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ABSTRACTS OF RECENT CASES

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Prosecution Need Not Immunize Defense Witness.—*Earl v. United States*, 361 F. 2d 531 (D.C. Cir. 1966). Defendant was convicted of narcotic offenses and appealed on the ground that it was error for the trial judge to refuse to compel the government to grant *immunity* to a defense witness who had claimed his privilege against self-incrimination when called to testify. The court of appeals declined to so hold and affirmed the conviction.

Defendant was accused of being an accessory to the sale of narcotics by one Scott. The charge against Scott was dropped by the government in return for his plea of guilty to other offenses, but when he was called by the defense to testify in exculpation of the defendant he refused on the ground that his testimony might incriminate him. His refusal was upheld by the trial court.

The defense then contended that if Scott were given immunity, and forced to testify, he would testify that appellant was not his partner in crime. The trial court refused to compel the government to grant immunity to Scott. In affirming this refusal, the court said:

> "What Appellant asks this Court to do is command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony. This power is not inherent in the Executive and surely is not inherent in the judiciary. * * * The Government does not suggest that Congress could not provide for a procedure giving a defendant a comparable right to compel testimony, but only that Congress has not done so. Whatever the merits of the arguments in favor of such a procedure, it is obvious that it would require safeguards to preclude abuses; the complexity and difficulty of evaluating the impact of that course suggest at once the inadequacy of the facilities available to the judiciary to make the assessment. We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power."

The court warned, however, that a different case would be presented if the government had granted immunity to one of its witnesses and had, at the same time, refused to grant similar immunity to a defense witness. "That situation", said the court, "would vividly dramatize an argument on behalf of Earl that the immunity statute *as applied* denied him due process."

Included Offense Will Not Support Felony Murder Charge—*State v. Branch*, 415 P.2d 766 (Ore. 1966). Defendant was convicted of murder in the second degree after a trial in which he was charged with murder in the first degree. At the trial, the court gave a prosecution instruction to the jury charging that malice need not be proved if they found that defendant had killed his victim while engaged in the commission of a felony. The defendant objected to this charge on the ground that the evidence did not show that he had committed any *collateral* felony at the time he killed the deceased. The prosecution replied that the felony which supported the felony-murder instruction was the offense of assault with a dangerous weapon which was an *included* offense under the charge of murder.

In reversing defendant's conviction, the Oregon Supreme Court refused to establish a rule that a felony-murder charge could be prosecuted when the felony involved was a lesser included, rather than a collateral, offense. "In order to preserve the distinctions between the degrees of murder and manslaughter," the court said, "courts in other states have held that where the only felony committed (apart from the murder itself) was the assault upon the victim which resulted in the death of the victim, the assault merged with the killing and could not be relied upon by the state as an ingredient of a 'felony murder.' "

Voice Identification Violates Due Process—*Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966). After three trials (the first ending in mistrial and the second in a hung jury), defendant was convicted of rape. Aside from testimony of a neighbor that Palmer had confessed the rape "of a white woman", the only testimony linking defendant to the crime came from the complainant who said that she recognized his voice as he conversed with the sheriff in another room. Holding that the voice identification made in the sheriff's office was not, because of the circumstances under which it was taken, the result of "an objective, impartial judgment by the prosecutrix", the court found that its admission into evidence violated the due process clause and reversed the state court judgment.

On the evening of the day on which the offense had occurred, the prosecutrix had witnessed a lineup of four or five Negro suspects, but failed to identify the voices of any. When defendant was taken into custody the next day (on the word of a man who had himself been a suspect), he was made to repeat phrases used by the criminal, but no voices (except that of the sheriff) were part of the conversation for comparison purposes. The victim did not see defendant in the station to corroborate her identification by noting his weight, height, color or other features. She had been told that a suspect was in custody and had been shown his shirt which resembled that worn by her attacker.

In condemning the identification as unconstitutional, the court noted that "Any identification process . . . involves danger that the percipient may be influenced by prior formed attitudes . . . [and] where the witness bases the identification on only part of the suspect's total personality, such as . . . voice alone, prior suggestions will have most fertile soil in which to grow to conviction. This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect."

Criminal Discovery Reviewed In New Jersey—*State v. Tate*, 221 A.2d 12 (N.J. 1966). Defendant, under indictment for felony murder, sought to interview prosecution witnesses who had been at the scene of the crime. Though the State voiced no objection, the witnesses declined to be interviewed. Defendant then sought a pre-trial order from the court "permitting him to take their depositions in advance of trial, solely for the purpose of discovery. The trial court denied the motion and [the Supreme Court of New Jersey] granted defendant leave to appeal."

In affirming the ruling of the trial court, the supreme court noted that the only pre-trial discovery procedures allowed by rule were those in cases where the defendant feared that a material witness would not be available at trial. In this case, said the court, "Defendant disavows that need, and seeks pretrial disclosure solely to learn what the witnesses know." Though the defendant argued that state and federal constitutional provisions compel such discovery, the court found that no cases had so held and that under current practise a good deal of discovery was permissible in other ways, e.g., a bill of particulars, requesting a defendant's own statement to the grand jury or the police, obtaining prior statements of state witnesses after their direct testimony.

"Further", the court said, "the State represents that it will produce all of [the persons sought to be interviewed] as witnesses, thus relieving defendant of his fear that one or more may not appear and that thereby testimony useful to the defense will be lost. In this regard, the prosecutor acknowledges his heavy ethical duty to produce at the trial, or to disclose to the defense before trial and sufficiently so to be meaningful, any information in his file helpful to the accused. In these circumstances, we see no constitutional difficulty."

The court concluded by saying that:

> "The question whether our rules should nonetheless be amended to permit discovery by deposition in criminal cases is another matter. No doubt the defendant in a criminal case, especially one who had no prior relation with the victim of the offense, has little practical opportunity to investigate. By the time he is charged and a private investigator retained, the scene has changed, and trails, if there were any, have been obliterated. * * *
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> Perhaps the investigatorial arms of government should be deemed the impartial servants of the defense as well as the prosecution, with the work product available to both, subject only to such restrictions as the personal security of a witness may demand. In a sense that proposition would be but an extension of the settled view that the prosecution must seek only a just result, and that the duty is the State's to produce or offer to the defendant whatever it has that could help him. To open the State's file before trial would have the virtue of relieving

the prosecutor of the burden of deciding correctly what should be revealed in obedience to this ethical obligation. Further, the defense may see significance in facts which to the prosecutor are but neutral. Again, if the public investigatorial services were the impartial servants of both the prosecution and the defense, there could be saved the cost of individual investigations which we may assume will continue to mount more and more as indigent defendants ask for private investigators at public expense. Finally, there is the related question whether the State's file should be opened only on the reciprocal condition that the defendant reveal his defense and the identity of his witnesses."

Finally, the court decided that it had no experience of its own, or of other states', to draw upon in deciding whether to allow discovery in criminal cases, and that resolution of this broad policy question was inappropriate within the confines of a single case. The court held that "The topic can be explored more satisfactorily in the rule-making process at hearings open to all who might contribute to a solution" and to that end scheduled public hearings on the issue.

Seizure of Clothing After Arrest Permissible—*Golliher v. United States*, 362 F.2d 594 (8th Cir. 1966). Convicted of unlawfully entering a federally insured bank, defendants appealed on the ground, *inter alia*, that their clothing had been unlawfully seized from them after arrest and subjected to microscopic examination which disclosed evidence of their guilt. The argument was rejected by the Court of Appeals and the conviction was affirmed.

Defendants contended that their clothes were "purely evidentiary in character, and, therefore, inadmissible under the doctrine of Gouled v. United States, [255 U.S. 298 (1921).]" The Court of Appeals distinguished *Gouled*, however, on the ground that that case did not involve a search of the *person* and that "at no time has the Supreme Court ruled that search for and seizure of evidence directly under the control of a validly arrested person is unconstitutional."

"There is a very narrow and hazy line between the instrumentalitites used in the commission of a crime and pure evidence," the court found, and noted that some state courts have "bravely announced that searches for evidence are proper regardless of where they took place as long as they were otherwise reasonable". While the court indicated sympathy with this viewpoint, it felt that it was bound by decisions such as *Gouled* not to go that far. Instead, it adoped a middle course:

"However, we do not feel that we have been foreclosed from holding that evidence directly and intimately connected with the crime for which an accused is arrested and is actually on the person of the accused at the time of his arrest is subject to search and seizure incident to his lawful arrest. * * * In such a situation the accused is already subject to a general search incident to his arrest for such things as weapons, instrumentalities, and fruits of the crime. Therefore, it is not a question of whether or not we shall allow a search, for the search already has the sanction of the law. It is only a question of whether evidence may be seized during the search. * * * We first note that scientific examination of dust particles, paint chips, blood stains, etc., is a widespread and necessary part of scientific police investigation. Were we to deny enforcement officials the right to gather this evidence from an accused actually in custody, a necessary weapon in the arsenal of detection would be largely destroyed. In recent years the Supreme Court has announced Constitutional principles that necessarily deemphasize the use of interrogation, and, at the same time, supposedly encourage scientific investigation. * * * As a practical matter we cannot possibly insist that enforcement officials rely upon scientific investigation and at the same time deny them an integral part of this scientific potential. * * * Were we to uphold appellants in this case the bloody shirt worn into the police station by the murder suspect would be kept from the eyes of the jury. To us this would be deplorable folly."

No Probable Cause Needed For Stop and Question—*Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966). Defendant, convicted in a state court for unlawful possession of weapons, was granted a writ of habeas corpus by a federal district court on the ground that the search and seizure which disclosed the weapons was unconstitutional. On appeal of the warden, the Court of Appeals for the Ninth Circuit reversed.

Traffic officers in Ontario, California noticed defendant's car go by them in a westbound direction at about 3:00 A.M. About 25 minutes later, the officers again observed the car, still going in a westerly direction, about nine blocks further

down the same street. After following the car a short distance, the police turned on their "Mars" light to signal the driver to pull over to the curb. Immediately, one of the passengers slid down on the seat as though placing an object under the seat. The car stopped at the curb, defendant alighted and was asked for identification.

At this point, no traffic laws had been violated. Defendant's passenger was also requested by the police to get out of the car and produce identification. As he did so, the officer shined a flashlight into the car and observed what he believed to be a gun barrel protruding from under the seat. A .22 caliber pistol was found and, after defendant's arrest, a dagger was found in the search of his pockets at the police station.

While refusing to characterize the initial stop of the automobile as an "arrest" or a "detention", the district court ordered defendant's release because "driving an automobile in the pre-dawn hours—that and nothing more—provides justification neither for arrest *nor* for detention . . . and the constitutional prohibition against unreasonable searches and seizures makes no distinction between detention without cause and arrest without cause."

In reversing, the court of appeals held that "While it is clear that at the time appellee's car was pulled over probable cause for an arrest did not exist, it is also clear that not every time an officer sounds his siren or flashes a light to flag down a vehicle has an arrest been made. The initial act of stopping appellee's car was not an arrest."

It was not enough, said the court, merely to conclude that the constitution "makes no distinction between informal detention without cause and formal arrest without cause". The true answer the court said, is that "there is a difference between that 'cause' which will justify informal detention short of arrest and the probable cause standard required to justify that kind of custody traditionally denominated an arrest. Our concern here is what degree of cause will justify cursory, informal detention in circumstances which would not justify an arrest, and whether the officers met that standard in the particular circumstances of this case."

The "degree of cause" necessary to justify "informal detention" was then characterized by the court as "a founded suspicion", i.e., "some basis from which the court can determine that the detention was not arbitrary and harassing", even as little as "the instinctive reaction of one trained in the prevention of crime." The court then concluded that the facts of this case were sufficient to meet that standard. "We cannot say that the circumstances of a car making inordinately slow progress along a street in the small hours of the morning could not reasonably have aroused the suspicions of a local officer alert to the unusual within his beat, and lead him to investigate."

Double Jeopardy And A Defendant's Appeal— *State v. Barger*, 220 A.2d 304 (Md. 1966). Indicted for murder, defendant was acquitted of the first degree offense, but found guilty of murder in the second degree. He appealed and the conviction was reversed on the ground that the jury had been misdirected. At the second trial, the prosecution announced its intention to reprosecute for the crimes charged originally, including the first degree charge of which defendant had been acquitted. Defendant moved to dismiss the indictment on the ground of double jeopardy and the trial court dismissed the first degree charge. The State appealed and the ruling was affirmed.

The position of the State was that "where the accused appeals a prior conviction the granting of a new trial nullifies *the entire first trial* and permits a retrial of the accused on the offenses of which he was found not guilty as well as those of which he was formerly acquitted." (Emphasis added.)

In rejecting this argument, the court characterized it as unreasonable "(a) because to hold that the appeal and consequent granting of a new trial constituted a waiver would be inconsistent with the fact that the defendant sought only to reverse so much of the verdict as supported his conviction of second degree murder and (b) because the opening of the whole case for reconsideration would place too great a price on the right of an accused to appeal."

In dissent, Judge Barnes pointed out that the State had argued that "its inability to try the defendant at the new trial for murder in the first degree would gravely handicap the State in the prosecution of this case". And, referring to his fear that the majority felt compelled to reverse because of what the Supreme Court *might* hold in the future, he said "I have seen no studies which attempt to show what effect [the Supreme Court's recent decisions] may have had upon the extraordinary increase in crime in the United States, but if the certainty of apprehension, conviction and punishment of criminals acts as a deterrent to