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Criminal Law in Tennessee in 1968 - A Critical Survey

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CRIMINAL LAW IN TENNESSEE IN 1968 — A CRITICAL SURVEY

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I. INTRODUCTION

The present study attempts to provide a comprehensive overview of the decisions of both federal and state courts reported during 1968[1] which have been of significance *vis-a-vis* state criminal prosecutions in Tennessee. The designation "*critical* survey" has been employed, because beyond a résumé of noteworthy decisions an effort will be made to evaluate cases in terms of their consistency with existing law and policy objectives. Further, where appropriate, comparative references will be made when the same or analogous problems have been confronted by other courts within the recent past.

The criminal process has been the dominant subject of concern of the United States Supreme Court during the past two decades, and inevitably the far-reaching decisions during this period have resulted in a substantial growth of criminal litigation in lower courts, both state and federal. As holdings of the Supreme Court are characteristically restricted in explicit application to the fact situation before the court,[2] the dimensions of constitutional protections are frequently molded in decisions of lower courts. The result is that until definitive answers are given by the Supreme Court, the nature of constitutional rights may vary from jurisdiction to jurisdiction, and thus an awareness of local decisions is imperative. While concern has not herein been limited to constitutional issues, it will be readily apparent that the greater proportion of decisions of the past year are concerned with substantive due process.

II. OFFENSES

A. *Against Person*

1. Assault with Deadly Weapon.

In *Brown v. State*[3] the defendant was convicted of robbery accomplished by use of a deadly weapon.[4] It appeared that the "weapon"

1. The author has arbitrarily confined this survey to decisions reported in the National Reporter System during the calendar year 1968, a result of which is that a number of cases are included which were actually decided in 1967. Conversely, a number of cases decided near the end of the year were not as yet reported. In some instances such decisions had been reported and published in abbreviated form in the *Criminal Law Reporter* (herein cited CRIM. L. RPTR.) As reports of these cases are fragmentary, and in many instances final judgment is still pending, they are only briefly discussed in footnotes appended to the appropriate subject.
2. Escobedo v. Illinois, 378 U.S. 478 (1964), is one of the most extreme instances of this type of judicial restraint. There the Court, per Justice Goldberg, listed five factual conditions present in the case and then held that under such circumstances the defendant had been denied the right to counsel under the sixth amendment. It was then left to lower courts to decide if the *Escobedo* rule applied if any one or more of these factual conditions were absent.
3. 423 S.W.2d 493 (Tenn. 1968).
4. TENN. CODE ANN. § 39-3901 (Supp. 1968).

was a soft drink bottle with which the victim, a taxi cab driver, was struck across the back of the head. Issue was raised on appeal as to whether a soft drink bottle could be classified as a deadly weapon.[5] The court observed that it had never before proffered a definition for the term "deadly weapon." In two previous decisions the issue had been raised, however. In *Cooper v. State*[6] it had been held that a toy pistol did not come within the term. In dicta the court noted that the holding should not be construed to mean that a real but unloaded pistol was not a deadly weapon.[7] In *Morgan v. State*[8] the evidence indicated that the defendants had used "some kind of an instrument in a sock." These devices were employed to gain access to a house and also to knock one of the victims unconscious. The court there distinguished between weapons which were dangerous per se, such as firearms, and weapons which were dangerous by virtue of the manner in which they were used or attempted to be used. A hard object wrapped in a sock used as a bludgeon clearly fit within the latter category.

In affirming the conviction in the *Brown* case, the court submitted the following standard:

> [T]he test is whether or not the weapon used would be likely to cause death; if one strikes another with a weapon with sufficient force and if the one struck might die as a result of the attack made on him, this is a deadly weapon.[9]

The court cited an Illinois decision[10] in which a bottle was recognized as a deadly weapon. Also referred to was a Missouri case[11] in which a two foot length of broomstick was found to be a deadly weapon. It was there observed by the Missouri Supreme Court that the deadliness of a weapon may be a function of the relative sizes and strengths of the victim and the assailant.[12]

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5. Robbery is punishable by imprisonment for five to fifteen years; robbery accomplished by the use of a deadly weapon is a capital offense, punishable by a minimum imprisonment of ten years. TENN. CODE ANN. § 39-3901 (Supp. 1968). The defendant in the present case had received a sentence of ten years.
6. 201 Tenn. 149, 297 S.W.2d 75 (1956).
7. Even here, however, the court did not express an opinion on the issue: "That question will be decided if, and when, it should arise." *Id.* at 154, 297 S.W.2d at 78. It is clear that such conduct *does* constitute a criminal assault. *See* State v. Smith, 21 Tenn. 457 (1841). The open question is whether it amounts to assault with a deadly weapon. *See generally* Annot., 74 A.L.R. 1206 (1931).
8. 415 S.W.2d 879 (Tenn. 1967).
9. 423 S.W.2d at 495.
10. Sleeting v. Supreme Tribe of Ben Hur, 161 Ill. App. 449 (1911).
11. State v. Henderson, 356 Mo. 1072, 204 S.W.2d 774 (1947).
12. "[T]he classification of such weapons as 'deadly' may depend in part on the *effect* produced by them, and the strength of the assailant who wields them. And we think it can be further affirmed that the strength and vitality of the victim of the assault also may be considered. For instance an assault on a child or a weak and defenseless person with a given weapon might be likely

The *Brown* case is of marginal significance in the development of a clearly defined notion of the term "deadly weapon." Yet it does as much as any court is willing to do, since it is desirable that the concept be left in a state of appropriate vagueness to accommodate the variety of items which may present themselves.[13] The decision adds one item to the list of devices which clearly fall within the definition, at least when the victim is actually struck with the bottle. The quoted passage is at best ambiguous as to the result where the victim is threatened with a soft drink bottle, but the threat is not carried out, perhaps because the victim acquiesces to the assailant's demands. Indeed, a literal reading suggests that a soft drink bottle is *not* a deadly weapon *until* the assailant strikes the victim with such force that death might result. This clearly would be an undesirable restriction on the concept. The opinion is preferably read to mean that *since* a soft drink bottle can be wielded in such a manner that it could reasonably be expected to cause death, *therefore* when a soft drink bottle is employed as a weapon, it is a deadly weapon. It may be argued that this interpretation is overlybroad, leaving open the possibility that virtually anything—a book or pencil, for example—could conceivably be used in such a manner as to cause death. Here it is suggested that a test of reasonableness could be employed in terms of the relative likelihood that the object in question could cause death.

2. Carnal Knowledge

Tennessee has the most stringent carnal knowledge statute in the United States, setting the age at which a woman is capable of giving consent to sexual intercourse at twenty-one.[14] The presumption of inability to consent is conclusive.[15] To mitigate the severity of this offense, the statute provides a series of defenses available to the accused, among them the following:

[E]vidence of the female's reputation for want of chastity, at and

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to produce death or great bodily harm, whereas the contrary would be true as against a vigorous adversary." *Id.* at 1078, 204 S.W.2d at 779. *See also* Commonwealth v. Dorazio, 365 Pa. 291, 74 A.2d 125 (1950), holding that the fist of a contender for the heavyweight boxing championship may be a deadly weapon.

13. *See generally* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 361 (Anderson ed. 1957) (hereinafter cited as WHARTON).

14. TENN. CODE ANN. § 39-3706 (1955). *See* MODEL PENAL CODE § 207.4, Comment (Tent. Draft No. 4, 1955).

15. That is to say, whether the victim was of such maturity as to be fully capable of giving knowing and understanding consent to the act of sexual intercourse is not a factual issue before the trial court. It is true that the defenses stipulated in the statute by-and-large reflect a belief that certain factual circumstances are persuasive evidence that the victim was capable of consent and is not in need of protection. These are, however, collateral approaches to the issue, and even here the actual ability of the victim to consent is not before the court.

> before the time of the commission of the alleged offense, shall be admissible in behalf of the defendant.[16]

This defense was liberally construed in favor of the defendant in 1947 in *Ledbetter v. State*.[17] There the prosecutrix testified that she met the defendant in a "beer joint" only a few days prior to the alleged offense. She was at that time in the company of a woman described by the court as "of unsavory reputation" who was the mother of two illegitimate children. The prosecutrix was fifteen years old at the time of the alleged offense; the defendant was twenty-two. After their first encounter, the prosecutrix wrote the defendant an amorous letter urging him to meet her at a designated place. The defendant complied with her request and ultimately spent the night with her in the same room where her aunt and uncle were sleeping. It was during this time that the defendant was alleged to have had sexual intercourse with the prosecutrix. The court held that establishing a reputation for want of chastity did not require proof of any specific act of intercourse,[18] and that the facts proven established the prosecutrix' reputation for want of chastity and constituted a complete defense.[19]

This issue was again raised in the recent decision of *Mangrum v. State*.[20] In this case the prosecutrix was nineteen years of age; the defendant was twenty-four. The trial court refused to give a charge to the jury requested by the defendant which attempted to state the reputation for want of chastity defense as explained in the *Ledbetter* case.[21] Rather, it charged the jury, in material part, as follows:

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16. TENN. CODE ANN. § 39-3706 (1955) (only applicable if the victim is over the age of fourteen). It may be noted that the statute merely provides that the evidence "shall be admissible in behalf of the defendant," not that it constitutes a defense per se. However, in Ledbetter v. State, 184 Tenn. 396, 199 S.W.2d 112 (1947), it was held that proof of such a reputation would constitute a complete defense to the charge.
17. 184 Tenn. 396, 199 S.W.2d 112 (1947).
18. The statute establishes as a separate defense that the female was "at the time and before the carnal knowledge, a bawd, lewd, or kept female." TENN. CODE ANN. § 39-3706 (1955). *See* Jamison v. State, 117 Tenn. 58, 94 S.W. 675 (1906).
19. "[T]he female, Lela Smith, by her general conduct in loitering around 'beer joints,' associating constantly with well known prostitutes in public drinking places, coupled with a willingness to use her uncle's home as a place of assignation, thereby established a reputation for sexual impurity." 184 Tenn. at 403, 119 S.W.2d at 115.
20. 432 S.W.2d 497 (Tenn. Crim. App. 1968).
21. "I have been asked to charge you and do charge you that if a woman has a reputation of being unchaste she is considered a lewd character within the meaning of Section 39-3706 even though there is no proof of any specific act of illicit relationship." 432 S.W.2d at 499. This is a somewhat inarticulate statement of the defense in that it confuses the "reputation for want of chastity" defense and the "bawd, lewd or kept female" defense. The trial court thus might be justified in refusing this charge if the "want of chastity" defense was adequately covered in the charge as given.

> The question is, whether she is actually chaste and virtuous at the time of the alleged carnal knowledge. In other words, the reputation for want of chastity is not a conclusive defense, for the offense is predicated upon character rather than the reputation of a female for chastity and virtue. If her character, that is, what she really is at the time of the alleged carnal knowledge or act charged, is pure and virtuous, and she is at the time chaste, is the question.[22]

The Court of Criminal Appeals held that this charge was inadequate, quoting from *Ledbetter* to the effect that the reputation of the woman for want of chastity can be established without proof of any specific acts of intercourse.

The *Mangrum* decision, as the *Ledbetter* decision, reflects a judicial awareness of who the parties are and the relative contribution of the man and the woman to the nefarious enterprise. The carnal knowledge of a female between the ages of twelve and twenty-one statute, enacted in 1893, is hopelessly anachronistic in the late 20th Century, at least in those instances in which it is applied to individuals of relatively mature years.[23] There is little the courts can do about that.[24] They can, however, within the context of the existing law, liberally construe the defenses available for this offense and thereby alleviate to some degree the existing disparity between the statute and contemporary societal values.

B. *Against Property*

1. Receiving Stolen Property

In *Deerfield v. State*[25] it was held that in order to be guilty of receiving stolen property,[26] it must be shown that the defendant received the property from a third party, that is, the defendant could not be guilty of the offense if he stole the property himself.[27] In absence of such evidence, the conviction in this case could not stand.[28] However, the court observed that *concealing* stolen property was a separate offense,

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22. 432 S.W.2d at 500.

23. For one suggested solution, see Myres, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965).

24. *But see* People v. Hernandez, 61 Cal.2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

25. 420 S.W.2d 649 (Tenn. 1967).

26. TENN. CODE ANN. § 39-4217 (1955).

27. To same effect, Franklin v. State, 202 Tenn. 666, 308 S.W.2d 417 (1957) (cited in the principal case). *See also* 2 WHARTON § 576. *Cf.* Peek v. State, 213 Tenn. 323, 375 S.W.2d 863 (1964).

28. Curiously, the defendant had not assigned as error that the crime of receiving stolen property had not been proven. Rather, according to the court, "The State has called to the attention of this Court the fact that this record contains no evidence establishing the fact that the defendant was guilty of receiving and concealing stolen property." 420 S.W.2d at 651. The court agreed with the state's argument on behalf of the defendant.

with which the thief himself could be charged,[29] and remanded the case for trial on this charge. While the statute recognized separate offenses of "receiving" and "concealing" stolen property,[30] the difficulty in the *Deerfield* case arose from improperly charging the defendant in the indictment.

In a later decision, *Moore v. State*,[31] the defendants were charged with "receiving and concealing stolen property." It was argued on the authority of the *Deerfield* case that the convictions were void since "receiving" and "concealing" stolen property were separate offenses and could not be charged as a single crime. The court held that while it would be preferable to allege a single crime in the indictment, it was not prejudicial error to charge the offenses conjunctively as was done in this case.[32]

In an effort to avoid this confusion in the future, the statute has been amended to clearly cover two separate and distinct offenses.[33] In addition, the line of demarcation in determining the severity of the potential punishment was raised from "goods over the value of $60.00"

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29. Jones v. State, 219 Tenn. 228, 409 S.W.2d 169 (1966). *See also* 2 WHARTON § 576.

30. "Every person who shall fraudulently receive or buy, conceal, or aid in concealing . . ." TENN. CODE ANN. § 39-4217 (1955).

31. 432 S.W.2d 684 (Tenn. Crim. App. 1968).

32. The issue does not seem as crucial in this case as it would appear that the defendants could have been found guilty of either offense.

33. Public Acts, 85th General Assembly, 2nd Session, Chapter 609:
Section 1, BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE. That Sections 39-4217 and 39-4218 of Tennessee Code Annotated be, and the same are hereby repealed, and the following inserted in lieu thereof:
"39-4217. (A) Every person who shall fraudulently receive or buy any goods over the value of one hundred ($100.00) dollars, feloniously taken or stolen from another, or goods obtained by robbery or burglary, knowing the same to have been so obtained, with the intent to deprive the true owner thereof, shall be guilty of receiving stolen property over the value of one hundred ($100.00) dollars. (B) Every person who shall fraudulently conceal or aid in concealing any goods over the value of one hundred ($100.00) dollars feloniously taken or stolen from another, or goods obtained by robbery or burglary, knowing the same to have been so obtained with the intent to deprive the true owner thereof, shall be guilty of concealing stolen property over the value of one hundred ($100.00) dollars. (C) Any person found guilty of either receiving stolen property over the value of one hundred ($100.00) dollars, or concealing stolen property over the value of one hundred ($100.00) dollars, shall be imprisoned in the penitentiary not less than three (3) years nor more than ten (10) years."
"39-4218. If any person receives stolen property or conceals stolen property as such crimes are defined in 39-4217, and the value of the property received or concealed does not exceed the value of one hundred ($100.00) dollars, the offender shall be imprisoned in the penitentiary not less than one (1) year nor more than five (5) years. Provided further, that no person shall be convicted of more than the one offense of larceny or either of the offenses defined in 39-4217 and 39-4218 growing out of the same felonious transaction."

to "goods over the value of $100.00."[34] It is further provided that a defendant cannot be convicted of both larceny and receiving or concealing stolen property arising out of the same transaction.[35]

2. Forgery

Wilson v. State[36] raised the novel question of whether a defendant could be guilty of forgery in executing his own name, an issue apparently not previously raised in a Tennessee case. The defendant introduced himself to a merchant as one Clyde Wilson and represented that he had married the daughter of a person known to the merchant. In light of this the defendant's check was accepted by the merchant. It was later discovered that the defendant was indeed named Clyde Wilson, but he was not the Clyde Wilson he led the victim to believe he was. The defendant was convicted of forgery and contended on appeal that he could not be guilty of the offense since he signed his own name.

Forgery is defined by statute as "the fraudulent making or alteration of any writing to the prejudice of another's rights."[37] The court held that the defendant's conduct in this case would constitute forgery. In one early Tennessee decision[38] the argument that one could not be guilty of forgery when he signed his own name to a document was rejected, but there it was the *document,* not the *signature,* which was determined to be a forgery. However, a number of decisions from other jurisdictions had considered the issue raised in the present case and had uniformly declared the conduct to amount to forgery.[39] Such would seem the only result consistent with the legislative purpose of the statute.[40]

C. *Against Person and Property*

1. Robbery

The crimes of robbery[41] and bank robbery[42] are separate and distinct offenses. In *State v. Smith*[43] the defendant was charged with rob-

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34. *Id.*
35. *Id.*
36. 421 S.W.2d 91 (Tenn. 1967).
37. TENN. CODE ANN. § 39-1701 (1955).
38. Luttrell v. State, 85 Tenn. 232, 1 S.W. 886 (1886).
39. People v. Rushing, 130 Cal. 449, 62 P. 742 (1900); Barfield v. State, 29 Ga. 127 (1859); Thomas v. First National Bank, 101 Miss. 500, 58 So. 478 (1912); Peoples Bank & Trust Co. v. Fidelity & Casualty Co., 231 N.C. 510, 57 S.E.2d 809 (1950); Edwards v. State, 53 Tex. Cr. 50, 108 S.W. 673 (1908). *See* 2 WHARTON § 629.
40. Alternatively, the defendant might be charged with obtaining property by false pretenses. TENN. CODE ANN. § 39-1901 (1955).
41. TENN. CODE ANN. § 39-3901 (Supp. 1968).
42. TENN. CODE ANN. § 39-3902 (1955).
43. 432 S.W.2d 501 (Tenn. Crim. App. 1968).

bery, but he sought to quash the indictment contending that the allegation showed that this was a bank robbery, and thus the defendant should be charged under the statute specifically applicable to bank robbery. The only indication in the presentment that the offense was bank robbery was the statement that the victims were employees of the bank and that the money was the property of the bank. The court held that this did not establish that the robbery occurred *in* a bank, and therefore the indictment should not be quashed.

Of greater interest is the potential issue presented had the allegation stated that the robbery had indeed occurred in a bank. Would it still be permissible to charge the defendant with robbery? Until 1955 no problem was presented. Bank robbery was punishable more severely than robbery; robbery was clearly a lesser included offense.[44] However, no longer is this the case, because the robbery statute was amended to allow capital punishment where the robbery is accomplished by the use of a deadly weapon.[45] No amendment regarding the use of a deadly weapon was made to the bank robbery statute. Therefore, today robbery is a lesser included offense where no deadly weapon is used; it is a greater offense, in terms of the potential punishment, where such a weapon *is* used. The implication of the court in the *Smith* decision is that if a bank robbery is alleged, the defendant must be tried under the bank robbery statute.

Viewing the problem as one of statutory construction this would seem eminently correct. It is a general rule of construction that, where one statute deals with a subject in general terms and another deals with part of the subject in more specific terms, in case of conflict the more specific statute should prevail.[46] This rule has frequently been applied in criminal cases. In some instances the application of the more specific statute has afforded a harsher punishment;[47] in others the result has been a punishment less severe.[48] It has been said that the application of the more specific statute is particularly compelling in the latter case.[49] In short, analytically speaking, there is overwhelming authority to support the conclusion that an armed bank robbery should be tried under the bank robbery statute.

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44. *See* Bibbs v. State, 162 Tenn. 646, 39 S.W.2d 1024 (1931).
45. TENN. PUB. ACTS OF 1955, ch. 72.
46. 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5204 (3d ed. Horack 1943) (hereinafter cited SUTHERLAND).
47. Enzor v. U.S., 262 F. 2d 172 (5th Cir. 1959), *cert. denied* 359 U.S. 953, 3 L.Ed.2d 761, 79 S.Ct. 740 (1959); Georges v. U.S., 262 F.2d 426 (5th Cir. 1959); State v. Mangiaracina, 344 Mo. 99, 125 S.W.2d 58 (1939).
48. Commonwealth v. Litman, 187 Pa. Super. 537, 144 A.2d 592 (1958); Thomas v. State, 129 Tex. Crim. App. 628, 91 S.W.2d 716 (1936).
49. Adams v. Culver, 111 So.2d 665 (Fla. 1959) (and cases cited therein).

However, there is persuasive evidence to the point that the customary rules of statutory construction should not be applied in this case. The notion that the statute more particularly applicable to the case should apply is nothing more than a reasonable implication of legislative intent. Any rule of statutory construction can be ignored where it is clear that its application would distort the legislative policy considerations. There is no question but that prior to 1955 it was legislative policy to view bank robbery as a more serious offense than robbery. The 1955 amendment did not alter the punishment for either offense but in effect created a new offense where robbery had been accomplished by means of a deadly weapon. Unfortunately the amendment was only added to the robbery statute. There is no reason to believe that because the penalty for robbery under aggravated circumstances is now more severe than for bank robbery that the legislative intent of the amendment was to make armed robbery a more severe offense than armed bank robbery.

One solution is to allow the prosecutor to do what it appears was done in the *Smith* case—allege facts which establish the offense of armed robbery, but omit the fact that the robbery occurred in a bank. While such a *sub rosa* method might be endurable in the present instance, it can not be recommended as an acceptable procedure generally as it would clearly work injustices where the legislative intent was to give the defendant the benefit of a less harsh particular statute.[50] For example, in a Texas case, *Thomas v. State*[51] the defendant was found guilty of keeping premises at which bets on horses were taken. A general statute prohibiting gambling activities carried a penalty of from two to four years in the penitentiary. Another statute dealing specifically with the defendant's activities carried a maximum jail term of ninety days. The court held that the defendant should be tried under the latter statute. Certainly the legislative policy reflected in such a statutory scheme would be defeated if the prosecution could bring the defendant under the felony statute by vaguely wording the statement of the offense in the charge. The more desirable solution would appear to be for the legislature to amend the bank robbery statute in the same manner as the robbery statute, providing for increased punishment where a bank robbery is accomplished by use of a deadly weapon.

2. Arson

In *Murphy v. State*[52] the issue was raised as to whether a house

50. Furthermore a defendant might defeat such a tactic through the use of a plea in abatement. *See, e.g.*, Bonds v. State, 421 S.W.2d 87 (Tenn. 1967).

51. 129 Tex. Crim. App. 628, 91 S.W.2d 716 (1936).

52. 426 S.W.2d 509 (Tenn. 1968).

trailer was a "structure" within the contemplation of the crime of arson.[53] The court held that it was a "structure" since it had become a fixture attached to the real estate. In what would appear to be the only other case raising this issue, the Supreme Court of Indiana held that a house trailer was not a "dwelling house" within the meaning of their arson statute where it had not been attached to the real estate.[54] In the present case the court observed that both a phone line and a pipe to a butane tank several feet away were attached to the trailer and thereby qualified as a "structure".

Several new offenses were created by statute relating to the use and possession of fire bombs.[55] The available sanctions are more severe than in the general arson statute.[56]

D. *Public Offenses*

The year witnessed the passage of a host of new criminal statutes aimed primarily at potential civil disorders. Among the newly created offenses are disrupting communication with the police and fire department,[57] trespassing in a public school building,[58] encouraging students to leave school,[59] destruction of vegetation on highway right of ways,[60] the manufacture, possession and use of fire bombs,[61] damaging property during a state of emergency,[62] rioting,[63] and looting.[64]

III. DEFENSES

A. *Self-Defense*

Where a defendant is charged with homicide and he claims self-defense, whether or not a duty to retreat is recognized,[65] it must be demonstrated that the defendant employed deadly force from apparent necessity.[66] Thus where the defender has adequately subdued his assailant, any further counter-assault may be viewed as going beyond

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53. TENN. CODE ANN. § 30-501 (Supp. 1968).
54. Simmons v. State, 234 Ind. 489, 129 N.E.2d 121 (1955) (Such was the decision of the court. However, the remaining four members of the five man court subscribed to a concurring opinion which found the trailer to be a dwelling.)
55. TENN. CODE ANN. §§ 39-5106 to 39-5113 (Supp. 1968).
56. The minimum sentence for arson was also raised from one year to three years. *Id.* § 39-501 (Supp. 1968).
57. *Id.* § 39-5115 (Supp. 1968).
58. *Id.* § 39-1214.
59. *Id.* § 39-1011.
60. *Id.* § 39-2308.
61. *Id.* §§ 39-5106 - 39-5113.
62. *Id.* § 39-5114.
63. *Id.* §§ 39-5101 - 39-5104.
64. *Id.* § 39-5105.
65. *See* Crowder v. State, 76 Tenn. 669 (1882).
66. *See* TENN. CODE ANN. §§ 38-101 and 38-102 (1955).

the bounds of acceptable self-defense. An obvious case was presented in the 1962 decision of *Nance v. State.*[67] There the defendant was standing at a bar in a tavern when the deceased approached him and after an exchange of words, according to the defendant, the deceased pulled out a knife. At this point the defendant drew a pistol and shot the deceased twice. The deceased staggered some distance across the room, then fell to the floor. The defendant walked over to him and shot him a third time in the head. The third shot caused the death. Whatever might have been the culpability of the defendant following the first two shots, the court had no difficulty in finding that the third shot obliterated any claim of self-defense.[68]

A similar problem arose in *May v. State.*[69] The defendant was convicted of voluntary manslaughter in the death of a fellow inmate in the state penitentiary. The defendant and the deceased engaged in a fight in their cell during which the defendant stabbed the deceased numerous times, resulting in his death. The defendant contended that he had been the victim of an initial attack by the deceased, who was armed with a knife. There was also evidence that the defendant had no opportunity to obtain a knife, and that he had been subjected to four "shakedowns" during the day, none of which revealed a weapon. The state contended that, notwithstanding the possibility of the defense of self-defense, such a justification was obviated by the defendant's actions in that the victim had been stabbed many times and the prison guards found the defendant "belligerent and vengeful" when they pulled him away from the deceased, anxious to continue the attack. Citing the *Nance* decision, the court felt that it was well within the province of the jury to reject the theory of self-defense.[70]

IV. PROCEDURE

A. *Equal Protection*

1. Payment of jail costs

When a defendant is assessed a fine and costs following the conviction of an offense, he may be imprisoned until the fine and costs

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67. 210 Tenn. 328, 358 S.W.2d 327 (1962).

68. "When the record shows though, as it does here, that the plaintiff in error followed and administered a third shot after the deceased had retreated and was falling to the floor, this obviously takes away the degree of self-defense that is necessary to excuse the homicide, because when the deceased had put himself in this position there was no reason for any apprehension of great bodily harm on the part of the plaintiff in error." *Id.* at 332-33, 358 S.W.2d at 329.

69. 420 S.W.2d 647 (Tenn. 1967).

70. *See generally* 1 WHARTON § 214.

are paid,[71] unless he has confessed judgment with good sureties.[72] The defendant is allowed to work out the sum at the rate of two dollars per day.[73]

In *State* ex rel. *Hawkins v. Luttrell*[74] the defendant was assessed $173.00 as costs for the ninety-nine day period he was confined to jail awaiting trial. The defendant had been unable to post bond pending trial because of his indigency. He contended that a jail term in lieu of payment of these costs constituted a denial of equal protection of the laws under the fourteenth amendment. It was not the defendant's argument that working out a fine per se was a denial of equal protection but rather that such was the case as regarded this particular fine since it would not have been sustained had the defendant been financially able to post bond.

The constitutional basis for this argument is found in *Griffin v. Illinois*,[75] in which the United States Supreme Court held that an indigent defendant is entitled to either a transcript of the trial or some alternative method whereby he may obtain adequate review. While there was no obligation on the state to provide any appellate review at all, if appeals *were* allowed, the state was under a duty to see to it that there was no invidious discrimination resulting from financial inability.[76]

The defendant in the present case sought to extend this rationale to pre-trial incarceration, an argument which the court found persuasive.[77] Distinguished from this case was the issue raised in *State* ex rel. *Dillehay v. White*,[78] wherein the defendant was confined to work out the costs of his prosecution on a misdemeanor charge. There it was held that the defendant had *not* been denied equal protection of the laws, since the fines were levied on rich and poor alike.[79] It has been held in some

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71. TENN. CODE ANN. § 40-3203 (1955).
72. *Id.* § 40-3202 (1955).
73. *Id.* § 41-1223 (Supp. 1968).
74. 424 S.W.2d 189 (Tenn. 1968)
75. 351 U.S. 12 (1956).
76. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19. *See also* Roberts v. LaVallee, 389 U.S. 40 (1967).
77. "We agree the statutes requiring an indigent defendant to remain in jail beyond his term to work out costs incurred as jail fees while awaiting trial do operate to discriminate against the defendant due to his poverty, and are in conflict with the above copied language of the fourteenth amendment to the Constitution of the United States. It is obvious that these particular costs would not be incurred by a defendant able to make bond and, in fact, would not be costs incurred by rich and poor alike." 424 S.W.2d at 191.
78. 217 Tenn. 524, 398 S.W.2d 737 (1966).
79. "It would, in fact, be a denial to the courts of their power to enforce judgments—an imposition on the integrity of the courts—if one financially unable to pay is relieved of his obligation. The rich man would be the one deprived of equal

jurisdictions that requiring a defendant to work out a fine imposed as punishment following conviction is unconstitutional as a denial of equal protection where the result is a jail term in excess of that allowed by statute for the particular offense, at least where the defendant is shown to be an indigent.[80] A recent Virginia decision has taken a different approach and held that confinement for costs (as opposed to fines for punishment) constitutes involuntary servitude in violation of the thirteenth amendment.[81] This disparity in decisions would appear to create a fertile ground for a constitutional consideration by the United States Supreme Court.[82]

B. *Due Process*

1. Application of repealed or amended laws

It is a rule of common law that a defendant cannot be convicted under a repealed statute, and this is true notwithstanding the fact that the statute was in force at the time of the act alleged.[83] A number of jurisdictions have abrogated this rule by enacting general savings statutes which permit the prosecution of an offense under a repealed statute.[84] A newly enacted statute in Tennessee provides for such prosecutions in this state.[85]

A related problem which has arisen in other jurisdictions concerns the effect of a savings statute on a statutory reduction in the punishment for a particular offense. The common law rule affords the defendant

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protection if he had to pay and the indigent were set free. Our system of justice must always balance the interest of society as against the interests of the individual—specifically, in this case, the interests (sic) of the State is enforcing its judgments as against the interests of the indigent defendant." *Id.* at 532, 398 S.W.2d at 740. This holding has been followed by the Tennessee Court of Criminal Appeals in Wilson v. Sloan, 4 CRIM. L. RPTR. 2299 (Dec. 5, 1968), Galbreath, J., dissenting, citing Wright v. Matthews, 163 S.E.2d 158 (Va. Sup. Ct. App. 1968), (see *infra* text accompanying note 81). Cf. Dillehay v. White, 264 F. Supp. 164 (M.D. Tenn. 1966), which in effect reversed the Supreme Court of Tennessee decision in the *Dillehay* case because a portion of the fees had accrued while the defendant was awaiting trial.

80. People v. Saffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966); Sawyer v. District of Columbia, 238 A.2d 314 (D.C. App. 1968). *But cf.* State v. Hampton, 209 So.2d 899 (Miss. 1968). In the *Dillehay* case the defendant had received a ninety day sentence, the maximum permitted by statute, plus confinement for an additional ninety-eight days to work out the costs.

81. Wright v. Matthews, 163 S.E.2d 158 (Va. Sup. Ct. App. 1968).

82. *See* Dunn v. U.S., 376 F.2d 191 (4th Cir. 1967). Noted in 33 Mo. L. REV. 317 (1967). *See also* Yates v. U.S., 356 U.S. 363 (1958).

83. 1 SUTHERLAND § 2046; 1 WHARTON § 173. *See also* Wharton v. State, 45 Tenn. 1 (1867), a questionable decision. *Cf.* 1 SUTHERLAND § 2046, text accompanying footnote 4.

84. 1 SUTHERLAND § 2048. No ex post facto problem is presented here, since the defendant is merely being prosecuted in accordance with the law in force at the time of his offense. *Cf.* Calder v. Bull, 3 U.S. 386 (1798).

85. TENN. CODE ANN. § 39-114 (Supp. 1968).

the benefit of the reduced punishment; the savings statute raises the possibility of punishing the defendant according to the law in effect at the time of the offense.[86] The Tennessee statute has avoided this issue by specifically providing that "[i]n the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act."[87]

C. *Self-Incrimination*

1. Failure to Comply with Statute

Among the more troublesome United States Supreme Court decisions of the past year were the cases of *Marchetti v. United States*,[88] *Grosso v. United States*,[89] and *Haynes v. United States*,[90] all dealing with the problem of self-incrimination. In *Marchetti* the defendant was convicted of a conspiracy to evade payment of a federal occupational tax on gamblers. In *Grosso* the defendant was convicted of failing to pay an excise tax imposed on gambling. In *Haynes* the defendant was convicted of the possession of a sawed-off shotgun which had not been registered. In each of the three cases the Court held that compliance with the statute which the defendant was alleged to have violated would have incriminated him in regard to other federal and state laws. The Court did not hold the statutes in question unconstitutional but held only that where there exists "substantial hazards of self-incrimination,"[91] the defendant may properly assert the privilege against self-incrimination and may not be punished for a failure to comply with the statutes.

A factor of apparent significance in the decisions is that they all involve statutes directed to a "selective group inherently suspect of criminal activities."[92] On this basis, a federal court in Tennessee in *United States v. McGee*[93] distinguished a failure to comply with statutes regarding the manufacture of intoxicants because the statutes were aimed "at the entire liquor distillery industry."[94]

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86. For decisions reaching opposite results on this issue, see People v. Oliver, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956), and People v. Harmon, 34 Cal.2d 9, 351 P.2d 329, 4 Cal. Rptr. 161 (1960).
87. TENN. CODE ANN. § 39-114 (Supp. 1968)
88. 390 U.S. 39 (1968).
89. 390 U.S. 62 (1968).
90. 390 U.S. 85 (1968).
91. Marchetti v. United States, 390 U.S. at 61.
92. Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) (quoted in *Marchetti*).
93. 282 F. Supp. 550 (M.D. Tenn. 1968).
94. *Id.* at 551. *But cf.* U.S. v. Fine, 293 F. Supp. 189 (E.D. Tenn. 1968), published too late for inclusion in this survey. Regarding tax forfeiture, *see* U.S. v. One 1965 Buick, 397 F.2d 782 (6th Cir. 1968). *Cf.* U.S. v. Coin and Currency in the Amount of $8,674.00, 393 F.2d 499 (7th Cir. 1968).

2. Investigation of Public Employees

The privilege of self-incrimination was also an issue in *Gardner v. Broderick*.[95] In 1967, in *Garrity v. New Jersey*,[96] police officers were convicted of a conspiracy to obstruct justice. At a previous investigative hearing, the officers were advised that they could invoke the privilege against self-incrimination, but that if they did so they would be subject to removal from office. The defendants thereafter did answer questions, and some of these answers were used against them in the criminal charge. The Court held that the defendants had been denied the privilege against self-incrimination.[97] *Garrity* was a 5-4 decision, and Justice Fortas, one of the majority, indicated that had the appellants merely refused to give information directly related to their official responsibilities at the investigation and as a result had been discharged, he would affirm the action of the state, because there would then be adequate grounds to discharge the employees for cause.[98]

In the *Gardner* case it appeared that the Court was confronted with the situation hypothesized by Justice Fortas.[99] The issue before the Court was "whether a policeman who refuses to waive the protection which the privilege gives him may be dismissed from office because of that refusal."[100] Justice Fortas, speaking for the Court, held that he could not be dismissed. Reiterating his position in the *Garrity* case,[101] Justice Fortas found the present case distinguishable. Here the appellant did not refuse to answer questions; he refused to waive his privilege against self-incrimination, and, the Court held, one could not be discharged for his refusal to waive a constitutional right.[102]

3. Statements at Evidentiary Hearing

In *Simmons v. United States*,[103] at a pre-trial hearing the defendant

95. 392 U.S. 273 (1968).
96. 385 U.S. 493 (1967).
97. "We now hold the protection of the individual under the Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Id.* at 500.
98. Fortas, J., concurring in Spevack v. Klein, 385 U.S. 511, 519 (1967).
99. Such was the conclusion of the Court of Appeals of New York. *See* Gardner v. Broderick, 20 N.Y.2d 227, 229 N.E.2d 184, 282 N.Y.S.2d 487 (1967).
100. 392 U.S. at 276.
101. "If the appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself . . . the privilege against self-incrimination would not have been a bar to his dismissal." *Id.* at 278.
102. To same effect; Uniformed Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 280 (1968).
103. 390 U.S. 377 (1968).

attempted to suppress evidence which had been seized by the police. In order to establish his standing to object to the use of the evidence, the defendant testified that he was the owner of the object in question, a suitcase. The motion to suppress was denied, and the defendant's testimony at the hearing was admitted against him at the trial. The Supreme Court held this procedure to be improper in that the defendant was forced to choose between challenging what he believed to be a violation of his fourth amendment protection against unreasonable searches and seizures and thereby waiving his fifth amendment protection against self-incrimination, or foregoing his objection against the evidence in order to preserve his privilege against self-incrimination. "In these circumstances we find it intolerable that one constitutional right should have to be surrendered in order to assert another."[104]

D. *Arrest*

1. Probable Cause

Among the more significant decisions handed down by the United States Supreme Court during the past year was *Terry v. Ohio*[105] which involved the power of the police to stop and interrogate a person found in suspicious circumstances, but circumstances short of probable cause for arrest. Defendant Terry and his companions were observed by a policeman on a street behaving in such a manner that the officer suspected they were planning the robbery of a store in front of which they passed numerous times. The officer stopped the three and after some inconclusive responses to questions carried out a "frisk" which revealed a pistol. Terry was convicted of carrying a concealed weapon. The conviction was affirmed in an 8 - 1 decision. While the Court acknowledged that there was no probable cause for *arrest,* the issue in this case was whether there was probable cause for *detention,* the fourth amendment being a prohibition of unreasonable seizures of the person. Answering this question in the affirmative the Court had little difficulty in finding that under the circumstances the "frisk" was a reasonable action for the officer's own protection, and that the result of the "frisk" gave rise to probable cause for arrest.[106]

A determination of the existence of probable cause for arrest became necessary in *West v. State.*[107] An officer had been dispatched shortly after three in the morning to investigate a break-in at a tire service com-

104. 390 U.S. at 394.
105. 392 U.S. 1 (1968).
106. The search and seizure aspect of this and related cases is discussed *infra,* text accompanying notes 132 to 136.
107. 425 S.W.2d 602 (Tenn. 1968).

pany. After observing the scene of the crime, he left the tire company and encountered the defendant approximately a block away. He stopped the defendant to talk with him, and observed that his clothing was covered with "beggar-lice." In the ensuing conversation, the defendant revealed that he had a criminal record, that he was taking a short-cut from a motel to town, that he was in the city attempting to persuade his wife to rejoin him in Atlanta where he had a job. The officer thereupon arrested the defendant for the following reason, according to the court:

> He thus arrested the plaintiff in error because of his looks and the time of day it was, around 4:00 a.m., and that he was not more than a block and a half from the scene of the burglary walking down the road, and the plaintiff in error was an ex-convict and looked suspicious and his pants were covered with "beggar-lice."[108]

In a search incident to the arrest, a screwdriver was found which was introduced in evidence against the defendant. The court held that the facts known to the officer established probable cause for an arrest.[109]

It is extremely difficult to objectify a practical constitutional standard of probable cause.[110] At best, one can examine the relevant Supreme Court decisions and thereby develop some sensitivity to the minimum level of information requisite for a finding of probable cause. Granting the existence of a large gray area in which appellate courts are unlikely to disturb the determination of the presence of probable cause, the present case is at best at the outer limits of constitutional permissibility. The fact that the defendant ultimately was found guilty of the crime for which he was arrested[111] of course has no bearing on the validity of

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108. *Id.* at 604. The presence of the "beggar-lice" was considered significant because there was a field grown up in weeds behind the burglarized building.

109. The court employed some extremely unfortunate language in reaching its decision: "The man is still being protected by our Constitution but under the circumstances of what he was doing then and what had happened which this officer was investigating *he lost the right of any protection he had under our Constitution and the Federal Constitution, Amendment Four,* because of where he was at the time, 4:00 o'clock in the morning, *he certainly looked so suspicious that unquestionably he should have been arrested.*" 425 S.W.2d at 607 (emphasis supplied). Clearly it is incorrect to suggest that this or any defendant loses his right under the fourth amendment because of "what he is doing." It is furthermore beyond question that "suspicion," no matter how strong, is not equivalent to probable cause, although such is the implication of this statement by the court. *See* Mallory v. United States, 354 U.S. 449, 454 (1957); Wong Sun v. United States, 371 U.S. 471, 479 (1963).

110. "In dealing with probable cause . . . as the very name implies, we deal with probabilities; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949).

111. Actually, the defendant was initially charged with vagrancy, which could lead to questions as to the reasonableness of the search incident to the arrest. How-

the arrest. Construing the evidence in favor of the prosecution, the only facts giving rise to suspicion are the proximity in time and place of the defendant to the offense, the hour of the day, and the presence of the "beggar-lice." The defendant's criminal record is not relevant to the determination of probable cause.[112] While it is clear that under the authority of the *Terry* decision the officer was justified in stopping the defendant, it would not appear that anything divulged at the time of that encounter raised the level of suspicion to probable cause.[113] Three prior decisions are cited by the court in substantiation of the conclusion reached, but in each instance it clearly appears that the information known to the officer was far more incriminating than in the present case.[114]

At common law, an arrest could be made for a misdemeanor, without a warrant, only if it was committed in the presence of the arresting

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ever, the court held that notwithstanding the nominal charge, the true reason for arrest was for burglary, in regard to which there was probable cause.

112. *See* Beck v. Ohio, 379 U.S. 89, 97 (1964). Also, Norfolk v. State, 4 Md. App. 52, 56, 241 A.2d 189, 191 (1968), where the court said, "We think that even a person with a criminal record can carry a screwdriver on a well lit street at 4:15 in the morning without being subject to arrest."

113. *Cf.* Commonwealth v. Howell, 213 Pa. Super. 33, 245 A.2d 680 (1968); People v. Leos, 71 Cal. Rptr. 614 (1968).

114. In Smith v. State, 155 Tenn. 40, 290 S.W. 4 (1927), a policeman approached an automobile parked in an alley and shown his flashlight in it, revealing several five gallon tins. The rear seat cushion was disarranged, suggesting an attempt to hide something. The officer then entered the car and found the tins to be empty, but under the cushion he discovered nine one-gallon tins of whisky. The owner of the car arrived shortly thereafter and was arrested for the unlawful possession and transportation of liquor.

In Suggs v. State, 156 Tenn. 303, 300 S.W. 4 (1927), an officer was informed of numerous complaints as to the transportation of whisky in the vicinity of a school. He stationed himself at a nearby point and observed the defendant drive up in a car, take a fruit jar from the rear of the car, conceal it beneath his coat, and enter a building. The officer then approached the vehicle and observed a fruit jar carton in the back. The car was searched and six half-gallons of whisky were discovered. Presumably the arrest occured on the defendant's return.

In Massa v. State, 159 Tenn. 428, 19 S.W.2d 248 (1929), policemen were aiding the driver of a stalled car when they detected the odor of mash and corn whisky coming from a nearby building. Entering the building, they discovered 2,000 gallons of mash, 55 gallons of whisky, and a 250 gallon copper still. The defendant thereupon entered and admitted he was the owner. He was convicted of the possession of a still and manufacturing whisky.

In all of these cases, there is no question but that the officers had probable cause to make an arrest at the time of the arrest. In each instance, the police had discovered the actual fruits of the offense charged and had identified these fruits with the defendant. In contrast, in the present case the search of the defendant apparently revealed no evidence of anything removed from the premises of the tire company. Furthermore, the three decisions all pre-date Mapp v. Ohio, 367 U.S. 643 (1961) and approve warrantless searches which today would be of questionable validity under the now-applicable standard of the fourth amendment.

officer.[115] However, this standard has not been recognized as one of constitutional dimensions, and therefore may be modified by statute.[116] A newly enacted Tennessee statute provides for the issuance of traffic citations by an officer investigating an accident where he has "reasonable and probable grounds to believe that such person has committed" a traffic offense.[117]

2. Notice of Authority and Cause

When making an arrest an officer is required by statute to advise the accused of his authority and the cause of the arrest.[118] In *United States v. Clemmons*[119] defendant Clemmons entered a grocery store and attempted to cash a stolen money order. The owner of the store detected the money order as being stolen whereupon Clemmons ran out of the store to an awaiting automobile. The license number of the automobile was given to the police, and Clemmons and a companion, both defendants in this case, were thereafter apprehended by state officers in the automobile. At the time of the arrest the defendants were told merely that they were being arrested for "investigation." They contended the arrests were illegal by virtue of the failure to comply with the state statute. While not literally a case of hot pursuit, the court held that the arrest was so "closely proximate to the offense in time and connecting facts" as to make the cause for arrest obvious and notice unnecessary.[120] The court held that no constitutional issue was presented.[121]

3. Amendment to Warrant

In *Murff v. State*[122] the defendant was charged with "driving while under the influence of an intoxicant." The warrant did not specify that he was driving a motor vehicle nor that the driving took place on a public road, both essential elements of the offense.[123] Over the defendant's objection, the trial judge allowed the prosecution to amend the warrant to read correctly. On appeal, the court held that the warrant did in fact charge an offense when read in its entirety. In addition to

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115. Carroll v. United States, 267 U.S. 132 (1925).
116. *See* John Bad Elk v. United States, 177 U.S. 529, 535 (1900); Lurie v. District Attorney of Kings County, 56 Misc.2d 68, 71, 288 N.Y.S.2d 256, 261 (1968).
117. TENN. CODE ANN. § 59-1019 (e) (1968 Replacement).
118. TENN. CODE ANN. § 40-806 (Supp. 1968). Compliance with this requirement is excused where the suspect is caught in the commission of an offense or the officer is in hot pursuit.
119. 390 F.2d 407 (6th Cir. 1968).
120. *Id.* at 409.
121. *See also* Ker v. California, 374 U.S. 23 (1963).
122. 425 S.W.2d 286 (Tenn. 1967).
123. TENN. CODE ANN. § 59-1031 (1968 Replacement).

the above quoted language the warrant went on to charge the defendant with having been convicted of the same offense on three prior occasions.[124] The court held that from the entirety of the warrant the offense charged could "be clearly inferred."[125]

Furthermore, the court held that the amendment to the warrant was properly allowed. While acknowledging that early decisions prohibited the amending of warrants, the court felt that the reason for this rule no longer existed.[126] On rehearing, it was argued by the defendant that while there was statutory authority for amendments in civil cases,[127] there was no such provision for criminal cases, and that this fact should be recognized as an expression of legislative policy opposed to amendments in criminal cases.[128] The court rejected this argument.[129] Next it was contended that according to statute, an indictment could be amended only with the consent of the defendant,[130] and that this should apply equally to arrest warrants. The court acknowledged that this appeared to be the implication of the statute but observed that the court had previously allowed amendments to indictments without the consent of the defendant, notwithstanding the statute.[131] Finally, it was argued that this was the first case ever to allow an amendment to an arrest warrant. The court responded that this was quite correct and that it was pleased to have settled the matter.

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124. The punishment for the offense is greater where the accused has prior convictions of the same offense. TENN. CODE ANN. § 59-1035 (1968 Replacement).

125. TENN. CODE ANN. § 40-708 (1955). "Name of defendant—Offense stated.—The warrant should specify the name of the defendant, but if it be unknown to the magistrate, the defendant may be designated therein by any name. It should also state the offense either by name, or so that it can be clearly inferred."

126. "The early cases, pronouncing against amendment of arrest warrants, arose out of the conflict between the king who sought unhampered power to arrest, and his subjects who sought with every reason to be free from such tyrranical (sic) power. In modern times, when even the rule against double jeopardy has been so modified as to permit amendments and substitutions in proceedings under indictments and presentments, there is no reason for not freely allowing amendments and substitutions of trial warrants where a defendant elects to go to trial upon such a warrant." 425 S.W.2d at 288.

127. TENN. CODE ANN. §§ 19-425, 20-1504, 20-1505 (1955).

128. This is the doctrine of *expressio unius est exclusio alterius. See generally,* 2 SUTHERLAND, §§ 4915-4917.

129. "It is not reasonable to infer from the absence of a statutory provision for such amendments a legislative intention to prevent this Court from exercising its supervening jurisdiction as it has in this case. If we were bound to nonaction by nonaction of the General Assembly we would be in a pitiful plight indeed." 425 S.W.2d at 289.

130. TENN. CODE ANN. § 40-1713 (1955). "Amendment of indictment.—An indictment may be amended by the consent of the defendant in all cases."

131. State v. Costen, 141 Tenn. 539, 213 S.W. 910 (1919); Holden v. State, 143 Tenn. 229, 227 S.W. 441 (1920); Bowmer v. State, 157 Tenn. 124, 6 S.W.2d 326 (1928). (Apparently the court was not willing to consider that these cases were wrongly decided in light of the inconsistent language in the statute.)

E. *Search and Seizure*

1. "Frisking"

It is a common police practice at the time of an arrest to "frisk" the suspect where the officer has reason to believe he might be harboring a concealed weapon. Such a practice is accepted as a reasonable search incident to an arrest. The power to frisk may also be exercised in circumstances short of arrest. In *Terry v. Ohio*[132] after stopping three men suspected of planning a robbery, though without probable cause for their arrest, the officer frisked them and found, inter alia, a pistol in the coat of the defendant. He was convicted of carrying a concealed weapon. The United States Supreme Court upheld the conviction, finding the "frisking" reasonable under the circumstances.[133]

While acknowledging that such methods are a reasonable and necessary concomitant of police field investigation, it is clear that the pretense of frisking cannot be used to carry out exploratory searches. In *Sibron v. New York*,[134] decided on the same day as *Terry*, the Court considered the application of the New York stop-and-frisk statute.[135] In the *Sibron* case, when an officer approached a suspected narcotics offender, the suspect reached into his pocket and the officer reached in the same pocket, discovering an envelope of heroin. There was no indication that the officer had reached into the pocket for the purpose of self-protection. The Court held this action by the policeman to be an impermissible exploratory search, going beyond the power approved in *Terry*.[136]

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132. 392 U.S. 1 (1968) See previous discussion *supra*, text accompanying notes 105 and 106.

133. "Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find." 392 U.S., at 30.

134. 392 U.S. 40 (1968).

135. N.Y. Code Crim. Proc. § 180-a.

"1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

(The Court did not reach a determination of the constitutionality of this statute.)

136. "The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man." 392 U.S. at 65. In a companion case, Peters v. New York, 392 U.S. 40 (1968), the Court avoided determining whether particular police activity went beyond a frisk by finding that there was probable cause to arrest, so that the officer could legitimately carry out an incidental search.

2. Items in Plain View

In *Sneed v. State*[137] officers had a warrant for the defendant's arrest for armed robbery and were advised that he would be found at a local hospital. They were unable to locate him but saw his car parked in front of the hospital. Looking through the window, one of the officers observed a pump rifle. He thereupon opened the door to the car and seized it. On appeal, the prosecution conceded that the removal of the rifle constituted an illegal search but contended that there was enough evidence without it to sustain the conviction. The court refused to accept the state's concession, observing that if it did so it would have no alternative but to reverse the conviction. Rather, the court held, the search violated no constitutional right of the defendant since the officers only seized that which was plainly visible. A series of cases was cited, both federal and state, in support of this view. It would appear, however, with one possible exception,[138] that all the cited decisions are distinguishable from the present case. Some of the cases involved observations made or property seized while on the premises with the consent of the occupant.[139] Others involved items seen or seized incident to an arrest.[140] Still others involved observations which were used to establish probable cause for arrest thereafter.[141] One case involved items seen while moving a car at the scene of an accident.[142] None involved, as did the present case, a trespass on property of the defendant to seize the items observed. However, the search may be held permissible here on the alternative theory that the location of the evidence in an automobile with the strong possibility that it would not remain there were the officers to first get a warrant makes the seizure justifiable.[143]

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137. 423 S.W.2d 857 (Tenn. 1968).

138. State v. Allred, 16 Utah2d 41, 395 P.2d 535 (1964) (Here a police car was following the defendant, he turned into a driveway, parked his car and ran away. The officers approached the car and observed incriminating evidence on the front seat, which they took. The court held the property was seizable, because the car had been abandoned. Even here, the present case may be distinguished.) Another cited case, People v. Buys, 42 Misc.2d 154, 246 N.Y.S.2d 925 (1964), appears inapposite since it involved the special authority of conservation officials to check clam boats.

139. United States v. McDaniel, 154 F. Supp. 1 (D.D.C. 1957); Chapman v. United States, 346 F.2d 383 (9th Cir. 1965), *cert. denied* 382 U.S. 909 (1965).

140. Miller v. United States, 356 F.2d 63 (5th Cir. 1966), *cert. denied* 384 U.S. 912 (1966); State v. Polton, 259 Ia. 435, 143 N.W.2d 307 (1966); State v. Baines, 394 S.W.2d 312 (Mo. 1965), *cert. denied* 384 U.S. 992 (1966); State v. Chinn, 231 Ore. 259, 373 P.2d 393 (1962).

141. People v. Holloway, 230 Cal. App.2d 834, 41 Cal. Rptr. 325 (1964); State v. Clifford, 273 Minn. 249, 141 N.W.2d 124 (1966).

142. Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965).

143. *See* Johnson v. United States, 333 U.S. 10, 14-15 (1948): "There are exceptional

A similar question was raised in *Chadwick v. State*.[144] However, here the officer merely looked through the window of a car and at the trial testified as to what he saw. The court had no difficulty in finding that this did not constitute an illegal search.

3. Consent

A search and seizure which otherwise would be unconstitutional may be legitimate where it is conducted with the consent of the party whose right is in jeopardy. The validity of a search, therefore, may turn on whether genuine consent has been given. In a recent United States Supreme Court decision, *Bumper v. North Carolina*,[145] officers went to the home of a suspect and announced to his mother that they had a search warrant to search the house, although they did not exhibit any document. The suspect's mother told them to "go ahead" and opened the door. In the kitchen, they found a rifle which was introduced in evidence against the accused. It was later discovered that the officers did not have a valid search warrant at the time of the search. The Court held that the search could not be justified on the theory of consent.[146]

In *United States v. Richardson*,[147] following the burglary of a bank, a witness observed two men hide some money bags behind the bank. Federal agents found the bags which contained silver coins. The coins were removed, the bags filled with gravel, dusted with fluorescein powder and returned to their hiding place. Thereafter the bags were removed, and the agents located the person they believed to be the culprit in a grill. They asked him if they could look at his hands under an ultra-violet light, to which he consented. The examination revealed powder similar to that placed on the bags. The defendant contended, inter alia, that these activities constituted a violation of his fourth amendment protection against unreasonable searches and seizures. The court held that the action by the agents in this case did not constitute a search.[148]

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circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. . . . The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction."

144. 429 S.W.2d 135 (Tenn. Crim. App. 1968).

145. 391 U.S. 543 (1968).

146. "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.* at 550.

147. 388 F.2d 842 (6th Cir. 1968).

148. The court cited Schmerber v. California, 384 U.S. 757 (1966), which held that the taking of a blood sample over the protest of the defendant was not un-

Furthermore, if it be assumed that a search occurred, the court was of the opinion that the defendant had voluntarily consented. The court rejected the suggestion of the defendant that he had been tricked into permitting the examination of his hands.[149]

Rosenthal v. Henderson[150] was a habeas corpus proceeding wherein the defendant was challenging the constitutionality of his conviction for armed robbery by a Tennessee state court. According to the officers, following the defendant's arrest, he voluntarily consented to their searching his apartment without a warrant. In this search a wallet was found which had been taken from the victim of the robbery. The defendant denied that he had given the officers permission to search his apartment. He claimed that he had been physically abused in an effort to illicit a confession and that he admitted having the wallet in question but that he won it in a "crap game." The federal district court held that the defendant had not knowingly and intelligently wavied his fourth amendment rights, and the court of appeals affirmed. An issue recognized but not determinative in the principal case was whether an accused can effectively waive his fourth amendment rights unless he has first been advised of them. A few decisions have indicated that just as *Miranda v. Arizona*[151] requires a suspect to be advised of his fifth amendment privilege against self-incrimination before he can effectively waive the privilege, the same standard may be applied to waivers of the protection of the fourth amendment.[152] Other courts have held that the *Miranda* approach is applicable only to fifth amendment problems.[153] The *Rosenthal* decision, while rejecting a requirement of notice of rights as

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reasonable under the circumstances. The *Schmerber* decision was also authority for the conclusion that this governmental activity did not violate the fifth amendment privilege against self-incrimination, because the appearance of the suspect's hands, as the blood sample, was not "of a testimonial or communicative nature", (*Id.* at 761), nor did it violate the sixth amendment right to counsel (*Id.* at 765-66).

149. "Certainly, from his standpoint, he used poor judgment in giving such permission but it is the sort of poor judgment from which the law does not protect. He gambled on his ability to convince the officer of his innocence. He set the stage and selected the role which he would play; he cannot now complain that he overplayed his part. The officers were under no duty to advise him of the propensities of fluorescein nor that it fluoresces under ultraviolet light. They were under no duty to inform him that the money bags had been dusted with fluorescein powder or what they expected to find from the examination of his hands." 388 F.2d at 845.

150. 389 F.2d 514 (6th Cir. 1968).

151. 384 U.S. 436 (1966).

152. *See, e.g.*, United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966); U.S. v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966); United States v. Modesacki, 280 F. Supp. 633 (D. Del. 1968).

153. Gorman v. United States, 380 F.2d 158 (1st Cir. 1968); State v. McCarty, 199 Kan. 116, 427 P.2d 616 (1967), *partially vacated* 392 U.S. 308, (1968); State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967), *aff'd* 182 Neb. 802, 157 N.W.2d 403 (1968).

a condition precedent to a valid consent search, does acknowledge that such is a factor to be considered.[154] *Bumper v. North Carolina*[155] is conspicuous for its silence on this issue. While it was determined there that valid consent had not been given, there was no implication that the Court considered the problem analagous to the *Miranda* situation. Rather, the analysis of the Court presents a closer analogy to the voluntary-involuntary test for confessions.

4. Reasonableness

When a warrantless search is justified as being incident to an arrest, the issue may arise as to whether it is reasonably incident thereto. An area of particular concern has been searches of automobiles. In 1964, the United States Supreme Court decided the case of *Preston v. United States*,[156] in which the defendant and two companions, seated in a parked automobile, were arrested for vagrancy. The car was not searched at the time of the arrest but was towed to a garage. Some time after the suspects had been booked officers went to the garage and searched the car, finding two loaded revolvers in the glove compartment. Later, they gained access to the trunk of the car and found several items intended for use in a robbery. The Court acknowledged that what might be unreasonable in regard to the search of a house might be reasonable in regard to a motor vehicle. Still, searches of motor vehicles are protected by the fourth amendment, and "once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."[157] The search in this case was, therefore, unreasonable.

A similar problem arose in 1966 in *Cooper v. California*,[158] where the defendant was arrested for a narcotics offense. His vehicle was impounded by the police but not searched until a week later, at which time incriminating evidence was found. The Court found the case distinguishable from *Preston* and upheld the seizure. Here it was not contended that the search was incident to an arrest. Rather, the prosecution relied on a state statute which authorized the seizure of any vehicle used in connection with a narcotics offense "to be held as evi-

154. "The failure to so advise might have more weight in one case than in another. To advise a person with experience or training in this field that he has the right to refuse consent would be a waste of words. To fail to so advise another, who by low mentality or inexperience is obviously ignorant of his rights, might in some cases be decisive. Other cases would doubtless fall between these two extremes." 389 F.2d at 516.
155. 391 U.S. 543 (1968).
156. 376 U.S. 364 (1964).
157. *Id.* at 367.
158. 386 U.S. 58 (1967).

dence until a forfeiture has been declared or a release ordered."[159] The Court recognized that the existence of statutory authorization did not preclude a finding of constitutional unreasonableness, but here, unlike *Preston,* the seizure of the car was closely related to the reason for the defendant's arrest. Having legal custody of the automobile, the police were not precluded from searching it.

Two recent federal cases have required a consideration of the reasonableness of automobile searches. In *DiMarco v. Greene*[160] the defendant, on parole, was observed by the police seated in a car driven by one DiSanto, known by the police to be an unemployed ex-convict. DiSanto left the car and entered a tavern. The police then approached the defendant and advised him that he was under arrest for a parole violation. One of the officers opened the door to the car, flashed a light inside, and observed burglar's tools. They then opened the trunk and found an electric drill. DiSanto had disappeared through the rear door of the tavern. The police placed the car in a garage, and the following day a garage attendant notified them of finding a pistol under the seat, which they confiscated. The defendant was convicted of burglary, safe tampering, armed robbery, and carrying a concealed weapon. On appeal the validity of the seizure of the pistol was challenged. The court held, first, that the discovery of the pistol was not the result of a search[161] and, second, if it was a search it was lawful as incident to an arrest.[162] The latter rationale would appear incorrect as the facts presented are more closely analagous to *Preston* than to *Cooper.*

In *Kimbro v. Henderson*[163] the defendant was arrested for murder at his place of employment. The police impounded his automobile and subsequently searched it for evidence which was introduced at his trial. The court acknowledged the similarity of the case to *Preston* but held that it was distinguishable, because here "the automobile was an integral part of the crime of which he was convicted."[164] Furthermore,

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159. CAL. HEALTH & SAFETY CODE § 11611 (1964).
160. 385 F.2d 556 (6th Cir. 1967).
161. Although it is not entirely clear, apparently the point is that the discovery by the garage attendant is not governmental action. *See* Burdeau v. McDowell, 256 U.S. 465 (1921); Wolf Low v. United States, 391 F.2d 61 (9th Cir. 1968), *cert. denied* 89 S.Ct. 136 (1968).
162. "Only a cursory search was made by the police at the scene because of conditions then and there existing. The police officers, instead of the attendant, could have made the search at the garage on the following day while the car was still in their custody and where a search would have been more conveniently made and better performed." 385 F.2d at 561.
163. 277 F. Supp. 550 (W.D. Tenn. 1967).
164. *Id.* at 553. "The crime for which a person is arrested is a significant factor in the determination of the reasonableness of a subsequent search and seizure of an automobile impounded, or taken into custody, by the police at the time of a person's arrest." *Id.*

the court observed that there was a large volume of evidence in addition to that contested which supported the conviction, whereas in the *Preston* case the conviction was based largely on the challenged evidence.[165]

5. Particularity of Affidavit

When an affidavit is presented to a magistrate to obtain a search warrant, it is essential that the affidavit not merely state the conclusions of the officer requesting the warrant.[166] Rather the affidavit must contain a statement of facts which the magistrate may examine in order to form an independent judgment as to the existence of probable cause.[167] In *Naples v. Maxwell*[168] an affidavit requesting a search warrant was presented to a magistrate which clearly was no more particular than that disapproved in *Aguilar*.[169] The magistrate so concluded, and then inquired of the detectives if they had any further information. On the basis of the exchange, the magistrate added two sentences to the affidavit,[170] and then issued the warrant. The court held that the affidavit as amended was sufficient and that it was clear that the magistrate had made a conscientious independent determination of the presence of probable cause.[171]

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165. Apparently the court is suggesting implicitly that even if this be considered an illegal search, the harmless error rule should be applied. The application of the harmless error rule to the introduction of illegally seized evidence has not been resolved by the United States Supreme Court. *But see* Black, J., dissenting, in Bumper v. North Carolina, 391 U.S. 543 (1968), advocating the application of the rule. *And see* People v. Parham, 60 Cal.2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963), applying the rule.

Also of interest is the decision of the Tennessee Court of Criminal Appeals, Edwards v. State, 3 CRIM. L. RPTR. 2240 (June 24, 1968). The defendant was arrested by a sheriff for driving while intoxicated. The entire car was searched except for the trunk. The defendant was then driven to jail in his own car. Thereafter, the sheriff learned that the defendant was a moonshiner, and he searched the trunk of the car, discovering illegal liquor, on which the present conviction was based. The court held that the search of the car was unlawful.

166. Aguilar v. Texas, 378 U.S. 108 (1964).

167. In the *Aguilar* case, the Court found the following affidavit inadequate: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Id.* at 109.

168. 393 F.2d 615 (6th Cir. 1968).

169. "The affiant says he has good reason to believe and does believe that the aforesaid property or some part thereof is still kept or concealed at the place aforesaid, and that there is urgent necessity for the search thereof to be made in the (nighttime) or (daytime). This affidavit is based on the facts as follows: that affiant has received information which he believes to be reliable and true, that the above named items, or a part thereof, are being unlawfully kept on said premises in violation of law." 393 F.2d at 616.

170. "Informant states that there is a secret room in cellar. Admitted to officers that he is a part of the Naples gambling operation." *Id.*

171. The lower court had determined that *Aguilar* was retroactive in its application.

F. *Right to Counsel*

1. Effective Assistance

With the right to counsel, at least in felony cases, firmly established,[172] the judicial focus of attention has shifted to the quality of assistance the defendant received in the defense of his case. By and large, claims of ineffective assistance of counsel have not been sympathetically received by the courts. Occasionally decisions have been reversed where appointed counsel had inadequate time to prepare the case.[173] However, *State* ex rel. *Edmondson v. Henderson*[174] indicates that time limitations alone will not suffice to demonstrate ineffective assistance. There it was alleged that appointed counsel did not consult with the defendant until a day before his trial for armed robbery. The court held that in the absence of any allegation of prejudice or potential benefit from the earlier appointment of counsel, the contention need not be further considered.

Where a defendant quarrels with the manner of preparation of the case or the trial tactics employed by his appointed counsel, it is a rare case in which an appellate court will attempt to evaluate his performance. In *State* ex rel. *Barnes v. Henderson*[175] the court was unimpressed by the defendant's complaint that his counsel had not interviewed the victim of a criminal assault. Similarly a defendant's complaint that his counsel had previously represented two of the witnesses for the prosecution and therefore did not cross-examine them vigorously enough was dismissed by the court in *McGowen v. State*[176] as "no more than a gratuitous condemnation of the attorney."[177] The decision of an attorney not to request a change of venue was viewed as a matter of discretion in *Morton v. Henderson*.[178] Three recent decisions suggest that effective assistance of counsel may be presumed where the attorney has a high reputation for effective representation.[179]

The Court of Appeals did not decide this issue since the affidavit satisfied the *Aguilar* standard in any event.

172. Gideon v. Wainwright, 372 U.S. 335 (1963). *See* Annot., *Accused's Right to Counsel under the Federal Constitution—Supreme Court Cases*, 18 L.Ed.2d 1420 (1968).

173. *See, e.g.*, Martin v. Commonwealth, 365 F.2d 549 (4th Cir. 1966); Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967). *But cf.* United States *ex rel.* Mathis v. Rundle, 394 F.2d 748 (3d Cir. 1968).

174. 421 S.W.2d 635 (Tenn. 1967).

175. 423 S.W.2d 497 (Tenn. 1968).

176. 427 S.W.2d 555 (Tenn. 1968).

177. *Id.* at 561.

178. 389 F.2d 699 (6th Cir. 1967).

179. One recipient of these plaudits was attorney Hugh Stanton, the Public Defender of Shelby County. In State *ex rel.* Doyle v. Henderson, 425 S.W.2d 593 (Tenn. 1968), the defendant objected to the failure of counsel to effect an appeal. The court responded: "The writer of this opinion has known Mr. Hugh

Beginning with the 1963 decision of *State* ex rel. *Dych v. Bomar*,[180] the Tennessee courts have drawn a distinction in effective assistance of counsel cases between appointed counsel and retained counsel.[181] The theory of this distinction is that in order for a constitutional deprivation to occur there must be some form of state action. Where counsel has been appointed, his performance is attributable to the state, but where the defendant is represented by privately retained counsel there is no state action, and therefore any shortcomings of counsel's performance are a risk which the defendant has assumed.[182] At most, if a defendant is dissatisfied with the services of his retained counsel, it is his duty to so advise the court of his dissatisfaction. If the trial judge elects to do nothing in response to the defendant's objection, he may thereafter be able to attribute the failure of counsel to state action. This distinction was adhered to in a series of decisions during the past year.[183]

Stanton for over thirty years and knows as a matter of fact that he is one of the most conscientious men he has ever known as well as one of the best criminal lawyers in the State. . . . Mr. Stanton is a man of much experience and is not a 'babe in the woods' in a trial of such cases, so if there had been the slightest chance of a reversal or of any rights being protected on behalf of this man he would have certainly answered the trial judge in the affirmative and an appeal would have been perfected." *Id.* at 595. In State *ex rel* Lawrence v. Henderson, 433 S.W.2d 96 (Tenn. Crim. App. 1968), attorney Stanton was referred to as "a lawyer of extensive experience and great ability and unquestioned integrity and fidelity to the cause of his clients." *Id.* at 99.

In State *ex rel.* Gann v. Henderson, 425 S.W.2d 616 (Tenn. 1968), the court made the following statement in response to the defendant's contention of ineffective assistance of counsel: "Mr. Jared Maddux has been State Chairman of the American Legion as well as Lieutenant Governor of the State and has served admirably in a number of very hard cases and tried them well as this Court is willing and able to testify. He knows what he is doing." *Id.* at 617.

Perhaps all three of these decisions are correct, although the *Doyle* case would appear to present the very dilemma apprehended in *Anders v. California* (see *infra* text accompanying notes 186 to 190), and doubtless the attorneys are well deserving of the praise conferred. However, it would seem unfortunate to leave the impression, as these decisions do to some degree, that the performance of counsel being infallible, there is no need for a consideration of the merits of the defendant's complaint. Indeed, in retrospect the defendants in these cases may have cause to wonder whether they were fortunate to have the assistance of such *effective* attorneys.

180. 213 Tenn. 699, 378 S.W.2d 772 (1963). *See also* State *ex rel.* Johnson v. Heer, 219 Tenn. 604, 412 S.W.2d 218 (1966).

181. The same distinction has been made by the United States Court of Appeals for the Sixth Circuit. Davis v. Bomar, 344 F.2d 84 (6th Cir. 1965), *cert. denied* 382 U.S. 883 (1965).

182. *See* criticism by Black, J., dissenting, joined by Douglas, J., in Morris v. Florida, 89 S. Ct. 84 (1968).

183. *In re* Johnson, 277 F. Supp. 267 (E.D. Tenn. 1967); State *ex rel* Gann v. Henderson, 425 S.W.2d 616 (Tenn. 1968); McGovern v. State, 427 S.W.2d 555 (Tenn. 1968). State *ex rel.* Donahue v. Russell, 429 S.W.2d 818 (Tenn. 1967).

Cf. Bible v. State, 4 CRIM. L. RPTR. 2101 (Tenn. Crim. App., Oct. 1, 1968); Walker, J., "Here the defendant was forced to go to trial represented by counsel whom he had discharged and who were selected by the Court over his objection. We think that the Court abused its discretion in appointing the discharged

2. On Appeal

In 1967 in *Anders v. California*[184] the United States Supreme Court established a vigorous standard for counsel in pursuing an appeal of a defendant's conviction. The Court said,

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae* . . . . Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. *That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.*[185]

Because of this affirmative duty to come forward with any conceivable issues which would favor the defendant, the holding of the Supreme Court of Tennessee in *State* ex rel. *Doyle v. Henderson*[186] would seem questionable. There the defendant's appointed counsel had, in the presence of the defendant, responded negatively when the trial judge asked if he wished to appeal. The court held that the defendant had raised no objection to his counsel's response.

> When such is done it seems to us that this clearly constitutes an oral waiver of appeal. . . . Mr. Stanton is a man of much experience and is not a "babe in the woods" in a trial of such cases, so if there had been the slightest chance of a reversal or of any rights being protected on behalf of this man he would have certainly answered the trial judge in the affirmative and appeal would have been perfected.[187]

Yet it is just this type of presumption which was being condemned in the *Anders* case. Indeed the California procedure which had been followed in that case required more than the informal "waiver" in *Doyle*. The California procedure required that counsel thoroughly study the record and if he found no meritorious grounds for appeal he would so advise the court. Thereafter the appellate court would determine from its own review if counsel's conclusion was correct. The United States Supreme Court found this procedure inadequate.[188] The Tennessee court acknowledges having examined the *Anders* decision but finds it inapplicable "because clearly under this record there was no

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counsel over his protest, and that he was fundamentally prejudiced in his defense."

184. 386 U.S. 738 (1967).

185. *Id.* at 744 (emphasis supplied).

186. 425 S.W.2d 593 (Tenn. 1968). Noted in 35 TENN. L. REV. 693 (1968).

187. *Id.* at 595.

188. "California's procedure did not furnish petitioner with counsel acting in the role of advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." 386 U.S. at 743.

arguable thing that could have been presented to the appellate court."[189] It would seem that such bootstrapping is the very thing being frowned upon in *Anders*. To date, there has been no suggestion that a violation of *Anders* may be dismissed as harmless error.[190] As *Anders* involved a defendant represented by appointed counsel, it has been held that its standard does not apply when the defendant has retained counsel.[191]

G. *Confessions*

1. Failure to Respond to Accusation

In a significant footnote to the *Miranda* decision,[192] the United States Supreme Court held,

> [I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.[193]

Such a problem was the central issue in *O'Brien v. State*.[194] The defendant and one Sinclair were stopped by customs agents in Laredo, Texas. A search revealed some twenty money orders. Sinclair told the agents he had obtained them from the defendant. The agents then asked the defendant if they belonged to him; he responded that he did not care to make a statement. At his trial for concealing stolen property an agent was allowed to testify that the defendant did not deny Sinclair's statement. Without referring to the *Miranda* decision,[195] the court observed that as a general rule the failure to deny an incriminating statement made in one's presence is admissible as evidence of his acquiescence in its truth.[196] Here, however, the defendant was asserting a legal right to remain silent and the court held it would not be reasonable to interpret this as an admission of guilt. Therefore the

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189. 425 S.W.2d at 596.

190. Of course, if the defendant requests counsel to appeal his case, clearly he has been denied his right if counsel fails to do so. State *ex rel.* Green v. Henderson, 421 S.W.2d 86 (Tenn. 1967).

A recent decision, Ward v. State, 4 CRIM. L. RPTR. 2013 (Tenn. Crim. App. Sept. 4, 1968), held that the defendant received inadequate assistance of counsel both at his trial and on appeal. Another recent decision held that a defendant who escaped from custody pending his appeal thereby waived his right to appeal. Trent v. State, 3 CRIM. L. RPTR. 2378 (Tenn. Crim. App., July 16, 1968).

191. *In re* Johnson, 277 F. Supp. 267 (E.D. Tenn. 1967).

192. Miranda v. Arizona, 384 U.S. 436 (1966).

193. *Id.* at 468 n.37.

194. 426 S.W.2d 507 (Tenn. 1968).

195. There is no indication in the report of the case whether the trial occurred before or after the decision of *Miranda*.

196. The court cited Phelan v. State, 114 Tenn. 483, 88 S.W. 1040 (1904).

judgment was reversed. The result is thus consistent with the standard established by *Miranda*.[197]

2. Method of Advising of Rights

The *Miranda* decision specifies the manner in which an accused is to be advised of his constitutional rights.[198] A growing number of cases require a determination of whether the warnings given the accused substantially complied with these requirements.[199] In *Shannon v. State*[200] the defendant signed a waiver which read:

> I have also been told that I have the right to call a lawyer or have one called for me and have him present.

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197. A recent yet-unreported decision also involving this issue is deserving of mention. The defendants were travelling salesmen, convicted of kidnapping based upon the removal of a schoolboy from a school bus, because they were irritated with the boy's throwing papers from the bus. The defendants were arrested and fully advised of their rights. The father of the boy confronted the defendants at the jail and asked them why they had done it. Defendant Morford responded, "We were going to take him off and beat the Hell out of him and teach him some damn manners." Defendant Vanatta didn't say anything. This silence was emphasized by the trial court to the jury. The Court of Criminal Appeals, Oliver, J., reasoned as follows: "Notwithstanding the fact that Morford was not being interrogated by any officer or other official at the time he made his statement, nevertheless, all the defendants were then and there in custody in the jail in the presence of the Sheriff and other law enforcement officers and the general sessions judge and the parents and sister of the victim, and the atmosphere was very tense as a result of the victim's father undertaking to interrogate these defendants and provocative statements by the father and sister. So, in this context and under those circumstances, the fact that they were not being interrogated by the Sheriff or other law enforcement officer or official can have no determinative bearing or effect upon this question. . . . Considered in the light of this situation, and from the standpoint of the constitutional rights of the defendants, this was for all practical purposes an in-custody interrogation, albeit the victim's enraged father was improperly permitted to conduct an inquisition which resulted in Morford's angry retort. In our view of the matter, after having been advised by a judicial officer of his constitutional right to remain silent, and exercising that right as he understood it, this defendant was not required to break his silence and speak up in protest and denial of Morford's statement." Vanatta v. State, 3 CRIM. L. RPTR. 2269 (Tenn. Crim. App., June 7, 1968). See also Galasso v. State, 207 So.2d 45 (Fla. 1968).

198. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." 384 U.S. at 444.

199. In United States v. Fox, 403 F.2d 97 (2d Cir. 1968), it was held that telling a defendant "he didn't have to make a statement" was not equivalent to advising him of his right to remain silent, nor was the statement that "he could consult an attorney prior to any question" adequate notice that he had the right to the presence of an attorney. Advising the suspect that he has the right to consult with an attorney "at anytime" was held inadequate notice of the right to the presence of an attorney in Atwell v. United States, 398 F.2d 507 (5th Cir. 1968). Nor is telling the defendant he has the right "to contact" an attorney sufficient. Duckett v. State, 3 Md. App. 563, 240 A.2d 332 (1968).

200. 427 S.W. 2d 26 (Tenn. 1968).

The court held that this did not satisfy the requirements of *Miranda*.[201] In *Floyd v. State*[202] the defendant was advised, inter alia, as follows:

> We have no way of furnishing you a lawyer but one will be appointed for you, if you wish, if and when you go to court.[203]

Clearly, this warning does not meet the requisites of *Miranda* either, but the court affirmed the conviction because the defendant did not object to the introduction of the confession at the trial.[204] It is arguable that any error was harmless in any event because the court noted the defendant was represented by retained counsel, and other portions of the notice acknowledge the right to presence of retained counsel during interrogation.[205]

3. Fruits of an Illegal Confession

In *Shannon v. State*[206] the accused, suspected of murder, was both illiterate and an alcoholic. He was taken to a motel for questioning by three officers who after some effort persuaded him to submit to a lie detector test. He was advised that he did not pass it and thereafter was interrogated for some five or six hours during which time a confession was obtained. After he was placed in jail two knives allegedly connected with the crime were shown to him, and he made incriminating statements with respect to them. He also made certain incriminating statements during the booking procedure. At some time, though it is not clear when, the defendant signed a waiver, which proved to be invalid.[207] The trial court excluded the confession on the ground that

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201. In a surprising outburst the court admonished law enforcement officials for their failure to fully apprise accused of their rights: "The sooner it is realized by all concerned that the *Miranda* guarantees must be afforded an accused, in full good faith and with intention on the part of the interrogators to comply fully therewith, in the spirit in which these tests are laid down and required, the sooner the time will come when it will not be necessary for this Court to reverse as it must do in this case. Let it be noted that the concern of this Court is not to favor a defendant but to see that the scales of justice be in balance between him and the State, which cannot be if the constitutional guarantee of *Miranda* can be withheld by its officers." *Id.* at 29. For a similar decision, see Lloyd v. State, 3 CRIM. L. RPTR. 2145 (Tenn. Crim. App., May 6, 1968).

202. 430 S.W.2d 888 (Tenn. Crim. App. 1968).

203. *Id.* at 891. This is but a small extract of the warning given, which is set out at length in the opinion. However, at no point in the warning was the suspect advised that he had the right to the presence of appointed counsel during interrogation.

204. However, the virtually identical warning was held adequate in Reed v. State, 3 CRIM. L. RPTR. 2519 (Tenn. Crim. App., Sept. 4, 1968).

205. The possibility of the application of the harmless error rule to *Miranda* violations has not yet been broached by the United States Supreme Court. *But see* Commonwealth v. Wilbur, 231 N.E.2d 919 (Mass. 1967), *cert. denied* 390 U.S. 1010 (1968), involving a problem similar to the one here discussed.

206. 427 S.W.2d 26 (Tenn. 1968).

207. *See supra* text accompanying notes 200 and 201.

it was coerced by reference to the failure to pass the lie detector test. The subsequent incriminating statements were admitted. The Tennessee Supreme Court held that the later statements were equally inadmissible, since they were "patently the fruit of the earlier one."[208]

A unique fruit of the poisonous tree problem was presented in *Harrison v. United States*.[209] The defendant was convicted of first degree murder, but on appeal the conviction was reversed because an illegally obtained confession had been introduced against the defendant. On retrial the confession was not admitted, but the court did allow the prosecutor to read portions of the defendant's testimony at the previous trial. The defendant objected to the admission of the testimony on the theory that he had been induced to testify at the prior trial only because he felt it necessary to rebut the confession. The Supreme Court acknowledged the general rule of evidence that a defendant's testimony at a former trial is admissible in a subsequent proceeding. Here, however, the question was whether the testimony was induced by the illegal confession, in which event it was the fruit of that confession and could not be introduced at a subsequent trial. Since the government had been guilty of illegal action, the burden of proof rested with it to show that the confession did not induce the testimony, a burden it had failed to satisfy.[210]

4. Application of *Miranda* to Retrials

The *Miranda* decision is applicable only to "cases commenced after" the date of its decision, June 13, 1966.[211] In the past year, two decisions were handed down by the Supreme Court of Tennessee involving retrials subsequent to *Miranda* where the first trial was prior to *Miranda*.[212] The court held that *Miranda* did not apply under these circumstances.[213]

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208. *Cf.* the case of Robinson v. State, 2 CRIM. L. RPTR. 2350 (Tenn. Sup. Ct., Jan. 5, 1968), where the defendant made a confession to the police which was determined by the trial court to be inadmissible. Shortly thereafter he made a confession to newspaper reporters, which was admitted at his trial. The appellate court held this latter confession to be admissible.

209. 392 U.S. 219 (1968).

210. While the *Harrison* case dealt with a confession which was illegal because of a violation of a federal rule of procedure, it would appear equally applicable to confessions found inadmissible for constitutional reasons.

211. Johnson v. New Jersey, 384 U.S. 719, 733 (1966).

212. Patten v. State, 426 S.W.2d 503 (Tenn. 1968); Murphy v. State, 426 S.W.2d 509 (Tenn. 1968).

213. Jurisdictions are split over this issue, the confusion arising from the meaning of the phrase "cases commenced after" used in the *Johnson* decision. For a discussion of the problem, see Note, 36 TENN. L. REV. 58 (1968).

5. Determination of Admissibility

In *McCravey v. State*,[214] when alleged confessions of the two defendants were offered into evidence, the defendant objected, challenging their admissibility. The trial judge thereupon excused the jury and heard testimony of the officers who had obtained the confessions to the effect that the *Miranda* warnings had been given. At the conclusion of the presentation, the trial court refused to allow the defendants to testify as to the circumstances under which the confessions were made, stating that such testimony could be given to the jury for its consideration. Primarily on the authority of *Jackson v. Denno*[215] and *United States v. Carigan*[216] the court reversed, holding that the defendants should have been afforded an opportunity to testify at this point regarding the admissibility of their confessions.[217]

6. Use of Co-Defendant's Confession in Joint Trial

In *Bruton v. United States*[218] the defendant challenged the admission of a confession of a co-defendant, which confession inculcated the defendant, at a joint trial. The jury had been instructed that the confession of the co-defendant was to be disregarded in the determination of the defendant's guilt. Overruling the prior decision of *Delli Paoli v. United States*,[219] the United States Supreme Court held that because of the "substantial risk" that the jury considered the confession in determining the defendant's guilt, notwithstanding the cautionary instruction, the admission of the confession was improper in that the defendant was deprived of the right to confront his accusers in accordance with the sixth amendment.

H. *Grand Jury*

1. Racial Discrimination

Just as it is a denial of equal protection to systematically exclude members of a race from a grand jury panel,[220] so it is equally unconstitutional to manipulate the make-up of the grand jury so that a designated percentage of members of a race are selected.[221] In *Bonds v.*

214. 426 S.W.2d 174 (Tenn. 1968).
215. 378 U.S. 368 (1964).
216. 342 U.S. 36 (1951).
217. Followed in Scalf v. State, 3 CRIM. L. RPTR. 2231 (Tenn. Crim. App., May 16, 1968).
218. 391 U.S. 123 (1968).
219. 352 U.S. 232 (1957).
220. *See* Patton v. Mississippi, 332 U.S. 463 (1947). And see State *ex rel.* Hathaway v. Henderson, 432 S.W.2d 503 (Tenn. 1968), where the principal was acknowledged, but no discrimination was proven.
221. Cassell v. Texas, 339 U.S. 282 (1950).

State[222] the court examined a grand jury selection procedure in which the letter "C" was written on all cards bearing the name of a Negro which were placed in the jury selection box.[223] Thereafter, when names were drawn from the box, the commissioners saw to it that twenty-five Negroes were included in each jury panel. The court held that this procedure smacked of racial discrimination just as much as systematic exclusion. The question was not whether any Negroes were actually on the grand jury; the sole concern was with the manner in which the grand jury members were selected.

I. *Guilty Plea*

1. Voluntarily and Understandingly Entered

The validity of a guilty plea entered in respect to two separate charges was attacked in a habeas corpus proceeding in *Rigby v. Russell*.[224] The defendant was first charged with armed robbery, and counsel was appointed to represent him. After consulting with the defendant and witnesses, including the victim of the robbery, counsel concluded that there was no defense to the charge and so advised the defendant. He told him that armed robbery was a capital offense, although such a penalty was very unlikely, and recommended that he enter a guilty plea and seek a minimum sentence. Counsel thereafter consulted with the district attorney, and it was agreed that the latter would recommend the minimum sentence of ten years if a plea of guilty was entered. The defendant entered a guilty plea and received a ten year sentence. In the meantime, however, while awaiting trial on the armed robbery charge, the defendant had participated in an attempted jail break. He was thus additionally charged with attempted escape and assault with intent to murder. The date for trial on these charges was some two weeks later than that on the armed robbery charge. The same attorney represented the defendant on this charge, and again he concluded that there was no defense available and so advised the defendant. The defendant told him that he would like to enter a guilty plea to the charges and again seek a minimum sentence. The district attorney told his counsel that he would dismiss the escape charge and would not oppose a minimum sentence on the assault charge, nor would he oppose the sentence running concurrently with the armed robbery sentence. Counsel advised the defendant of this agreement but explain-

222. 421 S.W.2d 87 (Tenn. 1967).
223. As the court noted, this procedure in and of itself was patently unconstitutional. Avery v. Georgia, 345 U.S. 559 (1963); Arnold v. North Carolina, 376 U.S. 773 (1964); Whitus v. Georgia, 385 U.S. 545 (1967).
224. 287 F. Supp. 325 (E.D. Tenn. 1968).

ed that the recommendation regarding a minimum sentence was not binding on the jury, nor was the recommendation for the sentences to run concurrently binding on the judge. The defendant entered a guilty plea, and the jury imposed a minimum sentence. However, the court ordered the sentence to run consecutively to the armed robbery sentence.

In the present proceeding the defendant contended that both guilty pleas were invalid. The court held against the defendant in each instance. Since the failure of the defendant to have his sentence run concurrently was the only matter which he did not receive as anticipated, this would appear to be the strongest point at which he could attack the pleas. In this regard the court said,

> However, whether the defendant received the benefit of the recommendation of leniency does not of itself establish that the plea was voluntary or involuntary, understood or not understood, valid or invalid. A mistaken or involuntary plea does not become valid because the bargain inducing it was good or bad, kept or unkept. The issue accordingly remains whether, in the light of all the circumstances, including any plea bargaining, the plea of guilty was freely, voluntarily and understandingly entered.[225]

Notwithstanding the court's statement that whether the bargain is kept is not determinative of the validity of the plea, it is generally true that where the defendant receives punishment in excess of that bargained for by counsel and prosecutor the plea will be held to be not "understandingly" entered. In the present case, however, the court was convinced that the defendant had been fully advised by his counsel of the possibilities prior to his entering the plea, and among those possibilities was the court's ordering the sentences to run consecutively. Thus the defendant had elected to take his chances, at least within the spectrum of potential results outlined to him by his counsel.

Having thus disposed of the case, the court took the opportunity to comment on the source of the problem in the case.

> This case points up the hazards involved in the practice of plea discussions or plea bargaining in criminal cases. Had there been no such bargaining in this case, it is unlikely that the proceeding would ever have been filed. Although plea bargaining appears to be a common practice in many courts, it has little to recommend its use. Many prosecuting officers, if not courts, appear to feel that it is a necessary and proper means of disposing criminal cases expeditiously. That it expedites disposition of cases may be true. That it is a necessary or proper means of doing so is subject to serious question. Where the practice is followed, the least that should be done is that the Trial Court should re-

225. *Id.* at 331.

> quire a full disclosure upon the record of such negotiations and then conduct a careful inquiry into the voluntary and understanding nature of the plea.[226]

This passage reflects the widespread growing concern of many judges and writers with the *sub rosa* procedure of plea bargaining which is so much a part of the contemporary criminal process.[227]

2. Requirement of Evidence to Determine Punishment

Until a 1967 amendment, Tennessee Code Annotated § 40-2310 provided:

> Upon the plea of guilty, when the punishment is confinement in the penitentiary, a jury shall be impaneled to hear the evidence and fix the time of confinement, unless otherwise expressly provided for by this Code.[228]

During the past year, a series of habeas corpus petitions raised objections to the failure to comply with this statute in that no evidence was submitted to the jury determining the punishment. In each instance, the court held that at stake was a statutory right which the defendant could waive. No constitutional right was in issue, and thus the judgments were not subject to a collateral attack by a petition for a writ

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226. *Id.* at 381-82.

227. The court quoted from the American Bar Association's project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (tentative draft, February 1967): "1.5 Determining voluntariness of plea. The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea."

See also The Negotiated Plea of Guilty in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS 9–13 (1967); NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL, ch. 6 (1966).

The yet-unreported decision, Owens v. Russell, 4 CRIM. L. RPTR. 2080 (Tenn. Crim. App., October 4, 1968), held that a signed guilty plea does not foreclose the defendant's later challenging it as being involuntary.

228. In 1967 the statute was amended by the following addition: "Provided however, that if the defense does not request a trial on his plea of guilty, and has agreed to accept the punishment recommended in the case on the plea of guilty, in the discretion of the court a résumé of the facts of the case shall be related to the jury by the state and stipulated and agreed to by the state and the defense as being the substantial facts and evidence in the case, to be considered by the jury as such facts and evidence, and the jury may then approve the recommendation and be sworn to fix the punishment. In such pleas of guilty by stipulation and agreement, the judge shall not be required to charge the jury in writing, or otherwise." TENN. CODE ANN. § 40-2310 (Supp. 1968).

of habeas corpus.[229] The possibility of this argument being raised, even on appeal, is now foreclosed by statutory amendment.[230]

J. *Trial*

1. Trial by Jury

a. Right to

In *Duncan v. Louisiana*[231] the United States Supreme Court extended the right to trial by jury to the states. The scope of application of the holding was left undecided. The defendant was charged with an offense which, though classified as a misdemeanor, was punishable by up to two years imprisonment and a fine. He was actually sentenced to sixty days in prison and a fine of $150. The Court held that the defendant was entitled to a trial by jury. It is clear that the determining factor is the *potential* punishment, not the punishment which the defendant actually received. The Court observed that a jury trial was not mandatory for "petty" offenses, and indicated this would probably include most crimes where the possible penalty was not in excess of six months. For present purposes, the Court was content to hold that where the crime is punishable by as much as two years in prison it is not a petty offense and the accused is entitled to a trial by jury.

In a case decided the same day, *Bloom v. Illinois*,[232] the Court also held that the right to trial by jury extended to serious criminal contempts in state courts. Here the Court was confronted with a state statute which provided no maximum punishment for criminal contempt. Acknowledging that criminal contempt was not such a crime that demanded a jury trial irrespective of the punishment involved, the Court concluded that in this situation it could only judge the seriousness of the matter by examining the punishment actually imposed. Here the petitioner had received a two year sentence, and the Court thought he was clearly entitled to a trial by jury.

In the only Tennessee decision concerning the right to trial by jury it was held that there was nothing unconstitutional about a statute which permitted a defendant to waive his right to trial by jury in a felony case.[233]

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229. State *ex rel.* Edmondson v. Henderson, 421 S.W.2d 635 (Tenn. 1967); State *ex rel.* Ingram v. Henderson, 423 S.W.2d 479 (Tenn. 1968); State *ex rel.* Barnes v. Henderson, 423 S.W.2d 497 (Tenn. 1968); State *ex rel.* Crumpler v. Henderson, 428 S.W.2d 800 (Tenn. Crim. App. 1968); State *ex rel.* Underwood v. Henderson, 428 S.W.2d 803 (Tenn. Crim. App. 1968); State *ex rel.* Gage v. Russell, 431 S.W.2d 299 (Tenn. Crim. App. 1968); State *ex rel.* George v. Henderson, 432 S.W.2d 492 (Tenn. Crim. App. 1968).

230. *See* note 228 *supra.*

231. 391 U.S. 145 (1968).

232. 391 U.S. 194 (1968).

233. Seals v. Luttrell, 428 S.W.2d 312 (Tenn. 1968).

b. Impartial Jury

In *Witherspoon v. Illinois*[234] the United States Supreme Court considered the propriety of excluding from jury service for cause individuals who expressed conscientious scruples against capital punishment.[235] The Court held that the exclusion of such individuals from the jury deprived the defendant of due process of law.

> [A] jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life and death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community.[236]

The Court acknowledged that it would be permissible to exclude from the jury all persons who would not even consider returning the death penalty – such would simply go to insure a "neutral" jury – but to exclude all who expressed any reservations about the death penalty "crossed the line of neutrality."

Several state decisions have raised various issues as to the impartiality of jurors. In *Brown v. State*[237] the defendant objected to the fact that one of the jurors sat on both his sanity hearing and the trial on the merits. It was argued that the prior participation of the juror at the sanity hearing affected his impartiality at the subsequent trial, and that this destroyed the impartiality of the entire body. The court found the present case distinguishable from a case in which a juror had previously sat on a prosecution of the defendant involving much the same evidence.[238] Rather, the court compared the problem to that raised when a juror has obtained information concerning the defendant or the crime from some independent source, such as a newspaper. In such instances, the court noted, an admonition to the jury to consider only the evidence heard from the witness stand afforded the defendant sufficient protection.[239] Assumedly, all the jurors were properly instructed on their responsibility in the trial of the present case, and the court was persuaded to affirm the conviction.

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234. 391 U.S. 510 (1968).

235. ILL. REV. STAT. ch. 38, § 743 (1959), provided: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

236. 391 U.S. at 519-520.

237. 423 S.W.2d 493 (Tenn. 1968).

238. Apperson v. Logwood, 56 Tenn. 262 (1873).

239. Smith v. State, 205 Tenn. 502, 327 S.W.2d 308 (1959), *cert. denied* 361 U.S. 990 (1960).

In *State* ex rel. *George v. Henderson*[240] the defendant entered pleas of guilty to charges of rape and assault and battery with intent to commit rape. A jury was empaneled for the determination of punishment. Prior to entering the guilty plea, an agreement had been reached between defense counsel and prosecutor as to the punishment which would be recommended. The defendant challenged the trial procedure employed whereby the prospective jurors were required to commit themselves before being sworn to return the verdict recommended by the prosecution. The defendant contended that this procedure totally abrogated his statutory right to have his punishment determined by a jury.[241] The court did not agree. Since the defendant had initiated the negotiations with the prosecution which had resulted in a mutually agreed to sentence, he could not now object to a procedure which accomplished his purpose.[242] Furthermore, no objection was made at the time of the empaneling of the jury.

In *Hyatt v. State*[243] the defendant was convicted of the illegal transportation of liquor. Following the trial it was discovered that one of the jurors had a son-in-law who was an alcoholic, and that the juror had previously sworn out a search warrant to have the defendant's premises searched for liquor in an effort to protect his relative. The court reversed the judgment holding that the presence of the juror on "the jury raises a reasonable doubt in our minds as to whether these defendants have been tried by a fair and impartial jury."[244]

With regard to a claim of general prejudice in the community, the Sixth Circuit Court of Appeals held that the fact that two hundred and fifty jurors were examined on voir dire before a jury could be selected did not prima facie indicate that the jury finally selected was biased and prejudiced.[245]

c. Alternate Juror

The Tennessee Constitution provides that "the right to trial by jury shall remain inviolate."[246] In *Grooms v. State*[247] the defendant was convicted by a jury of thirteen members, and he contended that this

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240. 432 S.W.2d 492 (Tenn. Crim. App. 1968).
241. TENN. CODE ANN. § 40-2310 (Supp. 1968).
242. "The presiding fact is that the petitioner made his own bargain, deliberately planned and obtained its final approval by a jury, and he is estopped to repudiate it now by claiming that the procedure he adopted to accomplish his own purpose was illegal, even if it were." 432 S.W.2d at 497.
243. 430 S.W.2d 129 (Tenn. 1968).
244. *Id.* at 130.
245. Morton v. Henderson, 389 F.2d 699 (6th Cir. 1967).
246. TENN. CONST. art 1, § 6.
247. 426 S.W.2d 176 (Tenn. 1968).

was a violation of the constitution. "The right to trial by jury" was held by the court to carry the common law meaning of "twelve good and lawful men."[248] Thus, it had been held that a conviction by a jury of less than twelve jurors was invalid.[249] The court was of the opinion that a trial by a jury of more than twelve members was equally invalid and reversed and remanded the case. Likely the problem arose in this case because of a state statute authorizing the selection of an alternate juror in certain cases in certain counties, who sits as a regular juror through the case and is available should a regular juror become incapacitated.[250] However, if when the case reaches the point for submission to the jury the twelve regular jurors are still available for service, the alternate juror should be discharged, and it is reversible error to allow him in the jury room during deliberations.[251]

d. Duty of Judge to Approve Verdict

In *Halliburton v. State*[252] the defendant was convicted of rape. In response to a motion for a new trial on the ground that the verdict was contrary to the weight of the evidence, the trial judge said,

> [F]or the Court to consider the matter further insofar as this motion is concerned, I would have to step into the rights and prerogatives set-up by the law for the jury, which is to hear the facts and to give a verdict in accordance with those facts, and I don't believe that the Court is warranted in doing anything like that because I feel it would be a clear abuse of the jury's authority and the judge's prerogative.[253]

The trial judge has been characterized as a "thirteenth juror" in a criminal case.[254] By virtue of this role, he is expected to "weigh the evidence and pass upon the issues," and in denying a motion for a new trial he must tacitly approve the verdict of the jury. As the statement of the trial judge in this case indicated that he had declined to consider the verdict of the jury on its merits, the court was compelled to reverse and remand the case for a new trial.

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248. Neely v. State, 63 Tenn. 174, 180 (1874). "By good and lawful men . . . is meant men 'esteemed in the community for their integrity, fair character, and sound judgment.'" *Id.*

249. Bell v. State, 37 Tenn. 507 (1857); Bowles v. State, 37 Tenn. 360 (1858); Willard v. State, 174 Tenn. 642, 130 S.W.2d 99 (1939) (all cited by the court in the present case).

250. TENN. CODE ANN. § 22-222 (Supp. 1968).

251. Patten v. State, 426 S.W.2d 503 (Tenn. 1968).

252. 428 S.W.2d 41 (Tenn. Crim. App. 1968).

253. *Id.* at 43.

254. Curran v. State, 157 Tenn. 7, 4 S.W.2d 957 (1928); Messer v. State, 215 Tenn. 248, 385 S.W.2d 98 (1964).

2. Conflict of Interest

Several months prior to the trial in the case of *Autry v. State*,[255] the defendant had gone to a particular attorney to seek his assistance in the defense. The defendant and his son testified that the case was discussed for about an hour, during which the facts were revealed and the witnesses were identified. The attorney did not accept the defense of the case, however, because the parties were unable to agree on a fee. When the defendant came to trial, the attorney in question appeared as a special prosecutor. The defendant argued that since the prosecutor had received confidential communications from him at a time when they were dealing with each other in an attorney-client relationship, he was thereby disqualified from participating in the trial in this capacity. The court recognized the general principle that an attorney cannot represent conflicting interests in a case, and that once an attorney has received the confidence of a client he is thereby precluded from serving interests adverse to those of the client. However, the court rejected the account of the facts as given by the defendant and concluded that no confidential communications had passed between the parties and that the mere discussion of proposed employment did not disqualify the attorney from serving the prosecution. The statement of the law by the court is quite accurate and is consistent with decisions from other jurisdictions.[256] Discretion would suggest that whenever an attorney is placed in a position where there is the possibility of the divulgence of confidences, he should remove himself from any further participation in the case adverse to the interests represented in this encounter.[257]

3. Jury Instructions

A newly enacted statute provides for a directed verdict of acquittal where insufficient evidence has been presented to warrant a conviction.[258] It was held to be reversible error to fail to provide the jury with the written charge when they retired to deliberate.[259] It was also held reversible error for the trial court to refuse to charge the jury as to a lesser included offense where there was some evidence which could support such a finding.[260]

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255. 430 S.W.2d 808 (Tenn. Crim. App. 1968).
256. Several are cited by the court.
257. *Cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (Preliminary Draft 1969), entitled "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," although not dealing specifically with the problem in the present case.
258. TENN. CODE ANN. § 40-2529 (Supp. 1968).
259. McElhaney v. State, 420 S.W.2d 643 (Tenn. 1967).
260. Prince v. State, 421 S.W.2d 627 (Tenn. 1967).

4. Determination of Degree of Murder

In *State* ex rel. *Lockhart v. Henderson*[261] the defendant plead guilty to first degree murder and a jury was empaneled for the determination of punishment. The jury returned as its verdict: "Fix the punishment for the defendant at the term of not more than fifty (50) years in the penitentiary." On appeal, the defendant objected to the absence in the verdict of any indication of the degree of murder. Section 39-2404 of the Tennessee Code Annotated provides:

> The jury before whom the offender is tried, shall ascertain in their verdict whether it is murder in the first or second degree; and if the accused confess his guilt, the court shall proceed to determine the degree of crime by the verdict of a jury, upon the examination of testimony, and give sentence accordingly.

A host of decisions are cited by the court in which it was held that a failure to specify the degree of murder in the verdict rendered it void. Yet all these cases had the common characteristic, distinguishing them from the present case, that the defendant had entered a plea of not guilty. Here the defendant had plead guilty to first degree murder, so it could be argued that the jury was making its determination within the context of this stipulation of guilt.

The only case discovered by the court with some relevance to the present issue was the 1951 decision of *State* ex rel. *Brinkly v. Wright*.[262] There the defendant entered a plea of guilty to an indictment of first degree murder, and the jury indicated it found him guilty of first degree murder. The defendant argued that the jury should only have determined punishment—that the determination of the degree of murder was for the court. On appeal it was held that a reasonable interpretation of the statute required the jury to determine the degree of murder. On the authority of this decision and the explicit language employed in the statute, the court held in the present case that the verdict of the jury was void.

K. *Punishment*

1. Cruel and Unusual

The decision of the United States Supreme Court in the case of *Powell v. Texas*[263] afforded further development of the "status crime" aspect of the eighth amendment protection against cruel and unusual punishment. The status crime doctrine was first expounded in *Robinson*

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261. 427 S.W.2d 834 (Tenn. 1968).
262. 193 Tenn. 26, 241 S.W.2d 859 (1951).
263. 392 U.S. 514 (1968).

v. California.[264] There the defendant had been convicted under a California statute which made it a crime to "be addicted to the use of narcotics." As California had interpreted this statute, a conviction did not require any proof of use, possession, purchase or sale of narcotics. If the prosecution could prove that the defendant was a drug addict, then the offense was complete. The Supreme Court held that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment."[265]

The *Robinson* decision potentially was of relatively minor significance, because statutes which impose criminal liability for a "status," pure and simple, as the California statute did, are exceedingly rare. Questions were raised in lower courts thereafter, however, as to the relevance of *Robinson* in cases where it was clear that the offense charged was unavoidable because of the accused's status. For example, if a defendant could not be convicted of being a drug addict, could a drug addict be convicted of using narcotics?[266] In the *Powell* case, the issue was whether an alcoholic could be convicted of public intoxication.[267] The defendant had appealed a $20.00 fine for being in a state of intoxication in a public place, contending that he was an alcoholic. Justice Marshall wrote the opinion of the Court, which represented the views of four of its members.[268] The opinion reasoned that the case did not fall within the rationale of the *Robinson* holding at all, because the defendant had not been convicted of being a chronic alcoholic but

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264. 370 U.S. 660 (1962).

265. *Id.* at 667. "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 666.

266. *See* Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), *cert. denied* 381 U.S. 929 (1965), where the court declined to consider the possibility. In People v. Borrero, 19 N.Y.2d 332, 227 N.E.2d 18, 280 N.Y.S.2d 109 (1967), the defendant went a step further and argued as a defense to larceny that he stole only so that he would have the funds necessary to satisfy his craving as a narcotics addict. The court rejected the argument.

267. Two lower courts had previously reached this conclusion: Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966). Several state decisions had gone the other way.

268. Justice Marshall was joined by Chief Justice Warren and Justices Black and Harlan.

rather of being in public while drunk. All that *Robinson* stood for, according to these Justices, was that a defendant could only be convicted if he was accused of committing some act. Justice White concurred in the result reached by his four colleagues, but disagreed that the *Robinson* rationale could not be extended to cover acts which were a product of the "status" as well.[269] He voted to affirm the conviction because he felt that public intoxication was not an inevitable consequence of being an alcoholic—i.e., the defendant could have as easily have become intoxicated in the privacy of his own home.[270] Four Justices[271] dissented, agreeing in theory with Justice White, but reaching a different conclusion on the facts, feeling that for all practical purposes the defendant was living in the public streets, and therefore the connection between the status and the offense could be established.[272] It will be noted that although the "Opinion of the Court" gives a narrow interpretation to the *Robinson* decision, five of the Justices are prepared to extend the doctrine to cover offenses inseparable from the status, and it was only Justice White's attitude toward the facts of the case that prevented such an extension at this time.

2. Indeterminate Sentence Law

Section 40-2707 of the Tennessee Code Annotated provides that where a defendant is convicted of a felony, the punishment for which is designated as within certain minimum and maximum terms, the jury is to fix punishment as "imprisonment in the penitentiary for not more than —— years." The defendant in *State* ex rel. *Crumpler v. Henderson*[273] was convicted of armed robbery and sentenced to "20 years in the

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269. "If it cannot be a crime to have an irresistible compulsion to use narcotics . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. . . . Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk." 392 U.S. at 548-49.

270. "Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record." *Id.* at 553. At the same time, Justice White acknowledged that there are homeless alcoholics in regard to whom it could be said that public intoxication is unavoidable.

271. Justices Fortas, Douglas, Brennan and Stewart.

272. The dissenters observed that the defendant had been convicted of public intoxication 100 times since 1949. He worked at a tavern shining shoes for $12.00 a week, which he used to buy wine. He did not contribute to the support of his family. He drank wine every day, got drunk about once a week, and then usually went to sleep on the sidewalk. "[T]he essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid." 392 U.S. at 567.

273. 428 S.W.2d 800 (Tenn. Crim App. 1968).

penitentiary." The defendant contended he should have received the benefit of the above cited statute, which would allow credit for good behavior to be deducted from his sentence. Armed robbery is a capital offense, but the jury may commute the sentence to imprisonment for from ten years to life. The court held that the indeterminate sentence law was not applicable to capital offenses. "Where an offense, such as robbery with a deadly weapon, is punishable by death, the statute prescribes no maximum term of punishment and the indeterminate sentence law does not apply."[274] It is obvious that the statute *does* prescribe a maximum term, "imprisonment for life," and therefore the court's reasoning is somewhat curious. However, it can reasonably be said that the indeterminate sentence statute is intended to apply where a minimum-maximum term is the *only* possible punishment, and thus capital offenses are not included. Apparently this is the basis of the present decision.

3. Credit for Time in Mental Hospital

In 1954, the defendant in *Marsh v. Henderson*[275] was charged with first degree murder. He was determined to be incapable of standing trial by virtue of insanity and was committed to the maximum security unit of a state mental hospital pursuant to statute.[276] Over eleven years later he was adjudged capable of standing trial, was returned to the criminal court, and plead guilty to second degree murder. He received a sentence of from ten to twenty years. It was the defendant's contention that he should be credited on his sentence with the time he spent in the mental hospital. The relevant statute, Tennessee Code Annotated § 40-3102, provides, inter alia, that the defendant shall be allowed "credit on his sentence for any period of time for which he was committed and held in county jail or workhouse pending his arraignment and trial." In an exceedingly obscure passage, the court said,

> [I]t seems to us that the enumeration undertaken by the Legislature in this statute was descriptive and restrictive (sic) of the statute (§ 40-3102, T.C.A.) an (sic) if it had been intended to be limited to "county jail or workhouse pending his arraignment and trial" and others *ejusdem generis* the broad purposes of the statute could not have been employed without doing violence to that intent. The primary emphasis of the second paragraph of the statute is on the word "committed" and as authorizing credit for time following such a commitment. When we thus

274. *Id.* at 803.
275. 424 S.W.2d 193 (Tenn. 1968).
276. TENN. CODE ANN. § 33-702 (Supp. 1968).

> view this statute it seems to us that the words indicative of the place of confinement are descriptive of places of confinement, and not exclusive of any other lawful place of commitment and detention.[277]

Examining the case as a problem of statutory construction, the conclusion reached by the court is difficult to follow. The doctrine of *ejusdem generis* is totally irrelevant, as that principle of construction is only applicable when a general term follows a series of specific terms, and the court is attempting to ascertain the scope of the general term.[278] Thus, if the statute had read "county jail, workhouse, or other place of confinement," the doctrine of *ejusdem generis* would be used to determine the meaning of the final phrase.[279] Here, however, the statute merely enumerates two specifics—"county jail or workhouse"—and the applicable rule of construction is the doctrine of *expressio unius est exclusio alterius,*[280] or the expression of one thing is the exclusion of another. Thus, presumptively, where an inclusive specification has been made by the legislature, the court will not make additions to the statutory enumeration.

If the problem is approached as a question of legislative intent, the initial response must be that legislative intent is first to be determined by the language employed in the statute, which in this instance appears quite explicit. The statute under the authority of which the defendant was committed to the hospital was enacted in the same year, but prior to, the present statute regarding the crediting of sentences.[281] Thus the legislature can be assumed to know this possible disposition of a criminal defendant at the time the latter statute was enacted. The failure of the legislature to include such a form of custody in the sentencing statute is again evidence of legislative intent adverse to the court's conclusion.

Only when examining the problem from a broad policy perspective, ignoring the language of the statute, can the conclusion reached be defended. The maximum security statute is unequivocally a form of criminal detention and is therefore analogous to pre-trial detention in jails or workhouses. There is no less reason to credit a prisoner with time spent before trial in a maximum security hospital than in any

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277. 424 S.W.2d at 196. Presumably, the first sentence should read "descriptive *not* restrictive."

278. 2 SUTHERLAND §§ 4909 et seq.

279. *See* People *ex rel.* Striar v. Fay, 14 Misc.2d 231, 178 N.Y.S.2d 721 (1958).

280. 2 SUTHERLAND §§ 4915 et seq.

281. TENN. CODE ANN. § 33-702 (Supp. 1968), was passed by the legislature February 22, 1965; the relevant portion of TENN. CODE ANN. § 40-3102 (Supp. 1968) was passed by the legislature March 17, 1965.

other form of custody. Decisions on the precise issue raised in this case are sparse.[282] A few courts have reached the same holding as in the principal case,[283] but none has confronted the same obstacle of statutory language.

4. Parole

There is no constitutional right to parole, and therefore where it is given it may be subject to conditions so long as they are reasonably related to the purposes of conditional release. Thus it was held to be a reasonable condition of parole to prohibit the parolee from associating with an ex-convict after midnight.[284] Nor can a parolee complain of a statutory provision[285] which provides that if a parolee is convicted of a felony committed while on parole, he will be required to serve the remainder of his original sentence before beginning to serve the sentence imposed for the new felony, and that he will not be eligible to earn any good and honor time on the remaining portion of his first sentence.[286]

In *Rose v. Haskins*[287] the issue was raised as to whether a parolee could be declared a parole violator without a hearing. While on parole, the parolee was charged with molesting his daughter. Following his arrest for parole violation, he requested that he be prosecuted for the substantive offense so that he could defend against the charge, but the prosecutor refused to do so because he did not have a warrant from the accuser. By the revocation of his parole, the parolee contended that he had been denied confrontation of his accusers, examination of witnesses, arraignment, right to counsel, trial by jury and the privilege of appeal. The court held that all the rights claimed by the parolee were applicable *prior* to conviction. "They are not applicable to a convicted felon whose convictions and sentences have not been served."[288] The court held that *Mempa v. Rhay*,[289] recognizing a right to counsel at a proceeding where probation was revoked and sentence imposed for the first time, was distinguishable.[290]

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282. See generally, 24B C.J.S. *Criminal Law* § 1995 (5) (1962).
283. *In re* Stearns, 343 Mass. 53, 175 N.E.2d 470 (1961); People *ex rel.* Molina v. Noble, 28 Misc.2d 646, 216 N.Y.S.2d 541 (1961). But see Ex parte Roberts, 310 Mich. 372, 17 N.W.2d 218 (1945).
284. DiMarco v. Greene, 385 F.2d 556 (6th Cir. 1967).
285. TENN. CODE ANN. § 40-3620 (1955).
286. Stanley v. Avery, 387 F.2d 637 (6th Cir. 1968).
287. 388 F.2d 91 (6th Cir. 1968).
288. *Id.* at 95.
289. 389 U.S. 128 (1967).
290. A vigorous dissent was written by Celebrezzee, C.J.

L. *Double Jeopardy*

1. State and Municipal Prosecutions

In *Robinson v. Henderson*[291] the defendant had been convicted in a state court of assault with intent to murder. He had also been convicted in a city court on three counts of assault arising out of the same incident. He sought a writ of habeas corpus contending that he had twice been placed in jeopardy for the same offense. The federal district court held[292] that the fifth amendment protection against double jeopardy did not extend to the states,[293] nor was the double prosecution so shocking as to constitute "fundamental unfairness."[294] This judgment was affirmed by the court of appeals. While it may be granted that the principal of federalism justifies the nonintervention of a court in successive federal-state or state-federal prosecutions,[295] the rationale cannot be analogized to successive state-municipal or municipal-state prosecutions, as no federal relationship exists between these governmental entities—the municipality has derived its authority from the state. Nevertheless, the principal case reflects the prevailing view that no double jeopardy violation has occurred.[296]

2. Determination of Insanity

A novel double jeopardy question was raised in *Bell v. State*.[297] The defendant was charged with murder and his counsel entered a plea "that on September 20, 1959, and prior to said date, and subsequent to said date, and at all times covered by the indictment herein, the Defendant, Thomas Bell, was legally insane." The case went to trial solely on the issue of sanity. The judgment of the trial court was as follows:

> The Attorney General read the indictment to the jury, thereupon the defendant entered a plea in bar alleging insanity.

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291. 391 F.2d 933 (6th Cir. 1968).
292. 268 F. Supp. 349 (E.D. Tenn. 1967).
293. The court cited Bartkus v. Illinois, 359 U.S. 121 (1959), for this principle.
294. Citing Palko v. Connecticut, 302 U.S. 319 (1937).
295. *See* Bartkus v. Illinois, note 293 *supra;* Abate v. United States, 359 U.S. 187 (1959).
296. *See generally,* Kneier, *Prosecution under State Law and Municipal Ordinance as Double Jeopardy,* 16 CORN. L.Q. 201 (1933).
While it is not within the scope of concern of a federal court considering a petition for writ of habeas corpus, the double jeopardy question can not be avoided merely by the assertion that the fifth amendment protection has not been extended to the states, because the same protection is afforded by the TENN. CONST. Art. 1, § 10. Under this provision, however, successive municipal-state prosecutions have been allowed. Greenwood v. State, 65 Tenn. 567 (1873); State v. Mason, 71 Tenn. 649 (1879); State *ex rel.* Karr v. Taxing District, 84 Tenn. 240 (1886).
297. 423 S.W.2d 482 (Tenn. 1968).

> There was then introduced as testimony the statement of a number of physicians of Central State Hospital and it was stipulated by both the State and the Defendant that the statement read in evidence would be the testimony of the doctors if called as witnesses. Both sides rested, both sides discussed the case with the jury. The court instructed the jury in the premise, thereupon the jury retired to consider their verdict. Upon their return into court they announced as their verdict that they found the defendant was insane.[298]

Subsequently the defendant was determined to be sane and was tried and convicted of murder. On appeal, the defendant contended that he had been placed in double jeopardy. The supreme court concluded that the trial court had decided nothing more than the defendant was insane at the time of his trial, and that no determination had as yet been made on the defendant's culpability for the crime charged.[299] Therefore, the defendant had not been placed in former jeopardy, and the conviction could be affirmed.

3. Harsher Sentence on Re-Trial

Where a defendant successfully attacks the validity of his conviction on appeal or by collateral attack, more often than not the case will be remanded for a new trial. The question of whether the imposition of a harsher sentence following a second or subsequent conviction constitutes a violation of the protection against double jeopardy is unsettled. In the case of *Murphy v. State*[300] the defendant had received a twenty year sentence at his first trial and on re-trial received a fifty year sentence. The court held that when a defendant procures the setting aside of a judgment against him, he is precluded to complain of the result of his retrial.[301] The California Supreme Court has found a violation of the protection against double jeopardy where a defendant charged with first degree murder received life imprisonment at his first trial and on

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298. *Id.* at 484.

299. "[U]nquestionably the only thing before the court when this man was tried was his present insanity even though the plea said that he was crazy at the time, had been crazy all the time, etc., because it is obvious that the only proof offered was that of the hospital attendants, the doctors who said that the man was crazy when they examined him and that was after the crime had been committed." *Id.* at 486.

300. 426 S.W.2d 509 (Tenn. 1968).

301. In support of its holding, the court cited State *ex rel.* Austin v. Johnson, 218 Tenn. 433, 404 S.W.2d 244 (1966), a case not in point. There the issue was whether the defendant could be retried at all following a reversal because the defendant was a juvenile at the time of his original conviction, and thus should hav been treated as such. The principal case would appear to be the first Tennessee decision raising the question of a greater sentence on re-trial.

re-trial received the death penalty,[302] and similar decisions may be found elsewhere.[303] Other jurisdictions have followed the rule of the principal case.[304]

M. *Juvenile Proceedings*

While offenses committed by persons under the age of eighteen normally come within the jurisdiction of juvenile courts,[305] in the case of certain designated serious offenses, the accused will be tried as an adult if he is at least fourteen years of age.[306] In *State* ex rel. *Donehue v. Russell*,[307] interpreting a superceded statute but one identical in material part,[308] the court held that remanding such a case to the criminal court was mandatory, and no preliminary hearing on the part of the juvenile court was required. In regard to certain other offenses, the juvenile court has the discretionary authority to waive its jurisdiction,[309] and a decision of a juvenile court to do so is a "disposition of a child,"[310] which, according to In re *Houston*,[311] may be appealed.[312]

N. *Habeas Corpus*

Two questions regarding the issuance of a writ of habeas corpus were raised in *Ussery v. Avery*.[313] First, a statute[314] provides that when a warden of a penitentiary is served with a petition for a writ of habeas corpus,

> If the party is detained under a writ, warrant, or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited to the court or judge, if required.[315]

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302. People v. Henderson, 60 Cal.2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).
303. *See, e.g.*, Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), *cert. denied* 390 U.S. 905 (1968).
304. U.S. *ex rel.* Starnes v. Russell, 378 F.2d 800 (3d Cir. 1967), *cert. denied* 389 U.S. 889 (1967); U.S. v. White, 382 F.2d 445 (7th Cir. 1967), *cert. denied* 389 U.S. 1052 (1968); State v. Young, 200 Kan. 20, 434 P.2d 829 (1968); Moon v. State, 243 A.2d 564 (Md. 1968); State v. Jacques, 99 N.J. Super. 230, 239 A.2d 252 (1968).
305. TENN. CODE ANN. §§ 37-242 *et seq.* (Supp. 1968).
306. *Id.* § 37-265 (Supp. 1968).
307. 429 S.W.2d 818 (Tenn. 1967).
308. TENN. CODE ANN. § 37-231 (1955).
309. *Id.* § 37-264 (Supp. 1968).
310. *Id.* § 37-273 (Supp. 1968).
311. 428 S.W.2d 303 (Tenn. 1968).
312. The yet-unreported decision of State v. Henderson, 4 CRIM. L. RPTR. 2035 (Tenn. Crim. App., Sept. 19, 1968), held that where the only issue before the juvenile court was whether the offense charged would require transfer to criminal court, the right to counsel afforded by the decision of *In re* Gault, 387 U.S. 1 (1966), did not apply.
313. 432 S.W.2d 656 (Tenn. 1968).
314. TENN. CODE ANN. § 23-1823 (1955).
315. *Id.*

The respondent in the present action was allowed to prove his authority for the detention by the introduction of the minutes of the criminal court, which showed two judgments of conviction of the petitioner. The court held that such proof did not comply with the statute and was therefore inadequate.

Second, the issue was raised, when a petitioner claims that one of two judgments against him is void, may he attack the allegedly void judgment before he completes serving his sentence on the other judgment. Here the court found the controlling statute[316] unequivocal to the effect that the petition would not be entertained "where the time during which such party may be legally detained has not expired."[317] Finding nothing unconstitutional in the provision, the court ruled that the petitioner would have to wait until the time he would be eligible for release were the second judgment void, taking into account all good time that would have been deducted from his sentence on the conceded valid judgment.

316. *Id.* § 23-1831 (1955).

317. *Id.* The result, however, is not as absolutely compelling as the court might lead one to believe. It is conceivable that a writ of habeas corpus could be issued in respect to the void judgment, and *then,* in accordance with the statute, the petitioner be remanded to custody to complete his legal detention. Such an interpretation is not inconsistent with the language of the statute.