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Abstracts of Recent Cases

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ABSTRACTS OF RECENT CASES

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Abstractor

Arrest—Downing v. State, 188 A.2d 224 (Del. 1963). Defendant Downing was convicted of third degree burglary, malicious mischief, and attempting to burn, and defendants Downing and Therkildsen were convicted of conspiracy to commit malicious mischief. On appeal, defendant Downing contended that his confession should have been excluded since it was taken while he was under illegal arrest, and defendant Therkildsen contended that the evidence was insufficient to sustain his conspiracy conviction. The Supreme Court of Delaware reversed Therkildsen’s conviction on the ground that there was no evidence of scienter, but affirmed Downing’s convictions, holding that since the officers did not inform Downing that he had to accompany them to State Police Headquarters, did not use the word “arrest,” and did not in fact attempt to restrain Downing’s liberty or freedom of movement, Downing was not under arrest when he voluntarily confessed, even though he believed he had no alternative but to accompany the officers. The Court noted that a confession obtained as a result of an illegal arrest was inadmissible in Delaware state courts.


Arrest, Search and Seizure—People v. Allen, 29 Cal. Rptr. 455 (Dist. Ct. App. 1963). Defendant was convicted of unlawful possession of heroin. On appeal, defendant contended that the heroin introduced as evidence against him was obtained as a result of an unlawful arrest. The California District Court of Appeal reversed, holding that where defendant, while detained in jail pursuant to an unlawful arrest for burglary, made efforts to conceal something in his mouth when officers were about to search him, discovery of the heroin was a direct result of the unlawful arrest and detention; that the State’s right to subject prisoners in jail to search at any time as a disciplinary measure and security precaution did not apply to defendant, inasmuch as he was not lawfully in custody and thus was not subject to the status of a prisoner; and that hence the heroin should not have been admitted in evidence. The Court noted that even if defendant’s furtive effort constituted probable cause to believe that he then possessed narcotics, the heroin would still be inadmissible, since this effort was prompted by the threat of the impending unlawful search which resulted from the unlawful detention.

Arrest, Search and Seizure—People v. Harris, 28 Cal. Rptr. 458 (Dist. Ct. App. 1963). Defendant was convicted of possession of marijuana. On appeal, defendant contended that the evidence used against him had been illegally obtained while he was under unlawful arrest. The California District Court of Appeal affirmed, holding that where the arresting officers, without search or arrest warrants, went to a cleaning store to investigate alleged bookmaking activities and were granted permission to search the premises by the proprietor, the officers properly questioned defendant, whom they discovered on the premises, when he possessed cigarette papers, inasmuch as the officers had been informed that records of the bookmaking under investigation were being written on cigarette paper; that when defendant failed to produce conclusive identification, the officers properly detained him for the purpose of determining whether any warrants were outstanding against him; that this short detention (about 20 minutes) for the purpose of checking police records for information relating to defendant, whom the officers were lawfully questioning, was not unreasonable and did not amount to an arrest; and that consequently, when during this period of lawful

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detention defendant, in attempting to get rid of marijuana, dropped it to the floor and the officers picked it up, and then, for the first time, placed defendant under arrest, the marijuana was lawfully obtained and admissible in evidence.

Arrest, Search and Seizure—State v. Blood, 378 P.2d 548 (Kan. 1963). Defendant was convicted of grand larceny and second degree burglary. On appeal, defendant contended that the trial court erred in failing to grant his motion to suppress evidence obtained by an illegal search of his car. The Supreme Court of Kansas affirmed, holding that the validity of the search for purposes of determining the admissibility of evidence in a Kansas criminal proceeding must be decided by applying Missouri law in the light of federal decisions, since the search occurred in Missouri, and because Mapp v. Ohio, 367 U.S. 643, abstracted at 52 J. Crim. L., C. & P.S. 292 (1961), and other federal decisions overshadow the law of the several states; that defendant was lawfully arrested without a warrant when a Missouri officer, who stopped defendant's car pursuant to police radio orders which included the car's license number, upon questioning defendant discovered that the car was unlawfully registered and, as had been related by the radio message, that defendant possessed a stolen watch; that where after arresting defendant, the officer with the aid of a flashlight observed a number of credit cards and a metal box in plain sight in the car, and defendant and his companions denied any knowledge of these items, the officer had reasonable grounds to believe the vehicle contained stolen property; and that consequently the search of the car, which produced the items on which defendants’ convictions were based, was lawful. The Court's opinion indicates that validity of the search depended only on existence of reasonable cause to believe that the car contained stolen property, regardless of incidence of the search to the prior valid arrest.

Arrest, Search and Seizure—People v. Caliente, 187 N.E.2d 550 (N.Y. 1962). Six defendants were convicted in four separate cases of misdemeanors relating to bookmaking. On appeal, defendants contended that their constitutional rights had been violated by introduction of evidence obtained by illegal search and seizure. Deciding the cases in a single opinion, the Court of Appeals of New York reversed and dismissed the complaints as to all defendants and ordered fines remitted as to two, holding that the validity of the warrantless searches depended on their being incidental to valid arrests for misdemeanors; that N.Y. CODE CRIM. PROC. §177 authorized arrest for a misdemeanor only if the misdemeanor was committed in the arresting officer’s presence; that where, in each case, the defendant’s conduct in the presence of the arresting officer did not comprise every element of the particular misdemeanor, the misdemeanor was not committed in the presence of the officer; and that consequently, all the arrests were illegal, and evidence obtained after the arrests pursuant to search was inadmissible. Judges Burke and Dye dissented in all four cases, with Judge Desmond joining as to two of these, all on the ground that the misdemeanors were committed in the arresting officers’ presence. Judge Burke stated that the majority opinion erroneously holds that no misdemeanor is committed in anyone’s presence unless what is directly observed can itself sustain a conviction, asserting that the better view is that a crime is committed in one’s presence if one is there while it is going on and can perceive what is happening.

Arson—State v. Spino, 377 P.2d 868 (Wash. 1963). Defendant was charged with second degree arson, and the trial court sustained his contention that the statute [WASH. REV. CODE ANN. §9.09.020 (1961)] was unconstitutional as an arbitrary and unreasonable exercise of the police power. On appeal, the State contended that although, when taken literally, the statute deemed second degree arson every wilful burning of property which did not amount to first degree arson, it should be read as requiring proof of malice. The Supreme Court of Washington affirmed, holding that since rules of statutory construction should be used only to ascertain the meaning of a statute and not to modify it, §9.09.020 should not be read to require malice, since it specified only that the burning be “wilful”; that the statute as written made unlawful the intentional burning of any property, including one's own, and even if the purpose of setting the fire was innocent and beneficial; and that since laws based on exercise of the police power must be reasonably necessary in the interest of the health, safety, morals, or welfare of the people, the statute was invalid because it made unlawful, inter alia,
acts the prosecution and punishment of which served no conceivable public purpose.


Confessions—Lynum v. Illinois, 83 Sup. Ct. 917 (1963). The Illinois Supreme Court affirmed defendant's conviction for unlawful possession and sale of marijuana. On certiorari, defendant contended that admission in evidence of testimony as to her oral confession violated her right to due process of law, since the confession was made as the result of psychological coercion. In a unanimous opinion written by Mr. Justice Stewart, the United States Supreme Court reversed and remanded, holding that where defendant, who had no previous experience with criminal law and had no reason not to believe that the Chicago Police Officers who arrested her had power to carry out their threats, confessed only after the officers told her that state financial aid for her infant children would be cut off and that her children would be taken away from her if she did not cooperate, and where the threats were made while she was encircled in her apartment by the officers and a twice-convicted felon who had "set her up" for the purported sale, defendant's confession must be deemed not voluntary, but coerced. The Court rejected the State's arguments that even if the confession were involuntary, the Court should affirm either because the Chicago Police Officers who arrested her had power to carry out their threats, confessed only after the officers told her that state financial aid for her infant children would be cut off and that her children would be taken away from her if she did not cooperate, and where the threats were made while she was encircled in her apartment by the officers and a twice-convicted felon who had "set her up" for the purported sale, defendant's confession must be deemed not voluntary, but coerced. 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(1961), decided the same day as Mapp v. Ohio, 367 U.S. 643, abstracted at 52 J. Crim. L., C. & P.S. 292 (1961), stated by way of dicta that the exclusionary rule of McNabb v. United States, 318 U.S. 332 (1943), had not been extended to the states as a Fourteenth Amendment requirement, thereby negating by implication the argument that Mapp rendered a McNabb-type exclusionary rule applicable to the states. [It would seem that, if Mapp equates Fourth and Fourteenth Amendment requirements, Wong Sun v. United States, 371 U.S. 471, abstracted at 52 J. Crim. L., C. & P.S. 189 (1963), would compel the opposite result in Keating; for while McNabb is based only on a federal statute, the holding in Wong Sun (that voluntary admissions resulting from official conduct illegal by constitutional rather than statutory standards are inadmissible) is constitutionally compelled.]

Conspiracy—Commonwealth v. Ellsworth, 187 A.2d 640 (Pa. 1963). Defendant was convicted of first degree murder committed during the course of a robbery. On appeal, defendant contended that he was prejudiced by the trial court's erroneous admission in evidence of statements implicating defendant made in his absence by one Wilson, one of defendant's three co-conspirators. The Supreme Court of Pennsylvania reversed and ordered a new trial, holding that Wilson's statements would be admissible against defendant only if the original conspiracy was still in existence when the statements were made; that even though there had been no division of the stolen money between Wilson and defendant at the time the statements were made, the conspiracy ended, if not before, upon the arrest and incarceration of Wilson and defendant in connection with the instant crime; and that consequently, since Wilson's statements were made after his arrest and incarceration, they were made after the conclusion of the conspiracy and were inadmissible against defendant. Regretting the granting of a new trial in light of the evidence of defendant's guilt, the Court stated that admission of Wilson's statements "gravely prejudiced the defendant and deprived him of the fair and impartial trial to which he was entitled."

Credit Cards—Adams v. United States, 312 F.2d 137 (5th Cir. 1963). See Mail Fraud, infra.

Cross-Examination—Shoffeitt v. State, 129 S.E.2d 572 (Ga. 1963). Defendant was convicted of abandonment. On appeal from the judgment and from the trial court's denial of his motion for new trial, defendant contended that the court erroneously permitted the prosecutor to cross-examine him after he made an unsworn statement in his defense. The trial court had reasoned that the necessary effect of Ferguson v. Georgia, 365 U.S. 570, abstracted at 52 J. Crim. L., C. & P.S. 300 (1961), which held that a criminal defendant has a right to be guided by counsel on direct examination in making his unsworn statement, was to allow the State the right to cross-examine him after he made an unsworn statement in his defense. The trial court had reasoned that the necessary effect of Ferguson's extension to a criminal defendant of the right to have counsel elicit his unsworn statement could not be read as granting the State the reciprocal right to
cross-examine without consent, since the statute governing unsworn statements [Ga. Code §38-415 (1962)] expressly prohibits the compulsion of testimony on cross-examination. The Court noted that the pertinent portion of the statute was re-enacted after Ferguson was decided.


Double Jeopardy—State v. Puckett, 377 P.2d 779 (Ariz. 1963). After the trial judge on his own motion declared a mistrial on the second day of defendant's trial, at which jury had been waived, the Superior Court granted defendant's motion to quash the information on which he was to be retried. On appeal by the State, defendant contended that the Superior Court properly quashed the information, since a subsequent trial would place him in double jeopardy. The Supreme Court of Arizona reversed and remanded, holding that where a newspaper article implying that the trial judge's decision in defendant's case would be politically influenced appeared the second morning of the trial, the trial judge had a "legal reason" for declaring the mistrial on his own motion, inasmuch as he felt unable to be fair and impartial in defendant's case after reading the article; and that consequently, defendant upon retrial would not be in double jeopardy, since declaration of mistrial on this proper ground removed the jeopardy which had attached upon commencement of the first trial.


Equal Protection of the Laws—Draper v. Washington, 83 Sup. Ct. 774 (1963). Petitioners, concededly indigent, were convicted of robbery, and their motions for new trial were denied. After filing notices of appeal from the judgments of conviction, petitioners filed identical motions requesting the trial court to grant them a free transcript, alleging indigence and necessity of a transcript for effective prosecution of appeal. In accordance with rules promulgated by the Supreme Court of Washington under compulsion of Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958) (which held that the then Washington procedure of granting transcripts to indigents only if in the opinion of the trial court justice would thereby be promoted constituted a denial of equal protection of the laws), the trial judge denied their motions on the ground that, in terms of the new rules, the assignments of error were patently frivolous. The Supreme Court of Washington quashed petitioners' writ of certiorari for review of the denial, solely on the basis of the stenographic record of the hearing for request of transcript and the conclusory findings of fact (arrived at without examination of the transcript) made by the trial judge subsequent to the hearing. On certiorari to the United States Supreme Court, petitioners contended that the present Washington procedure for indigent appeals had not cured the constitutional defects disapproved in Eskridge, since though the standard for granting of transcript was now nonfrivolity rather than promotion of justice, the procedure still denied petitioners equal protection by denying them adequate appellate review because of indigence. In an opinion written by Mr. Justice Goldberg, a five-Justice majority of the United States Supreme Court reversed and remanded, holding that in some cases a report of the events at trial other than a complete, formal transcript may be sufficient to assure adequate appellate review of an appellant's contentions (e.g., when the contentions involve challenges to the validity of a statute, sufficiency of an indictment, etc.); that petitioners' contentions, which related to improper foundations for the introduction of certain evidence, failure of proof of identification of petitioners, and failure of the evidence to sustain the conviction, could not be adequately considered on appeal on the basis of the inadequate information before the Washington Supreme Court; and that since the State thus failed to perform its duty to provide the indigent defendants with means of presenting their contentions to the appellate court which were as good as those available to non-indigents with similar contentions, petitioners were denied equal protection of the laws. The majority noted that because of the nature of petitioners' contentions, supplying petitioners with a trial record not amounting to a complete transcript could satisfy the criterion. Justices Clark, Stewart and Harlan joined in Justice White's dissenting opinion, considering the appellate review on the trial court's finding of facts to be constitutionally adequate.
Equal Protection of the Laws—Lane v. Brown, 83 Sup. Ct. 768 (1963). After petitioner, an indigent, was convicted of murder in an Indiana state court and sentenced to death, the Indiana Supreme Court affirmed, and the United States Supreme Court denied certiorari. Petitioner filed in the Federal District Court an application for habeas corpus, which was dismissed for failure to exhaust state remedies then available. The state trial court then denied petitioner's petition for writ of error coram nobis. Upon refusal of the Public Defender, who had previously represented petitioner, to represent him in an appeal to the Indiana Supreme Court from the trial court's denial of coram nobis, because of the Defender's belief of the futility of such course of action, petitioner applied to the trial court for a transcript of the coram nobis hearing, and the Indiana Supreme Court affirmed denial of this request. The Supreme Court of the United States denied certiorari without prejudice to petitioner's right to apply for federal habeas corpus, and petitioner again applied for habeas corpus in the Federal District Court. The District Court granted the writ, ordering that petitioner be given full appellate review of his coram nobis denial and be discharged upon default within a time determinable by the Court, and the Court of Appeals for the Seventh Circuit affirmed, directing that petitioner remain in custody pending final disposition by the United States Supreme Court. On certiorari by the State Prison Warden, petitioner contended that the trial court's refusal to grant his application for a transcript of his coram nobis hearing effectively prevented him from appealing the order denying coram nobis and thus constituted denial by Indiana of petitioner's Fourteenth Amendment right to equal protection of the laws, since the right of appeal was available to all criminal defendants in Indiana who could afford to pay for a transcript. The Supreme Court, per Mr. Justice Stewart, vacated and remanded to the District Court with instructions to order petitioner's discharge from custody unless the State should provide him an appeal on the merits to the Indiana Supreme Court from denial of coram nobis, holding that where under Indiana decisional law only the State Public Defender and not the indigent himself could procure a transcript of a coram nobis hearing for an indigent, and Indiana Supreme Court rules required the filing of a transcript as a condition of hearing an appeal from denial of a writ of error coram nobis, the operation of the Public Defender Act [Burns' Ind. Ann. Stat. §13-1401 et seq. (1946)] as interpreted by the Supreme Court of Indiana denied petitioner equal protection of the laws, since it denied the indigent petitioner the benefits of an existing system of appellate review available to non-indigents. The majority noted that this principle was applicable although the appeal sought was from state collateral proceedings and even though an appeal on the merits from the judgment of conviction had already been provided by the State. Mr. Justice Harlan wrote a separate opinion in which Mr. Justice Clark concurred, basing his decision to remand on denial of due process for unreviewability of the Public Defender's decision not to appeal rather than on denial of equal protection, and would instruct the District Court to discharge petitioner only if the Indiana Supreme Court failed to review the Public Defender's decision.

Forgery—People v. Allen, 28 Cal. Rptr. 409 (Dist. Ct. App. 1963). Defendant was convicted of forgery. On appeal from the judgment and from an order denying her motion for new trial, defendant contended that since the handwriting expert failed to give reasons for his opinion that the forged checks and money orders were signed by defendant, the trial court should have granted her motion to strike the expert's testimony. The California District Court of Appeal affirmed, holding that where the examiner of questioned documents was found by the trial court to be a qualified expert, his opinion was admissible since it was based upon his examination of the questioned documents and standards admittedly written by defendant, regardless of the expert's failure to detail reasons for his opinion. The Court noted that failure of an expert to state reasons for his opinion goes to the weight but not the admissibility of the evidence.


Freedom of Speech—Wollam v. City of Palm Springs, 29 Cal. Rptr. 1 (1963). Plaintiffs, members of Local 535 of the Culinary Workers and Bartenders Union, brought an action (apparently for declaratory judgment) attacking the constitutionality of an ordinance prohibiting the use of stationary sound trucks. On stipulated facts that plaintiffs intended to use stationary sound trucks
at job sites to peacefully disseminate to the public information regarding working conditions and that defendants intended to enforce the ordinance and arrest violators, the trial court ruled that the ordinance was unconstitutional. On appeal by defendants, plaintiffs contended that First Amendment freedom of speech as incorporated into the due process clause of the Fourteenth Amendment extended to the use of sound trucks, and that the instant ordinance exceeded the City’s permissible range of regulation of this freedom. The Supreme Court of California affirmed, holding that use of sound trucks for purposes of communication was protected by freedom of speech, since the right to speak freely inherently encompasses the right to effectively communicate, and use of a sound truck is a practical and effective means, and in some cases the only available means, for communication; and that although a city or state may regulate the use of sound trucks in order to protect the public from certain evils, such as traffic hazards or noisy disturbances, the ordinance under attack exceeded the permissible bounds of regulation of free speech by its blanket prohibition of the use of stationary sound trucks without regard to whether or not a traffic hazard is created and even if the truck is complying with the maximum sound limitation prescribed by another section of the ordinance.

Habeas Corpus—Ray v. Noia, 83 Sup. Ct. 822 (1963). Petitioner was convicted in a New York state court of felony murder and failed to appeal. After his two co-felons, whose confessions were obtained under the same circumstances as was petitioner’s and who had appealed from their state convictions, were released on federal habeas corpus following their unsuccessful appeals in the state courts, petitioner applied for state coram nobis, the time during which he could appeal having run. The trial court granted coram nobis and set aside his conviction, but the New York Court of Appeals affirmed the Appellate Division’s reversal reinstating the judgment, basing its affirmance on petitioner’s inability to prosecute coram nobis because of his failure to appeal when appeal was available. The United States District Court for the Southern District of New York dismissed petitioner’s application for writ of habeas corpus, and the Court of Appeals for the Second Circuit, 300 F.2d 345 (2d Cir.), abstracted at 53 J. Crim. L., C. & P.S. 494 (1962), reversed and ordered petitioner discharged from custody unless given a new trial, on the ground that, under the circumstances, the state procedural ground—petitioner’s failure to appeal—was not an adequate and independent state ground preventing his success on federal habeas corpus. On certiorari by the State Prison Warden, petitioner contended that he was deprived of due process because the only evidence on which he was convicted was an admittedly coerced confession. Speaking through Mr. Justice Brennan, the United States Supreme Court affirmed, holding that although a state procedural default is held to constitute an adequate and independent non-federal ground barring direct review by the Supreme Court, this doctrine did not limit the power of federal courts to grant habeas corpus, since state procedural rules must yield to the overriding federal policy of providing a federal forum via habeas corpus to test the constitutionality of restraint and enforce the right of personal liberty, in light of the nature of the writ at common law, the language and purpose of the Habeas Corpus Act of 1867, the course of Supreme Court decisions for nearly a century, and the power of the federal courts under 28 U.S.C. §2243 to take testimony and determine the facts de novo, and in view of the fact that the only concrete impact the assumption of federal habeas corpus jurisdiction in the face of a procedural default has on the state interest to achieve orderly criminal procedure is that it prevents the state from foreclosing a criminal defendant’s opportunity to vindicate his constitutional rights in order to punish him for his default and to deter others from committing similar defaults. The Court further held that petitioner’s failure to exhaust a state remedy once available but no longer available at the time he applied for habeas corpus did not preclude issuance of habeas corpus, since 28 U.S.C. §2254, which provides that federal habeas corpus re a state prisoner shall not be granted unless he “has exhausted the remedies available in the courts of the State,” required only that petitioner exhaust state remedies still open at the time he filed his application for federal habeas corpus; and that although a federal judge has limited discretion to deny habeas corpus to an applicant who, as a matter of tactics or strategy, has deliberately bypassed the orderly procedure of the state courts, petitioner’s failure to appeal from his state conviction did not constitute a waiver of his federal claims such as to justify invocation of this discretion, inasmuch as petitioner’s deliberate
choice not to appeal was based on his reasonable fear that reversal and retrial would result in electrocution rather than his present sentence of life imprisonment, and thus could not realistically be deemed a merely tactical or strategic litigation step or a deliberate circumvention of state procedures. The majority noted that a federal court sitting in a habeas corpus case is not bound by a state court's finding of waiver of the right to raise a constitutional violation, but can independently determine the question, since waiver in such a case affects federal rights and thus is a federal question; that choice not to pursue a state remedy made by competent counsel but not participated in by the habeas corpus applicant would not automatically constitute waiver meant there could never be binding waiver.

Habeas Corpus—Townsend v. Sain, 83 Sup. Ct. 745 (1963). After completely exhausting his state remedies, petitioner, under sentence of death for murder on the judgment of an Illinois state court, applied for habeas corpus in the United States District Court for the Northern District of Illinois. The District Court denied the writ without a hearing, and the Court of Appeals for the Seventh Circuit dismissed petitioner's appeal. The United States Supreme Court granted certiorari and vacated and remanded to the District Court for a decision as to whether, in light of the state court record, a plenary hearing was required. On remand, the District Court dismissed the petition, holding that no hearing was required, and the Seventh Circuit affirmed. On certiorari, petitioner contended that the confession introduced against him after denial of his motion to suppress was inadmissible because it was produced by the injection of hyoscine, a drug having properties which tend to induce a person to confess. In an opinion written by Chief Justice Warren, the United States Supreme Court reversed and remanded, holding that petitioner's allegations, if proved, would establish his right to release, since a confession produced by a drug having the effect of a "truth serum" does not meet constitutional standards of admissibility for want of free will, whether or not the drug was administered by persons aware of its properties as a "truth serum"; that the District Court thus had the power to receive evidence and try the facts anew, since this power exists where a habeas corpus applicant alleges facts which, if proved, would entitle him to release; that since it was not clear from the record and impossible to reconstruct therefrom whether the state trial judge applied the proper standard of federal law in ruling upon the admissibility of the confession (i.e., it was unclear whether he would have excluded it had he believed the evidence presented at the hearing on petitioner's motion to suppress regarding coercion due to injection of the drug), he could have believed petitioner's evidence of coercion; that since, although there was medical testimony as to the general properties of hyoscine from which coercion by injection might have been inferred, failure to disclose that hyoscine was the same drug as scopolamine, popularly known as "truth serum" and capable of triggering statements in a legal sense involuntary, amounted to failure at the trial to consider a crucial fact; and that consequently, the District Court was under a duty to exercise its power to determine the facts de novo at an evidentiary hearing on petitioner's application for habeas corpus. The majority, feeling that it was appropriate to discuss the considerations which should govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings, set out a standard for determining when it is mandatory that the power of a federal court to hold such a hearing be exercised, as follows: "Where the facts are in dispute, the federal court on habeas corpus must hold an evidentiary hearing if the . . . applicant did not receive a full and fair evidentiary hearing in a state court . . . . [A] federal evidentiary hearing is required unless the
state court trier of fact has after a full hearing reliably found the relevant facts.” 83 Sup. Ct. at 757. Recognizing that overparticularization of this test was unwise, the majority spelled out six categories of circumstances in which it applied. The majority stated that *Brown v. Allen*, 334 U.S. 443 (1953), was superseded by the enunciated standard to the extent of any inconsistencies. Justice Stewart, with whom Justices Clark, Harlan and White joined, dissented, stating that the majority’s statement of an elaborate set of standards was not necessary to decision of the instant case, and that this amounted to an advisory opinion; and that even under this new criterion, no hearing was required because the Illinois courts had fully and fairly determined petitioner’s factual claims. Justice Goldberg, joining in the majority opinion, wrote a concurring opinion in rebuttal of the points made by the four dissenting Justices.


**Habitual Criminal Acts—** *Tuel v. Gladden*, 379 P.2d 553 (Ore. 1963). Petitioner was convicted of burglary in 1929, and on proof of three prior felony convictions was sentenced to life imprisonment under the Habitual Criminal Act then in effect. In 1959, after his commutations and parole were respectively revoked for violation of conditions and terms, the trial court granted petitioner’s application for post-conviction relief. On appeal by the Warden, petitioner contended that the Habitual Criminal Act under which he was sentenced violated an Oregon constitutional provision commanding that criminal law be founded on principles of reformation rather than vindictive justice. The Supreme Court of Oregon reversed, holding that the constitutional provision [ORE. CONST. art. I, §15] must not be construed to require that reformation be sought at substantial risk to the people of the State; that the probability that one convicted of four felonies would “continue to be a menace to the community” was so great that mandatory life imprisonment was justified; and consequently the Act did not violate the Oregon Constitution, and defendant’s sentence was valid.

**Homicide—** *Benneft v. State*, 377 P.2d 634 (Wyo. 1963). Defendant was convicted of manslaughter for the killing of her newborn baby. On appeal, defendant contended that the trial court erred in refusing to grant an instruction to the effect that proof of “an independent circulation” of the baby was essential to proving that the baby was born alive, and that the corpus delicti had not been established in the absence of such proof. The Supreme Court of Wyoming affirmed, holding that the “independent circulation” test could not properly be applied by a jury, since there is no satisfactory standard by which to determine when such a circulation exists; and where the opinion testimony of an expert witness indicated that the child was born alive, there was sufficient evidence to support the conclusion that one of the essential elements of the offense—the existence of a human being—had been established beyond a reasonable doubt.
dead body or any part of the body or remains of the alleged victim was produced, the State had failed to establish the corpus delicti. The Supreme Court of Pennsylvania affirmed, holding that the corpus delicti of murder could be proved by circumstantial evidence even in absence of any evidence of a body; and that the circumstantial evidence in the instant case, which included proof of complete, sudden termination of a long-established, consistent pattern of living of the alleged victim, a healthy, 49-year old woman, who was last seen lying on the floor in defendant's presence in an apparently helpless condition with blood on her head, was sufficient to prove the corpus delicti.

**Homicide—“Proximate Cause”—** Commonwealth v. Atencio, 189 N.E.2d 223 (Mass. 1963). Defendants were convicted of manslaughter and illegal carrying of firearms. On appeal, defendants contended that the trial court erred in denying their motions for directed verdict, inasmuch as they could have committed neither offense as a matter of law. The Supreme Court of Massachusetts reversed the convictions for carrying firearms on the ground that defendants' temporary possession did not amount to the prohibited “carrying,” and it affirmed the manslaughter convictions, holding that where defendants participated in a “game” of “Russian roulette” which resulted in the death of one Britch, the evidence supported the convictions for manslaughter, inasmuch as the voluntariness of Britch's participation was irrelevant to the case, and since defendants' participation was not, as a matter of law, precluded from being found to be the “cause” of Britch's death. The court distinguished the instant case from Commonwealth v. Root, 170 A.2d 310 (Pa.), abstracted at 52 J. Crim. L., C. & P.S. 426 (1961), and other cases wherein the drag-racing driver of a non-colliding car was held not to have been the “cause” of his competitor's death, on the ground that drag-racing depends on the skill of the competitors whereas the outcome of “Russian roulette” is merely a matter of chance, and someone is bound to be killed.

**Homicide—“Proximate Cause”—** State v. Smith, 119 N.W.2d 838 (Minn. 1962). Defendant was convicted of third degree murder. On appeal from an order denying his motion for dismissal of the indictment or for new trial, defendant contended that the injuries he inflicted on one Knopic were not shown to have proximately caused Knopic's death. The Supreme Court of Minnesota affirmed, holding that where Knopic died in the throes of delirium tremens brought about by acute alcoholism after having been beaten up by defendant, defendant's acts were sufficiently causally connected with Knopic's death to justify holding him criminally liable therefor, despite expert testimony that the technical cause of death was cirrhosis of the liver, inasmuch as the jury could properly infer from other expert testimony, consisting of opinions with regard to the increased mortality rate from external injuries among cirrhotics and as to the probability that Knopic's liver condition would not then have caused his death in absence of the beating, that the essential causal connection existed. The Court noted that the presence of other contributing causes of death does not relieve from criminal responsibility one whose injurious actions contributed mediately or immediately to the death.

**Improper Conduct by Prosecutor—** McGhee v. State, 149 So. 2d 1 (Ala. App. 1962), aff'd, 149 So. 2d 5 (Ala. 1963). Defendant was convicted of robbery. On appeal, defendant contended that the trial court erroneously overruled his objection to improper comment made during the prosecutor's closing argument. The Court of Appeals of Alabama reversed, holding that where, with regard to the credibility of the prosecuting witness, a minister, the prosecutor stated, “I know this man of God told you the truth, he is on God's side, gentlemen, and God is on his,” defendant's objection should have been sustained, since the statement was unsupported by the evidence, invaded the province of the jury, and was calculated to prejudice defendant's substantial rights. On petition for certiorari by the State, the Supreme Court of Alabama affirmed, concurring without elaboration in the Court of Appeals opinion.


**Insanity—** State v. Hood, 187 A.2d 499 (Vt. 1963). Defendant was convicted of first degree


dead body or any part of the body or remains of the alleged victim was produced, the State had failed to establish the corpus delicti. The Supreme Court of Pennsylvania affirmed, holding that the corpus delicti of murder could be proved by circumstantial evidence even in absence of any evidence of a body; and that the circumstantial evidence in the instant case, which included proof of complete, sudden termination of a long-established, consistent pattern of living of the alleged victim, a healthy, 49-year old woman, who was last seen lying on the floor in defendant's presence in an apparently helpless condition with blood on her head, was sufficient to prove the corpus delicti.
murder. On appeal, defendant contended that the trial court should have granted his request for an instruction that a verdict of not guilty by reason of insanity did not mean that he would automatically be free to live in society and that he could be committed to an institution if his going free were considered dangerous to the community. The Supreme Court of Vermont affirmed, holding that since the issue of insanity is a factual question for the jury’s determination, the jury should decide the question solely on the basis of the evidence and should not be influenced by such extraneous factors as a consideration of the effect of a finding of not guilty by reason of insanity; and that consequently the trial court’s refusal to give the requested instruction was not error.


Mail Fraud—Adams v. United States, 312 F.2d 137 (5th Cir. 1963). Defendant was convicted of using the mails in the execution of a scheme to defraud in violation of 18 U.S.C. §1341. On appeal from the District Court’s denial of his motions to dismiss the indictment, for judgment of acquittal, and in arrest of judgment, defendant contended that his unauthorized use of another’s Gulf Oil credit card in face-to-face transactions with various Gulf distributors did not constitute mail fraud because use of the mails was merely incidental to the fraudulent scheme rather than, as required by the statute, in execution of it. The Court of Appeals for the Fifth Circuit affirmed, holding that mailing is “in execution of” a fraudulent scheme where use of the mails is only incidental if it is incidental to a material element of the scheme; that the crucial question was whether the use of the mails was significantly related to those operative facts making the fraud possible or constituting the fraud; and that since the essence of defendant’s fraudulent scheme was utilization of the practice of Gulf Oil distributors to extend credit on the faith of Gulf credit cards—i.e., but for this practice, the scheme could not have existed—defendant violated §1341, because the practice of extending credit was inseparably connected with the distributor’s use of the mails to forward sales slips to the Gulf Oil Company. [Compare the instant case with United States v. Fordyce, 192 F. Supp. 93 (S.D. Cal.) and Williams v. United States, 192 F. Supp. 97 (S.D. Cal.), both abstracted at 52 J. CRM. L., C. & P.S. 298 (1961). In these two cases, the Courts reached conclusions as to whether fraudulent use of credit cards could be prosecuted under a federal statute punishing interstate transportation of false securities. The theory of the instant case reaches intrastate transactions and avoids the problem presented by Fordyce and Williams, i.e., what, if any, tangible things connected with credit card transactions constitute “securities.”]

Narcotics—In re De La O, 28 Cal. Rptr. 489 (1963). Petitioner waived jury trial and was found guilty by the Municipal Court of being a narcotics addict in violation of CAL. HEALTH &
SAFETY CODE §11721 [the section held unconstitutional in Robinson v. California, 370 U.S. 660, abstracted at 53 J. CRIM. L., C. & P.S. 492 (1962)]. Rather than entering judgment imposing any penal sanction against petitioner, the Municipal Court certified petitioner to the Superior Court pursuant to CAL. PEN. CODE §6450, and after a hearing and examination of petitioner, the Superior Court adjudicated petitioner to be a narcotics addict and committed him to the Director of Correction for compulsory treatment under §6450. On order to show cause issued upon application for writ of habeas corpus, petitioner contended that his confinement at the California Rehabilitation Center under the §6450 commitment order was not cruel and unusual punishment. The Superior Court of Correction for compulsory treatment under §6450 commitment was unconstitutional, since such confinement for the illness of being an addict constituted cruel and unusual punishment under the holding in Robinson v. California. Noting that habeas corpus would be available to inquire into the fact of addiction (not contested in this case), and recognizing petitioner's right to appeal the commitment order, the Supreme Court of California discharged the order to show cause and denied the petition for habeas corpus, holding that despite certain external indicia of criminality adhering to the §6450 commitment procedure, petitioner's confinement was not an unconstitutional criminal sanction for addiction but rather was a civil commitment confining petitioner to the Rehabilitation Center for treatment, and thus was not cruel and unusual punishment. The Court noted that Robinson expressly excepted such confinement from the “cruel and unusual” ban.

Narcotics—People v. Davis, 188 N.E.2d 225 (Ill. 1963). Defendant was convicted of being “addicted to the unlawful use” of narcotics. The Cook County Criminal Court granted defendant's motion to strike the complaint on the ground that the pertinent part of the statute [ILL. CRIM. CODE OF 1961, art. 22, §3] was invalid. The State prosecuted a writ of error, contending that use of the term “unlawful” brought the statute out of the rule of Robinson v. California, 370 U.S. 660, abstracted at 53 J. CRIM. L., C. & P.S. 492 (1962), that the status of addiction cannot validly be made a crime. The Supreme Court of Illinois affirmed, holding that since the provision in question made addiction, rather than use, a crime, that part of the statute was invalid under Robinson, since use of the term “unlawful” did not make the statute materially different from that involved in the Robinson case. The Court noted that one could violate the statute by being an addict in Illinois even if addiction were acquired innocently or in another jurisdiction.


Nolo Contendere—Peel v. State, 150 So. 2d 281 (Fla. Dist. Ct. App. 1963). Defendant, an attorney and former judge, was convicted of being an accessory before the fact to the first degree murder of another judge's wife by hiring another to drown her. On appeal, defendant contended that the trial court erroneously denied his variously grounded motions for a bill of particulars, for mistrial, for continuance and interrogatories, and for dismissal of prosecution; that his plea of nolo contendere to a capital offense should not have been accepted on the express condition that a life sentence would be imposed; and that defendant had twice been placed in jeopardy for the same offense. The Florida District Court of Appeal affirmed, holding that since defendant had entered a plea of nolo contendere, he could not on appeal raise questions concerning matters other than the sufficiency of the indictment, inasmuch as a nolo contendere plea has the same effect as a plea of guilty with regard to the case in which it is entered; that in the absence of coercion, defendant was in no position to complain of the trial court's acceptance of his plea of nolo contendere, especially since Florida permits the acceptance of pleas of guilty in capital cases; and additionally, that defendant was not placed in double jeopardy, since murder of the judge's wife required proof of a separate corpus delicti from that established in the case of the judge's murder for which defendant had previously been convicted.

Obscenity—United States v. Peisner, 311 F.2d 94 (4th Cir. 1962). Defendants waived trial by jury and were convicted by the District Court of transporting books containing obscene material in interstate commerce for the purpose of sale and distribution. On appeal, defendants contended that there was no probable cause for the search of defendant Peisner's car, in which both defendants were riding, which resulted in seizure of the evidence on which both defendants were con-
ABSTRACTS OF RECENT CASES

victed. Considering the First and Fourth Amendments together, the Court of Appeals for the Fourth Circuit reversed, holding that since obscene books are contraband, a search for books is constitutional only if the officer has probable cause to believe both that books are in the place to be searched and that they are obscene; and that since there was no evidence in the record that some qualified individual aware of the Roth v. United States, 354 U.S. 476 (1957), test of obscenity read the particular books to be seized and determined that they were obscene, the New Jersey state officer, who, under the direction of FBI agents, made the warrantless search and seized the admittedly obscene books, lacked probable cause. The Court stated that although a prior determination of obscenity by a judicial officer was not essential to constitute probable cause for a search for and seizure of books, prior determination by a qualified individual as described above was essential to probable cause in order to assure non-obscene material the constitutional protection to which it is entitled.


Police Power—Garden Spot Mkt., Inc. v. Byrne, 378 P.2d 220 (Mont. 1963). Plaintiff retail stores brought action for declaratory judgment against defendant members of the State Board of Equalization to declare that MONT. LAWS ch. 153 (1961) was unconstitutional and to enjoin defendants from enforcing the statute. Granting the requested relief, the trial court held the statute unconstitutional and void. On appeal by defendants, plaintiffs contended that the Act, which purported to regulate by license arrangements the use of redeemable devices such as trading stamps, was unconstitutional because it imposed a license fee so high that use of such devices was indirectly but effectively prohibited. The Supreme Court of Montana affirmed, holding that the use of redeemable devices to promote retail sales was a legitimate method of advertising and a useful business activity; and that consequently the Act, which in effect prohibited use of such devices, was unconstitutional, inasmuch as virtual prohibition through use of either the police power or the taxing power of a prohibitory license fee for dealing in redeemable devices, the statute imposed a penalty of treble payment of a fee not paid when due. [The opinion contains reference to many state and federal cases dealing with the question whether use of redeemable devices to promote retail sales is a legitimate and useful business activity or whether it is a practice which, in the interest of the general welfare, could be condemned by legislation.]

Police Power—State v. Brewer, 129 S.E.2d 262 (N.C. 1963). Defendants were convicted of conspiracy to violate N.C. GEN. STAT. §14-353 (1953), which prohibits influencing agents and servants to violate duties owed employers, and of the substantive offense. On appeal, defendants contended that the trial court erroneously denied their motion to quash the indictment, since §14-353 was unconstitutional as an unreasonable and arbitrary exercise of the police power. The Supreme Court of North Carolina affirmed, holding that since it was substantially related to prevention of commercial bribery, an evil which the legislature had a right to prevent, the statute was a reasonable and proper exercise of the police power. [The Court's opinion collects many cases dealing with the propriety and constitutionality of commercial bribery statutes.]

Prejudicial Publicity—United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963). Petitioner was convicted of first degree murder in a New York state court and was sentenced to be executed. On appeal from the Federal District Court's denial of his petitions for habeas corpus, petitioner contended that the state court's denial of his motion for change of venue deprived him of a fair and impartial jury in violation of his Fourteenth Amendment rights. The Court of Appeals for the Second Circuit reversed and remanded for issuance of the writ, on the condition that petitioner be retained in custody for the purpose of retrial by a proper jury, holding that where the pre-trial publicity was highly inflammatory, great in volume, and universally accessible, and where, of the twelve regular and four alternate jurors, all but one had read prejudicial news accounts, eight stated that they had formed an opinion that petitioner was guilty, and of these
eight, three (who were among the regular jurors) stated that it would take evidence to change this opinion, the Fourteenth Amendment standard of jury impartiality as pronounced in Irvin v. Dowd, 366 U.S. 717, abstracted at 52 J. Crim. L., C. & P.S. 428 (1961), was not met, even though all the jurors stated that they could decide solely on the evidence presented in court, and even though petitioner's counsel shared with the State responsibility for much of the publicity; and that consequently, when the State court denied petitioner's motion for change of venue, the State deprived petitioner of his Fourteenth Amendment right to a fair trial.


Prejudicial Publicity—Commonwealth v. Crehan, 188 N.E.2d 923 (Mass. 1963). Defendants were convicted of crimes related to robbery and theft. On appeal, defendants contended that the trial court's denial of their motions to poll the jury and for mistrial deprived them of their right to a fair trial. The Supreme Judicial Court of Massachusetts reversed, holding that publication during the trial by three local newspapers of the trial court's request that they refrain from printing defendants' past criminal records tended to be prejudicial and "directly interfered with the judicial process"; that the jurors would be presumed to have read the articles, inasmuch as they separated after publication and the poll sought was denied; and that in the absence of immediate, specific cautionary instructions, the trial court's general cautionary instruction at the close of the trial that the articles were not evidence was insufficient to cure the presumed prejudice.

Revocation of Suspended Sentence—Gerard v. State, 363 S.W.2d 916 (Ark. 1963). Defendant was convicted of assault with a deadly weapon, and upon recommendation by the jury that the penalty of fine and imprisonment be suspended, the trial court imposed the fine but suspended imprisonment. Ten months later, defendant was again charged with assault with a deadly weapon for acts unrelated to the original charge, and on testimony of local police officers, the court summarily revoked suspension of the sentence for violation of the conditions of suspension. On appeal from revocation, defendant contended that the trial court's failure to specify the conditions on which suspension was predicated and refusal to allow defendant to present witnesses or to speak in his own behalf vitiated the revocation. The Supreme Court of Arkansas reversed and remanded, holding that although specification and enumeration of the conditions of suspension would be conducive to the future good conduct of one under suspended sentence and is thus the better practice, failure so to specify did not render revocation invalid, inasmuch as it is generally understood that suspension is dependent on good behavior; but that since a defendant's absolute right to be heard and to call witnesses in his defense is "a basic principle of American justice," the summary revocation was invalid, and defendant was entitled to exercise that right at a new revocation hearing. Although the Court cited several cases which indicated that the right to defend extends to suspended sentence revocation hearings, the instant case is apparently the first Arkansas case so to hold.


Right to Counsel—State ex rel. Sheppard v. Koblentz, 187 N.E.2d 40 (Ohio 1962). Relator Sam Sheppard, a state prisoner serving a sentence for second degree murder, brought an original action in the Ohio Supreme Court for writ of mandamus to compel respondent, the Chief of the Division of Correction of the Department of Mental Hygiene and Correction, to allow him to undergo hypnosis and polygraph tests in order to establish his innocence, and respondent demurred. Relator contended that his constitutional right to effective assistance of counsel included the right to use scientific means to aid counsel in establishing relator's innocence. The Supreme Court of Ohio sustained the demurrer and denied mandamus, holding that the right to counsel extended only to the right to representation by an attorney and did not include the assistance of experts often employed in the preparation of criminal cases; that respondent was under no clear, legal duty to permit relator to subject himself to hypnosis or polygraph tests in order to demonstrate his innocence of the crime for
which he was convicted, since relator's duty to regulate state penal institutions vested him with discretion to refuse any person except counsel access to prisoners; and that absent failure to carry out a clear, legal duty, mandamus would not lie.

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Search and Seizure—Villano v. United States, 310 F.2d 680 (10th Cir. 1962). Defendant was convicted of failing to pay a special occupational tax on his business of accepting bets on the outcome of football games. On appeal, defendant contended that the District Court erred in denying his motion to suppress evidence which had been illegally obtained by state officers. The Court of Appeals for the Tenth Circuit reversed with directions to sustain the motion and for further proceedings consistent with the decision, holding that even though defendant lacked ownership and exclusive possession both of the desk searched at his place of employment and of the notebooks seized following the search, he was within the class protected by Fed. R. Crim. P. 41 and thus had standing to move for suppression of the notebooks, inasmuch as the search and seizure were “directed at” defendant; and that since defendant had not consented to the state officers' search without a warrant, the evidence must be suppressed in the federal prosecution under Elkins v. United States, 364 U.S. 206 (1960).

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Search and Seizure—Hall v. Warden, 313 F.2d 483 (4th Cir. 1963). Petitioner was convicted of murder in a Maryland state trial court, and the Maryland State Court of Appeals affirmed. After the trial court denied the relief requested by petitioner under Maryland’s Uniform Post Conviction Procedure Act, the Court of Appeals of Maryland denied leave to appeal, and petitioner’s application for writ of certiorari was denied by the United States Supreme Court. Petitioner then sought habeas corpus in the United States District Court for the District of Maryland. On appeal from the District Court’s denial of the writ, 201 F. Supp. 639 (D. Md.), abstracted at 53 J. Crim. L., C. & P.S. 354 (1962), petitioner contended that illegally seized evidence was introduced at the trial, and that Mapp v. Ohio, 367 U.S. 643, abstracted at 52 J. Crim. L., C. & P.S. 292 (1961), decided after he exhausted his state remedies, applied retroactively to vitiate his conviction on constitutional grounds. The Court of Appeals for the Fourth Circuit reversed and remanded petitioner to the District Court with instructions to allow the State a reasonable opportunity to retry petitioner, and in default of this to release him, holding that the search complained of was clearly illegal unless petitioner consented thereto, and the record failed to support a determination that his conduct constituted implied consent; that Mapp v. Ohio should be retroactively applied to petitioner’s case even though his conviction was affirmed and finalized before Mapp was decided, because the Supreme Court did not expressly state that the decision should be restricted to prospective application, and because enforceability of constitutional rights must not be determined by technicalities in point of time; and that Hall’s failure to object at his trial to admission of the fruits of the illegal search and to raise the question of admissibility on appeal was excusable and did not constitute waiver of his constitutional right (which then existed though not yet declared by the Supreme Court), because to raise the question would have been futile under Maryland law as it then existed. Not reaching the question of the effect of Mapp on petitioner’s conviction, two judges dissented on the ground that petitioner had impliedly consented to the search.

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Instead of appealing from the conviction, petitioner unsuccessfully sought state habeas corpus, and the Maryland State Court of Appeals denied leave to appeal from that decision. Subsequently petitioner filed a petition in a Maryland state court under the Maryland Post Conviction Procedure Act which was denied, and no application for leave to appeal was filed. All of these state proceedings were completed prior to the decision for leave to appeal was filed. All of these state habeas corpus and the Maryland State Court of Appeals denied petitioner's petition in a Maryland state court. The District Court of Appeal affirmed, holding that consequently, before it would act on the writ of habeas corpus in the Federal District Court, petitioner contended that evidence obtained as a result of an illegal search and seizure was used against him at the trial, relying on Hall v. Warden, 313 F.2d 483 (4th Cir. 1963), abstracted supra, for the proposition that Mapp applies retroactively even to finalized state convictions, and regardless of failure to raise the search and seizure question in the state court. The District Court denied the writ without prejudice to petitioner's right to file another petition in the Court after filing a new post-conviction petition in the state court. The Court noted that the State intended to seek certiorari from the United States Supreme Court in Hall v. Warden, and it also noted that the Maryland State Court of Appeals decisions conflicted with Hall on the waiver issue and that the Maryland state courts had not yet expressly ruled on the retroactivity question. The Court held that consequently, before it would act on the pending petition for habeas corpus, petitioner would be required to file a new post-conviction petition in the state courts raising the search and seizure point, to give these courts an opportunity to consider both the waiver and the retroactivity questions in the light of Hall and of whatever action the Supreme Court might take on the writ of certiorari being requested in that case.

Search and Seizure—People v. Young, 29 Cal. Rptr. 492 (Dist. Ct. App. 1963). Defendant was convicted of sex perversion. On appeal, defendant contended that the arresting officers' testimony, on which his conviction was based, was inadmissible because their observation of his conduct constituted an illegal search. The California District Court of Appeal affirmed, holding that where the arresting officers, concealed in a shack adjacent to a public men's toilet, observed defendant's activities through a vent between the shack and the men's room, their observation did not amount to a search, inasmuch as defendant's offense was committed while he was seated on a commode having neither doors nor sides in an area open to the view of anyone entering the toilet area. [The Court relied on People v. Norton, 25 Cal. Rptr. 678 (Dist. Ct. App. 1963), abstracted at 54 J. Crim. L., C. & P.S. 292 (1961), and in none of them did petitioner raise any question of illegal search and seizure. On application for writ of habeas corpus in the Federal District Court, petitioner contended that evidence obtained as a result of an illegal search and seizure was used against him at the trial, relying on Hall v. Warden, 313 F.2d 483 (4th Cir. 1963), abstracted supra, for the proposition that Mapp applies retroactively even to finalized state convictions, and regardless of failure to raise the search and seizure question in the state court. The Court denied the writ without prejudice to petitioner's right to file another petition in the Court after filing a new post-conviction petition in the state court. The Court noted that the State intended to seek certiorari from the United States Supreme Court in Hall v. Warden, and it also noted that the Maryland State Court of Appeals decisions conflicted with Hall on the waiver issue and that the Maryland state courts had not yet expressly ruled on the retroactivity question. The Court held that consequently, before it would act on the pending petition for habeas corpus, petitioner would be required to file a new post-conviction petition in the state courts raising the search and seizure point, to give these courts an opportunity to consider both the waiver and the retroactivity questions in the light of Hall and of whatever action the Supreme Court might take on the writ of certiorari being requested in that case.

Search and Seizure—Hall v. Warden, 25 Cal. Rptr. 678 (Dist. Ct. App. 1963). Defendant was convicted of sex perversion. On appeal, defendant contended that the arresting officers' testimony, on which his conviction was based, was inadmissible because their observation of his conduct constituted an illegal search. The California District Court of Appeal affirmed, holding that where the arresting officers, concealed in a shack adjacent to a public men's toilet, observed defendant's activities through a vent between the shack and the men's room, their observation did not amount to a search, inasmuch as defendant's offense was committed while he was seated on a commode having neither doors nor sides in an area open to the view of anyone entering the toilet area. [The Court relied on People v. Norton, 25 Cal. Rptr. 678 (Dist. Ct. App. 1963), abstracted at 54 J. Crim. L., C. & P.S. 292 (1961), and in none of them did petitioner raise any question of illegal search and seizure. On application for writ of habeas corpus in the Federal District Court, petitioner contended that evidence obtained as a result of an illegal search and seizure was used against him at the trial, relying on Hall v. Warden, 313 F.2d 483 (4th Cir. 1963), abstracted supra, for the proposition that Mapp applies retroactively even to finalized state convictions, and regardless of failure to raise the search and seizure question in the state court. The Court denied the writ without prejudice to petitioner's right to file another petition in the Court after filing a new post-conviction petition in the state court. The Court noted that the State intended to seek certiorari from the United States Supreme Court in Hall v. Warden, and it also noted that the Maryland State Court of Appeals decisions conflicted with Hall on the waiver issue and that the Maryland state courts had not yet expressly ruled on the retroactivity question. The Court held that consequently, before it would act on the pending petition for habeas corpus, petitioner would be required to file a new post-conviction petition in the state courts raising the search and seizure point, to give these courts an opportunity to consider both the waiver and the retroactivity questions in the light of Hall and of whatever action the Supreme Court might take on the writ of certiorari being requested in that case.

Search and Seizure—People v. Shapiro, 28 Cal. Rptr. 907 (Dist. Ct. App. 1963). Defendant was convicted of illegal possession of marijuana. On appeal, defendant contended that the marijuana admitted in evidence against her was obtained by an unlawful search. The California District Court of Appeal affirmed, holding that where police officers signalled defendant to stop her car at night because of absence of a tail light, and defendant, before stopping almost two blocks after the signal to stop, leaned over in the seat so far that her head was out of the officers' view, the officers were justified in searching defendant's car after she stopped it, inasmuch as defendant's delay in stopping and her furtive movements justified the police in suspecting that she was attempting to hide contraband; and that consequently the search which yielded marijuana was valid because made upon probable cause.

Search and Seizure—Baker v. State, 150 So. 2d 729 (Fla. Dist. Ct. App. 1963). Defendant was convicted of illegally operating a gambling house. On appeal, defendant contended that the trial court should have granted his motions for a bill of particulars, to quash the search warrant, and to suppress evidence seized thereunder on which his conviction rested, inasmuch as an unknown informant had signed the affidavit on the basis of which the warrant was issued. The Florida District Court of Appeal reversed and remanded, holding that although in many circumstances the prosecution need not reveal the identity of a confidential informer, this rule could not apply where the informant actually executes the affidavit which results in a criminal proceeding, since such an informant is an "accuser" by whom one ac-
cused of crime is entitled to be confronted [U.S. Const. amend. VI; Fla. Const. Declaration of Rights §11]; and that since evidence seized pursuant to the defective warrant should not have been admitted and was necessary for conviction, defendant’s conviction must be reversed. The Court noted that requiring the prosecution to identify or produce the affiant would cure the defect in the warrant.

Search and Seizure—State v. Scrotsky, 189 A.2d 23 (N.J. 1963). Defendant was convicted of unlawful entry and larceny, and the Appellate Division affirmed. In light of Mapp v. Ohio, 367 U.S. 643, abstracted at 51 J. Crim. L., C. & P.S. 292 (1961), decided after defendant’s trial but before appeal, the Supreme Court of New Jersey remanded to the trial court for determination of the validity of a search and seizure which produced evidence on which defendant’s conviction was predicated, retaining the appeal. The trial court found the search and seizure lawful and returned the matter to the Supreme Court for review. On appeal, defendant contended that although the search and seizure were made not by state police officers but by his landlady, the search and seizure violated his constitutional rights, inasmuch as she was acting as the agent of the state officers. The Supreme Court of New Jersey reversed and remanded, holding that since the police officers lacked an arrest or search warrant, the validity of the search and seizure depended on the landlady’s right to enter defendant’s apartment; that because the landlady had reserved no right of re-entry in the apartment rented by defendant, her claim to admission to the searched premises was no greater than that of a stranger; and that since the landlady must be considered the instrument of the state officers for purposes of applying the exclusionary rule, inasmuch as she entered as a participant in a police action, the evidence was unlawfully seized and should not have been admitted against defendant.

Search and Seizure—“Incident to Arrest”—People v. Carrigan, 28 Cal. Rptr. 909 (Dist. Ct. App. 1963). Defendant brothers William and Herschel Carrigan were convicted of burglary. On appeal, defendants contended that burglars’ tools which matched pry marks left on the burglarized premises were unlawfully obtained from defendant William’s automobile, since the search was not properly incident to William’s admittedly lawful arrest. The California District Court of Appeal affirmed, holding that even though the arresting officer did not display or execute a search warrant he had obtained for seizure of the tools, the search of William’s station wagon, parked in the driveway of the apartment house in which William was lawfully arrested, was lawful as incident to the arrest, particularly since a knife bearing incriminating pigment was visible from outside the vehicle.

Search and Seizure—Multiple Occupants—Tompkins v. Superior Court, 27 Cal. Rptr. 889 (1963); People v. Contreras, 27 Cal. Rptr. 619 (Dist. Ct. App. 1963); People v. Collins, 27 Cal. Rptr. 825 (Dist. Ct. App. 1963). Three recent California cases deal with the admissibility of evidence of narcotics violations obtained by officers who gained entry by virtue of admittance or authority given by defendant’s co-occupant of the premises.

Evidence so obtained was held inadmissible against the defendants in People v. Contreras and People v. Collins, decided by the 4th and 2d Divisions, respectively, of the California Second District Court of Appeal. The person admitting the officers in Collins was the permanent, as opposed to transient, tenant of a hotel room in which defendant was merely a visitor, while in Contreras the precise legal rights of the person granting admittance and the defendant with regard to the hotel room is not made clear. Since the room in Contreras appears to have been only temporarily rented for purposes of sexual intercourse, probably neither occupant had greater rights in the room than the other. In these two cases, both persons were present when the officers arrived.

In Tompkins v. Superior Court, decided after the two District Court of Appeal cases, the Supreme Court of California held that petitioner’s permanent joint occupant, who, while not on the premises, gave police officers his keys thereto, could not authorize them to enter and search the premises over the objection of petitioner, who was present when the officers entered. The Court held inadmissible against petitioner the evidence obtained by the unauthorized officers.

Lower courts in California would seem able to follow Contreras and Collins on like facts after the Tompkins decision, since the nature of the defendants’ rights in the premises in the first two
cases is significantly less substantial than in Tompkins.

Search and Seizure—Sufficiency of Affidavit—State v. Macri, 188 A.2d 389 (N.J. 1963); State v. DeGrazio, 188 A.2d 399 (N.J. 1963); State v. Burrachio, 188 A.2d 401 (N.J. 1963); State v. Zizulock, 188 A.2d 403 (N.J. 1963). In four recent cases decided on the same day by the New Jersey Supreme Court, the sufficiency of similar affidavits to satisfy the requirement of probable cause for the issuance of a search warrant was considered.

State v. Macri, decided first and referred to in the three subsequent cases, presented the question whether a search warrant could properly issue on an affidavit which set forth that, through information received from another police officer and through personal investigation, the affiant police officer had reasonable cause to believe and did believe that the property to be searched was being used for bookmaking, but which stated no facts or circumstances personally known by or told to the affiant on which he based his belief. The Court affirmed the trial court's granting of defendant's motion to suppress, holding that the determination of probable cause must be made by a neutral issuing judge who has first been apprised of the facts or circumstances giving rise to the affiant's belief, since the crucial point of the constitutional requirement is that the determination whether the affiant has probable cause must be made by the judge on the facts stated under oath in the affidavit, regardless of uncommunicated information possessed by the affiant or his good faith belief that probable cause existed.

In DeGrazio, the Court affirmed suppression of evidence obtained by use of a search warrant issued on the basis of an affidavit conceded by the State to be virtually identical to that held insufficient in the Macri case.

State v. Burrachio involved a warrant issued upon an affidavit setting forth that the affiant police officer had reason to believe and did believe that bookmaking and lottery were being conducted on the described premises, and that affiant's belief was based on information he received to that effect. Relying on Macri, the Court affirmed the trial court's suppression of the evidence obtained pursuant to this warrant. The Court discussed the necessity for the issuing judge to have knowledge concerning the reliability of the unknown person on whose information the affiant's belief was based, stating that although the informant's name need not be disclosed, the issuing judge must at least have facts before him on which to decide whether the hearsay in the affidavit was sufficiently trustworthy to constitute probable cause. It should be noted that no reference to the informer's identity was here made, while the affidavits in the first two cases stated that the unidentified informers were law enforcement officials.

Considering the apparent judicial climate which produced the foregoing cases, State v. Zizulock initially seems a bit surprising. The affidavit here, unlike that in Macri, DeGrazio and Burrachio, stated specific facts and circumstances on which the affiant police officer's belief rested, but did not state how the affiant came to know them; i.e., the form of the document was, "Individuals have been observed violating the law," rather than, "I, the affiant, saw it," or "X, a reliable informer, told me he saw it." Affirming a conviction based on evidence obtained under the warrant issued on this affidavit, the Court held that since the entire affidavit was made in the third person, the affiant's failure to set forth the underlying facts and circumstances in the first person would not of itself invalidate the warrant; and since the affidavit must be read as a whole and in light of the acknowledged fact that the affiant officer had been conducting a prolonged investigation of the premises searched, the affidavit validly could be, and apparently was, interpreted by the issuing judge as referring to the affiant's personal observations. The fact of the affiant's investigation seems to justify this holding, but it would seem that, under the rationale of Macri, even this fact should be set forth under oath in the affidavit before it can be taken into account by the issuing judge for purposes of his consideration of the question of probable cause.

Self-Incrimination—Shotwell Mfg. Co. v. United States, 83 Sup. Ct. 448 (1963). Petitioners, a corporation and two corporate officers, were convicted of willful attempted evasion of federal income taxes, for failure to report on the company's tax returns for the years 1945 and 1946 income received on sales of candy above OPA ceiling prices. The Court of Appeals for the Seventh Circuit reversed and remanded, and on certiorari brought by the Government, the Supreme Court vacated and remanded to the District Court with
instructions. A judgment adverse to petitioners on remand was affirmed by the Court of Appeals. On certiorari, petitioners contended that since disclosure of the black market receipts was made in reliance on the Treasury Department's "voluntary disclosure policy" then in effect, whereby the Treasury represented that delinquent taxpayers could escape criminal prosecution by disclosing their derelictions to the taxing authorities before any investigation of them had commenced, the Government could not, consistently with the Fifth Amendment, use the disclosed material at petitioners' trial. The United States Supreme Court, per Harlan, affirmed, holding that since the voluntary disclosure policy was part of a broad administrative scheme designed to accomplish the expeditious and economical collection of revenue by enlisting taxpayer cooperation, was addressed to the public generally rather than to a particular individual, and was not an invitation aimed at extracting confessions of guilt from particular known or suspected delinquent taxpayers, petitioners' chose to act as they did, and hence making the disclosures were acts of free will, even if in absence of the policy petitioners might not have done so; and that even if petitioners in deciding to disclose were justified in relying on the general offer of immunity, once they decided to make fraudulent rather than full and honest disclosures petitioners must be deemed to have recognized that the offer had in effect been withdrawn, since petitioners were aware that the offer of immunity presupposed that accurate disclosures would be made. In an opinion in which Chief Justice Warren and Mr. Justice Douglas concurred, Mr. Justice Black dissented, stating that the majority's conclusion—that although the confessions might not have been made in absence of the Treasury's offer of immunity, they nevertheless were not induced by that offer—was reached by alternative formulas which remove from the Fifth Amendment a significant part of its protection. Noting that few confessions in criminal cases are ever wholly truthful, Black further argued that the majority's requirement that a disclosure coerced by a promise of immunity be completely truthful before it can be excluded as evidence runs afoul of the established rule that a confession's truth or falsity is not relevant to the question of admissibility.


Statutory Construction—Adams v. United States, 312 F.2d 137 (5th Cir. 1963). See Mail Fraud, supra.


Stolen Property—Concealing—State v. Carlton, 378 P.2d 557 (Ore. 1963). Defendant was convicted of concealing stolen property. On appeal, defendant contended that since he initially stole the property, he could not be convicted of concealing it. The Supreme Court of Oregon affirmed, holding that although one cannot be convicted of receiving property he has stolen, because one cannot receive from himself, defendant could be convicted of concealing property he had stolen.
inasmuch as the offense of concealing the property was a separate crime constituting one part of the transaction of stealing the property, carrying it off and concealing it. The Court noted that the question whether one could be convicted of more than one such part in the transaction was not before it, since defendant had been charged only with concealing.

Stolen Property—Receiving—People v. Meyers, 28 Cal. Rptr. 753 (Dist. Ct. App. 1963). Defendant was convicted of attempting to receive stolen property. On appeal, defendant contended that since defendant had the specific intent to receive stolen property and, believing the lists to be stolen, did in fact receive them, he was properly convicted of attempting to receive stolen property even though the property was in fact not stolen, because guilt of this crime is established where, under the circumstances as defendant saw them, he did the acts he believed were necessary to consummate the substantive offense, even though, unknown to him, an essential element of the substantive crime was lacking. The Court noted that the instant case was governed by Faustina v. Superior Court, 345 P.2d 543 (Cal. 1959), and People v. Rojas, 10 Cal. Rptr. 465, abstracted at 52 J. Crim. L., C. & P.S. 430 (1961), even though the property involved in Meyers had never been stolen, while that in Faustina and Rojas had originally been stolen but had been recovered by officials before being received.

Sunday Closing Laws—Vornado, Inc. v. R. H. Macy & Co., 187 A.2d 620 (N.J. Super., Ch. 1963). Plaintiff, a Kansas corporation operating retail department stores in New Jersey, informed the New Jersey Attorney General and local prosecutors that defendants, New Jersey corporations operating retail department stores in New Jersey in competition with plaintiff’s stores, were engaging in conduct prohibited by the New Jersey Sunday Closing Law, N.J. STAT. §2A:171-5.8 et seq. (1959). Upon failure of the officials to take any enforcement action against defendants, plaintiff sought a declaratory judgment that defendants’ conduct was in violation of the Act, and an injunction preventing defendants from continuing to violate the Act, on the ground that defendants’ violation damaged plaintiff’s business. On motion for judgment on the pleadings, defendants contended that use of Sunday newspaper advertisements and of a telephone answering service for placing orders on Sunday did not violate the statute. The Chancery Division of the New Jersey Superior Court entered judgment on the pleadings in favor of defendants, holding that a Sunday newspaper ad was a lawful invitation to order rather than a proscribed offer of sale; that since the answering service merely provided an opportunity to place an order which was not processed on Sunday, title in the ordered goods did not pass on Sunday, and hence defendants did not “engage in selling” on Sunday in contravention of the statute; that even if the telephone orders would constitute “engaging in selling” within the statute, which defined such conduct as including an attempt to induce future transfer of title, use of the telephone service was not “engaging in selling,” in light of legislative intent to restrict the statute to personal confrontation between buyer and seller; and that consequently, defendants’ conduct did not violate the Sunday Closing Law.

Unauthorized Practice of Law—Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334 (Ore. 1962). Plaintiff, the Oregon State Bar, brought suit against defendants, two private corporations and certain of their officers, to enjoin them from preparing conveyances and certain other instruments, and the trial court issued an injunction prohibiting defendants from preparing documents affecting legal rights, including in its scope the filling in of blanks on printed forms. On appeal, defendants contended that the drafting and selection of forms to be used in connection with the closing of real estate transactions in the process of performing escrow services did not constitute the practice of law. The Supreme Court of Oregon modified the decree to except from the injunction the filling in of blanks under a customer’s direction upon forms selected by the customer, holding that the practice of law includes the drafting or selection of documents and the giving of advice with regard thereto in all cases where an informed or trained discretion is necessary in such selection or drafting in order to meet the needs of the person being served; and that where any discretion is exercised by an escrow agent in the selection or preparation for another of an instrument affecting that person’s legal rights, the escrow agent is