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Abstracts of Recent Cases

ABSTRACTS OF RECENT CASES

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Prosecutor May Peremptorily Challenge Negroes—*Swain v. Alabama*, 85 S.Ct. 824. Defendant was convicted of rape and sentenced to death. The Supreme Court granted *certiorari* to consider claims of the improper exclusion of Negroes from the trial jury. Among those claims was a question not heretofore examined by the Court in its long history of cases dealing with the exclusion of minority groups from state grand and petit juries —the extent to which a prosecutor may, through the vehicle of the peremptory challenge, exclude Negroes from a jury.

In affirming the conviction, the Court distinguished, to a great extent, the rules previously laid down in cases involving the exclusion of Negroes from grand and petit juries by state jury officials. "The essential nature of the peremptory challenge," the Court said, "is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control ... [and,] unlike a challenge for cause, permits rejection for a real or imagined partiality that is less easily designated or demonstrable." Since the challenge "is frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty ... the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." The Court then concluded that "the striking of Negroes in a particular case is [not] a denial of equal protection of the law for ... in the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."

The Court did agree, however, that a showing that the prosecutor in a particular county, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries" may require a different result since under "these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted."

Confrontation Clause Applies to State Trials—*Pointer v. Texas*, 85 S.Ct. 1065 (1965). In reversing a Texas robbery conviction, the Supreme Court of the United States has held that the "Confrontation Clause" of the sixth amendment ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....") is "a fundamental right and is made obligatory on the States by the Fourth Amendment."

During the preliminary hearing held prior to defendant's trial, the victim testified and identified defendant as one of the men who had robbed him at gunpoint. Defendant was not represented by counsel and did not seek to cross-examine the victim. By the time of trial, the victim had moved to California and was not available as a witness. Over the objection of defendant, a transcript of the victim's testimony at the preliminary hearing was introduced and the Texas Court of Criminal Appeals affirmed defendant's conviction on the trial court's holding that he had been " 'accorded the opportunity of cross examining the witnesses there against him.' "

After declining to decide the broader question of whether an accused is entitled to the appointment of counsel at a preliminary hearing which is not, under state law, a "critical stage in the proceedings" (see *White v. Maryland*, 373 U.S. 59), the Court held that the right to confront the witnesses includes the right of cross-examination and since there had been no "full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine ... it follows that use of the transcript to convict petitioner denied him a constitutional right."

In a companion case, *Douglas v. Alabama*, 85 S.Ct. 1074 (1965), the Court held that the

Confrontation Clause was violated when the prosecution, "in the guise of cross-examination to refresh" the recollection of a hostile witness who invoked the privilege against self-incrimination when called to testify, read the confession of the witness (which implicated defendant), preceding each few questions with the phrase "Did you make that statement?" Since the invocation of the privilege by the witness deprived defendant of the opportunity to effectively cross-examine him, the Court held, the Confrontation Clause was violated, even though the reading of the confession by the prosecutor coupled with the refusal to answer by the witness was not technically *testimony*, since the witness's refusal "created a situation in which the jury might improperly infer both that the statement had been made and that it was true."

Comment on Defendant's Failure to Testify— *Griffin v. California*, 85 S.Ct. 1229 (1965). In the last issue of the Journal, we noted that in the absence of an authoritative ruling from the Supreme Court of the United States, the Supreme Court of California had held, in *People v. Modesto*, 398 P.2d 753 (Cal. 1965), that comment on the failure of a defendant to testify in a state criminal case was not forbidden by the fifth amendment. (See 56 J. CRIM. L., C. & P.S. 224.) Now, in *Griffin*, the Supreme Court has ruled—such comment *is* forbidden.

Griffin was convicted of murder and sentenced to death in California. At his trial, the prosecutor recounted the evidence against the defendant and told the jury, in closing argument, that "These things he has not seen fit to take the stand and deny or explain." In his instructions to the jury, the trial judge charged that the jury might take into account defendant's failure to testify as to matters which he could reasonably be expected to deny or explain, and could draw from that failure inferences unfavorable to the defendant's case.

In reversing, Mr. Justice Douglas, writing for the Court, said that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' which the Fifth Amendment outlaws . . . is a penalty imposed by courts for exercising a constitutional privilege . . . [and] cuts down on the privilege by making its assertion costly." To the argument of the California court in the *Modesto* case (that the jury would draw unfavorable inferences whether or not instructed by the court that they might do so), Mr. Justice Douglas said that "What the jury may infer given no help from the court is one thing. What they may infer when the court solemnizes the silence of the accused into evidence against him is quite another."

Comment: Though few states allowed comment prior to the *Griffin* opinion, the number of reversals which will flow as a consequence of that decision may mount if it is given *retroactive* effect. Although the opinion does not even hint at the answer, prosecutors and defense counsel will note that *Gideon v. Wainwright*, 372 U.S. 335 (1964) requiring the appointment of counsel for indigents in all felony cases, is probably retroactive (see *Durocher v. LaVallee*, 330 j.2d 303 (2d Cir. 1964), *cert. denied*, 84 S.Ct. 1921), and the Court has held that *Mapp v. Ohio*, 367 U.S. 643 (1965), requiring the suppression in state courts of illegally obtained evidence, does not affect convictions final before the date of that ruling. See *Linkletter v. Walker*, 85 S.Ct. 1731 (1965). An answer will be forthcoming sometime in the 1965–1966 Term of the Court, for *certiorari* has been granted in a case where the parties have been specifically directed to brief and argue the question of *Griffin's* retroactivity. *Tehan v. Shott*, 85 S.Ct. 1650 (1965).

Secondly, in *Griffin*, the court expressly reserved the question of whether the fifth amendment affirmatively compels the giving of an instruction, at defendant's request, that the jury *must disregard* the fact that defendant has not testified. Though the instruction is commonly given in state courts where comment has long been forbidden, and in the federal system, *Bruno v. United States*, 308 U.S. 287, it has not been given, of course, in those states where comment was allowed. The prudent prosecutor, we believe, would not hereafter object to the giving of such an instruction in a "comment" state and risk the reversal of a conviction under an *extension* of the rationale of *Griffin*, though the command of that case—forbidding comment or instruction on the failure of a defendant to testify—was followed.

No Forfeiture of Illegally Seized Contraband— *One 1958 Plymouth Sedan v. Pennsylvania*, 85 S.Ct. 1246 (1965). In a decision of importance to prosecutors and defense counsel alike (and even more important to gamblers) the Supreme Court of the United States decides that evidence which is illegally seized, and therefore not admissible in

criminal cases, may not be forfeited in civil proceedings.

In this case two Pennsylvania Liquor Control Agents stationed near the New Jersey border saw a 1958 Plymouth sedan bearing Pennsylvania license plates cross the border bridge headed in the direction of Philadelphia. The officers observed that the car "was low in the rear, quite low." After it had proceeded for a short distance into Pennsylvania, the officers stopped the car and a search disclosed 31 cases of liquor not bearing Pennsylvania tax seals.

Although there is no report of a subsequent criminal prosecution, a petition to forfeit the automobile was filed by the Commonwealth under statutory authority providing for the forfeiture of any "vehicle... used in the... illegal transportation of liquor...." The trial court dismissed the petition on the ground that the seizure of the liquor and automobile had been made without probable cause. This holding was reversed by the Supreme Court of Pennsylvania which decided that, the issue of probable cause aside, the exclusionary rule which had been fashioned in aid of the fourth amendment's prohibition of unreasonable searches and seizures applied only to *criminal* cases. Noting the considerable conflict among the lower federal and state courts which have passed on the question, the Supreme Court granted *certiorari* and reversed.

The leading case in the field of search and seizure law, Mr. Justice Goldberg noted in writing for the Court, *Boyd v. United States*, 116 U.S. 616, "was not a criminal case but was a proceeding by the United States to forfeit 35 cases of plate glass which had allegedly been imported without payment of the customs duty." Although the Commonwealth argued that the force of *Boyd* had been "undermined" by the decisions in *United States v. Jeffers*, 342 U.S. 48 and *Trupiano v. United States*, 334 U.S. 699 (where the Court had said, in *dictum*, that the contraband was not to be returned, though illegally seized), the Court distinguished those federal criminal cases on the ground that the contraband involved there (illegally imported narcotics in *Jeffers* and an unregistered still, alcohol and mash in *Trupiano*) were "objects, the possession of which, *without more*, constitutes a crime. The *repossession* of such *per se* contraband by Jeffers and Trupiano would have subjected them to criminal penalties." (Emphasis added.) In the *One 1958 Plymouth* case, the Court noted, there is nothing criminal about the ownership or possession of an automobile and it "is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its loss... and it is conceded here that the Commonwealth could not establish an illegal use without using the evidence resulting from the search which is challenged as having been in violation of the Constitution... [and] the return of the automobile to the owner would not subject him to any possible criminal penalties for possession or frustrate a public policy concerning automobiles, as automobiles."

Finally, said Justice Goldberg, "a forfeiture proceeding is quasi-criminal in character... [and] its object, like a criminal proceeding, is to penalize for the commission of an offense against the law... and can result in even greater punishment than the criminal prosecution."

Contempt and the Due Process Clause—*Holt v. Virginia*, 85 S.Ct. 1375 (1965). The defendants, both lawyers, filed a petition for change of venue in a contempt prosecution then pending against one of them. The petition charged that the trial judge was "acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge" and that he had "intimidated" and "harassed" the defendant who represented his brother lawyer in the contempt proceeding. The trial judge held that the language in the petition for change of venue was contemptuous and summarily convicted both counsel of that offense, imposing a fifty dollar fine. The conviction was affirmed by the Supreme Court of Appeals of Virginia on the ground that the defendants had been guilty of violating a statute authorizing the summary contempt conviction of any person who uses " 'contemptuous or insulting language' to or about a judge in respect of his official acts." The Supreme Court of the United States granted *certiorari* and reversed.

Since both the sixth and fourteenth amendments guaranteed the defendant on whose behalf the change of venue petition was filed the right to a fair trial and representation by counsel, the Court held, the defendants clearly had the right to file a petition "essential to present claims and raise relevant issues... [and] it necessarily follows that motions for change of venue to escape a biased tribunal raise constitutional issues both relevant and essential." "Consequently," the Court said, "neither Dawley nor his counsel could consistently with due process be convicted

for contempt for filing these motions unless it might be thought that there is something about the *language used* which would justify the conviction." (Emphasis added.)

The Supreme Court of Appeals of Virginia had concluded that the motion was "'a vehicle to heap insults upon the court, a studied attempt to smear the judge,'" but the Supreme Court of the United States held merely that "the words used in the motions were plain English, in no way offensive in themselves, and wholly appropriate to charge bias in the community and bias of the presiding judge." And "if the charges were 'insulting'," the Court concluded, "it was inherent in the issue of bias raised, an issue which we have seen had to be raised, according to the charges, to escape the probability of a constitutionally unfair trial."

Obscenity and the Fourth Amendment—*State v. Vollmar*, 389 S.W.2d 20 (Mo. 1965). After arresting the defendant for the sale of obscene nudist magazines, officers of the St. Louis morality squad searched his bookstore for similar material. Out of "thousands of books and magazines of various kinds in the store in question," the officers seized several other nudist publications and these were admitted in evidence at the trial. Following conviction, defendant appealed, *inter alia*, on the grounds that [1] because the officers had no search warrant "and were provided with no guide to the exercise of informed discretion in determining which magazines were obscene and subject to seizure" the search violated the *first* and fourteenth amendments, and [2] the search was "a general exploratory search for evidence not incidental to the arrest" in violation of the *fourth* and fourteenth amendments.

In rejecting these contentions, the Missouri court distinguished *Marcus v. Search Warrants*, 367 U.S. 717 and *Quantity of Books v. Kansas*, 378 U.S. 205. In *Marcus*, which involved a civil forfeiture petition filed to seek the destruction of obscene books, the Supreme Court held that police officers who seized books and magazines under the authority of a search warrant calling only for the seizure of "obscene" material, without further specificity, violated the first amendment in relying upon their own judgment of what was obscene. In *Quantity of Books*, also a forfeiture case, the warrant called for the seizure of specific books and the officers did not go beyond the authority of the warrant, but the Court held that since the warrant called for the seizure of *all* copies of the named books it could not be issued on the basis of an *ex parte* hearing before the magistrate. The defendant, the Court said, must be allowed to participate in the hearing which leads to the conclusion of obscenity before the warrant may issue.

Both *Marcus* and *Quantity of Books*, the Missouri court noted, "are cases wherein the primary object was to seek authority to destroy large quantities of books . . . [and] the books were seized and held for a considerable period of time before there was a proper judicial determination of the issue of obscenity." The instant case, the court said, was a *criminal* prosecution "and hence there were the usual constitutional protections that are afforded all defendants in that type of case." Moreover, prior to the arrest the officers had submitted copies of one of the magazines seized to "two attorneys entrusted with law enforcement duties and were advised that it was obscene," and during the search following the arrest they seized only copies of magazines "similar" to the scrutinized publications. Finally, the court said, the total number of magazines seized in the Missouri case amounted only to 44 compared with 1,715 books seized in the *Quantity of Books* case and 11,000 books and magazines seized in the *Marcus* case.

Comment: Prosecutors have been troubled for some time by the effect of the *Quantity of Books* and *Marcus* cases upon the validity of currently used search and seizure practices in the investigation and prosecution of criminal obscenity cases. The problem is two-fold.

First, if *Marcus* is read as outlawing all warrantless searches in obscenity cases, the police are deprived of an opportunity to gather evidence by seizing *other copies* of a book or magazine following an arrest without warrant for the sale of such material. This evidence is useful not only in persuading the jury of the seriousness of the offense and the scope of the defendant's operations, but may also be relevant to the question of *scienter*. It would be incongruous, to say the least, to allow police officers to arrest without warrant following the sale to them of a book or magazine which they believe to be obscene (and no court has outlawed this practice) and yet forbid them to take other copies of the same book or magazine which may be in plain view on the racks or counter of the store.

Second, if both *Marcus* and *Quantity of Books* forbid the seizure of books or magazines not named in a warrant, even though equivalent to or surpassing in obscene qualities those named, police are deprived of the opportunity to bring additional charges for the possession of obscenity (which may be in open view) and are forbidden to gather additional evidence to show the character of the store in a prosecution for the sale or possession of books named in the search warrant.

Some prosecutors, following the rationale of the Missouri court, have distinguished the *Marcus* and *Quantity of Books* cases on the grounds that the Court struck down the practices involved there on *first*, not fourth, amendment grounds, reasoning that an exclusionary rule which would keep illegally seized books from evidence in a criminal prosecution has been applied only in fourth amendment cases and that books seized in violation of the first amendment may still be admissible in a criminal prosecution although they could not be forfeited in a civil hearing.

It seems doubtful, however, that the Supreme Court would long tolerate the "chilling effect" of repeated violations of the first amendment in the prosecution of obscenity cases merely because the exclusionary rule has heretofore been invoked only for the protection of fourth amendment rights. *Cf. Dombrowski v. Pfister*, 85 S.Ct. 1116, 1120–1121 (1965).

The answer then, it would seem, lies in the conformation of existing search and seizure practices to the demands of the *Marcus* and *Quantity of Books* cases. Several alternatives are suggested.

First, if books are to be seized without warrant (as an incident to arrest) or outside the scope of a warrant (as open contraband), seizure can be conditioned upon the judgment of a prosecutor who has some experience and training in the field of obscenity. This practice has been used in Chicago, where, on several occasions, Assistant State's Attorneys have accompanied officers during the execution of search warrants in bookstores and books or magazines not named in the warrants were seized only upon the orders of the attorneys and not at the discretion of police officers who, by and large, share the layman's, not the legal, conception of obscenity.

Second, if the use of search warrants (and consequent prosecution for possession, rather than sale, of obscenity) is to continue in this field, and adversary hearings on the question of obscenity before issuance of the warrant are to be (from the police standpoint, *must* be) avoided, perhaps the answer is to employ warrants which call for the seizure of only *several* copies (enough for evidence purposes) of a named book rather than, as in *Quantity of Books*, *all* copies. This may satisfy the objection of the Court in *Quantity of Books* that an *ex parte* warrant authorizing the seizure of all copies of a named publication constitutes too great an interference with first amendment freedoms and results in a total exclusion from the market of material which may be subject to first amendment protection without the protection of a speedy and adversary hearing. *Cf. Freedman v. Maryland*, 85 S.Ct. 734, 738–739.

In ruling on defendant's appeal, the court disposed of several other questions of interest to practitioners in obscenity cases. On the merits of the obscenity issue, the court ruled that several current nudist magazines were obscene despite earlier holdings of the Supreme Court that particular nudist magazines then published were not obscene. In the instant appeal, the court noted that the photographs "clearly depict both male and female genitalia, including the pubic hair . . . [and that] predominating in all of these publications are close-up photographs of attractive, shapely, young women, . . . posed so as to portray both the face and figure of these women in a most alluring manner, . . . a considerable number of the photographs are in color . . . [and include] a close-up photograph of a young man and young woman facing the camera with the sex organ of the male in a condition of erection."

The court also held that the defendant was not insulated from knowledge of the nature of the material on the ground that he "could not have known that the magazines were obscene until there had been a prior adversary proceeding establishing such obscenity" and that proof that [1] he told the officers that there were pictures of "some real nude women" in one of the publications, and [2] nude pictures were shown on the front and back covers of all the magazines involved sufficed to show *scienter*.

On the subject of expert witnesses in obscenity cases, the court held that expert testimony on the question of contemporary community standards and the obscenity of the particular material was inadmissible, although the court intimated that expert testimony on the question of "the literary or artistic value of publications alleged to be obscene" was permissible.

Defendant Entitled To Counsel at Preliminary Hearing—*Harris v. Wilson*, 239 F. Supp. 204 (N.D.Cal. 1965). Passing upon the question reserved by the Supreme Court in the *Pointer* case (abstracted above), the court in the instant case becomes the first to hold that "the federal constitutional right to counsel attaches at the" preliminary hearing, at least in California.

Prior Supreme Court decisions have extended the right to counsel to preliminary hearings in state criminal cases only if the hearings constitute a "critical stage" in the proceedings against the defendant. (See, for example, *Hamilton v. Alabama*, 368 U.S. 52 and *White v. Maryland*, 373 U.S. 59.) The "critical stage," however, has heretofore been interpreted to include preliminary hearings only when special defenses must be raised at that time or forever lost, or when some special event (e.g., a plea of guilty) occurs which operates to the disadvantage of a defendant at his subsequent trial on the indictment.

In holding preliminary hearings to be included within the critical stage regardless of the special considerations found in prior cases, the District Court was persuaded by the following considerations.

First, the court said, "Counsel must be assigned at a time when it might be helpful in *investigating* and *preparing* for the case . . . [and it] could hardly be denied that it is vital to any defendant's interest to have some information about the strength of his case before he makes up his mind how to plead."

Second, "the most convincing reason that presence of defense counsel at Preliminary Examination might 'affect the whole trial' is the fact that the Examination is an initial adversary confrontation. The rest of the judicial proceedings can be completely avoided if the defendant achieves a victory at this stage."

Third, the preliminary hearing constitutes a stage "where counsel is most helpful because . . . 'incompetent evidence received without objection may be given its full probative effect . . . [and] prosecution witnesses may be cross-examined and the defense may proffer its own witnesses."

Fourth, the preliminary hearing "is a species of criminal pre-trial discovery."

Comment: The court in this case reaches the conclusion that several state supreme courts have rejected since the opinion of the Supreme Court in the *Gideon* case. If this opinion becomes the law generally and, like *Gideon*, is held to have retroactive effect, those states in which counsel has always been appointed for indigent defendants at the indictment, but not the preliminary hearing, stage may see the penitentiary doors swung wide to the same extent, and, perhaps to a greater extent, as those states which, prior to *Gideon*, did not furnish counsel at the trial to indigent defendants in felony cases.

Accessories and the Hearsay Rule—*People v. Tunnacliff*, 134 N.W.2d 682 (Mich. 1965). Suppose that *A* is on trial for the crime of burglary. The proof, including his own confession, shows that he aided and abetted *B* in the commission of the crime by telling *B* the best way to enter the burglarized premises. There is, however, no proof that *B* actually committed the offense of burglary except *B*'s confession which he now repudiates, which was made outside the presence of *A* (thus eliminating any possibility of an admission by silence or an adoptive admission), and which is now related by a third party. Although the confession of *B* now related in the trial of *A* would clearly be hearsay as direct evidence of *A*'s guilt, is it admissible on the theory that it is only being used to prove the commission of the crime by *B*, the *corpus delicti*, while proof of *A*'s guilt as an accessory to *B*'s crime is made by other competent evidence? Ruling on this question for the first time, the Supreme Court of Michigan, by a split decision, joins those courts who have held such evidence *inadmissible*.

The rationale for the admission of such testimony despite its obvious hearsay character is that [1] it is being used only for a limited purpose, i.e., to establish that the *declarant* was guilty of an offense as a *principal*, [2] such testimony is worthy of credit since, as to the declarant, it is a statement against interest not likely to be made unless true, and [3] the guilt of the defendant as an accessory to the declarant's crime must still be shown by competent evidence beyond a reasonable doubt.

The majority of the Michigan Supreme Court refused to follow this reasoning, however, in the instant case where the defendant, a policeman, was charged with having been the accessory to the commission of a burglary by one Mahar. Although defendant admitting counseling Mahar on how to gain entrance to the burglarized premises, there was no proof that it was Mahar who committed the burglary in question except for the

testimony of the witness Smith (then in jail charged with an offense) that Mahar told him, out of the presence of the defendant Tunnacliff, that he had committed the burglary. Following the early, and leading, case of *Ogden v. State*, 12 Wis. 532, 78 Am. Dec. 754, the court noted that though Mahar's statement was a declaration against his interest, still there was the possibility that "being innocent, and believing that his personal safety would not thereby be endangered, [he] might make . . . [the confession], from feelings of ill-will and hatred to [the defendant] for the sole purpose of deceiving and misleading others. . . ." And the confession was still subject to the classical defaults of hearsay evidence, noted the court, since it was "made privately . . . without the sanction of an oath . . . subjected to no cross-examination" and without the opportunity for inquiry into the motive of the declarant.

Comment: Though the majority opinion rejecting the confession of the principal as competent proof (at the trial of the accessory) of the principal's guilt does not so state directly, it is hard to read the opinion without assuming that the court was influenced by the following factors: (1) the principal had not been (so far as the record showed) tried for or convicted of the offense, (2) Mahar, the principal, had denied making the confession in issue, (3) the confession was related by a man who was then in custody and "charged with a most serious offense" and whose possible motives for falsification were therefore obvious.

Of course, all these factors bear heavily upon the weight or the *credibility* to be attached to the confession as evidence of the commission by the principal of the offense of burglary and, presumably, the jury, which was explicitly and adequately instructed on these points, took them into account. They do not furnish a satisfactory reason, however, for finding the evidence *incompetent*. Balancing the notion that a confession to a crime is not likely to be made unless true against the possibility that an innocent man will confess to a crime which he did not commit in order to implicate another as an accessory, though the confession does not name the accessory, I believe that the majority opinion of the Michigan court in the instant case is unfortunately retrogressive. See Wigmore, *Evidence* §1079(c)(3d ed.1940).

Defendant Shackled For Trial—*People v. Thomas*, 134 N.W.2d 352 (Ct.App., Mich. 1965). Indicted for escaping from prison, the defendant was brought to the court-room and tried in front of a jury while "in prison uniform and in chains." After conviction, he appealed on the ground that his appearance during the trial prejudiced the jury to the extent that a fair trial was impossible. The conviction was affirmed by the Court of Appeals of Michigan.

While the appellate court recognized that "it would have been better in this case if appellant had been brought into court in civilian clothes and unchained" and that "the action of the trial court in so chaining appellant during the trial is not recommended," it held the question was one for the discretion of the trial court, especially in view of the fact that defendant had once escaped from prison and it was therefore understandable that the trial court would act with caution in the matter of defendant's custody.

Telephone Booth is Building—*Perry v. State*, 174 So.2d 55 (Ct.App., Fla. 1965). Defendant was tried for the burglary of three outdoor telephone booths and convicted. On appeal, he contended that a telephone booth was not a "building" within the meaning of the Florida burglary statute. The conviction was affirmed.

The District Court of Appeal recognized that another Florida appellate court, in construing the same statute, had held that telephone booths which were located within other buildings were not themselves buildings, but "closets." This case was distinguished, however, on the ground that the booths involved in the instant case were built outdoors and fell within the commonly accepted dictionary meaning of the word building, i.e., an "edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land, for . . . [a] useful purpose." In addition, the court was persuaded by prior decisions from California and Colorado which had reached the same result.

Defendant Cannot Claim Fifth Amendment—*State v. Manning*, 134 N.W.2d 91 N.D. 1965). In an interesting opinion, the Supreme Court of North Dakota has ruled that when a defendant testifies in a criminal case, he cannot refuse to answer certain questions asked on cross-examination though the answers would tend to incriminate him in a collateral criminal proceeding.

Defendant was tried for the offense of failure to

render assistance and for leaving the scene of an automobile accident. Under cross-examination, he objected to certain questions relating to his consumption of alcoholic beverages before the accident on the ground that the answers would tend to incriminate him in a prosecution for driving while intoxicated which was then pending. His objections were overruled and a conviction followed.

While reversing on other grounds, the supreme court held proper the trial court's order compelling defendant to answer the incriminating questions, ruling that a defendant who takes the witness stand becomes the same as any other witness and must answer "any relevant and proper question on cross-examination, the answer to which will tend to convict him of the crime for which he is being tried, even though such answer may also incriminate him of a collateral crime." Refusal to answer collaterally incriminating questions, the court said, would be justified only if "the answers to the questions objected to would not tend to establish the guilt of the accused of the crime for which he was being tried."

Forced Speech Not Incriminating—*State v. King*, 209 A.2d 110 (N.J. 1965). In a unanimous opinion, the Supreme Court of New Jersey has decided that forcing the defendant, a suspect in a police lineup, to repeat the words used by a robber did not violate his privilege against self-incrimination even though the spoken words made positive the identification of defendant by his victim who attended the lineup and heard him speak.

The privilege against self-incrimination, the court held, arose as a "reaction to the practice in the early English courts of compelling a witness to be sworn and give testimony concerning his guilt or innocence." Repeating words in a police lineup, said the court, fell within the scope of those things which have been held by other courts to be "non-testimonial" in character, e.g., fingerprinting, photographing, physical examinations, drunkometer tests and blood tests, all of which may be compelled "since to do so does not require the witness to disclose any knowledge he may have."

Lineup Identification of Indigent Defendant Valid—*Morris v. Crumlish*, 239 F. Supp. 498 (D.C.Penn. 1965). In a novel opinion, the District Court for the Eastern District of Pennsylvania has concluded that the practice of putting an indigent defendant into police lineups does not violate the federal constitution though the defendant could not have been made to participate in the lineup if he had possessed the funds with which to make bail while awaiting trial.

Defendant was charged with burglary, and because his bail was set at the sum of $10,000, which he did not possess, he was committed to jail to await trial. While in the jail, the police proposed to place him in a lineup "for possible identification by the victim of a rape and burglary unrelated to the charges on which he . . . [was] then being held." Defendant, to prevent the lineup, sued the police department under the federal civil rights act (42 U.S.C.A. §1983) for an injunction claiming a violation of equal protection of the law since "he is in custody only because he is too poor to pay for bail and, in consequence, he is subject to being placed in a lineup while those who are free on bail are not and since this difference in treatments is based on his indigency, it constitutes invidious discrimination." Defendant also claimed that the lineup, during which he may be "made to move about and to speak," violated his privilege against self-incrimination and the due process clause. The latter argument was based on the rationale that, if free, it would be a violation of due process (incorporating the fourth amendment) for the police to take him into custody without probable cause for the purpose of placing him into a police lineup, and, although imprisoned for other crimes, he was "free" with respect to the crimes with which he had not been charged.

In rejecting defendant's constitutional arguments, the court held that the equal protection of the law was not violated because the classification of the indigent who cannot make pre-trial bail "is not only constitutionally permissible, it is expressly provided and guaranteed by the Eighth Amendment to the Federal Constitution . . . [and] since it is constitutionally sanctioned, the classification cannot be made the basis for a charge of discrimination." Further, the court held, "it is clear that the privilege against self-incrimination does not prohibit the use of a defendant's body as evidence during a trial . . . [and it therefore follows that it does not] prevent the viewing in a police lineup of a suspect under arrest, since such bodily view does not require the accused to be an unwilling witness against himself." In ruling against the due process claim, the court held that defendant was simply not "free" with respect

to the crimes for which he was not charged because he was in custody for others and that transferring him, temporarily, from a cell to a lineup room within the prison did not constitute an "arrest' without probable cause.

Officer Qualified in Breathalyzer Test—*State v. Brown*, 209 A.2d 324 (Vt. 1965). Declining to follow a contrary opinion of the Supreme Court of Rhode Island (*State v. Gregoire*, 148 A.2d 751), the Supreme Court of Vermont holds that a police officer who has had three hours of instruction in the operation of a "photo-electric intoximeter" given by the inventor of the device, and who has made tests with the machine on twenty-four prior occasions, is sufficiently qualified to testify as an expert witness in a prosecution for driving while intoxicated. And in affirming defendant's conviction, the court also held that testimony of a defense expert witness, a pathologist, that "as many as 16% of persons having a blood alcohol content of 0.20 would not show the effects of intoxicants," did not rebut the legislative presumption of intoxication (for readings of 0.15 and above) when the testimony was not related to the defendant in any way and there was no showing that he belonged to the 16 per cent classification.

Expert Arson Testimony Admissible—*State v. Turnbough*, 388 S.W.2d 781 (Mo. 1965). The defendants were convicted of the crime of arson and appealed on the ground, *inter alia*, that it was error to allow the fire chief to "testify as to the origin of the fire, and the intensity of the heat." In rejecting this contention, the Supreme Court of Missouri, noting that the witness had been a member of the fire department for thirty years, "had witnessed near to 1,000 fires and had taken courses in fire fighting at the University of Missouri," held the witness to be qualified as an expert and, since he had observed the fire while it was burning, allowed such opinion testimony to be given in the discretion of the trial judge.

Narcotic Act is Constitutional—*People v. Stark*, 400 P.2d 923 (Colo. 1965). On appeal from the ruling of the trial court in holding unconstitutional the narcotic drug act of the state of Colorado, defendant, in support of the trial court's judgment, argued that the inclusion of cannabis, or marijuana, within the classification of a narcotic drug denied defendant due process of law because such legislative classification was contrary to the scientific principle that marijuana causes neither "physical [n]or psychological addiction."

The trial court ruling was reversed by the Supreme Court of Colorado which held, in accordance with prior decisions in sister jurisdictions, that the classification of narcotic drugs adopted by the legislature was reasonable despite what the court termed "differences of opinion" concerning the addictive qualities of marijuana. The court noted that the "important and pivotal consideration is whether the classification bears a reasonable relation 'to the public purpose sought to be achieved' " and that "the use of marijuana and other drugs identified in the Colorado statute presents a danger to the public safety and welfare of the community since they are clearly *related to each other* and to the commission of crime." (Emphasis added.)

Evidence Chain Incomplete—*Jones v. Forrest City*, 388 S.W.2d 386 (Ark. 1965). In reversing a conviction for driving while intoxicated, the Supreme Court of Arkansas holds incomplete the evidence necessary to establish a foundation for testimony concerning the results of an analysis of a urine sample. The sample, after being given by the defendant in the police station, was placed in a bottle in a room in the station and tagged with the name of an officer investigating the case. The technician came to the police station, picked up a bottle in the same room, with the same name attached, and made the analysis. Since there was no "testimony that the bottle was sealed, and, of course, there was no 'hand to hand' or direct transmittal of the specimen" to the technician, and because no one could testify positively that the specimen given was the same as that analyzed, the court held the foundation testimony insufficient.

Discovery of Lie Test Results Allowed—*Ballard v. Superior Court*, 44 Cal. Rep. 291 (Cal.App. 1965). The defendant, a doctor, was charged with the crime of rape. Prior to trial, he sought, in a discovery proceeding, the results of lie tests given to the complaining witness by the police. The trial court refused to grant discovery of the results and defendant sought a writ of mandate from the appellate court to compel discovery. The appellate court granted the writ.

An important question in the case to be tried,

the court held, was whether certain admissions made by the doctor to the complainant (which were recorded with the cooperation of the police), were admissible in evidence under the rule of *People v. Dorado*, 398 P.2d 361. That case prohibits evidence of confessions or admissions made by a "focal suspect" who has not been warned of his privilege against self-incrimination or his right to counsel. Since this question would turn on whether the police, when they made the recordings, had sufficient cause to suspect defendant of the crime (thus making him a focal suspect), or whether they were merely conducting a "general inquiry into an unsolved crime," the court reasoned that the lie test results would "appear to be the main objective information available to the petitioner on the officers' state of mind at the time the conversations were recorded." Because the court found it "difficult to distinguish the defendant's right to discover the prosecution expert's opinion based on an evaluation of physical evidence (clearly allowable) from discovery of his opinion concerning a complaining witness' veracity based on an evaluation of physical responses recorded on a p machine," discovery of the lie test results was permitted.

Probation Revoked on Hearsay Evidence—*Scott v. State*, 208 A.2d 575 (Md. 1965). The defendant was convicted of robbery and placed on probation. Thereafter he was charged with assault with intent to rape, tried and acquitted when the only witness linking defendant to the offense (his mother identified as his the hat recovered by the victim at the scene of the crime) recanted and refused to testify. After the acquittal, the trial court, acting on the hearsay testimony he had refused to receive at the trial of the assault case (the police officer's testimony that the mother, prior to trial, had identified the hat as defendant's), revoked defendant's probation in the robbery case.

The probation revocation was affirmed by the Court of Appeals of Maryland which held that "probation is a matter of grace . . . that . . . may be ended, if the court is reasonably persuaded, by knowledge of facts, even if obtained more informally than the rules of evidence would permit . . . [them] to be obtained in a trial . . . including hearsay (provided that information not received from or in the presence of the defendant should be called to his attention so that he has the opportunity to refute, discredit or explain it.'"

Narcotic Defendant Entitled to Own Expert—*State v. Johnson*, 208 A.2d 444 N.J.Cty.Ct. 1965). The defendant was tried for being under the influence of a narcotic drug. At the trial, the state offered the opinion of the police department physician, who had examined defendant after his arrest, that the scratches on his arm appeared to be puncture wounds and that defendant was then under the influence of a drug. Defendant testified that he had requested that a physician of his choice be called to examine him, which request was denied by the police, and explained that the scratches were incurred in his work as a tree surgeon. Defendant was convicted.

In reversing the conviction, the appellate court held that it was a denial of due process to hold the defendant for twenty-six hours after his arrest without allowing him to arrange for an examination by a private physician, since this resulted in the denial of an opportunity to prepare a defense to the charge. "Possibly a physician of defendant's own choosing might have had a different opinion than that of the police physician," the court said, but unless "withdrawal symptoms were evident, the passage of a substantial period of time such as the 26-hour period defendant was held, would probably make it more difficult for a physician to formulate an opinion of defendant's condition at the time of his arrest . . . [and this] was fundamentally unfair."