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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

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Abstractor

Civil Rights Act—*Magee v. Williams*, 329 F.2d 470 (7th Cir. 1964). Plaintiff, a Chicago police officer, sued the Superintendent of Police of Chicago and seven Chicago policemen for damages under the Civil Rights Act, alleging that while acting under color of law, in their official capacities as Chicago police officers, defendants conspired to deprive and did deprive plaintiff of federal constitutional and statutory rights, privileges and immunities. The complaint alleged, *inter alia*, that defendant Eubanks persuaded his superiors to conspire against plaintiff as alleged above in order to discredit plaintiff and make him less effective in the matter of charges against Eubanks for which plaintiff lawfully had arrested him, and that pursuant to the conspiracy defendant Williams speeded a car on plaintiff's beat and, while using a hidden recording device in violation of Illinois law, offered him a bribe, which plaintiff refused. On appeal from dismissal of his complaint by the United States District Court for the Northern District of Illinois, plaintiff contended that the complaint alleged denial of Fourteenth Amendment protection, violation of 42 U.S.C. §1983, and a conspiracy to deny equal protection of the laws in violation of 42 U.S.C. §1985(3), and that he did not forfeit his basic constitutional rights by becoming a Chicago police officer and public servant. The Court of Appeals for the Seventh Circuit affirmed, holding that the Illinois electronic eavesdropping statute [ILL. REV. STAT. ch. 38, §§14-2 & -4 (1963)] was not violated, inasmuch as defendant Williams consented to use of the device; and that Williams' conduct toward plaintiff did not constitute attempted entrapment for which plaintiff could conceivably maintain a cause of action, even though the eavesdropping device was used, inasmuch as plaintiff said nothing in the recorded conversation inconsistent with the faithful performance of his police duties. The Court noted that the situation plaintiff complained of was one incident in a general plan to determine which police officers were dishonest as a basis for discharge, and that this plan obviously "would operate for the good of the public as well as every honest police officer," and concluded, "Certainly there is no federal law that a policeman be awarded damages simply because he did his work honestly."

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Confessions—*Jackson v. Denno*, 84 Sup. Ct. 1774 (1964). Petitioner was sentenced to death on his conviction of murder in the New York state courts, and the New York Court of Appeals affirmed. On appeal from the Second Circuit's affirmance of the U.S. District Court's denial of his application for writ of habeas corpus, petitioner contended that his conviction was invalid because it was based upon a confession not properly determined to be voluntary. The United States Supreme Court, per Justice White, reversed and remanded to the District Court to allow the State a reasonable time to afford petitioner a hearing on the issue of voluntariness or a new trial, in default of which petitioner would be entitled to release. The Court held unconstitutional the New York rule, applied to petitioner's confession at the trial, whereby the trial judge makes a preliminary determination regarding the voluntariness of a proffered confession, excluding it only if under no circumstances it could be deemed voluntary, but receiving it as evidence and allowing the jury to determine its voluntariness if he finds the evidence presents a fair question of voluntariness, with the jury being told to consider the confession as evidence and to determine its credibility and weight only if it finds the confession voluntary. The Court held that this rule violated petitioner's fourteenth amendment right to be free of a conviction based upon a coerced confession, inasmuch as the jury may have improperly considered factors relating to truthfulness, such as evidence of guilt, in deciding the question of voluntariness, or, equally unconstitutionally, the jury may have found the confession involuntary but may in fact have been consciously or unconsciously unable to disregard it in determining the ultimate issue of guilt. In so holding the Court expressly overruled *Stein v. New York*, 346 U.S. 156 (1953), which had held New York's procedure as described above not violative of the fourteenth amendment. The ma-

jority explained that *Stein's* underlying alternative assumptions—that either (1) the jury properly determined the facts bearing upon the issue of voluntariness against the accused and properly relied on the confession, or (2) the jury found the contested facts in favor of the accused, deemed the confession involuntary, and disregarded it in accordance with the trial court's instructions—failed to take proper account of the dangers to an accused's rights. As to the first assumption, the *Jackson* majority decided that, since under the New York rule the jury heard both the evidence bearing on voluntariness and all the corroborative evidence showing that the confession was true and that the accused committed the crime, there was a serious danger that the jury disregarded or disbelieved Jackson's testimony pertaining to involuntariness because it believed he was guilty and because the jury was expressly told (consistently with the New York rule) to determine the confession's truthfulness in assessing its probative value. Thus the *Stein* assumption that the jury may have found the confession voluntary under this procedure, said the *Jackson* majority, was erroneous because there was no assurance that the jury *reliably* determined the facts in accordance with the constitutionally required test of voluntariness-regardless-of-truthfulness. The *Jackson* majority noted that the *Stein* holding stemmed from the premise—since overruled by *Rogers v. Richmond*, 365 U.S. 534, abstracted at 52 J. CRIM. L., C. & P.S. 294 (1961)—that the exclusion of involuntary confessions is constitutionally required because of inherent untrustworthiness. As to *Stein's* second assumption, the Court refused to believe that a jury can entirely disregard a confession it believed to be true merely because it found the confession to be involuntary. The Court distinguished the disapproved "New York rule" from both the "orthodox rule," under which the trial judge is the sole judge of voluntariness and the jury passes only on the weight of confessions he decides are voluntary, and the "Massachusetts rule," whereby the jury determines both voluntariness and weight only after the trial judge has resolved the voluntariness issue against the accused.

Justice Black concurred in part and dissented in part, stating that in his opinion the confession in question was involuntary because of "inherently coercive circumstances," and thus he would reverse and remand, releasing petitioner from custody unless the state retried him within a reasonable time. In that part of Black's opinion in which Justice Clark joined, Justice Black was of the opinion that the majority's ruling was based on the erroneous conclusion that any state procedure it believed unfair was therefore unconstitutional, and that the instant decision, in finding the New York jury determination "tainted by inherent unreliability," undermined the Constitution's draftsmen's implicit belief in the soundness of the jury system.

In his separate dissent, Justice Clark would not have considered the issue because of petitioner's failure to attack the constitutionality of New York's procedure in the state courts, and further stated, "If I am in error on this, then I join my Brother Harlan. His dissent is unanswerable."

Justice Harlan dissented in an opinion in which Justices Clark and Stewart joined. Harlan stated that the majority's decision rested on a rationale of jury incompetence which in effect condemned the jury system generally, noting that the Court has consistently, and, in Harlan's opinion, correctly, rejected that rationale in recent cases, even in one tried in the federal courts [*Delli Paoli v. United States*, 352 U.S. 232 (1957)], over which the Court's supervisory authority is much broader than its authority to dictate state procedures. Justice Harlan stated, "Limitations on the States' exercise of their responsibility to prevent criminal conduct should be imposed only where it is demonstrable that their own adjustment of the competing interests infringes rights fundamental to decent society. The New York rule now held unconstitutional is surely not of that character."

[The majority opinion and Black's opinion contain appendices listing decisions of states and federal circuits according to which procedures of determining confession voluntariness are followed.]

Confessions—*Rogers v. United States*, 330 F.2d 535 (5th Cir. 1964). Defendant was convicted of forging a U.S. Government check. On appeal, defendant contended that his confession and handwriting sample were improperly received in evidence, inasmuch as they were obtained during a period of unnecessary delay in violation of FED. R. CRIM. P. 5(a), and because they were the product of his illegal arrest. The Court of Appeals for the Fifth Circuit, per Wisdom, J., affirmed, holding that where the first hour of delay after defendant's arrest by state officers and booking on state charges was devoted to apprehending his confederate, one

Swallow, attempts were begun as soon as Swallow was in custody to reach the U.S. Commissioner, who did not have regular office hours, for arraignment on the federal charge, and the federal arraignment was held two or three hours thereafter, it was proper to interrogate defendant between arrest and federal arraignment so long as none of his rights was abused, inasmuch as the delay was for legitimate police purposes rather than for the impermissible purpose of seeking to elicit a confession; that consequently, defendant was not detained in violation of Rule 5(a), so his confession and handwriting sample were not inadmissible on that ground; that the arresting Secret Service agent possessed information (consisting of knowledge that forgery had been committed, information from a source known by him to be reliable that Swallow implicated defendant in the crime, information from a detective that defendant had been convicted of forgery, and knowledge that Swallow had closed his place of business and disappeared) sufficient to constitute probable cause to arrest defendant without a warrant; but even assuming *arguendo* that defendant's arrest was illegal, there was sufficient evidence of defendant's "freedom of mind," where defendant's arrest was not surrounded by "oppressive circumstances," three hours elapsed between arrest and confession, and interrogation was non-continuous, to conclude that his confession and handwriting sample were the product of an intervening act of free will so that any illegality involved in the arrest did not taint the voluntarily given evidence or render it inadmissible under the rule of *Wong Sun v. United States*, 371 U.S. 471, abstracted at 54 J. CRIM. L., C. & P.S. 189 (1963).

Double Jeopardy—*United States v. Tateo*, 84 Sup. Ct. 1587 (1964). Defendant was convicted on four counts relating to federal bank robbery. In a §2255 proceeding, another district judge granted defendant's motion to set aside the judgment on the ground that defendant's pleas of guilty on the fourth day of his jury trial were coerced. When defendant was then re-indicted on a kidnaping charge that had been dismissed when he pleaded guilty to the four bank robbery charges and on those four counts, a third district judge, before whom defendant was to be retried, granted his motions for dismissal of all counts on grounds of double jeopardy. On direct appeal by the Government [which had then abandoned the kidnaping count] pursuant to 18 U.S.C. §3731, defendant contended that where during the course of a jury trial he had pleaded guilty under coercion of the trial judge's threats of extreme sentences if found guilty by the jury, his retrial constituted double jeopardy, and that his retrial should not be allowed on the rationale that an accused found guilty by a jury whose conviction is later reversed at his instance for trial error can be retried without being put in double jeopardy, inasmuch as defendant's situation was distinguishable on the ground that his involuntary plea of guilty deprived him of the opportunity to obtain a jury verdict of acquittal. In an opinion written by Justice Harlan, the United States Supreme Court reversed and remanded to the District Court with instructions to reinstate the four bank robbery counts, holding that it is well settled that the fifth amendment's double jeopardy provision does not preclude retrial of a defendant whose conviction is set aside because of an error leading to conviction; that it was irrelevant in applying this principle whether the original conviction was overturned in collateral or direct proceedings; and, in answer to defendant's argument that his case must be distinguished from those in which defendants found guilty by a jury may be constitutionally retried after reversal, that defendant was no more wronged by failure to get a jury verdict than one who was found guilty by a jury in a trial at which error was committed; and consequently defendant could be retried without being placed in double jeopardy. The Court noted that *Downum v. United States*, 372 U.S. 734, abstracted at 54 J. CRIM. L., C. & P.S. 494 (1963), was not inconsistent with the instant decision. The Court concluded that defendant's case was squarely within the reasoning of *United States v. Ball*, 163 U.S. 662 (1896), and subsequent cases allowing the Government to retry persons whose convictions have been overturned and justified the permissibility of retrial not on any technical legal theory, but rather on the basis of the "implications of the [*Ball*] principle for the sound administration of justice." The majority reasoned that society's clear interest in punishing the guilty would be undermined if every accused were granted immunity from subsequent prosecution because of any reversible error in the original trial and further stated that the *Ball* rule allowing retrial serves defendants' rights as well as society's interest, inasmuch as "it is at least doubtful that appellate courts would be as zealous as they now

are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution."

Justice Goldberg, with whom Justices Black and Douglas joined, dissented, stating that the majority improperly limits the *Downum* case, *supra*, since just as Downum was deprived of his constitutional right to be tried by the impaneled jury because of prosecutorial neglect, Tateo was deprived of this right by reason of the trial court's threat which produced the admittedly coerced pleas of guilty.

Entrapment—*United States ex rel. Hall v. Illinois*, 329 F.2d 354 (7th Cir. 1964). Petitioner was convicted of unlawful sale and possession of narcotics in the Illinois state courts, the Illinois Supreme Court affirmed, and the United States Supreme Court denied certiorari. On appeal from summary denial by the United States District Court for the Northern District of Illinois of his petition for writ of habeas corpus, petitioner contended that freedom from entrapment is a right protected by the due process clause and thus was properly raised in his federal habeas corpus petition, and that the Illinois courts erred as a matter of law in holding he had not been entrapped. Noting that this was a case of first impression in the federal courts on the constitutional issue, the Court of Appeals for the Seventh Circuit affirmed, holding that petitioner's contentions attempting to analogize entrapment to the exclusionary rules concerning unlawful search and seizure and coerced confessions were fallacious, since state and federal cases evidenced that the states have used the same standards of entrapment as have the federal courts and have afforded accuseds the unfettered protection of the doctrine of entrapment when the facts establish that a crime was induced by law enforcement officials; that where the several states have thus consistently discharged their responsibility to society in giving full recognition of their constitutional obligation to prevent lawless enforcement of the criminal law—as the states have done in the area of entrapment—the need for federal intervention is "not apparent"; and consequently, petitioner's claim that the Illinois courts' determination of his entrapment defense was invalid did not constitute a claim of deprivation of a federally guaranteed right raisable on petition for writ of habeas corpus.

Obscenity—*Jacobellis v. Ohio*, 84 Sup. Ct. 1676 (1964). Defendant was convicted of possessing and exhibiting an obscene film, and the Ohio intermediate appellate and supreme courts affirmed. On appeal, defendant contended that the movie "The Lovers" was not obscene when tested, as it must be, against national as opposed to local community standards. In an opinion by Justice Brennan, in which Justice Goldberg joined, announcing the judgment of the Court, the United States Supreme Court reversed, holding that the film was not obscene, and that consequently, defendant's conviction violated his first amendment rights. Stating, "It is, after all, a national Constitution we are expounding," Justice Brennan's opinion declared that the standard to be applied must be a national rather than a local community standard, since the alternative would result in the same material being constitutionally punishable in some areas but not in others. Justice White concurred in the judgment without opinion. Justice Black's concurring opinion, joined by Justice Douglas, stated that any conviction for exhibiting a motion picture violates freedom of the press. Justice Stewart, concurring, stated that criminal laws in this area are constitutionally limited to hard-core pornography, which may be difficult to define, "But I know it when I see it . . . ." Justices Warren, Clark, and Harlan dissented, being of the opinion that the State's determination of obscenity was supported by sufficient evidence, not irrational, and not unconstitutional.

[This case is somewhat unusual in that the Court actually viewed the entire film before passing judgment, thus carrying to the utmost its articulated rule that it has a responsibility independently to determine facts of constitutional magnitude.]

Right to Counsel—*Escobedo v. Illinois*, 84 Sup. Ct. 1758 (1964). Petitioner was convicted of murder, and the Illinois Supreme Court affirmed. *People v. Escobedo*, 190 N.E.2d 825, abstracted at 54 J. CRIM. L., C. & P.S. 492 (1963). On certiorari, petitioner contended that since his incriminating statement was obtained after the police refused to allow him to consult with his attorney, use of the statement as evidence at his trial violated his right to due process of law. The United States Supreme Court, per Justice Goldberg, reversed and remanded, holding that even though petitioner had not then been indicted, the adversary system had begun to operate—and thus petitioner's right to counsel arose—as of when the investigation

ceased to be a general inquiry into an unsolved crime and began to focus on petitioner for the purpose of obtaining a confession; that police refusal of petitioner's requests to see his retained counsel, who was in the building where petitioner was being held, coupled with their continuing to interrogate him without advising him of his absolute right to remain silent, constituted deprivation of petitioner's right to counsel; and therefore the statement elicited from petitioner during this interrogation could not constitutionally be used against him. Discussing the historical and philosophical foundations for its decision, the majority opinion stated that "a system of criminal enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than one which depends on extrinsic evidence independently secured through skillful investigation," and that "no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, those rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." The Court also noted that *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. LaGay*, 357 U.S. 504 (1958), were distinguishable on the ground that in *Escobedo* petitioner was not informed of his right to remain silent, but that to the extent that those cases were inconsistent with *Escobedo* they were no longer controlling.

Justices Harlan, Stewart, White, and Clark dissented, all of the opinion that the majority's decision would unjustifiably and seriously fetter legitimate methods of law enforcement. Justices White, Clark, and Stewart deplored what they regard as an inevitable though not yet decided corollary to *Escobedo*—that indigents must have counsel at some accusatorial pre-indictment stage —as unworkable "unless police cars are equipped with public defenders . . . ."

Right to Counsel—*Massiah v. United States*, 84 Sup. Ct. 1199 (1964). Petitioner was convicted of federal narcotics offenses, and the Court of Appeals affirmed. *United States v. Massiah*, 307 F.2d 62 (2d Cir. 1962), abstracted at 54 J. CRIM. L., C. & P.S. 77 (1963). On certiorari, petitioner contended that where a radio transmitter was installed in co-defendant Colson's car by Government Agent Murphy, with Colson's consent, Murphy's testimony regarding incriminating statements petitioner made while, unaware that the transmitter was sending the conversation to Murphy's receiving device some distance away, petitioner voluntarily engaged in a conversation with Colson in the car, should not have been used against him at the trial, inasmuch as use of the radio equipment violated his fourth amendment rights, and, alternatively, because use against him of the statements elicited from him by Government agents after indictment and in the absence of retained counsel violated petitioner's fifth and sixth amendment rights. Noting that the fourth amendment issue was not reached, the United States Supreme Court, in an opinion written by Justice Stewart, reversed, holding that petitioner was denied the basic protections of the sixth amendment when evidence of his incriminating statements, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel, was used against him at his trial. "Fourth Amendment problems to one side," the Court accepted and, for present purposes, approved, the Government's argument that the agents were justified in making use of Colson's cooperation by having him continue his normal associations, and stated that it was "entirely proper to continue an investigation of the suspected criminal activities of . . . [petitioner] and his alleged confederates, even though . . . [petitioner] had already been indicted."

Justice White dissented in an opinion in which Justices Clark and Harlan joined, stating that if Colson had had no prior arrangements with the police and had gone to the police after his conversation with petitioner, his testimony regarding petitioner's statements, as well as a recording he might have made, would be admissible, whereas because of Colson's prior cooperation with the government, "both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same—the defection of a confederate in crime." The dissenters were unable to see how under the facts of this case petitioner's right to counsel was infringed, and they believed the majority was unjustified in formulating a rule requiring exclusion of voluntary statements in the absence of any facts, objective evidence, or reasons to warrant

"scrapping" the voluntary-involuntary test in this area.

Search and Seizure—*Aguilar v. Texas*, 84 Sup. Ct. 1509 (1964). Petitioner was convicted of illegal possession of heroin by the Texas state courts, and the Texas Court of Criminal Appeals [the highest Texas court hearing appeals of criminal cases] affirmed. On certiorari, petitioner [apparently] contended that evidence obtained pursuant to a constitutionally defective warrant was used against him at the trial. The United States Supreme Court, per Justice Goldberg, reversed and remanded, holding that the standard for obtaining a search warrant was the same under the fourth and fourteenth amendments [citing *Ker v. California*, 347 U.S. 23, abstracted at 54 J. CRIM. L., C. & P.S. 488 (1963), as authority for this holding, while noting that *Ker* itself involved a search without a warrant]; that since the fourth amendment's protection prefers the informed and deliberate judicial determinations of a magistrate issuing a warrant to actions without warrants based upon a police officer's determination of probable cause, a reviewing court examining the validity of a search warrant based upon a neutral magistrate's determination of probable cause will accept evidence of a less judicially competent or persuasive character than that which would be required to justify a police officer acting without a warrant, and will sustain the judicial determination of probable cause so long as it rested upon a substantial basis; and where the search warrant in question had been issued on the affidavit of two police officers, which stated, *inter alia*, that "affiants have received reliable information from a credible person and do believe [that narcotics were being unlawfully kept on the described premises]," and set forth neither any underlying circumstances from which affiants' undisclosed informant concluded that narcotics were where he claimed they were nor any underlying circumstances from which the officers concluded that the informer was "credible" or his information "reliable," the affidavit did not provide a sufficient basis for the magistrate's finding of probable cause; and consequently, the warrant was constitutionally invalid, and the evidence obtained thereunder should not have been admitted against petitioner.

In a dissenting opinion written by Justice Clark, in which Justices Black and Stewart joined, these Justices stated that they would affirm on the ground that since the affiants made a sworn statement that they had received reliable information from a credible informer, and the officers did not make the affidavit nor obtain the warrant until after they had undertaken a week-long surveillance of the premises, the affidavit did not constitute a mere "conclusion" or "suspicion" insufficient to justify the finding of probable cause requisite to issuance of a valid warrant. [It should be noted that the officers' surveillance of the premises covered by the warrant, which was disclosed on petitioner's motion to suppress below, was not mentioned in the affidavit and thus was irrelevant to disposition of the instant case, inasmuch as in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention. While the majority does not treat this issue in the text of its opinion, the above statement is a paraphrase of its footnote 1.]

Search and Seizure—*Presley v. Pepersack*, 228 F. Supp. 95 (D. Md. 1964). After petitioner was convicted of rape and sentenced to death, the Maryland Court of Appeals affirmed, and the United States Supreme Court denied certiorari. Petitioner's application for state post-conviction relief was denied, and the Maryland Court of Appeals denied leave to appeal. On petition for writ of habeas corpus, petitioner contended that illegally seized evidence was admitted against him at the trial, that involuntary confessions were used against him, that he was denied effective assistance of counsel, and that the prosecuting authorities suppressed alibi evidence favorable to him. The United States District Court for the District of Maryland ordered that the writ issue in 30 days unless the State should retry petitioner or seek appellate review of this decision, holding that where, after petitioner was taken to the police station, his apartment was searched without a warrant, without his consent, and in the absence of any exceptional circumstances obviating the necessity of either, the search was in violation of petitioner's constitutional rights; and consequently, since illegally seized tangible items and testimony concerning certain other illegally seized tangible items were introduced against petitioner at the trial, and the jury was not precluded from considering this evidence, petitioner was convicted in violation of his constitutional rights, and habeas corpus must issue subject to the State's opportunity to seek appellate review or to retry petitioner. The Court noted that petitioner's

suppression of exonerating evidence point was rendered moot by this decision, inasmuch as the suppressed information would now be available to petitioner for purposes of possible retrial. In view of its decision to issue the writ on the search and seizure ground, the Court declined to consider petitioner's confession and counsel contentions, stating, "It is more appropriate in the interest of comity that the courts of the State of Maryland be the first to consider the petitioner's contentions as they have been changed by later cases . . . ."

Search and Seizure—*United States v. Poppitt*, 227 F. Supp. 73 (D. Del. 1964). Defendants, charged with accepting wagers without payment of tax, moved to suppress evidence, contending that the warrant under which their home was searched failed to describe the premises with sufficient particularity, and that the warrant was executed in violation of 18 U.S.C. §3109. The District Court for the District of Delaware denied the motion, holding that where the affidavit on which the warrant was issued did particularly describe the property to be searched, characterizing it as a one-family dwelling, whereas actually defendants lived in the first floor and basement while the second floor was an apartment rented by three men unconnected with the charges against defendants, the question of description was really a question of probable cause; that where the affidavit set forth probable cause to believe, *inter alia*, that the house was a one-family dwelling—e.g., the affidavit stated that a deed to the premises was recorded in defendants' names, that the building was a one-family dwelling—and the Commissioner had no reason to believe anyone other than defendants lived therein, the warrant was properly issued to search the whole house; and since the affiant himself had reasonable grounds to believe the house was a one-family dwelling, and the second floor of the house was not searched, the evidence obtained under the properly issued warrant was admissible even though it was later disclosed that the warrant applied to premises in addition to those actually occupied by defendants. With regard to defendants' alternative contention that the officers unlawfully broke into the house in executing the warrant, the Court held that although the officers did "break in" when they pushed open an unlocked but closed screen door and entered through the already opened permanent door, this conduct was not in violation of §1309, inasmuch as they waited 15 seconds after knocking, announcing their authority and purpose, and receiving no response thereto before they broke in.

Self-Incrimination—*Malloy v. Hogan*, 84 Sup. Ct. 1489 (1964). Petitioner was convicted of contempt by a Connecticut state court for refusing to answer questions in a state gambling inquiry, and the Connecticut Supreme Court of Errors affirmed. On certiorari, petitioner contended that he was privileged not to answer the questions by virtue of the fourteenth amendment's due process clause, which guaranteed him the protection of the fifth amendment's privilege against self-incrimination. Noting that "the Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme" [citing as examples *Gitlow v. New York*, 268 U.S. 652 (1925), where the Court reversed its previous position that the first amendment was not applicable to the states through the fourteenth; *Mapp v. Ohio*, 367 U.S. 643, abstracted at 52 J. CRIM. L., C. & P.S. 292 (1961), where the Court reversed its prior holding that the fourth amendment's exclusionary rule was merely a rule of evidence not binding on the states as part of due process; and *Gideon v. Wainwright*, 372 U.S. 335, abstracted at 54 J. CRIM. L., C. & P.S. 193 (1963), where the Court reversed its holding that the sixth amendment's right to counsel was not applicable to the states], the United States Supreme Court, per Justice Brennan, reversed, holding that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States"; that the privilege was available to petitioner in the statutory inquiry even though he was not then a defendant in a criminal prosecution; and since it was evident from the implications of each of the questions asked which petitioner refused to answer together with the setting in which it was asked that an answer or an explanation why it could not be answered could result in the disclosure of incriminating evidence, petitioner's claim of privilege was properly asserted, and his privilege was unconstitutionally abridged by his contempt conviction. In reaching its conclusion, the Court noted that United States Supreme Court cases forbidding the use of coerced confessions in state

criminal cases and *Mapp v. Ohio*'s language concerning the fifth amendment's interrelationship with the fourth had already undermined and repudiated *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947), which were overruled by the instant decision. The Court further held that the same standard which determines the validity of a claim of privilege asserted in a federal proceeding must be applied in a State proceeding, citing first amendment, search and seizure, and right to counsel cases as exemplary of the prior application of uniform standards in constitutional areas.

Justices Harlan and Clark dissented in an opinion written by the former, stating that due process prohibits a state, as the fifth amendment prohibits the federal government, from imprisoning a person *solely* because he refuses to give testimony which may incriminate him under state law; but Harlan and Clark disagreed with the Court's "incorporation" of the fifth amendment, together with the whole body of federal case law surrounding the privilege as directed against the federal government, into fourteenth amendment due process, stating that under our system of federalism, which should recognize relevant differences existing between state and federal criminal law enforcement, compelled uniformity of standards between state and federal assertion of a federally guaranteed right was ill-advised. They would have applied in this case—as they have advocated in all such cases—a test of fundamental fairness to determine to what degree, if any, the fifth amendment must be held applicable to the states.

Justice Stewart joined in Justice White's dissent, stating that petitioner failed adequately to assert the privilege in the instant case, and criticizing the majority's resort to speculation to hold that the questions asked petitioner were liable to result in incriminating answers or explanations. Justices Harlan and Clark agreed that the privilege had not properly been invoked. [Although Stewart and White did not express their agreement with the majority's basic holding that the fifth amendment applies to the states, the fact that they discussed the validity of petitioner's invocation of the privilege without expressing disagreement with that holding indicates their tacit agreement.]

Mr. Justice Douglas joined in the Court's opinion while expressly stating that he adheres to his concurrence in *Gideon*. [In that concurrence, Douglas had stated that the entire Bill of Rights applies to the states through the fourteenth amendment. The precise holding of *Gideon* involved a state felony charge. The Justices agreeing with the entire majority opinion in *Malloy* (Brennan, Goldberg, Warren, and Black) and Justice Douglas presumably agree with Brennan's statement in the majority opinion (at 1495) that the fourteenth amendment guarantees a state defendant the *same* sixth amendment right to counsel as that afforded a federal defendant—i.e., five of the nine Justices now agree that state defendants have a federal constitutional right to counsel in *all* state criminal cases, including those charging only minor misdeameanors.]

Self-Incrimination—*Murphy v. Waterfront Commission*, 84 Sup. Ct. 1594 (1964). Petitioners were held in civil and criminal contempt of court for refusing to testify at a hearing of the New York Harbor Waterfront Commission (a New York-New Jersey joint entity) after being granted immunity from prosecution under the laws of New York and New Jersey. The New Jersey Supreme Court reversed the criminal convictions on procedural grounds, but affirmed the civil contempt judgments. On certiorari, petitioners contended that their answers might tend to incriminate them under federal law, to which the grant of immunity did not purport to extend. In an opinion written by Justice Goldberg, the United States Supreme Court sustained the judgment ordering petitioners to answer the questions, but vacated and remanded the contempt judgments to the New Jersey Supreme Court to afford petitioners an opportunity, in light of the instant decision, to answer the questions. The Court held that since the fifth amendment now applies to state as well as federal criminal proceedings, citing *Malloy v. Hogan*, 84 Sup. Ct. 1489 (1964), abstracted *supra*, all the prior cases [discussed at length in the opinion] which would dictate that there was no constitutional objection to one sovereign's use in a criminal prosecution of testimony compelled by another sovereign, and which rested on the rule rejected by *Malloy*, were similarly rejected; that there was therefore "no continuing vitality to, nor historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction"; and consequently, "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state

law and a federal witness against incrimination under state as well as federal law." As to the instant decision's effect upon existing state immunity legislation, the Court further held that in light of its holding that the privilege against self-incrimination protects a state witness from federal prosecution, and *Malloy*'s holding that the same standards must be applied to determine the validity of invocation of the privilege in either a state or federal proceeding, "the constitutional rule . . . [is] that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." The majority concluded that "to implement this constitutional rule and accomodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." The Court noted that this exclusionary rule, while permitting the states to secure necessary information, leaves the witness and the federal government in substantially the same position as if the witness had successfully claimed his privilege in state proceedings in the absence of a state grant of immunity. The Court's order sustaining the state court judgment ordering petitioners to answer the questions but vacating and remanding the contempt judgments to allow petitioners an opportunity to answer was based upon the premises that the *Murphy* holding dictates that no use can be made in a federal criminal prosecution against petitioners of their state-compelled immunized testimony, and that at the time petitioners refused to answer they had a reasonable fear, based on *Feldman v. United States*, 322 U.S. 487 (1944) (overruled by the instant decision), that their state immunized testimony could be used against them in a subsequent federal prosecution.

In a concurring opinion by Justice White, with whom Justice Stewart joined, White stated why the majority's exclusionary rule—whether viewed as an exercise of the Court's supervisory power over federal law enforcement or a constitutionally compelled rule—was both necessary and desirable. [The majority opinion had concluded the rule would be adopted without further discussion than that abstracted above.] The concurring Justices also emphasized that once a federal criminal defendant shows that he was compelled by a state to give testimony, he can nonetheless be prosecuted by the federal government for activities relating to his testimony so long as the Government can demonstrate that its evidence against the defendant is independent of and untainted by the compelled testimony. [The majority had also made this point, but in a footnote.]

Justice Harlan, in a separate opinion in which Justice Clark joined, concurred in the judgment solely on the ground that testimony compelled in a state proceeding should not be used in a federal criminal trial on the basis of a supervisory rule of exclusion, stating that, in their opinion, the majority's holding requiring such exclusion erroneously rests on constitutional grounds. These Justices adopt a supervisory power exclusionary rule because it is "protective of the values which the federal privilege aginst self-incrimination expresses, without in any way interfering with the independent action of the States and the Federal Government in their respective spheres," rather than in reliance on *Malloy*.

[It should be noted that, while the facts of the instant case concern only the possible incrimination under federal law of a witness compelled to testify in a state proceeding, and the newly adopted exclusionary rule deals only with that situation, the majority's broad statements, which are characterized in the language of the opinion itself as "holdings," also include the reverse situation—involving possible incrimination under state law brought about by federally compelled testimony. If the majority's exclusionary rule is merely a supervisory power rule of evidence, then it is an open question how to protect from subsequent state prosecution a witness whose testimony is sought to be compelled in a federal proceeding; if the rule is constitutionally compelled, then the corollary rule will doubtless be applied to the states in a situation where state-incriminating testimony has been federally compelled. As mentioned above, the majority fails expressly to state which of these alternatives is its basis for the rule.]

Self-Incrimination—*Wild v. Brewer*, 329 F.2d 924 (9th Cir. 1964). Albert J. Wild, President of Air Conditioning Supply Co., was ordered by the United States District Court for the District of Arizona, on application of one Brewer, an agent of the Secretary of the Treasury, to appear before the Court and produce certain records of the corporation which he had refused to produce as required by a summons served against him as president of the corporation by Brewer in connection with an

investigation of the corporation's tax liability. On appeal from the court order, Wild contended that he was privileged not to produce the books and records of the corporation of which he was the sole shareholder and director, inasmuch as these items would tend to incriminate him under federal criminal law. The Court of Appeals for the Ninth Circuit set aside the order appealed from and remanded to the District Court with a direction to dismiss Brewer's application, holding that although a corporation has no privilege against self-incrimination, and although ordinarily an officer of a corporation who, in his capacity as officer, has custody of corporate records, cannot successfully refuse to produce those records in response to a subpoena issued to the corporation and served upon him as custodian, on the ground that the records contain material which would incriminate him, that rule would not apply to Wild, since the reasons justifying the rule—that a corporation is an impersonal embodiment of the group interests of its constituents, and that shareholders have a right not to be damaged by their officer's suppression of records which he holds only as a custodian for them—did not apply to his situation, since as sole shareholder of the corporation, the corporation embodied his interest alone, and no one but himself could be affected by what he did with the corporation; and consequently, Wild was entitled to assert his personal privilege against self-incrimination as to the corporate records sought. The Court noted that the instant decision extended the privilege "beyond the borders marked by the precedents . . . ." One judge dissented.

Self-Incrimination—*United States v. Fleish*, 227 F. Supp. 967 (E.D. Mich. 1964). Defendant was convicted in 1939 on 14 counts of violations of the National Firearms Act, 26 U.S.C. §§5841, 5854(b), & 5851 [§§3261(b), 3263(b), & 2726(a) of the 1939 Code, under which defendant was convicted], and was sentenced to six consecutive five year sentences on one count of failing to pay a required tax and five counts of failing to register. Defendant was never sentenced on the remaining eight counts. On motion to vacate sentence, defendant contended that the registration provision of the National Firearms Act, 26 U.S.C. §5841, is unconstitutional as violative of the fifth amendment privilege against self-incrimination. The United States District Court for the Eastern District of Michigan vacated the sentence and ordered defendant's release, holding that since anyone who complies with the registration requirement of §5841 necessarily admits that he is in illegal possession of a firearm, that section violates the privilege against self-incrimination [relying on *Russell v. United States*, 306 F.2d 402 (9th Cir. 1962)]; and since defendant had already served 20 years, only five of which were supported by a valid conviction, he must be released, even though there were convictions on eight counts which could support the 30 year sentence imposed, inasmuch as no sentence had been imposed on those counts, and to impose sentence now on those 1939 convictions would violate FED. R. CRIM. P. 32(a)'s requirement of imposing sentence without unreasonable delay. Noting that the United States Supreme Court has never declared a registration statute violative of the fifth amendment, the District Court quoted language in several United States Supreme Court decisions lending support to the instant decision. The gambling stamp cases were distinguished on the ground that, while in those cases one must register an *intention* to commit a crime, in the Firearms Act each registrant declares not an intention but *current criminal activity*.

Wiretapping—Standing To Object—*United States v. Tane*, 329 F.2d 848 (2d Cir. 1964). Defendant, a union official, was indicted for unlawfully receiving money from an employer. The District Court for the Eastern District of New York granted defendant's motion to suppress proffered testimony and dismissed the indictment on the ground that it had resulted from an illegal wiretap. On appeal by the Government, defendant moved to dismiss for lack of appellate jurisdiction and contended that the trial court properly ruled that the proffered testimony could not be used and correctly dismissed the indictment, inasmuch as the proffered testimony and the indictment were the product of a wiretap in violation of §605 of the Federal Communications Act. The Court of Appeals for the Second Circuit denied defendant's motion to dismiss the appeal, holding that since the order dismissing the indictment was appealable under 18 U.S.C. §3731, the order suppressing evidence, though not appealable standing alone, was appealable where it was coupled with the dismissal, and where the basis of dismissal of the indictment was inextricably intertwined with the basis of the suppression order. The Court affirmed the lower court's judgment, holding that defendant had