's act criminal, or to the words "by man," which construction would necessitate the use of the male sexual organ and would not cover defendant's act—must be construed in the latter way, strictly against the state; that although collateral attack on a judgment, such as mandamus, cannot be generally substituted for direct attack, this rule does not apply where the judgment was not merely erroneous or voidable but, as here, was utterly void for absence of a law proscribing the act in question; and consequently, since the judgment of conviction on Count 2 was void and petitioner had served, on Count 1, more than the term required by the rules of the Board in order to be eligible for parole, mandamus would issue to compel the Board to consider petititioner's

application for parole from the judgment of conviction on Count 1.

Statutory Construction—Unauthorized Use of Motor Vehicle—*State v. Edmonson*, 371 S.W.2d 273 (Mo. 1963). Defendant was convicted of driving a motor vehicle without the owner's permission in violation of MO. STAT. ANN. §560.175. On appeal, defendant contended, *inter alia*, that his act of steering the car in question while it was being pushed along the street without its motor running by another car did not constitute "driving, using and operating" the car within the meaning of the statute. The Supreme Court of Missouri affirmed, holding that guiding the car along a public street while it was being pushed by another car did constitute "driving, using and operating," since it was not necessary for the car to be running under its own power, inasmuch as any and all acts reasonably necessary to be performed in moving a motor vehicle from one place to another or fairly incidental to the ordinary course of its operation were encompassed by the statutory language.

Traffic Violations—*People v. Lewis*, 194 N.E.2d 831 (N.Y. 1963); *State v. Brown*, 196 A.2d 133 (R.I. 1963). The highest courts of two states have recently considered whether a charge of violating a statute prohibiting, *inter alia*, the driving of a motor vehicle "at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing" was unconstitutionally vague.

The New York Court of Appeals answered in the negative in the *Lewis* case. Noting that although the defendant's act was a traffic infraction rather than a crime, the rules of criminal law were applicable to his prosecution, the Court held that the above-quoted language of the statute in question [N.Y. VEHICLE & TRAFFIC LAW §1180(a)] was not unconstitutionally vague and indefinite, since the language rendered a motorist guilty only if, in view of existing conditions and reasonably foreseeable hazards, he was chargeable with ordinary negligence with respect to speed.

In *State v. Brown*, the Supreme Court of Rhode Island upheld defendant's contention that a complaint alleging a violation in the language of R.I. GEN. LAWS §34-14-1, identical to the language of the New York statute, was so vague as to violate his right to be informed of the nature and cause of the accusation against him. Two subsections [§§34-14-2 & 34-14-3] of §34-14, under neither of which defendant was charged, specified certain standards and evidentiary presumptions for determining whether speed is unreasonable or imprudent. The Court held that all three subsections must be considered as a whole, and that the complaint, which merely alleged the language of §34-14-1 without reference to either of the standard-setting subsections, failed to give defendant adequate notice of the nature of the accusation.

Witnesses—*State v. Solven*, 371 S.W.2d 328 (Mo. 1963). Defendant was convicted of first degree robbery by means of a dangerous and deadly weapon and was sentenced as a fourth offender. On appeal, defendant contended that the trial court committed prejudicial error in not permitting defendant's counsel to show, by cross-examination of the State's chief witness, who had identified defendant as the robber on direct examination, that the witness had refused to discuss the case with defense counsel on advice of the prosecutor. Noting that the case was one of first impression in Missouri and that no case precisely in point had been cited from any jurisdiction, the Supreme Court of Missouri reversed and remanded, holding that since the proferred line of cross-examination would have tended to show the witness's willingness to cooperate with and follow the instructions of the prosecutor and her hostility toward defendant, which matters may properly be the subject of cross-examination because they bear on the credit which should be given the direct testimony, the trial court's refusal to allow defense counsel to pursue the proferred inquiry was prejudicial error, inasmuch as it effectively prevented all examination as to the witness's bias and prejudice.

Witnesses—*State v. Carroll*. 123 N.W.2d 659 (N.D. 1963). See Expert Witnesses, *supra*.