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Criminal Law in Tennessee in 1969 - A Critical Survey

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CRIMINAL LAW IN TENNESSEE IN 1969—A CRITICAL SURVEY

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I. INTRODUCTION

The present article is intended to provide a comprehensive review of developments in criminal law affecting state prosecutions during the past year.[1] Beyond an elucidation of case holdings, an effort will be made to evaluate decisions in terms of their consistency with constitutional mandates and analogous cases from other jurisdictions.

Doubtless the most significant decision affecting substantive criminal law was *Kirkwood v. Ellington*,[2] declaring a portion of the Tennessee vagrancy statute unconstitutional.[3] Procedurally, the United States Supreme Court decision in *Chimel v. California*[4] is likely to have as profound an impact on police investigations as any recent holding.[5] Search and seizure generally[6] and various aspects of the privilege against self-incrimination[7] were the most frequently discussed problems. Of local interest was *Johnson v. Avery*,[8] reservedly upholding the activities of "jailhouse lawyers" in Tennessee.[9] Finally, the infrequently used thirteenth amendment prohibition of involuntary servitude was resorted to in *Anderson v. Ellington*[10] to invalidate imprisonment under a state statute for the non-payment of court costs.[11] Beyond these most notables, numerous decisions served to further delineate the vague penumbras of procedural safeguards.

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1. For purposes of convenience, coverage has been limited to those decisions which appeared in advance sheets of the National Reporter System during 1969. As a result, some 1968 decisions are the subject of discussion, and, conversely, a number of decisions rendered during the past year were not yet published. In the latter case, some decisions had appeared in abbreviated form in the CRIMINAL LAW REPORTER [hereinafter cited CRIM. L. REP.], and these are frequently noted under appropriate categories.
2. 298 F. Supp. 461 (W.D. Tenn. 1969).
3. *See* pp. 448-49 *infra*.
4. 395 U.S. 752 (1969).
5. *See* p. 476 *infra*.
6. *See* pp. 472-80 *infra*.
7. *See* pp. 459-64 *infra*.
8. 393 U.S. 483 (1969).
9. *See* pp. 481-82 *infra*.
10. 300 F. Supp. 789 (M.D. Tenn. 1969).
11. *See* pp. 497-98 *infra*.

II. OFFENSES

A. *Against Person*

1. *Murder.* Few concepts of substantive criminal law are more ephemeral than the notion of "malice aforethought," or, as it is frequently abbreviated, "malice," an essential element in any charge of murder.[12] A reasonably precise delineation of the term is desirable since, at least in charges of first degree murder, malice is an element on equal footing with willfulness, deliberateness, and premeditation,[13] and it may be presumed that each of these conditions of the mind is to be independently established. The question of the presence of malice arose in three cases during the past year. In *Simpson v. State*,[14] the defendant became disgruntled after waiting in a cafe fifteen minutes to be served a beer. He moved to a front booth where others were seated, took a pistol from his pocket, and asked one of the men, "Do you believe I'll blow your brains out?" The deceased mistakenly responded, "No." The defendant was convicted of second degree murder.[15]

In *Brown v. State*,[16] the defendant was the operator of a junk yard. Late one afternoon the victim, a fifteen-year old, accompanied by two of his friends, had mechanical difficulties with the automobile he was driving and maneuvered it to the side of the street adjoining the property of the defendant. From past experience, the victim knew that the automobile only needed to cool off. The three sat in the vehicle and talked for about twenty minutes. While the victim was outside the automobile checking it, the defendant and an employee approached the vehicle, the defendant carrying a shotgun. He yelled twice to the victim to stop, whereupon the latter became frightened and attempted to re-enter the vehicle. The defendant fired the shotgun, hitting the victim, who managed to get into the rear seat of the car. The defendant fired again, breaking out the rear window and hitting the victim in the head. The testimony of the defendant was to the effect that he had experienced substantial losses by way of theft, that the victim was engaged in stealing five-gallon buckets of plumbing fixtures at the time he ordered him to stop. He

12. TENN. CODE ANN. § 39-2401 (1955).
13. *Id.* at § 39-2401.
14. 437 S.W.2d 538 (Tenn. Crim. App. 1968).
15. After fatally shooting the victim in the face, "the defendant turned to one Youngblood and asked him, 'Do you believe I'll blow your brains out?' Youngblood answered, 'Yes, I sho' do.' The defendant told him, 'I'm going to let you live.'" *Id.* at 539. The defendant again ordered beer and was promptly served.
16. 441 S.W.2d 485 (Tenn. Crim. App. 1969).

was convicted of assault with intent to commit second degree murder.[17]

The defendant in *Fox v. State*[18] was a forty-nine-year-old woman who had been repeatedly disturbed by burglars and prowlers at night while her husband was working at a nearby service station. On the night in question, two boys, one ten years old and the other thirteen, entered the defendant's yard to catch an opossum that had escaped from them. Upon hearing her dog barking, the defendant peered through her bedroom window and observed someone in the back yard. She thereupon took a pistol and went to her front porch, without taking her glasses and without turning on the porch light. At this time the older boy was walking from the rear of the yard to the front to request permission to pursue the opossum further into her property. When he was about three feet from the porch, the defendant began firing "in a generally wild and indiscriminate manner." One bullet hit the older boy in the knee; another hit the younger boy in the head, killing him. The defendant did not know either of the boys and testified "that she was scared and afraid and only shot to scare what she thought were burglars." She was convicted of second degree murder.

In all three cases the convictions were affirmed. Initially it should be noted that malice will be presumed where a deadly weapon is used.[19] This, however, is only a presumption, and may be rebutted by the defendant.[20] By and large, discussions of the nature of malice have been sparse, and frequently confusing. For example, in the *Fox* case, the court said, "Malice is an intent to do an injury to another, a design formed in the mind of doing mischief to another."[21] First, it is worthy of mention that malice as a concept in criminal law is not confined to homicide cases,[22] and thus the "injury to another" phrasing will at times be inapplicable.[23] Further, assuming the court is only speaking of malice for purposes of homicide, the use of "in-

17. This is a lesser included offense of TENN. CODE ANN. § 39-604 (1955).

18. 441 S.W.2d 491 (Tenn. Crim. App. 1968).

19. Foster v. State, 74 Tenn. 213 (1880); Lewis v. State, 202 Tenn. 328, 304 S.W.2d 322 (1957); Neely v. State, 210 Tenn. 52, 356 S.W.2d 401 (1962); Cooper v. State, 210 Tenn. 63, 356 S.W.2d 457 (1962); McClain v. State, 445 S.W.2d 942 (Tenn. Crim. App. 1969).

20. *See* Smith v. State, 212 Tenn. 510, 370 S.W.2d 543 (1963); Logan v. State, 5 CRIM. L. REP. 2067 (Tenn. Crim. App. 1969).

21. 441 S.W.2d at 495.

22. *See, e.g.*, TENN. CODE ANN. § 39-609 (1955) (mayhem); §§ 39-501 to 504 (1963), § 39-507 (1955) (arson); § 39-2701 (1955) (libel).

23. For example, a person may be found guilty of arson in the act of burning his own property. *Id.* at §§ 39-501 to 503.

tent" in the definition would place the court in an embarrassing position had it been called upon to discuss the concept of "willfulness" in the same opinion, as the latter concept is generally considered synonymous with "intent."[24]

Professor Perkins defines malice aforethought as "an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind,"[25] and notes that such may exist without an actual intent to kill.[26] Wharton makes no attempt at pinpointing the concept, suggesting simply that malice aforethought "comprehends a number of different conditions of mind."[27] Tennessee decisions use such descriptive phrases as "an intent to do an unlawful act which may probably result in depriving the party of life,"[28] "an evil design,"[29] "a malignant heart,"[30] and "a heart regardless of social duty."[31]

In the final analysis malice aforethought can only be understood by a perusal of the cases in which the subject has been in issue. A pair of early decisions provide the best comparison. In *Ann v. State*[32] the defendant was a slave entrusted with the care of the infant child of her master. Apparently to the end of pursuing a tryst with her paramour, she administered a quantity of laudanum to the child for the purpose of inducing sleep.[33] The child died from the dosage about four hours later. The conviction of the defendant for murder was reversed because of improper jury instructions. The court held that, if the defendant was wholly ignorant of the poisonous propensity

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24. *See* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 268 (Anderson ed. 1957) [hereinafter cited WHARTON].
25. PERKINS, CRIMINAL LAW 48 (2d ed. 1969) [hereinafter cited PERKINS]. *And see generally* Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L. J. 537 (1934).
26. PERKINS at 35-36. "An intent to kill, to give a very limited illustration, may be the same intent, in a certain sense, whether it is for self-preservation, or is formed in a sudden rage engendered by great provocation, or is part of a well-laid plan for financial gain; but the psychical fact in its totality is not the same in any two of these." *Id.* at 47.
27. 1 WHARTON § 523.
28. Ann v. State, 30 Tenn. 159 (1850); Travers v. State, 90 Tenn. 485, 16 S.W. 1041 (1891).
29. Ann v. State, 30 Tenn. 159 (1850).
30. Ann v. State, 30 Tenn. 159 (1850); Lee v. State, 41 Tenn. 37 (1860); Travers v. State, 90 Tenn. 485, 16 S.W. 1041 (1891). Professor Perkins finds this language "more suggestive of cardiac tumor than a state of mind." PERKINS at 770.
31. Lee v. State, 41 Tenn. 37 (1860).
32. 30 Tenn. 159 (1850).
33. Laudanum is "the alcoholic tincture of opium." 13 ENCYCLOPEDIA BRITANNICA 807 (1968). The *Ann* decision implicitly held that laudanum would have been harmless to the child if properly administered. *See also* Higbee v. Guardian Mutual Life Insurance Co., 66 Barb. (N.Y.) 462 (1873), where laudanum is accepted as a medical remedy for headaches.

of the substance and did not have as her purpose to injure the child in any way, it could not be said that the killing was malicious.[34]

In *Lee v. State*,[35] the defendant was driving a hack drawn by two horses which ran over and killed a small boy crossing a street. It appeared that the defendant had made no effort to avoid the accident, notwithstanding the entreaties of bystanders. He was convicted of involuntary manslaughter. In affirming the conviction, the court gratuitously observed that "A more proper conviction would have been, for murder."[36] In discussing the requisite malice for murder, the court said:

> If persons in pursuit of their lawful and common occupations see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of the danger, the death which ensues will be murder. Thus, if workmen throwing stones, rubbish, or other things from a house, in the ordinary course of their business, happen to kill a person underneath, the question will be whether they deliberately saw the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, a general malignity of heart may be inferred and the act will amount to murder, from its gross impropriety.[37]

Returning to the three principal cases, the presence of malice in the *Simpson* case requires no discussion. Clearly the facts here reflect "an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind," and would without difficulty fit any other accepted definition of malice. The *Brown* case is a little more difficult. The contention of the defendant that he was merely protecting his property is worthy of consideration in the determination of malice,[38] though his testimony suggested "an evil design."[39] However, any presumption of good faith on the part of the defendant was wholly erased when he fired the second shot, hitting the victim in the head, after he was seated inside the vehicle.[40]

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34. "If the prisoner's purpose really was, to superinduce a state of temporary quietude or sleep, without more, in order to afford better opportunity, or greater facility, for carrying on her own illicit intercourse with Tom, this, however culpable in morals, would not involve her in the guilt of murder." 30 Tenn. at 165.
35. 41 Tenn. 42 (1860).
36. *Id.* at 66. Malice may also be found in the operation of a motor vehicle, *see* Shorter v. State, 147 Tenn. 355, 247 S.W. 985 (1922), particularly where the defendant is intoxicated. Rogers v. State, 196 Tenn. 263, 265 S.W.2d 559 (1954); Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957).
37. 41 Tenn. at 46-47.
38. *But see* text accompanying notes 110-13 *infra*.
39. "His attitude in the whole matter is expressed in his testimony: 'I think it is an awful good remedy. It must have got the job done.'" 441 S.W.2d at 487.
40. *Id.* at 489.

Fox is the most difficult of the three cases. Notwithstanding the defendant's testimony that she was induced by fear to fire the shots, testimony of other witnesses indicated a more malevolent attitude.[41] In concluding that malice was present, the court took special cognizance of these facts: (1) the defendant was in the safety of her own home;[42] (2) she could have called the police, who had responded within a few minutes to such calls in the past, and/or her husband, who was working only 225 feet away; (3) she failed to turn on the outside light in an effort to identify the source of the disturbance,[43] and (4) she failed to use her glasses, the absence of which, she testified, rendered her practically blind.[44]

B. *Against Property*

1. *Larceny.* An essential element of the common law crime of larceny is "asportation" of the property taken, and this is likewise a

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41. An investigating officer quoted the defendant as saying, "I didn't miss him this time. I hit him right in the head." 441 S.W.2d at 494. Another witness "said he heard the defendant say she shot the boys because they were making a race track through her yard." *Id.*

42. Smith v. State, 212 Tenn. 510, 370 S.W.2d 543 (1963), relied upon by the defendant, was found distinguishable on this point. There the defendant, a night watchman at a school, was excited by a figure approaching him in the dark with a flashlight. He fired seven shots, ran from the building locking the door behind him, and hysterically reported the incident to the police. The court there found an absence of malice and concluded that the defendant could be guilty of nothing greater than involuntary manslaughter.

43. It may be suggested that this factor is of ambiguous significance: If the light only illuminated the porch, then it actually would be *more* difficult to see into the yard from the porch after turning the light on. Further, if the defendant's claim of fear is accepted, the light would have the effect of exposing her presence, while blinding her to movements beyond the porch.

44. The yet-unreported case, Yarbrough v. State, 4 CRIM. L. REP. 2363 (Tenn. Crim. App., Jan. 17, 1969), takes note of the distinction between intent, required for murder, and premeditation, required only for first degree murder. "It was only after the drunken deceased, justifiably or not, caused Nesbitt to fall from the porch by striking at him, did the rage of the apparently equally drunken Nesbitt and his co-defendant friends rise quickly to the boiling point of murder. . . . In short, the bloody, senseless, brutal butchery of the deceased was clearly the mad, irrational, malicious, savage, intentional acts of wine besotted creatures in a manner which distinguishes the impassionate crime of second degree murder from that of the comparatively deliberate, cool, non-passionate crime of murder in the first degree." Language here employed might suggest a confusion of second degree murder and voluntary manslaughter. However, consistent with the holding of the court, a killing in the heat of passion will be second degree murder, not voluntary manslaughter where it is determined that there was an absence of adequate provocation, and intoxication does not reduce the standard for provocation. *See* Pirtle v. State, 28 Tenn. 663 (1849); Norfleet v. State, 36 Tenn. 340 (1857); Lewis v. State, 202 Tenn. 328, 304 S.W.2d 322 (1957); Bostick v. State, 210 Tenn. 620, 360 S.W.2d 472 (1962).

requisite of the statutory offense in Tennessee.[45] *Black v. State*[46] involved a conviction of assault with intent to commit robbery.[47] Robbery is an aggravated larceny from the person, and thus the court reached a consideration of whether the facts proven unequivocally demonstrated an attempted larceny, or whether, as the defendant insisted, the jury should have been charged concerning the lesser included offense of assault and battery.

The defendant and another had assaulted the victim after the latter had parked his car and was proceeding to the YMCA where he lived. They brutally attacked him for about five minutes until others responded to his cries for help, whereupon the two attackers fled. One of them grabbed the victim's toolbox, which he had been carrying when attacked, but as one of the rescuers chased him, he dropped it in the street a short distance from the point of the attack, and it was recovered. The court correctly concluded that there was a sufficient asportation of the toolbox for larceny.[48] The most noteworthy decision on asportation in Tennessee is *Caruso v. State*,[49] where the defendant had attempted to steal a 600-pound safe. The evidence showed that the defendant had managed to move it five feet. It was still in the building and apparently had not been opened. The court held that the requirements of larceny had been satisfied.[50]

While there can be little question that the facts in the present case are sufficient to support a finding of asportation, it may be suggested, as Judge Galbreath in dissent argued, that the court decided this aspect of the case on a specious issue. Indeed, for a conviction of assault with intent to commit robbery it is not necessary that an

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45. Larceny is defined as "the felonious taking and carrying away the personal goods of another." TENN. CODE ANN. § 39-4202 (1955). "Carrying away" has been construed as synonymous with "asportation." Caruso v. State, 205 Tenn. 211, 326 S.W.2d 434 (1958).
46. 443 S.W.2d 523 (Tenn. Crim. App. 1969).
47. TENN. CODE ANN. § 39-607 (Supp. 1969).
48. "It is immaterial that these assailants retained possession of it and its contents for only a brief period of time and then abandoned it in the street. The slightest movement of the property by another by trespass is sufficient to satisfy the law's requirement of asportation, carrying away." 443 S.W.2d at 526.
49. 205 Tenn. 211, 326 S.W.2d 434 (1958).
50. The court quotes Gettinger v. State, 13 Neb. 308, 14 N.W. 403, 404 (1882), for the point that "[e]ven if the removal were but a hair's breadth, it will do." *See generally* 2 WHARTON § 480. It is essential, however, that for at least a moment in time it can be said that the property was within the control of the defendant. Thus, in the oft-cited case, People v. Myer, 75 Cal. 383, 17 P. 431 (1888), the defendant jerked an overcoat from a store dummy and attempted to abscond with it, only to discover that it was fastened to the dummy by a chain. The court concluded that the defendant could not be convicted of larceny of the coat.

asportation be proven.[51] The dissenting opinion provided additional facts surrounding the altercation, to wit, the victim had swung his tool box at his attackers in an attempt to defend himself, whereupon one of the assailants grabbed his arm and the box was torn from his grasp. This then raised an issue not of asportation but of intent to steal.[52]

To appreciate this question, a Maine decision, *State v. Boisvert*,[53] involving less ambiguous facts, is worthy of comparison. There the defendant was charged with robbery in the taking of a revolver, but he submitted that the revolver was taken from the assailant in the lawful act of self-defense. The court held that if the defendant were correct in this allegation, then he did not have the requisite intent to steal at the time of the taking to sustain a finding of larceny.[54] While the defendant in the *Black* case could not claim self-defense, he still could contend that there was no clear indication of an intent to steal in the conduct described here. The dissent concluded, "[I]t may have been that the unprovoked attack had as its basis simply a warped desire to inflict great bodily harm on the prosecuting witness."[55] The issue was not which interpretation of the fact was more credible but simply whether the evidence *could* support the conviction for the lesser included offense and thus warrant a jury charge to that effect.[56]

2. *Shoplifting. Binkley v. State*[57] would appear to be the first appellate decision to require an interpretation of the Tennessee shoplifing statute.[58] The defendant was convicted of attempt to commit grand larceny.[59] He and two others were employees in a furniture warehouse. They had been working on an automobile that they had

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51. "An actual and personal assault must be made upon the party, coupled with a felonious intent, in order to complete the offences." State v. Freels, 22 Tenn. 227, 229 (1842). (The court is here discussing an earlier decision involving assault with intent to murder but is implicitly saying that the explanation is equally appropriate to the present offense.)
52. "The taking must be . . . with the intent to deprive the owner, not temporarily, but permanently, of his property." Fields v. State, 46 Tenn. 524, 526 (1869).
53. 236 A.2d 419 (Me. 1967).
54. *See also* People v. Brosnan, 31 App. Div. 2d 975, 299 N.Y.S.2d 263 (1969); *see generally* 2 WHARTON §§ 452, 453.
55. 443 S.W.2d at 527.
56. The argument of the dissent cuts both ways: if theft was not the motive of the assault, the alternative interpretation suggests a potential charge of assault with intent to commit murder. TENN. CODE ANN. § 39-604 (1955).
57. 434 S.W.2d 336 (Tenn. Crim. App. 1968).
58. TENN. CODE ANN. § 39-4235 (Supp. 1969). *See generally* Annot., 90 A.L.R.2d 811 (1963).
59. TENN. CODE ANN. § 39-603 (1965).

driven inside the warehouse. As they began to drive the car out, a supervisor opened the trunk and discovered several items of property belonging to the furniture company. It was the contention of the defendant that he was at most chargeable with shoplifting, a misdemeanor.

The pertinent language in the shoplifting statute read, "goods, wares or merchandise offered for sale by any store or other mercantile establishment."[60] Any act that would fall within the statute would also come within the definition of larceny.[61] However, where a general and a specific statute deals with the same subject matter, the more specific statute will control, particularly where the result, as in this case, subjects a criminal defendant to a less harsh punishment.[62] The issue then was whether the acts of the defendant were encompassed by the shoplifting statute.[63] The court held that the warehouse was not a retail outlet but rather a supply house to the retail stores of the company, and therefore did not come within the contemplation of the statute.

A common sense reading of the statute clearly supports the conclusion of the court. A Kansas case[64] involving similar facts assumed without deciding that the defendant who took a television set from a warehouse could have been convicted of shoplifting. The court held that this fact did not preclude a conviction for grand larceny. A Connecticut decision,[65] however, put forth a very narrow delineation of shoplifting and thereby lends support to the present case. There the defendant was charged with stealing goods from a trading stamp redemption store. The court held that the items taken did not constitute, in the language of the statute, "goods, wares or merchandise offered or exposed for sale."[66]

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60. Subsequent to the commission of the crime here involved, the shoplifting statute was amended to limit its application to takings not in excess of $100. This change would preclude its application in cases such as the present one.
61. TENN. CODE ANN. § 39-4202 (1955).
62. *See generally* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5204 (3d ed. Horack 1943). *And see* discussion of this same issue in regard to the Tennessee robbery statutes in Cook, *Criminal Law in Tennessee in 1968—A Critical Survey*, 36 TENN. LAW REV. 221, 230-31 (1969) [hereinafter cited *1968 Survey*]. *But see* Black v. Gladden, 237 Ore. 631, 393 P.2d 190 (1964); State v. Crowe, 196 Kan. 622, 414 P.2d 50 (1966); 2 WHARTON §§ 174-75.
63. The problem of shoplifting, from the perspective of the shopkeeper, is discussed in Mayfield, *Shoplifting in Tennessee*, 24 TENN. L. REV. 1177 (1957). *See also*, Annot., 86 A.L.R.2d 435 (1962).
64. State v. Crowe, 196 Kan. 622, 414 P.2d 50 (1966).
65. State v. Benson, 153 Conn. 209, 214 A.2d 903 (1965).
66. CONN. GEN. STAT. ANN. § 53-63(b) (Supp. 1969). "Where the consideration or medium of exchange normally contemplated and utilized in the sale of goods consists of trading stamp books, rather than cash or credit, those goods would not fall within the commonly approved usage of the quoted language." 153 Conn. at 214-15, 214 A.2d at 907.

3. *Credit Card Crime.* A new species of offenses was legislatively created under the aegis of the State Credit Card Crime Act.[67] The Act seeks to specifically cover offenses involving the use of credit cards that might be difficult to pigeon-hole in traditional theft offenses.[68] Among the offenses covered by the Act are certain false statements in writing made for the purpose of procuring a credit card, the unauthorized use of the credit card of another, the sale of a credit card by a person other than the issuer, the purchase of a credit card from a person other than the issuer, the obtaining of a credit card as a security for a debt with the intent to defraud the issuer, the acceptance of the credit cards of two or more persons within a twelve month period known to have been taken or retained in violation of the act, the false making or embossing of a credit card, the use of a forged, expired or revoked credit card, and the false representation by a merchant to the issuer of a credit card that he has furnished something of value to a card holder with the intent to defraud.

A previously existing statute[69] concerned with credit card offenses to a more limited extent was not repealed. This section is in one respect broader in that it includes the use of any "other credit device" in addition to a credit card. More importantly, the new Act requires, in the case of a revoked card, that the defendant "knows" it to be revoked. The prior statute provides that notice of revocation "shall be *conclusively presumed* to have been given when deposited, as registered or certified matter, in the United States mail, addressed to such person at his address as it appears in the files of the issuer of the credit card" (emphasis supplied). In cases where particular conduct would be subject to prosecution under either Act, the new Act is controlling.[70]

4. *Receiving Stolen Property.* The offenses of receiving and concealing stolen property produced analytical problems which became extraordinarily intricate in *Tackett v. State.*[71] For a conviction of re-

67. TENN. CODE ANN. §§ 39-1968 (Supp. 1969). For comparable legislation *see* CAL. PENAL CODE §§ 484d-484g (West 1968).

68. *See* PERKINS at 318-19.

69. TENN. CODE ANN. § 39-1948 (Supp. 1969).

70. *Id.* at § 39-1978. A recent decision has correctly held that where an offense comes within the designation of credit card offense per TENN. CODE ANN. § 39-1948 (Supp. 1969), it is improper to charge the defendant with a more general and more severe criminal offense, in this instance receiving and concealing stolen property, *Id.* at § 39-4218; Hall v. State, 4 CRIM. L. REP. 2404 (Tenn. Crim. App. 1969). *See* discussion accompanying note 62 *supra. Cf.* People v. Liberto, 79 Cal. Rptr. 306 (App. 1969), involving a statutory provision to the contrary. *See also* McDuffy v. State, 6 Md. App. 537, 252 A.2d 270 (1969).

71. 443 S.W.2d 450 (Tenn. 1969).

ceiving or concealing stolen property the prosecution must show (1) knowledge that the property was stolen, and (2) intent to deprive the owner thereof.[72] However, a significant distinction is drawn between the offenses of receiving and concealing stolen property.[73] A person who was himself the thief cannot be guilty of receiving stolen property, as he cannot receive property from himself; he can, however, be charged with concealing stolen property.[74]

In the *Tackett* case, the defendant was charged with second degree burglary, grand larceny, and receiving and concealing stolen property. The evidence showed that a residence had been forcibly entered during the daytime and a number of items were stolen, including an electric typewriter, a portable radio and a camera. On the day of the theft, but prior to any report thereof, a policeman observed the portable radio and the camera in the possession of a party in a beer tavern. Upon inquiry, the policeman was told that the items had been purchased from defendant. Later the same day the electric typewriter was recovered from another party who told the police the defendant had given it to him as security for a $30 loan. The defendant first told the officers that he had received the items from persons unknown to him. At the trial, he denied having sold the portable radio and camera at all and claimed to have been too intoxicated to remember anything about the electric typewriter. The jury found the defendant not guilty of burglary and grand larceny but guilty of receiving and concealing stolen property.

The Tennessee Court of Criminal Appeals reversed, holding that there was no evidence to support the finding that the defendant had received or concealed the property knowing it to be stolen. The court did, however, believe that the defendant could have been found guilty of larceny, because of the inference which may be drawn from the unexplained possession of recently stolen property.[75] Thus, it concluded, since the defendant could have been charged with the theft, he could not be charged with receiving stolen property. The case

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72. Reiterated in Bennett v. State, 435 S.W.2d 842 (Tenn. Crim. App. 1968). *See also* Lewis v. State, 50 Tenn. 214 (1871); Parham v. State, 78 Tenn. 498 (1882); State v. Missio, 105 Tenn. 218, 58 S.W. 216 (1900); Williams v. State, 216 Tenn. 89, 390 S.W.2d 234 (1965); Kessler v. State, 220 Tenn. 82, 414 S.W.2d 115 (1967); Deerfield v. State, 220 Tenn. 546, 420 S.W.2d 649 (1967).

73. The statutory language was modified in 1968 in an effort to more clearly delineate two separate offenses. *See* TENN. CODE ANN. §§ 39-4217, 39-4218 (Supp. 1969).

74. *See* Deerfield v. State, 220 Tenn. 546, 420 S.W.2d 649 (1967), discussed in *1968 Survey* at 227-28.

75. *See, e.g.*, Hughes v. State, 27 Tenn. 75 (1847); Curtis v. State, 46 Tenn. 9 (1868); McGuire v. State, 65 Tenn. 621 (1872); Cook v. State, 84 Tenn. 461 (1886).

was thereupon ordered remanded for trial on the simple charge of concealing stolen property. A dissenting judge contended that the judgment should be reversed and the case dismissed on the authority of *Kessler v. State*,[76] as there was no direct evidence that the property had been stolen.

The supreme court found neither analysis to be correct and reinstated the judgment of the trial court. While it is true that the unexplained possession of recently stolen property may raise an inference of larceny, it may also raise an inference of the receipt of stolen property.[77] Since there was some evidence that the defendant had received the stolen property—that is, the testimony of the officer regarding the admission of the defendant—the court of criminal appeals was incorrect in concluding that the crime of receiving stolen property could not possibly have been committed. The relevance of the *Kessler* decision was rejected on factual distinctions. There the defendant had sold stolen narcotics to a narcotics agent, but the court concluded that there was no evidence indicating that the defendant had known the property to be stolen. The court declined to entertain the inference of guilty knowledge from possession. In the present case, however, the "character of possession clearly warrants the inference, in the absence of a reasonable and honest explanation, that Tackett received the property with guilty knowledge of its theft."[78] In *Kessler,* the defendant was a narcotics pusher, and the source of his supply was, to him, immaterial. Further, the fact that the theft occurred in Nashville and the defendant took possession of the drugs in Bowling Green, Kentucky, after negotiating a sale in Nashville was indicative of a lack of knowledge of the theft. In the present case, the possession by the defendant was far more temporally and spatially confined in proximity to the theft. Furthermore, the activities of the defendant were more suggestive of one in possession of property known to be stolen than were those in *Kessler,* where the conduct of the de-

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76. 220 Tenn. 82, 414 S.W.2d 115 (1967).

77. "[T]he unexplained possession of goods quite recently stolen may warrant the inference they were illegally received and so impose on the accused the obligation of accounting for their possession in a straightforward, truthful way, in the absence of which a jury would be warranted in returning a verdict of guilty." 443 S.W.2d at 451. *See also* Pearson v. United States, 192 F.2d 681 (6th Cir. 1951).

Implicitly, the court is holding that for this inference to apply, it is unnecessary for the prosecution to prove that the defendant was not himself the thief. *See* People v. Marquez, 237 Cal. App. 2d 627, 47 Cal. Rptr. 166 (1965); Stanley v. State, 97 Ga. App. 828, 104 S.E.2d 591 (1958). *Cf.* Liakas v. State, 199 Tenn. 549, 288 S.W.2d 430 (1956), *cert. denied,* 352 U.S. 845 (1956).

78. 443 S.W.2d at 452.

fendant would be essentially the same, whether the narcotics were stolen or had been obtained from other legal or illegal sources.

C. *Against Person and Property*

1. *Arson.* While the unexplained possession of recently stolen property may raise an inference of theft or of receiving or concealing stolen property on the part of the possessor,[79] such an inference cannot be drawn to prove the commission of arson, according to *Collins v. State*.[80] There a vacant house was unexplainedly burned down. Afterwards, in checking the ruins it was noted that there was no debris of certain items that would not have been totally destroyed in the fire, notably an organ. A short time later, the defendant was found in possession of a number of items that were in the house, the organ among them. He was unable to provide a satisfactory explanation of how he came into possession of the property. The only other evidence implicating the defendant was a report that a car similar to his had been observed going toward the house shortly before the fire was discovered.

The crime of arson[81] requires proof of willfulness and malice. Earlier cases have held that even a confession by the accused is not enough, in and of itself, to establish the *corpus delicti* of the offense.[82] The court in the present case felt that the cumulative evidence fell far short of even this. Even if it be assumed that a case of theft could be made out against the defendant based on the legal presumption arising from the unexplained possession of stolen property, it was impossible to infer from this a willful and malicious burning, since too many other hypotheses were readily conceivable. If the defendant had accidentally set fire to the building in perpetrating the theft, the elements of arson would not be proven. The court offered a number of other possibilities.[83] Thus it concluded the evidence was inadequate to sustain the conviction.

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79. *See* text accompanying notes 71-78 *supra*.
80. 445 S.W.2d 931 (Tenn. Crim. App. 1969).
81. TENN. CODE ANN. § 39-501 (Supp. 1969).
82. Copley v. State, 153 Tenn. 189, 281 S.W. 460 (1925); Rickets v. State, 192 Tenn. 649, 241 S.W.2d 604 (1950).
83. "The house could have burned from spontaneous combustion. A careless match or cigarette from anyone, including one of the three unidentified men seen driving towards the house in the unidentified car, could have started the blaze. The action of some animal such as a rat or squirrel gnawing on a match on a kitchen shelf; the accumulation of oily rags in an attic, or any number of inexhaustible hypothesis [sic] could be advanced to possibly account for the fire which left no evidence of an incendiary, or criminal origin." 445 S.W.2d at 933.

D. *Public Offenses*

1. *Vagrancy.* Vagrancy statutes have come under increasing scrutiny in recent years,[84] and a number of statutes have been held unconstitutional in whole or in part.[85] The Tennessee statute[86] came under attack in *Kirkwood v. Ellington*,[87] a class action challenging the constitutionality of the act and seeking an injunction against a prosecution under it. The plaintiffs contended that the statute was being employed discriminately against Negroes. Testimony of public officials indicated a growing concern with the problem of solicitation for prostitution in an area of several blocks in Memphis. Because the suspects were able to identify the officers, arrests for prostitution became virtually impossible. Thus it became a regular practice of officers to detain women frequently seen in the area and question them respective to their employment. They would then be warned of their vulnerability to arrest for vagrancy if they were seen in the area again. Each officer kept a record of these encounters. If the individual were subsequently observed in the area, she would be arrested for vagrancy and specifically charged under the statutory language declaring it a misdemeanor "for any person having no apparent means of subsistence to neglect to apply himself to some honest calling."

The court held that this language was unconstitutionally vague,[88] noting that there was a wide range of views among the arresting officers themselves as to what the phrases "apparent means of subsistence" and "honest calling" meant.[89] Additionally, it found that the

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84. *See generally* Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Comment, 37 N.Y.U. L. REV. 102 (1962); Davis, *Vagrancy-Loitering Laws: An Antithesis to Recent Jurisprudential Trends*, 35 TENN. LAW REV. 617 (1968).

85. *See, e.g.*, Alegata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967); Fenster v. Leary, 20 N.Y.2d 309, 282 N.Y.S2d 729, 229 N.E.2d 426 (1967); City of Seattle v. Drew, 70 Wash. 405, 423 P.2d 522 (1967); Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968); Broughton v. Brewer, 298 F. Supp. 260 (N.D. Ala. 1969); Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969); Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969); Knowlton v. State, 257 A.2d 409 (Me. 1969).

86. TENN. CODE ANN. § 39-4701 (1955).

87. 298 F. Supp. 461 (W.D. Tenn. 1969).

88. The court quoted Connally v. General Construction Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); and Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965). *See also* Knowlton v. State, 257 A.2d 409 (Me. 1969).

89. "A penal law which creates such a diversity of opinion on the part of those charged with its enforcement is unconstitutional." 298 F. Supp. at 466. This statement was not needed to justify the conclusion of the court and, it is submitted, is of dubious relevance. Certainly a statute can be constitutionally

language was overbroad and thereby infringed upon the constitutional rights of innocent parties.[90] To the extent that the *Kirkwood* decision is followed by state courts, the notorious Tennessee decision *Fonte v. State*,[91] where the conviction for vagrancy of a gambler with over seven hundred dollars in cash in his possession at the time of his arrest was affirmed because the money had not been gained in an "honest calling,"[92] has become moot. The vagrancy statute describes three other patterns of behavior that are prohibited: (1) loitering about gambling houses; (2) loitering about houses of ill fame; and (3) "strolling through the country without any visible means of support." It was not necessary in the present case for the court to consider the validity of a conviction under any of these provisions.

2. *New Offenses.* Several statutory additions and modifications were enacted regarding various public offenses. The statutory offense proscribing obscene remarks over the telephone was amended to cover in addition the making of anonymous calls and repeated calls for the purpose of harassment.[93] The more general obscenity statute was amended to provide for the issuance of a temporary injunction against the removal of obscene materials from the jurisdiction of the court, increase the maximum fine for the offense from one thousand to five thousand dollars, and stipulate a broad definition of the term "person" as used in the statute to include any type of organization of people.[94]

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valid notwithstanding its non-comprehension by one or many enforcing officers. If the point is that a valid arrest cannot be made unless the arresting officer understands the elements of the offense, this too would seem not to be correct. The question is whether *objectively* there was probable cause to believe an offense was committed. *See* text accompanying notes 225-32 *infra*.

90. "The fact that the motive or purpose of the vagrancy statute is to prevent another and separate crime of prostitution does not justify the possible inclusion of those persons not on the street for criminal purposes." 298 F. Supp. at 466. (The plaintiff denied any involvement in prostitution or solicitation.)

91. 213 Tenn. 204, 373 S.W.2d 445 (1963).

92. *See also* Hutchins v. State, 172 Tenn. 108, 110 S.W.2d 319 (1937).

93. TENN. CODE ANN. § 39-3002 (Supp. 1969). While section headings are not a matter of constitutional impact, as are titles, *See* TENN. CONST. art. 2, § 17, they are relevant in matters of statutory interpretation. It may be noted that the heading of the present section, *Telephone conversations—Lewd, obscene and lascivious remarks—Penalty*, which was not altered by the amendment, no longer fully encompasses the text of the section. *See generally* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4903 (3d ed. Horack 1943) [hereinafter cited as SUTHERLAND].

A recent yet-unreported decision held that calling a listener a "lice carrying son of a bitch" did not constitute an obscene telephone conversation under the statute. Lowrie v. State, 4 CRIM. L. REP. 2533 (Tenn. Crim. App., March 5, 1969).

94. TENN. CODE ANN. § 39-3003 (Supp. 1969).

Finally, a new series of statutes was enacted prohibiting the sale or loan of specified pornographic materials to minors.[95]

A wholly new act for the provision of "campus control" prohibits interference with the normal activities of campus facilities,[96] obstructing ingress or egress to campus facilities,[97] and entering a campus for the purpose of inciting violence.[98]

Finally, a new offense was created making it a misdemeanor for any person to teach a course in sex education in any public, elementary, junior high, or high school unless approved by the state board of education and the local school board involved. Excepted are high school courses in biology, physiology, health, physical education and home economics.[99]

III. DEFENSES

A. *Insanity*

Among the defenses proffered in *Simpson v. State*[100] was mental incapacity. The defendant requested and was denied the following jury instruction:

> I further charge you that if you find from all the proof that the defendant did not know what he was doing at the time of the alleged killing, he is not guilty in that event of any crime, for the law requires in order to convict of any crime that the defendant was in possession of his faculties.[101]

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95. *Id.* at §§ 39-1012—1016. The United States Supreme Court acknowledged the propriety of more restrictive obscenity standards in regard to exposure to minors in Ginsberg v. New York, 390 U.S. 629 (1968).

96. TENN. CODE ANN. § 39-1215 (Supp. 1969). Each of these provisions is applicable to public schools as well as institutions of higher education.

97. *Id.* at § 39-1216.

98. *Id.* at § 39-1217. Again there is an error in the section heading, in this instance attributable to the codifiers, and an error that could give rise to a problem of interpretation. The text of the statute refers to "a public disturbance *involving an act or acts of violence*" (emphasis added). The section heading reads "to incite public disturbance *or* violence" (emphasis added). Thus the section heading suggests a possibility of a violation where a campus was entered to incite a public disturbance not involving violence. Where such a conflict exists between the language of the text of the statute and the section heading, the normal rule of construction is to the effect that the section heading will not be used to broaden the scope of application of the statute. *See* 2 SUTHERLAND § 4903.

99. TENN. CODE ANN. § 49-1924 (Supp. 1969). The stipulated exceptions are so broad as to render the statute virtually impotent. The statute is only applicable to "courses in sex education," as opposed to "instruction," and as long as the course carries the designation of one of the excepted subjects there would appear little danger of a violation. For a discussion of this statute, *see* Note, 37 TENN. L. REV. 654 (1970).

100. 437 S.W.2d 538 (Tenn. Crim. App. 1968). Also discussed is malice aforethought, text accompanying notes 14-15 *supra*.

101. *Id.* at 540.

The court of criminal appeals interpreted this as raising a defense of amnesia and then proceeded to reject it.[102] It is dubious that this instruction actually describes the condition of amnesia, which connotes a loss of memory,[103] not a loss of awareness. In fairness to the court, it is impossible to determine what the defendant is suggesting by this instruction. The defendant testified that he had "a memory lapse or blackout" at the time of the offense, and a doctor testified that the defendant had apparently had an epileptic seizure at an earlier hearing and was at that time "disoriented."

Tennessee has consistently adhered to the *M'Naghten* test[104] in the determination of insanity, and the courts have not been concerned with the particular malady claimed by the defendant except as it bears on satisfying the test.[105] The instruction requested in the present case would appear to be an extremely inarticulate paraphasing of the first part of the *M'Naghten* test and was justifiably refused.

B. *Self-Defense*

In *McClain v. State*[106] the defendant was convicted of voluntary manslaughter in the death of her husband. The father of the deceased, who observed the couple about an hour prior to the death, testified that he saw the defendant assault the victim several times, once with a butcher knife and once with a small radio. During this time, the deceased was attempting to gather up his clothes with the intent of leaving. Each time he placed them on a chair, the defendant threw them to the floor. The defendant, who was the only witness to the death, testified that the deceased had been beating her, she

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102. "[A]mnesia, in and of itself, is no defense to a criminal charge unless it is shown by competent evidence that the accused 'did not know the nature and quality of his act and that it was wrong.'" Thomas v. State, 201 Tenn. 645, 653, 301 S.W.2d 358, 361 (1957); Lester v. State, 212 Tenn. 338, 347, 370 S.W.2d 405, 409 (1963). Both decisions are quoted in the principal case.

103. *See* "Amnesia" 1 ENCYCLOPEDIA BRITANNICA 807 (1968).

104. "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." Daniel M'Naghten's Case, 8 Eng. Rep. 200, 210 (1843).

105. *See, e.g.*, cases cited, note 102 *supra, re* amnesia. Alleged irresistible impulses have likewise been of no particular significance. *See* Wilcox v. State, 94 Tenn. 106, 28 S.W. 312 (1894); Watson v. State, 133 Tenn. 198, 180 S.W. 168 (1915); McElroy v. State, 146 Tenn. 442, 242 S.W. 883 (1922); Temples v. State, 183 Tenn. 531, 194 S.W.2d 332 (1946); Ryall v. State, 204 Tenn. 422, 321 S.W.2d 809 (1959); Spurlock v. State, 212 Tenn. 132, 368 S.W.2d 299 (1963). Noted in 31 TENN. L. REV. 251 (1964). *See generally* Woolf, *Criminal Responsibility and Insanity*, 27 TENN. L. REV. 389 (1960).

106. 445 S.W.2d 942 (Tenn. Crim. App. 1969).

had bitten him, and he had retired to the bathroom for medication. She said that he threatened to further mistreat her and she thereupon took a pistol to defend herself. Then, she testified, "I came back to a little hall and I said to him, 'Mac, you're not going to whip me anymore today' and I shut my eyes. I raised up the pistol, I shut my eyes and pulled the trigger."[107] The court held that, accepting the defendant's account of the facts, a case of self-defense was not presented.[108] The decision is consistent with recent holdings.[109]

C. *Defense of Property*

In *Brown v. State*[110] the defendant appealed the refusal of the following requested instruction:

> If you find that Mike Westfield was in the actual perpetration of a felony, that is that of larceny, when he was shot, then you should acquit the defendant.[111]

The court was of the opinion that the jury had rejected the contention that the victim was engaged in theft at the time of the affray, but even assuming such to be the case, the protection of property could not justify the taking of life.[112] *Marks v. Brown,* [113] an action for wrongful death, would appear to be the only prior Tennessee case in which the issue has arisen. There the court held that the attempted larceny of poultry belonging to the defendant did not render the homicide justified.

D. *Resisting Illegal Arrest*

In *Long v. State,*[114] a posse of eight officers went to the home of the defendant to arrest him for the misdemeanor of assault and battery. According to the prosecution, they identified themselves and stated their purpose, whereupon the defendant responded that he would kill anyone who entered the house intending to arrest him. They then forcibly entered the house and confronted the defendant

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107. *Id.* at 944.
108. "Until he indicated that he intended to attack the defendant under the circumstances existing at the time of the killing, the jury could conclude that the defendant had no reason to believe her danger was such as justified the taking of life." *Id.* at 945.
109. *See* Nance v. State, 210 Tenn. 328, 358 S.W.2d 327 (1962), and May v. State, 220 Tenn. 541, 420 S.W.2d 647 (1967) discussed in *1968 Survey* at 232-33.
110. 441 S.W.2d 485 (Tenn. Crim. App. 1969) (*See* discussion, text accompanying notes 16-17, 38-40, *supra*).
111. *Id.* at 488. Another refused instruction was premised on danger to the person of the defendant, which apparently was completely unsupported by the evidence.
112. The court quoted at length from several treatises to substantiate the point. *See, e.g.,* 1 WHARTON § 223.
113. 60 Tenn. 87 (1873).
114. 443 S.W.2d 476 (Tenn. 1969).

standing at the foot of his bed with a shotgun. The defendant announced that he was going to shoot and then did; the lead officer lurched to the floor, simultaneously firing his pistol, and the shot by the defendant killed the second officer. After a further exchange of gunfire the defendant surrendered. The defendant testified that his wife awakened him to tell him someone was breaking the door down. He then reached for his gun which was located next to the bed and fired when someone shined a flashlight in his eyes. He contended that he did not know whom he was firing at. While the officers had in their possession an arrest warrant, it had not been sworn to before a magistrate and was therefore void. It was the theory of the defendant that since the arrest was illegal his resistance was justified. The trial judge, however, instructing the jury on the issue of self-defense, said that the validity of the warrant was inconsequential.[115]

The court of criminal appeals reversed the conviction on the authority, according to the supreme court,[116] of *Poteete v. State*.[117] There the defendant had been convicted of unlawfully carrying a pistol and a fine had been imposed. Judgment executions were given to the deceased deputy sheriff which ordered the defendant to be taken into custody until the amount of the judgment was paid. The process was apparently void because it was issued by the court clerk without any order or judgment of the court, and in fact the court found that, as the defendant had posted sureties for the fine, his arrest was unauthorized in any event. As the charge against the defendant was a misdemeanor, not committed in the presence of the officer, the validity of the court order was essential to the legality of the arrest.[118] The court concluded that the officer lacked authority for the arrest and thus acted at his peril,[119] and the defendant was not chargeable with murder. Regrettably, the court did not discuss the facts surrounding the death of the officer.

The supreme court, while agreeing that the case must be remanded

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115. "You have heard some testimony concerning a charge of assault and battery set out in a paper writing, designated a State's warrant. You will not consider whether it was technically valid or invalid. You may consider such testimony as explanation of the presence of the deceased and other officers at the scene if it does so explain that." *Id.* at 478.

116. The opinion of the court of criminal appeals is unpublished.

117. 68 Tenn. 261 (1878).

118. The defendant in the principal case was also being arrested for a misdemeanor.

119. "While we go far toward justifying an officer in the *bona fide* performance of his official duty, in obedience to an apparent warrant issued by a proper officer, and would hold that no mere technical or formal objection should be allowed to prevent his being shielded from the charge of an unauthorized aggression, yet, on the other hand, we must remember, that the rights and liberties of a citizen can only be invaded by due process of law." 68 Tenn. at 265.

for a new trial, was concerned that the court of criminal appeals had left the impression that "any slaying of a peace officer with a void warrant may be justified, and is never more than manslaughter."[120] Two decisions were cited by the court. *Galvin v. State*[121] involved an attempted warrantless arrest for assault following a complaint by the party assaulted. Considering whether the killing should be reduced from murder to manslaughter the court said:

> An unlawful arrest, made *bona fide* under color of legal authority, is a trespass, and like other trespasses, it may, or may not, in particular case, constitute an aggravated provocation. And the mere fact that the officer or citizen attempting the arrest, and being slain in so doing, has exceeded his authority, does not necessarily reduce the killing to manslaughter, if the slayer had no reason to believe himself in imminent danger of life, or great bodily harm, and the homicide were, in fact, perpetrated, not in passion or sudden heat, upon the provocation of the arrest, but with cool, deliberate malice and premeditation.[122]

In *Hurd v. State*[123] the officer was attempting to make a warrantless arrest for the misdemeanor of unlawfully carrying a pistol following a bar room fracas. Again the court recognized that there was no privilege to use unlimited force in resisting an illegal arrest.

> The amount of force which he may use in self-defense, however, is that only which is necessary to prevent the carrying out of the unlawful purpose. If excessive force is used in making resistance, the right of self-defense is eliminated, and killing by means calculated to cause death, with knowledge that the intent was only to arrest, is murder.[124]

With these guiding principles, the principal case was remanded for a new trial.

While the court was only concerned with the instruction by the trial court that repudiated any significance to the invalidity of the warrant and thus the case was disposed of on this issue, other considerations may be worthy of note. If the testimony of the defendant to the effect that he had no knowledge of the identity of the intruders is believed, then there is authority in the *Hurd* decision that this fact may be determinative in reducing the offense to manslaughter.[125] Indeed, if the defendant in good faith had no way of knowing that

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120. 443 S.W.2d at 478.
121. 46 Tenn. 283 (1869).
122. *Id.* at 292.
123. 119 Tenn. 583, 108 S.W. 1064 (1907).
124. *Id.* at 595, 108 S.W. at 1067-68. The court is here quoting from the Annotation in 66 L.R.A. 353, 387 (1905).
125. 119 Tenn. at 594-95, 596, 108 S.W. at 1067, 1068.

the invaders were not burglars then he might legitimately raise the defense of justifiable homicide, and in this case it would seem the validity of the warrant would be inconsequential.[126] Even if it were determined that the warrant for arrest were valid, the manner of execution might still be unreasonable, thus illegal, in the fourth amendment sense.[127] From the facts given, it is curious that there was a need to execute the warrant for a past misdemeanor in the middle of the night and that a posse of eight officers was needed to accomplish the task.

IV. PARTIES

A. *Accessories*

Maxwell v. State[128] involved the conviction of three defendants for robbery. Two victims, Smith and Phillips, were assaulted by the defendants after leaving a cafe. Phillips was hit in the mouth by defendant Newmon who took his billfold and money. Defendants Maxwell and Stokes struck Smith from behind, rendering him unconscious, and took his billfold. Each of the defendants was convicted on two counts of robbery. It was contended on appeal that Newmon could not be convicted of the robbery of Smith, and that Maxwell and Stokes could not be convicted of the robbery of Phillips, as in each instance the parties named did not personally participate in the crime. The Court affirmed all convictions, holding that "[a]ll who are present at the commission of a robbery, rendering it countenance and encouragement, ready to assist should the necessity arise, are liable as principal actors."[129]

Typically, the aiding and abetting issue arises where there is but

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126. *See, e.g.,* Morrison v. State, 212 Tenn. 633, 371 S.W.2d 633 (1963), wherein the court quoted 1 WHARTON at § 489: "In the case of a forcible attack on the habitation, the law does not require that the danger should be real—that is, that the peril should actually exist—to entitle a householder to resist to the taking of life. The defendant may act on a reasonable apprehension of danger induced by appearances. . . . On the other hand, the law does require that the appearance should be such as would excite a reasonable apprehension of the danger or peril in order to render the killing excusable."

127. *See* Ker v. California, 374 U.S. 23 (1962), holding unannounced entry reasonable under the circumstances of the case but recognizing the constitutional issue. The justification of the conduct of the officers in the principal case may turn on compliance with TENN. CODE ANN. § 40-806 (Supp. 1969) and § 40-807 (1955). The factual conflicts must be resolved by the jury.

128. 441 S.W.2d 503 (Tenn. Crim. App. 1969).

129. *Id.* at 504. "To be criminally responsible, the accused need not have taken any money from the victim with his own hands, or actually participated in any other act of force or violence; it is sufficient if he was present, aiding and abetting, or ready and willing to aid if necessary." *Id. See* TENN. CODE ANN. § 39-109 (1955).

a single crime committed, but more than one party is involved in some degree in its accomplishment. Thus in *Woody v. State*,[130] the defendant was one of two persons engaged in the burglary of a house at the time a fatal shot was fired. The evidence was not conclusive that the defendant fired the shot, but as the defendant and the other burglar were engaged in a common evil design, the court held in effect that establishing the fact that one of them fired the shot was sufficient.

A passenger in an automobile has been recognized as an aider and abbetor to murder committed by the driver in two cases. In *Flippen v. State*,[131] the driver of the vehicle struck another vehicle from the rear, whereupon an occupant of the hit car was thrown into a lake and drowned. As the driver and passenger failed to stop at the scene of the accident, the court held them both accountable for murder.[132] In *Stallard v. State*,[133] the three defendants were involved in a drag race on a public highway, two as drivers and a third as a passenger who had served as "starter" for the race. The vehicle improperly in the left lane collided with an oncoming vehicle killing a passenger. The court held all three defendants guilty of second degree murder.

The Tennessee decision closest in point to the principal case would appear to be *Turner v. State*,[134] where three defendants were convicted for the rape of two victims. Defendants *X* and *Y* were found to have raped *A*; defendant *Z* raped *B*. The conviction, however, had been for the rape of *A* only. The court held that *Z* was equally culpable for the offense.[135] The *Maxwell* case can only be factually distinguished on the basis that the defendants assaulted their respective victims independently, while in *Turner* the defendants were working collusively in regard to both victims. However, there is no question that *Maxwell* involves a single nefarious venture on the part of the three defendants and that the acts perpetrated by each reflects more

130. 46 Tenn. 299 (1869).
131. 211 Tenn. 507, 365 S.W.2d 895 (1963).
132. *See also* Eager v. State, 205 Tenn. 156, 325 S.W.2d 815 (1959), affirming a conviction of involuntary manslaughter of the driver and passenger of an automobile, both of whom were intoxicated.
133. 209 Tenn. 13, 348 S.W.2d 489 (1961).
134. 187 Tenn. 309, 213 S.W.2d 281 (1947).
135. "From the time that Turner pointed his pistol at Miss 'A' and her companions and forced them down the north side of Capitol Hill until two hours or more later when the girls were released and went home, all three of the defendants played active criminal roles in the joint concerted criminal enterprise and were equally guilty as principals of the crimes committed." *Id.* at 316, 213 S.W.2d at 284.

a division of labor than the accomplishment of two independent crimes.

B. *Victim or Accomplice*

A party cannot be convicted of a felony on the uncorroborated testimony of an accomplice.[136] This is a particularly compelling doctrine in regard to crime against nature[137] where the opportunity for extortion is great.[138] For this reason Tennessee courts have been reluctant to affirm convictions for crime against nature where the only evidence is the testimony of the other participant in the act, even where the party is a minor, recognized to be legally incapable of giving consent. Thus in 1959 in *Sherrill v. State*[139] the defendant was charged with crime against nature perpetrated against two boys, ten and eleven years old. The court held that when the conviction resulted from ."the uncorroborated testimony of an accomplice even though a child . . . the Court as a matter of law should declare a mistrial."[140] In so holding, Tennessee places itself in an extremely small minority.[141] Interestingly, in a related context, the statute prohibiting carnal knowledge of a female between twelve and twenty-one[142] expressly requires corroboration of the testimony of the female. The carnal knowledge of a female under twelve years,[143] as the crime against nature statute, says nothing of corroboration.[144]

The recent decision of *Davis v. State*[145] indicated that if the prosecution could show evidence of non-consent, then the party would be treated as a victim rather than accomplice. There the defendant attempted to induce a fourteen-year-old boy to engage in an unnatural

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136. *See* Fair v. State, 2 Tenn. Cas. 481 (Shannon 1877); Hall v. State, 71 Tenn. 552 (1879); Robinson v. State, 84 Tenn. 146 (1885); Clapp v. State, 94 Tenn. 186, 30 S.W. 214 (1895).
137. TENN. CODE ANN. § 39-707 (1955).
138. *See* Kelly v. United States, 194 F.2d 150 (D.C. Cir. 1951).
139. 204 Tenn. 427, 321 S.W.2d 811 (1959).
140. *Id.* at 436-37, 321 S.W.2d at 816. *See also* Boulton v. State, 214 Tenn. 94, 377 S.W.2d 936 (1964), involving a sexual assault on a fourteen-year old boy.
141. "[A] minor under twelve years of age cannot consent, so that his submission without resistance does not . . . render him an accomplice." 2 UNDERHILL'S CRIMINAL EVIDENCE 1637 (5th ed. Herrick 1957). The *Sherrill* case is the only contra decision cited. "A minor who is under the age of consent, or is too young to understand the nature of the act, and is consequently too young to be criminally accountable therefor, is not deemed an accomplice witness in a prosecution for a sexual crime in which such child was involved." 2 WHARTON'S CRIMINAL EVIDENCE § 460 (12th ed. Anderson 1955). One contra decision is cited, State v. Howard, 97 Ariz. 339, 400 P.2d 332 (1965), concerning a twelve year old girl who was an accomplice to lewd and lascivious acts.
142. TENN. CODE ANN. § 39-3706 (1955).
143. *Id.* at § 39-3705.
144. Curtis v. State, 167 Tenn. 427, 70 S.W.2d 363 (1932) (dictum).
145. 442 S.W.2d 283 (Tenn. Crim. App. 1969).

sex act by offering him some fishing gear and money. When the offer was not immediately accepted, the defendant picked up a knife and threatened to cut off his ears and kill him if he refused to cooperate. Under the threat of the knife, the boy acquiesced in the demands of the defendant. Afterwards, the boy cried and asked about the fishing equipment. The defendant responded that he needed it, gave the boy a dollar, and left. The court held that the boy had not voluntarily engaged in the act, and therefore the conviction could rest on his uncorroborated testimony. The subsequent inquiry concerning the fishing gear did not preclude the jury from finding a non-consensual act.

V. PROCEDURE

A. *Due Process*

Under the Tennessee Constitution an accused is entitled to a trial in "the County in which the crime shall have been committed."[146] Proof of venue is thus recognized as a constitutional right under the *state* constitution.[147] Further, under statute trial in the locus of crime becomes a matter of jurisdiction.[148] The problem came up in a unique way in *Jones v. Russell*.[149] The petitioner sought a writ of habeas corpus in a federal court claiming that no proof had been offered at his trial that the offense had been committed in the county in which the trial was conducted.[150] Unfortunately, there was no transcript of the trial available, and the notes and recordings of the court reporter had been lost. The petitioner testified in the present hearing to the facts of the case and contended that the offense had occurred in another county.[151] He further stated that no evidence had been introduced at the trial placing the crime in the county of the trial. The trial judge testified that it was his "definite recollection" that the offense took place in the county of trial, but he could not

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146. TENN. CONST. art. 1, § 9.

147. *See* Harvey v. State, 213 Tenn. 608, 376 S.W.2d 497 (1964).

148. TENN. CODE ANN. § 40-104 (1955). *See* Harvey v. State, 213 Tenn. 608, 376 S.W.2d 497 (1964). However, "venue" may be changed on the application or with the consent of the defendant. TENN. CODE ANN. § 40-2202 (1955).

149. 299 F. Supp. 970 (E.D. Tenn. 1969).

150. The petitioner had twice exhausted his remedies under state law through two petitions for writ of habeas corpus, the first of which reached the United States Supreme Court and was there remanded to the Supreme Court of Tennessee for further proceedings. Jones v. Russell, 390 U.S. 199 (1968). According to the principal case, his second effort was frustrated by the trial court in refusing to give any written reasons for the denial of the writ as required by state law [TENN. CODE ANN. § 23-1809 (1955)], and as directed by the state supreme court. He thus had not been properly accorded the protective processes of the law.

151. The crime of rape had occurred at or near an automobile at some point on a public road.

recall any testimony or details. Two jurors offered equally ambiguous testimony. The arresting officer testified that the prosecutrix had said at the trial that the offense had taken place in the county, although he conceded that she had not shown him the locus of the crime. The court concluded that the evidence was inadequate to show that the crime occurred in the county of the trial, and that this failure of proof resulted in a denial of due process under the fourteenth amendment.[152]

B. *Self-incrimination*

1. *Comment on Failure to Testify.* Comment on the failure of the defendant to testify at his trial is a violation of the privilege against self-incrimination protected by the fifth amendment, applicable to the states through the fourteenth amendment.[153] In *Kinser v. Cooper,*[154] the defendant chose to testify, but his co-defendant did not. The prosecutor commented on this failure to testify, and the defendant contended this was a violation of *his* constitutional rights. While it is generally true that a defendant can only object to violations of his own constitutional rights, in joint trials errors in the proceedings may have an effect on a defendant not the immediate subject of the error. Particularly relevant are the decisions involving the impact of a confession on a co-conspirator in a joint trial.[155] Avoiding the postulation of a uniform rule, the court turned to an analysis of the facts. It

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152. While it is not generally true that a violation of state law is per se a denial of fourteenth amendment due process, by virtue of the Tennessee constitutional and statutory provisions here involved the judgment in question was void and therefore was subject to collateral attack.

An unrelated problem in the nature of a due process question arose in the yet-unreported case of Phinney v. State 6 CRIM. L. REP. 2142 (Tenn. Crim. App., Oct. 16, 1969), where the defendant was prosecuted under the repealed statute, TENN. CODE ANN. § 39-1904 (1953), in effect at the time of the commission of the offense. The statute was replaced by §§ 39-1959—39-1967 (Supp. 1969), according to which the court instructed the jury. The court held that the defendant could not be prosecuted under either law, the first because of the common law rule that, in the absence of a savings clause, a repeal works as a pardon of all unprosecuted crimes thereunder, the second because of the protection against ex post facto laws. *Id.* Const. art. 1, § 11. Presumably the trial was held prior to the enactment of *Id.* § 39-114 in 1968 (see *1968 Survey* at 235-36), as that section apparently was not discussed by the court. However, were this latter statute in effect at the time of the trial, the same result would appear warranted. As § 39-1904 was repealed before § 39-114 enacted, there was a period of time during which the defendant was not subject to the jeopardy of either statute. Thus, the passage of § 39-114 itself has an ex post facto effect as applied to this defendant in reinstating a lapsed offense.

153. Griffin v. California, 380 U.S. 609 (1965). The possible application of the "harmless error" rule to *Griffin* violations was considered in Chapman v. California, 386 U.S. 18 (1967), but found not applicable under the facts.

154. 413 F. 2d 730 (6th Cir. 1969).

155. *See* text accompany notes 198-205 *infra.*

was observed that the co-defendant was charged with aiding and abetting the offense so that his conviction turned on a finding of guilt as to the defendant. Thus if an inference of guilt was drawn from his failure to testify, it followed that he was guilty of aiding and abetting the *defendant.*[156] *A fortiori,* the defendant must be guilty. Thus, the court concluded that the defendant had been denied a fair trial by the comment on the failure of his co-defendant to testify.

2. *Failure to Comply with Statute.* Among the more litigious self-incrimination problems of recent vintage has been that spawned by the *Marchetti-Grosso-Haynes* holdings.[157] Essentially, the cases held that the privilege against self-incrimination would be a valid defense to a charge of failing to comply with a statutory mandate where to do so would incriminate the party in respect to other laws.[158] The doctrine was again applied by the Court in *Leary v. United States,*[159] involving violations of the Marijuana Tax Act.[160]

In *United States v. Fine,*[161] the issue was raised in regard to federal liquor violations. The defendant was charged with (1) working in a distillery, the outside of which did not bear a sign denoting the name of the distiller and the nature of the business;[162] (2) possession, custody and control of an unregistered still;[163] (3) failure to give bond required of distillers;[164] and (4) possession of unstamped distilled spirits.[165] The court held that, except for (1), the privilege against self-incrimination was a valid defense as compliance would incriminate the defendant under state law.[166] The first charge was distinguished because the gravamen of the offense was working in the distillery, as opposed to posting a sign, and thus no incrimination would result from compliance.

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156. "There was no independent crime with which [co-defendant] Chapman was charged or of which he could have been convicted. It is not like a joint indictment of two persons for a crime where either one or both may be convicted." 413 F. 2d at 732.
157. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968). *See 1968 Survey* at 236.
158. *Marchetti* and *Grosso* involved gambling offenses; *Haynes* concerned the failure to register a sawed-off shotgun.
159. 395 U.S. 6 (1969).
160. 26 U.S.C. §§ 4741, 4742 (1964).
161. 293 F. Supp. 189 (E.D. Tenn. 1968).
162. 26 U.S.C. §§ 5180(a), 5681(c) (1964).
163. *Id.* § 5179(a).
164. *Id.* § 5173(b), 5222.
165. *Id.* § 5205.
166. TENN. CODE ANN. §§ 39-2507, 39-2513, 39-2521 to 2525 (1955).

The *Fine* decision creates a conflict in the federal courts in Tennessee on the issue raised. Previously the same issue arose in *United States v. McGee,*[167] with different results. The *McGee* court found the *Marchetti* rationale inapplicable to violations of the federal liquor laws because the statutes were directed to the entire liquor industry, not to "a highly selective group inherently suspect of criminal activities,"[168] a factor which had been noted in *Marchetti.*[169] The *Fine* court, to the contrary, reasoned that the manufacture of intoxicating liquor in a dry county was "an area permeated with criminal statutes,"[170] and persons engaged in such endeavors were inherently suspect. The United States Court of Appeals for the Fifth Circuit recently held consistently with *McGee* in a case involving the possession of unstamped liquor.[171] These decisions are indicative of the general confusion that has surrounded the application of *Marchetti.*

It is to be noted that the *Marchetti* doctrine, not withstanding a Pennsylvania decision to the contrary,[172] does not concern the admissibility of evidence but rather the culpability of the defendant to prosecution at all. The cases did not hold any of the statutes under consideration to be unconstitutional, but simply held that under the facts the defendants were immune from prosecution.[173] Recognition of this distinction was made in *Di Piazza v. United States.*[174] There the defendant contended that evidence should have been excluded because he was initially charged with gambling offenses against which he could plead self-incrimination per *Marchetti* and *Grosso.* The court held that no problem was presented since the warrants were executed prior to the decisions in those cases,[175] the searches were clearly legal at the time, and the decisions had not affected the constitutionality of the statutes. The Court, however, declined to intimate an opinion of the validity of similar warrants executed subsequent to the decisions.

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167. 282 F. Supp. 550 (M.D. Tenn. 1968). *See 1968 Survey* at 236.
168. Albertson v. Subversive Activities Control Board, 382 U.S. 70, 79 (1955) (quoted in *Marchetti*).
169. This was again emphasized in Leary v. United States, 395 U.S. 6, 13 (1969).
170. Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).
171. Shoffeitt v. United States, 403 F.2d 991 (5th Cir. 1968), *cert. denied,* 393 U.S. 1084 (1969).
172. Commonwealth v. Katz. 429 Pa. 406, 241 A.2d 809 (1968). *But see* State v. Boiardo, 103 N.J. Super. 381, 247 A.2d 357 (1968), *and* State v. Gerardo, 53 N.J. 261, 250 A.2d 130 (1969), soundly criticizing the *Katz* decision.
173. For example, the defendant could not have plead the privilege in *Marchetti* had all his gambling activities been legal under state law.
174. 415 F.2d 99 (6th Cir. 1969).
175. The holdings were held not to apply to any case where the decision had become final prior to their date of decision in Graham v. United States, 407 F.2d 1313 (6th Cir. 1969).

3. *Civil Interrogatories. United States v. Detroit Vital Foods, Inc.*,[176] raised the issue of incrimination resulting from the defendants' responses to civil interrogatories. The defendants were being simultaneously investigated by the federal government in respect to both civil and criminal liability arising from misbranding of drugs. The defendants were served with extensive written interrogatories in the civil action "seeking comprehensive and detailed information about the corporate defendant and the activities of the individual defendants in connection with the company's business."[177] Before the interrogatories were answered, the defendants were notified of the contemplated criminal action, whereupon they objected to being required to respond to the interrogatories. Their request to stay the civil proceedings until the criminal action was disposed of was denied, and the interrogatories were answered. There seemed little question that the answers were extensively utilized by the government in preparing the criminal prosecution. The court felt that there were but three alternatives available to the defendants: (1) refuse to answer the interrogatories, which would have resulted in a forfeiture of their property; (2) falsely answer the interrogatories, which would make them vulnerable to a prosecution for perjury or (3) truthfully answer the interrogatories, which would incriminate them in the upcoming criminal prosecution. The court concluded that these choices constituted a "compelling" of testimony within the contemplation of the fifth amendment.[178] Equally inadmissible would be any "fruits" of the violation of the constitutional protection.[179] While there are no United States Supreme Court decisions directly in point, the cases forbidding requiring a person to waive his privilege against self-incrimination or in the alternative lose his employment[180] would appear to provide some support for the present decision.

4. *Presumption of Innocence.* The Tennessee bad check law[181] provides that, except where the maker pays to the holder the amount due within five days of notice, the refusal of payment by the drawee

176. 407 F.2d 570 (6th Cir. 1969).
177. *Id.* at 572.
178. The privilege can only be claimed by the individual, not the corporate, defendants, Hale v. Henkel, 201 U.S. 43 (1906); Wilson v. United States, 221 U.S. 361 (1911); George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968).
179. *See generally* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Wong Sun v. United States, 371 U.S. 471 (1963); Harrison v. United States, 392 U.S. 219 (1968).
180. Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 380 (1968).
181. TENN. CODE ANN. § 39-1960 (Supp. 1969).

shall "create a presumption of intent to defraud and of knowledge of insufficient funds."[182] This language was attacked in *Smithson v. State*[183] as rebutting the presumption of innocence and thereby denying the defendant due process of law.[184]

The due process test promulgated by the United States Supreme Court requires that "there be a rational connection between the facts proved and the fact presumed."[185] This rule was recently applied by the court in *Leary v. United States*.[186] The defendant in the present case relied on *Marie v. State*,[187] where the court had said that a legal presumption would be unconstitutional if it deprived the defendant of the presumption of innocence. However, the holding of the court there was not that the presumption was unconstitutional but that it had been effectively rebutted by the defendant. The court in the *Smithson* case concluded that the rational nexus between fact and conclusion was present, and that the defendant had not been denied due process.[188]

5. *Handwriting Exemplars.* The privilege against self-incrimination guaranteed by the fifth amendment applies only to evidence of a "testimonial or communicative nature."[189] Thus it affords no protection against requiring an accused to execute handwriting exemplars.[190] *United States v. King,* [191] recognizing these principles, held that as no constitutional right is infringed by the taking of the samples, there is no need for a prior warning to the suspect of his fifth amendment rights analogous to the *Miranda* requirements.[192] Nor is there a vio-

182. "The word 'notice' as used herein shall be construed to include not only notice given to the person entitled thereto in person, but also notice given to such person in writing. Such notice in writing shall be presumed to have been given when deposited in the United States mail addressed to such person at his address as it appears on such check, draft or order, or to his last known address." *Id.* at § 39-1961.

183. 438 S.W.2d 61 (Tenn. 1969).

184. The defendant also contended that certain provisions in the statutory scheme were unconstitutionally vague, but this argument was summarily rejected for want of any specific objections.

185. Tot v. United States, 319 U.S. 463, 467 (1943). *See also* United States v. Gainey, 380 U.S. 63 (1965); United States v. Romano, 382 U.S. 136 (1965).

186. 395 U.S. 6 (1969) (decided subsequent to the *Smithson* case).

187. 204 Tenn. 197, 319 S.W.2d 86 (1958).

188. "[T]here is a natural, rational, and evidentiary relation existing between the results of issuing this check and it coming back and showing no funds for such a prima facie presumption to be not unfair to the accused." 438 S.W.2d at 66.

189. Schmerber v. California, 384 U.S. 757, 761 (1966). Here the privilege was held inapplicable to a blood test to determine intoxication.

190. Gilbert v. California, 388 U.S. 263 (1967).

191. 415 F.2d 737 (6th Cir. 1969).

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

lation of the privilege, according to *United States v. Doremus*,[193] where a handwriting exemplar is taken from the defendant at his trial.[194]

C. *Right of Confrontation*

The right to confront one's accusers protected by the sixth amendment applies to the states through the fourteenth amendment.[195] Two United States Supreme Court decisions are of primary relevance in understanding current developments. In *Douglas v. Alabama*[196] a co-conspirator was placed on the stand and the prosecutor proceeded to read his confession, which implicated the defendant. After every few sentences, the prosecutor asked the witness to affirm or deny it, and each time the witness asserted his privilege against self-incrimination. The court concluded that this procedure had effectively deprived the defendant of the right to confront his accusers.[197] The rationale of *Douglas* was applied to a new problem in *Bruton v. United States*.[198] Here the issue arose where co-conspirators were tried jointly, and again the confession of one implicated the other, but the confessor exercised his privilege against self-incrimination and did not take the stand. The court held that, nothwithstanding admonitions to the jury not to consider the confession in determining the guilt of the co-defendant, the latter had been denied the right of confrontation.[199]

The only solution, if the prosecution wishes to introduce the confession in evidence, is to grant a severance to the defendants. Two recent federal decisions hold that this may be necessary even where the confessing defendant takes the stand if the substance of his testimony is to deny the confession.[200] Potential prejudice can likewise not be avoided by substituting an "X" for the name of the co-de-

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193. 414 F.2d 252 (6th Cir. 1969).

194. But this practice must also be considered in the context of the right to a fair trial. *See* discussion accompanying notes 403-05, *supra*.

195. Pointer v. Texas, 380 U.S. 400 (1965).

196. 380 U.S. 415 (1965).

197. "Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusal to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement . . . [E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his." *Id.* at 419, 420.

198. 391 U.S. 123 (1968).

199. Applied in United States v. DeBose, 410 F.2d 1273 (6th Cir. 1969).

200. Townsend v. Henderson, 405 F.2d 324 (6th Cir. 1968). West v. Henderson, 409 F.2d 95 (6th Cir. 1969).

fendant when it is patently obvious that he is the one referred to.[201] In *Campbell v. United States*,[202] the defendant sought protection in *Bruton* from the admission in evidence of certain extra-judicial statements of co-defendants not made in his presence. The court held *Bruton* inapplicable in this context as the holding had been limited to extra-judicial statements which were inadmissible hearsay so far as the objector was concerned.[203] In the present case, the statements were admissible under the exception to the hearsay rule allowing the admission of statements by conspirators in the furtherance of the conspiracy.

Two recent United States Supreme Court decisions have placed further limitations on the application of *Bruton*. In *Frazier v. Cupp*[204] the defendant and a co-conspirator had been indicted for the same offense but the con-conspirator plead guilty. Before the trial, counsel for the defendant advised the prosecutor that if the co-conspirator were called to the stand he would invoke the privilege against self-incrimination, and he admonished the prosecutor not to rely on the anticipated testimony of the co-conspirator in his opening statement. However, the prosecutor had contacted various others who were of the opinion that the co-conspirator would in fact testify. Relying on this information, the prosecutor included in his opening statement a summary of the expected testimony of the co-conspirator. No particular emphasis was given to the portion of the prosecution's case. At one point the prosecutor referred to a paper, which could have been understood by the jury to be a confession, although there was no explicit identification. When the co-conspirator was called to the stand, he did invoke the privilege against all questions concerning events on

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201. Greer v. State, 443 S.W.2d 681 (Tenn. Crim. App. 1969). The point is dictum. There is no indication in the opinion as to whether the confessor took the stand. *Cf.* Maxwell v. State, 441 S.W.2d 503 (Tenn. Crim. App. 1969), where the court found a confession admissible where the letters "A" and "B" were substituted for the names of the co-defendants. Galbreath, J., dissented, contending that the rights of the co-defendants had not been effectively protected. Again, there is no indication whether the confessor took the stand. *Cf.* Bruton v. United States, 391 U.S. at 134, n.10. However, in Davis v. State, 445 S.W.2d 933 (Tenn. Crim. App. 1969) the court held the ability of the jury to identify the co-defendant anonymously referred to was immaterial where the confessor took the stand.

See also Hunter v. State, 440 S.W.2d 1 (Tenn. 1969), finding no prejudice where confessions of several of eleven defendants were introduced, but each of the confessors took the stand and was subject to cross-examination.

202. 415 F.2d 356 (6th Cir. 1969).

203. "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence." Bruton v. United States, 391 U.S. at 128.

204. 394 U.S. 731 (1969).

the day of the crime. The defendant contended that the conduct of the prosecutor amounted to reversible error under the authority of *Douglas* and *Bruton*. The court found both cases distinguishable. The situation in *Douglas* where a transcript of the confession was read to the witness was a far cry from a brief paraphrase of a statement made where no one was on the stand. Nor was the jury asked, as in *Bruton,* "to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial."[205] Under the circumstances, the court concluded that cautionary instructions to the jury not to consider any statement made by counsel as evidence afforded adequate protection to the defendant.

Of even more significance to all aspects of constitutional criminal procedure was the holding in *Harrington v. California*.[206] The defendant and three co-defendants were jointly tried, and the confessions of the three co-defendants were introduced in evidence with instructions to the jury that each confession should be considered only against the confessor. One of the co-defendants took the stand and was subjected to cross-examination by counsel for the defendant; the other two co-defendants chose not to testify. While recognizing a violation of the *Bruton* standard, the Court held that the lack of opportunity to cross-examine constituted harmless error because the case against the defendant was "overwhelming."[207]

The *Harrington* decision is noteworthy not only because of its effect in limiting the impact of *Bruton,* but also because it is the first decision in which the Supreme Court has applied the harmless error rule to an acknowledged violation of a constitutional right.[208] The device is potentially an effective means of diminishing the effect of prior decisions without overruling them.

D. *Arrest*

1. *Probable Cause.* The most frequently quoted definition of probable cause for arrest is found in *Beck v. Ohio*:[209]

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205. *Id.* at 735.
206. 395 U.S. 250 (1969).
207. "The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed." *Id.* at 254. *Followed* in Nix v. State, 446 S.W.2d 266 (Tenn. Crim. App. 1969); United States v. Long, 415 F.2d 307 (6th Cir. 1969). *See* text accompanying notes 327-32 *infra.*
208. The possibility was recognized but not utilized in Chapman v. California, 386 U.S. 18 (1967). *See also* Black, J., dissenting, in Bumper v. North Carolina, 391 U.S. 543 (1968).
209. 379 U.S. 89 (1964).

> [W]hether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.[210]

Within this broad framework, the presence of probable cause must be determined in each case by a careful factual analysis. *United States v. Kucinich*,[211] created the need for such an analysis. There a federal agent was notified by a car rental service that two cars, a Ford and a Mercury, rented in the name of John T. Demoss, had not been returned. Thereafter the agent received a call from a motel manager informing him that two men, a woman, and a child had registered at the motel, and one member of the party used the name John T. Demoss. They had arrived in a car which fit the description of the Mercury. Earlier it had been determined that the man who identified himself as Demoss resembled one Edmondson, who was on the FBI's ten most wanted list.[212] Three agents went to the motel and showed the manager a picture of Edmondson; he said there was a resemblance to one of the men in the room. An agent approached the vehicle parked in front of the room and through the window read a number on the back of the rear view mirror which substantially complied with the car rental identification number. The court held that these facts known to the agents established probable cause for an arrest.[213]

In *Colosimo v. Perini*[214] an observer in an airport control tower witnessed the petitioner stealing from cars in the airport parking lot. This information was relayed to officers on the ground who promptly made an arrest. The court held that the arrest was supported by probable cause. Similarly, officers can rely on information received from official sources, such as radio broadcasts, to justify an arrest.[215]

Also calling for a particular evaluation of the information known to the arresting officer was *Greer v. State*,[216] where the two defendants were convicted of the robbery of a bus driver. The driver gave the police a physical description of both defendants. An officer recog-

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210. *Id.* at 91.
211. 404 F.2d 262 (6th Cir. 1968).
212. This was apparently a false lead.
213. Other aspects of this case are discussed in text accompanying notes 293, 300 *infra*.
214. 415 F.2d 804 (6th Cir. 1969).
215. Nix v. State, 446 S.W.2d 266 (Tenn. Crim. App. 1969); United States v. Johnson, 403 F.2d 1002 (6th Cir. 1968). *See also* United States v. Clemmons, 390 F.2d 407 (6th Cir. 1968). This, of course, assumes that the aggregate knowledge of the police reaches the level of probable cause.
216. 443 S.W.2d 681 (Tenn. Crim. App. 1969).

nized one of the descriptions as fitting Greer. Particularly significant was the fact that the robber had been wearing sunglasses during the robbery which occurred at around midnight. The officer "had had previous experience with Greer and knew that he wore sunglasses at all times, both day and night."[217] Further, the officer had received an anonymous telephone call implicating Greer in the robbery. The court concluded that the arrest was valid. As regards the factual description of the assailant, Judge Galbreath argued, in dissent, that this was so vague that it could have fit "hundreds, perhaps thousands, of men" in the general area of the crime.[218] It was further noted that the description had missed the actual weight of Greer by between twenty and forty pounds.

Lending some support to the argument of the dissent is the recent United States Supreme Court decision of *Davis v. Mississippi*,[219] wherein following a rape, the victim described her assailant as simply a "Negro youth," and numerous people fitting that general description were taken into custody and fingerprinted. While the focus of attention in the *Davis* decision is on the "dragnet" operation, it would seem apparent that if but one person were arrested who met the description "Negro youth," apart from the unlikely chance that only one person met that description in the community, the arrest would be illegal. While the description in *Greer* is somewhat more detailed, if the dissent is correct in suggesting it could fit hundreds of people or more, the problem is equivalent; in *Davis* between sixty-four and seventy-four were either fingerprinted or questioned, or both.

As regards the tip received from the anonymous informant, it is clearly established that probable cause cannot be based on such information standing alone,[220] and so the majority conceded.[221] But, it

217. *Id.* at 684.

218. *Id.* at 688. "Not only do a significant number of people, because of visual sensitivity, wear dark glasses but it is well known that many perpetrators of personal crimes wear such a masking device to obscure from witnesses their identity. Even more prevalent is the custom on the part of young people, particularly, of the Negro race, in this generation to wear such 'shades,' as they are called, in their imitation of well known musicians and entertainment personalities, such as Ray Charles, Sammy Davis, Jr., and others whom have caused dark glasses to become a badge of the 'in-crowd.'

"While the fact that the bandit wore dark glasses, coupled with the fact that Greer wore dark glasses, should have afforded the officer a clue from which further investigation should have been mounted, it presented no more basis for probable cause to arrest than would have information that the robber was wearing a derby hat; perhaps not as much so as derby hats have become much rarer in our times than have sun glasses." *Id.*

219. 394 U.S. 721 (1969). *See also* text accompanying notes 240-42 *infra*.

220. *See, e.g.*, Contee v. United States, 215 F.2d 324 (D.C. Cir. 1954); Katz v. Peyton, 334 F.2d 77 (4th Cir. 1964); Swinney v. United States, 391 F.2d 190 (5th Cir. 1968).

221. 443 S.W.2d at 684.

held, such a tip may still be "added to the mix" in making the ultimate determination of probable cause.[222] Reliance is here placed on *Spinelli v. United States*[223] which, however, involved the use of information from a known informant, alleged to be reliable, whose information was unsubstantial in itself to establish probable cause because of its conclusory nature and for want of factual allegations establishing his reliability.[224]

Finally, note should be taken of the argument in dissent that the arresting officer "candidly admitted he had no reasonable information on which to base an arrest,"[225] that he was simply "playing a hunch." The argument runs that if the officer himself did not believe he had probable cause, it does not behoove the court to hold he did. However, it is submitted that the answer here is not as simple as the dissent would suggest. On one hand, it is unquestionably the case that the good faith of the officer is immaterial in determining whether he had probable cause to support an arrest[226] —it is a matter of objective determination. There is some confusion as to the validity of an arrest where the officer concedes that he did not believe that he had probable cause at the time he made the arrest, but the court, objectively examining the facts, concludes that he did. In *Carroll v. United States*,[227] the United States Supreme Court said,

> The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony.[228]

This language may be construed to mean not only that probable cause must objectively exist but further that the officer must have acted in good faith, and at least one court has so held.[229] On the other hand *Terry v. Ohio*[230] suggests that the existence of probable

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222. *See also* United States v. Canty, 297 F. Supp. 853 (D. D.C. 1969).
223. 393 U.S. 410 (1969). *See* text accompanying notes 246-53 *infra*.
224. *See* United States v. Barnett, 407 F.2d 1114 (6th Cir. 1969), for a more appropriate use of *Spinelli* in this context.
225. 443 S.W.2d at 688.
226. Director of General Railroads v. Kastenbaum, 263 U.S. 25, 27-28 (1923); Henry v. United States, 361 U.S. 98, 102 (1959); Terry v. Ohio, 392 U.S. 1 (1968).
227. 267 U.S. 132 (1925).
228. *Id.* at 156.
229. Winkle v. Kropp, 279 F. Supp. 532, 537 (D. Mich. 1968) ("The use of the 'prudent man test' . . . should not obscure the point that it is the belief of the officer which is being tested for its reasonableness. . . . In this case, the officer specifically denied having believed that any offense other than the traffic violation had occurred and stated no belief that a search of the trunk would disclose relevant evidence. Hence, the question of what a prudent man would have believed under the circumstances does not even arise."). *See also* Massachusetts v. Painten, 389 U.S. 560 (1968).
230. 392 U.S. 1 (1968).

cause is purely an objective question,[231] and this has been interpreted by one court to mean that the officer's subjective evaluation of his conduct is immaterial, even when he believes he is making an illegal arrest.[232]

It is futile to suggest that the *Greer* decision is correct or incorrect. It presents a not infrequent situation in which prudent men may differ. The unqualified success of the officer in his conclusion that Greer was the guilty party may be attributed to excellent police work and warrant commendation in the form of sustaining the validity of the arrest. Yet the admonition of the dissent is worthy of constant recognition:

> The fact that this time the hunch paid off should not blind us to the fact that many such hunches would prove worthless and subject many innocent citizens to the type of harassment forbidden by the Fourteenth Amendment to the United States Constitution.[233]

2. *Effect of an Illegal Arrest.* An illegal arrest, that is, an unreasonable seizure of the person, is unquestionably a violation of the fourth amendment.[234] Yet, it is equally clear that an illegal arrest without more does not constitute reversible error.[235] The explanation

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231. "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of these charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Id. at 21-22.

232. Klinger v. United States, 409 F.2d 299, 304 (8th Cir. 1969) ("Because probable cause for an arrest is determined by objective facts, it is immaterial that Kisecker, at the hearing on the motion to suppress, testified that he did not think that he had 'enough facts' upon which to arrest Klinger for armed robbery. His subjective opinion is not material.").

233. 443 S.W.2d at 688.

See also the yet-unreported case, Tolden v. State, 5 CRIM. L. REP. 2088 (Tenn. Crim. App., April 16, 1969), where Galbreath, J., the dissenter in *Greer*, spoke for the court in holding the information received from an informant inadequate to support an arrest. There the information received was that an "old model green Buick" would pass through a given intersection, driven by a Negro male with a physical defect, and that the automobile would contain two or three gallons of illegal liquor. "It is apparent that any colored man driving an old green Buick automobile through the intersection while the officers were there would have been arrested. Although the officers recognized the defendant when he did appear, they had no information as to his identification while they waited. To permit such tactics would subject countless innocent people to harassment and would be violative of the Fourth Amendment."

234. Albrecht v. United States, 273 U.S. 1 (1927); Giordenello v. United States, 357 U.S. 480 (1958); Henry v. United States, 361 U.S. 98 (1959).

235. Ker v. Illinois, 119 U.S. 436 (1886). *See* Annot., 96 A.L.R. 982 (1935).

for these seemingly contradictory principles rests on the fact that judgments are reversed because of unfairness in the trial. An illegal arrest does not in and of itself affect the fairness of the trial.[236] It may, of course, affect it in the sense that the defendant might otherwise never have been caught, and thus the court would not have gained jurisdiction of the case, but the courts have never deemed this argument persuasive.[237] Were it accepted, the result would be either that because of this illegal arrest the defendant is now immune from prosecution, a conclusion with little to recommend it, or the defendant must be released and re-arrested in a legal manner. But where we are considering cases at the appellate level, this would seem a singularly pointless ritual—if the prosecution has presented a case strong enough to convict, it is patently obvious that they now have and have had at some point along the way adequate probable cause to make a legal arrest. Thus the defendant could be re-arrested at the very moment he received his liberty.[238] The want of significance of an illegal arrest for purposes of appellate review was acknowledged in *Manier v. Henderson*.[239]

More serious constitutional problems arise, however, when the defendant claims the use of the "fruits" of his illegal arrest at his trial.[240] A question of this variety came before the United States Supreme Court in *Davis v. Mississippi*.[241] The "fruits" in this case was a set of fingerprints introduced at the trial of the defendant for rape. The defendant had been taken into custody along with twenty-four others following the crime, briefly interrogated and fingerprinted. The Court had no difficulty in finding that the detention amounted to an illegal

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236. "When the Court is asked to reverse a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial." Stroble v. California, 343 U.S. 181, 197 (1952).

237. "[I]n criminal cases the interests of the public override that which is, after all, a mere privilege from arrest." *Ex parte* Johnson, 167 U.S. 120, 126 (1897). *See also* Mahon v. Justice, 127 U.S. 700 (1888); Cook v. Hart, 146 U.S. 183 (1892); Lascelles v. Georgia, 148 U.S. 537 (1893); Frisbie v. Collins, 342 U.S. 519 (1952).

238. One would be hard pressed to find a more convincing statement of probable cause than that the defendant has been convicted of the crime for which he is being arrested in a trial free of error.

239. 442 S.W.2d 281 (Tenn. Crim. App. 1969). The court's statement, "There is no constitutional immunity from an unlawful arrest (*Id.* at 282)," is misleading. As previously indicated, there is here a constitutional deprivation; it is simply viewed as a form of harmless error. *See also In re* Lollis, 291 F. Supp. 615 (E.D. Tenn. 1968); State v. Johnson, 216 Tenn. 531, 393 S.W.2d 135 (1965); State v. State, 219 Tenn. 80, 407 S.W.2d 165 (1966).

240. The most notorious case is Wong Sun v. United States, 371 U.S. 471 (1963). *See generally* Maguire, *How to Unpoison the Fruit—the Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307 (1964).

241. 394 U.S. 721 (1969).

arrest. It required no elaboration to demonstrate that the fingerprints were "tainted" by the illegal arrest and therefore the judgment was reversed. One argument raised in dissent was analogous to the simple illegal arrest rationale—since the fingerprints could now legally be obtained, any error should be deemed harmless. However, from the perspective of the effect of the error on the trial of the defendant, it was clearly *not* harmless, being crucial to placing the defendant at the scene of the crime.

E. *Search and Seizure*

1. *Search Warrants.* In 1964 in *Aguilar v. Texas*[243] officers sought the issuance of a search warrant with an affidavit which read in material part as follows:

> 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.[244]

The petitioner, who was convicted of the illegal possession of heroin, challenged the validity of the search warrant. The United States Supreme Court held that the search warrant was invalid as it was based on the "mere conclusion" of the officer and in effect removed from the magistrate the prerogative of making an independent judgment of the facts alleged to determine if probable cause to issue the warrant existed.[245]

The *Aguilar* problem arose again in *Spinelli v. United States,*[246] wherein the Court deemed it "desirable that the principles of *Aguilar* should be further explicated." In *Spinelli* the affidavit contained essentially the following allegations:

> (1) The FBI had kept a surveillance of the suspect's movements on five days, during which time he was observed to cross two bridges and park in a lot used by an apartment house. On one occasion he was observed to enter a particular apartment.

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242. "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'." *Id.* at 726-27.

243. 374 U.S. 108 (1964).

244. *Id.* at 109.

245. Followed in United States v. Ventresca, 380 U.S. 102 (1965). *See also* Byars v. United States, 273 U.S. 28 (1927); Grau v. United States, 287 U.S. 124 (1932).

246. 393 U.S. 410 (1969).

(2) The apartment in question was known to contain two telephones.

(3) The suspect was known to be "a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

(4) The FBI had "been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones."

In holding the affidavit insufficient the Court found that (1) and (2) reflected no incriminating actions at all.[247] Nor was the fact that the suspect was "known" to be a gambler of significance in determining probable cause.[248] The only remaining basis for the issuance of the warrant, then, was (4). It was the position of the government that the informant's tip, corroborated by the aforementioned information, established probable cause for the issuance of the search warrant.

The Court was of the opinion that the tip must first be evaluated in and of itself. If it, standing alone, did not satisfy the requirements of *Aguilar,* then the Court would determine if the cumulative affect of the corroboratory data established probable cause. Even at this point, however, *Aguilar* provided the guide for the determination of adequacy. As the Court formulated the test:

> Can it fairly be said that his tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's test without independent corroboration?[249]

As regards the first consideration, it was clear that the tip standing alone would not afford adequate grounds for the issuance of the

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247. "Spinelli's travel to and from the apartment building and his entry into a particular apartment on one occasion could hardly be taken as bespeaking gambling activity; and there is surely nothing unusual about an apartment containing two separate telephones." *Id.* at 414.

248. "[A] bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." *Id. See also* Beck v. Ohio, 379 U.S. 89, 91 (1964); Carroll v. United States, 267 U.S. 132, 174 (1925) (McReynolds, J., dissenting); Clay v. United States, 239 F.2d 196, 199 (5th Cir. 1956), *cert. denied,* 355 U.S. 863 (1957).

249. *Id.* at 415. "*Aguilar* is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long standing principle that probable cause must be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, 333 U.S. 10, 14 . . . (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which — even when partially corroborated—is not as reliable as one which passes *Aguilar's* requirements when standing alone." Id. at 415-16.

warrant for want of any allegation as to the informant's reliability.[250] Furthermore, the Court held, "[t]he tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation."[251] Thus not only may a warrant not be issued on the mere conclusion of the officer requesting the warrant, as in *Aguilar*; it likewise may not be issued on the mere conclusion of the reliable informant. Either the informant must indicate how he came about his information, or the criminal activity must be described "in sufficient detail so that the magistrate will know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."[252] On the basis of this standard the tip alleged in the *Spinelli* case was clearly inadequate to establish probable cause, nor were the corroborating allegations sufficient to establish reliability.[253]

Several subsequent sixth circuit decisions have involved the application of *Spinelli*.[254] In *United States v. Kidd*[255] the officer alleged that the informant had "proved to be reliable on many occasions in the immediate past," and on this occasion had advised him that he had seen moonshine whiskey in the possession of the defendant. The court, noting the desirability of encouraging officers

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250. *See generally* Draper v. United States, 358 U.S. 307 (1959); Jones v. United States, 362 U.S. 257 (1960); Ker v. California, 374 U.S. 23 (1963); McCray v. Illinois, 386 U.S. 300 (1967); Recznik v. City of Lorraine, 393 U.S. 166 (1968).

251. 394 U.S. at 416. *And see* Justice White concurring: "If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2) the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the officer, who is to judge the existence of probable cause. . . . With respect to (3), where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hearsay." *Id.* at 423-24.

252. *Id.* at 416. *Cf.* Jones v. United States, 362 U.S. 257 (1960), where allegations were based on personal observations of the informant.

253. The Court compared the present case with Draper v. United States, 358 U.S. 307 (1959), which it refered to as "a suitable benchmark." There, the Court felt, the corroborating information was far more extensive that that in the present case. In a concurring opinion, Justice White was convinced that the *Nathanson* and *Aguilar* decisions (and implicitly the present decision) were irreconciable with the *Draper* decision, and the subject was in need of a "full scale reconsideration." *Id.* at 429. Justice Black offered a vigorous dissent in which he reiterated his dislike for the *Aguilar* decision and contended that the present holding was even worse. Justices Fortas and Stewart also dissented.

254. *See also* United States v. Harris, 412 F.2d 796 (6th Cir. 1969).

255. 407 F.2d 1316 (6th Cir. 1969).

to obtain warrants,[256] concluded that the affidavit was sufficient.[257] *DiPiazza v. United States*[258] held that it is unnecessary to establish the reliability and credibility of the informant where there is sufficient probable cause for the issuance of the warrant independent of the tip, and this is true even if the tip was the initiating factor in the investigation. In *United States v. Nolan*[259] the court held that when two affidavits for search warrants relating to the same criminal activity are filed contemporaneously, the validity of either warrant will be sustained if the two affidavits read together satisfy the *Aguilar-Spinelli* standard.[260]

One consideration in the determination of probable cause to issue a search warrant that is absent in the determination of probable cause to issue and arrest warrant is timeliness. While an affidavit seeking an arrest warrant is required to establish the probability of a past fact, that is, the commission of a crime, that will not change with the passage of time, an affidavit for a search warrant alleges a present fact, that is, the probability of the presence of specified items at a given location at the time the warrant is sought. This is, of course, a fact that is subject to change, and therefore the lapse of time between the facts alleged in the affidavit and the time of filing the affidavit is a material factor in the determination of whether the warrant should issue.[261] The recent decision of *Franklin v. State*[262] held that an interval of seventeen days did not preclude a finding of probable cause for the issuance of the warrant, although the court acknowledged that "[t]he nearer the time of the application for the

256. *See also* United States v. Bowling, 351 F.2d 236 (6th Cir. 1965).

257. It may be argued that a "mere conclusion" as regards the informant's reliability is no more acceptable than a "mere conclusion" as regards the commission of the crime. *See, e.g.*, United States v. Perry, 380 F.2d 356, 358 (2d Cir. 1967), *cert. denied*, 389 U.S. 943 (1967). ("[I]t would be better practice if affidavits also contained statements of the length of time the agent had known and dealt with the informant and the approximate number of times information had been received from the informant."); Edmondson v. United States, 402 F.2d 809 (10th Cir. 1968). *Cf.* United States v. Eisner, 297 F.2d 595 (6th Cir. 1962); Price v. State, 254 A.2d 219 (Md. App. 1969).

258. 415 F.2d 99 (6th Cir. 1969).

259. 413 F.2d 850 (6th Cir. 1969).

260. The court was somewhat bothered by the fact that in reference to the challenged warrant the issuing magistrate indicated that he had considered the affidavit (not affidavits) of the officer, but concluded, "the exclusionary rule was not designed to correct the administrative errors of a United States Commissioner." *Id.* at 854. *See also* Commonwealth v. Saville, 353 Mass. 458, 233 N.E.2d 9 (1968).

261. *See* Sgro v. United States, 287 U.S. 206 (1932); Annots., 162 A.L.R. 406 (1946), 100 A.L.R.2d 525 (1965).

262. 437 S.W.2d 260 (Tenn. Crim. App. 1968).

search warrant the more effective it is to justify a conclusion of probable cause."[263]

2. *Incident to Arrest.* Unquestionably the most significant decision by the United States Supreme Court during the past year, in terms of practical impact on law enforcement and the rights of the accused, was *Chimel v. California*.[264] The petitioner was arrested at his home pursuant to a warrant for the burglary of a coin shop and the officers proceeded to carry out a search of the premises incident to the arrest. "[T]he officers then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop."[265] A number of items were seized in the search which lasted between forty-five minutes and an hour. Quoting language from *Terry v. Ohio*[266] that "the police must whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,"[267] the Court concluded that the present search was unreasonable. The constitutional restrictions on searches incident to arrest were enunciated thus:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might search in order to grab a weapon or evidentiary items must of course, be governed by a like rule.[268]

Any warrantless search incident to an arrest which proceeds beyond these limitations is constitutionally unreasonable.[269] In so concluding the Court departed from a long line of precedent[270] which had made the warrantless search incident to an arrest the most useful of police investigative tools.[271]

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263. *Id.* at 262. *See also* Waggener v. McCanless, 183 Tenn. 258, 191 S.W.2d 551 (1946).
264. 395 U.S. 752 (1969).
265. *Id.* at 754.
266. 392 U.S. 1 (1968).
267. *Id.* at 20.
268. 395 U.S. at 762-63.
269. "There is no comparable justification . . . for routinely searching rooms other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in the room itself." *Id.* at 763.
270. Notably, Harris v. United States, 331 U.S. 145 (1947) and United States v. Rabinowitz, 339 U.S. 56 (1950).
271. It may be anticipated that efforts will be made by lower courts to mitigate against the strict application of *Chimel*. *See, e.g.*, Scott v. State, 256 A.2d 384 (Md. App. 1969), where the court interprets within "reach" to mean within "lunge."

Two other cases decided by the Court on the same day as *Chimel* are worthy of note. In *Von Cleef v. New Jersey*,[272] incident to an arrest the officers searched the entire sixteen-room house in which the petitioners lived for some three hours, seizing several thousand articles. The Court found the search unreasonable under the pre-*Chimel* standard.[273] In *Shipley v. California*[274] the petitioner was arrested as he alighted from his car which he parked fifteen or twenty feet from the house. After searching him and the car, the officers then entered the house and searched it.[275] Again, the Court held that this search could not be justified an incident to the arrest under pre-*Chimel* standards.[276]

3. *Consent.* An exception to the requirement of search warrants is found in those cases where valid consent was given by the party in interest to the search,[277] and consent given by a co-occupant of the premises having equal access to the area searched may effectively waive the rights of the defendant.[278] In *Frazier v. Cupp*,[279] the United States Supreme Court was faced with a challenge to the effectiveness of consent given by the petitioner's cousin for the search of a duffel bag jointly used by the two. It was the contention of the petitioner that his cousin only had the use of one compartment of the duffel bag and therefore lacked the consent to a search of other compartments. The Supreme Court declined to "engage in such metaphysical subtleties" in determining the validity of the search and held the consent valid.

4. *Hot Pursuit.* A warrantless search may be held reasonable where officers are in "hot pursuit" of a suspect.[280] Such a situation was presented in *United States v. De Bose*.[281] Following a bank robbery, an officer was trailing an automobile which he suspected as being stolen, not having associated it with the robbery. When the car was parked, the officer stopped nearby, intending to check the license

272. 395 U.S. 814 (1969).
273. *See* Kremen v. United States, 353 U.S. 346 (1957).
274. 395 U.S. 818 (1969).
275. A previous search of the house, not in issue here, was made with the consent of the petitioner's wife.
276. "[T]he Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person *outside* his home and then take him inside for the purpose of conducting a warrantless search." *Id.* at 820.
277. *See 1968 Survey* at 245-47. *And see* Lloyd v. State, 440 S.W.2d 797 (Tenn. Crim. App. 1969).
278. *See generally* Annot., 31 A.L.R.2d 1078; Comment, 70 DICK. L. REV. 510 (1966); Comment, 1967 WASH. U. L. Q. 12.
279. 394 U.S. 731 (1969).
280. *See* Warden v. Hayden, 387 U.S. 294 (1967).
281. 410 F.2d 1273 (6th Cir. 1969).

to determine if it was stolen. One of the occupants thereupon fired two shots at the officer. The officer returned the fire, and the two suspects fled down an alley. When other officers arrived at the scene, they were told by a bystander that the men had entered a rooming house through a back door. The house was then thoroughly searched, but the suspects were not found, nor was any evidence seized. The identity of one of the suspects was determined by this search, however. While conceding that nothing seized at this time was introduced in evidence, the defendant contended that the fruits of the search led the officers to other evidence. Noting that there was no specification of just what these fruits of the search were, the court held that it made no difference, as the search was reasonable since the officers entered the premises in "hot pursuit" to search for the suspects or their weapons.

5. *Vehicle Search.* Searches of vehicles have received exceptional treatment in terms of fourth amendment reasonableness. *Carroll v. United States,*[282] a case decided during the prohibition era, held that a warrantless search of a vehicle was reasonable where officers had probable cause to believe it contained contraband. It is frequently noted that the inherent mobility of the vehicle may justify prompt action by the officer.[283] Warrantless searches continue to be approved in situations analogous to *Carroll.*[284]

Where a search of a vehicle is justified as incident to an arrest, there must be first, a relationship between the subject of the arrest and the search and second, contemporaniety of the search to the arrest. A search failed in regard to both requirements in the 1963 decision, *Preston v. United States.*[285] There the suspects were arrested for vagrancy and after they were taken to jail their automobile was searched, as a result of which burglarly paraphernalia was found in the trunk. The Court held the search unreasonable because the arrest had been accomplished long before the search occurred, and furthermore, as there are no fruits or instrumentalities of the crime of vagrancy, no search could be reasonably justified as incident thereto, other than that necessary for the protection of the arresting officer. *Preston* is frequently distinguished where there is a closer proximity between arrest and search, and the search would have been reasonable

282. 267 U.S. 132 (1924).
283. *See* Preston v. United States, 376 U.S. 364 (1964); United States v. Barnett, 407 F.2d 1114 (6th Cir. 1969) (dicta).
284. United States v. Buckner, 296 F. Supp. 121 (E.D. Tenn. 1968); United States v. Thompson, 409 F.2d 113 (6th Cir. 1969).
285. 376 U.S. 364 (1963).

had it been immediately consummated.[286] In *Alvey v. State*[287] the defendants were arrested in their automobile four blocks from a burglarized drug store, in front of which the vehicle had been seen parked. They were placed in a police car and returned to the scene of the burglary. The court found the search of the automobile some twenty-five minutes later reasonable.

It is not clear what effect, if any, *Chimel v. California*[288] has on the vehicle search cases. While *Chimel* expressly acknowledged the continued vitality of *Carroll*,[289] the impact on *Preston*-type searches is uncertain. *Colosimo v. Perini*[290] would appear to be the first case to deem the *Chimel* decision germane to vehicle searches with the result that reasonable contemporaniety is not enough to validate the search.[291]

A further justification for the warrantless search of a vehicle was recognized in a 1966 decision, *Cooper v. California*.[292] There, contemporaneous with an arrest for narcotics violations, the police took a vehicle used in the offense into custody. The seizure was authorized by statute because the vehicle was subject to forfeiture. At a later time an inventory was made of the contents of the car, and evidence of a wholly unrelated crime was discovered. The Court held that since the police has lawful custody of the vehicle, an inventory of its contents was reasonable. Analogously, in *United States v. Kucinich*,[293] where the defendants had been arrested for the theft of an automobile and officers took possession of the automobile on behalf of the owner, the search of the vehicle was reasonable.

6. *Standing to Object.* The right protected by the fourth amendment is a personal right,[294] and therefore in order to object to the admission of illegally seized evidence, the defendant must show that

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286. United States v. Barnett, 407 F.2d 1114 (6th Cir. 1969).
287. 443 S.W.2d 518 (Tenn. Crim. App. 1969).
288. 395 U.S. 752 (1969). *See* text accompanying notes 264-76 *supra*.
289. "Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.'" *Id.* at 764 n.9 (citing *Carroll*).
290. 415 F.2d 804 (6th Cir. 1969).
291. "With the person, or persons, suspected of crime and the automobile to be searched both in police custody, the precipitous action of a warrantless search is no longer justified. It is true that in *Preston* the vehicle was searched at a point away from the scene of arrest, while here the vehicle remained at the place where the defendant was arrested. *Chimel*, however, persuades us that such factual distinction is not of controlling importance." *Id.* at 806.
292. 386 U.S. 58 (1966).
293. 404 F.2d 262 (6th Cir. 1968).
294. *See* Agnello v. United States, 269 U.S. 20, 35 (1925).

he had some interest in the property seized[295] or the premises searched.[296] The defendant will be held to fall within the first category if the offense with which he is charged is the possession of the very evidence he claims was illegally seized.[297] To come within the second category it is not essential that the defendant have a property interest in the premises. "Anyone legitimately on premises where a search occurs may challenge its legality."[298] A different result will be reached where the court concludes the suspect did not qualify as a "guest" or "invitee" at the time of the search. Thus in *United States v. Gregg*[299] the defendant was held to lack standing to object to a search of a closet in an unrented motel room where he was found hiding, and in *United States v. Kucinich*[300] the defendant would not be heard to object to the search of the trunk of an automobile he had stolen after the vehicle had been retaken by the police on behalf of the owner.[301]

F. *Right to Counsel*

1. *Determination of Indigency.* A corollary to the right to counsel guaranteed by the sixth amendment is the right to the use of other legal mechanisms designed to insure due process of law. Specifically, in *Griffin v. Illinois,*[302] the United States Supreme Court held that if a state made trial transcripts available to those able to afford them for the preparation of an appeal, transcripts must be provided by the state to an indigent defendant. This constitutional standard has been implemented by statute.[303] While there is no specific language indicating how eligibility for the benefits of the statute is to be determined, *Elliott v. State*[304] held that upon application for a free transcript it

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295. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

296. *See* Jones v. United States, 362 U.S. 257 (1960); Mancusi v. DeForte, 392 U.S. 364 (1968).

297. Jones v. United States, 362 U.S. 257 (1960). *Followed* in Colosimo v. Perini, 415 F.2d 804 (6th Cir. 1969).

298. Jones v. United States, 362 U.S. at 267. *See also* United States v. Jeffers, 342 U.S. 48 (1951).

299. 403 F.2d 222 (6th Cir. 1968).

300. 404 F.2d 262 (6th Cir. 1968).

301. The question of standing to object to evidence obtained by means of electronic eavesdrop was considered in Alderman v. United States, 394 U.S. 165 (1969), the Court concluding that a party would have standing if he was a participant in the overheard conversation or if the conversation took place on his premises, even if he were not himself a participant.

302. 351 U.S. 12 (1956).

303. TENN. CODE ANN. §§ 40-2037, 40-2040 (Supp. 1969).

304. 435 S.W.2d 812 (Tenn. 1968).

is the duty of the trial judge to conduct a hearing to determine indigency.[305]

2. *"Jailhouse Lawyers."* In *Johnson v. Avery*[306] the petitioner, an inmate in the Tennessee State Penitentiary, had been active in assisting fellow inmates in the preparation of pleadings to attack judgments. Because the practice was in violation of a prison regulation,[307] the petitioner had been transferred to the maximum security building and denied access to law books and a typewriter. A federal district court held that the regulation was void because it effectively prevented illiterate inmates from seeking federal habeas corpus.[308] The court of appeals reversed, holding that the regulation was a legitimate device for the maintenance of prison discipline, notwithstanding the incidental effect it might have on others in attempting to attack these convictions.[309] The United States Supreme Court reversed the decision of the court of appeals and remanded the case for further proceedings. Recognizing the fundamental importance of the writ of habeas corpus,[310] the Court concluded that the regulation in question as effectively denied illiterate prisoners of the opportunity to file habeas corpus petitions as if they had simply been prohibited from doing so.

The *Johnson* case does not hold that the petitioner had the right to practice law; the Court simply said that under the circumstances alleged allowing the petitioner to provide assistance to inmates was the only means of assuring the protection of their rights.[311] "[U]nless and until the State provides some reasonable alternative to assist in-

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305. There are no constitutional guidelines as to what constitutes indigency. The unreported case, Johnson v. State, 4 CRIM. L. REP. 2342 (Tenn. Crim. App., Jan. 8, 1969), held that the ability of the defendant to post bond did not preclude a finding of indigency.

306. 393 U.S. 483 (1969).

307. "No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs." *Id.* at 484.

308. Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966).

309. Johnson v. Avery, 382 F.2d 353 (6th Cir. 1967).

310. Bowen v. Johnston, 306 U.S. 19, 26 (1939).

311. This is a curious aspect of the case. The petitioner is given relief on the allegation of a deprivation of rights of others. It would seem that the proper case would be brought by an inmate who was himself prejudiced by the regulation. But the very nature of the problem renders such a case impossible—once a petitioner has gotten before a court he has thereby repudiated the need for the "jailhouse lawyer."

mates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue."[312]

3. *Effective Assistance.* With the right to counsel, at least in felony cases, now firmly established,[313] increasing attention is being directed to the quality of assistance a defendant receives.[314] The right of effective assistance of counsel clearly does not entitle an indigent to demand that a particular attorney be appointed to represent him.[315] While a case for ineffective assistance may be established by a lack of adequate time to prepare the case,[316] it is requisite that the defendant demonstrate actual prejudice.[317] Rarely will a court find ineffective assistance of counsel where the defendant's complaint extends to matters of trial strategy. In *Hayes v. Russell,*[318] the court held that it would have to be demonstrated that what "was done or not done by the attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court."[319] Tennessee courts have repeatedly taken the position that where the defendant retained his own counsel, he will not be heard to complain of ineffective assistance, because no state action is involved.[320]

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312. 393 U.S. at 490. An interesting potential issue in respect to the effective assistance of counsel (*see* text accompanying notes 313-32, *infra*) is presented by the decision. Suppose an inmate avails himself of the services of his "jailhouse lawyer," and his efforts are unsuccessful. Might he subsequently claim ineffective assistance of counsel, contending that the services of an untrained, unlicensed, convicted felon, ineligible for the bar, could hardly be deemed adequate. The problem may be complicated by the added factor that the "jailhouse lawyer" is *retained* rather than *appointed* counsel. *See* text accompanying note 320 *infra*.

313. Gideon v. Wainwright, 372 U.S. 335 (1963).

314. *See 1968 Survey* at 250-51.

315. United States v. Murphy, 413 F.2d 1129 (6th Cir. 1969). *See also* Raullerson v. Patterson, 272 F. Supp. 495 (D. Colo. 1967).

316. *See 1968 Survey* at 250.

317. United States v. Sisk, 411 F.2d 1192 (6th Cir. 1969). *See also* State *ex rel.* Edmondson v. Henderson, 220 Tenn. 605, 421 S.W.2d 635 (1967).

318. 405 F.2d 859 (6th Cir. 1969).

319. *Id.* at 860. *See also* O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961). In Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965), such a failure was found where counsel failed to file a written plea of not guilty by reason of insanity, thereby creating a conclusive presumption of sanity and then attempted to establish the defense at trial.

320. State *ex rel.* Jennings v. Henderson, 443 S.W.2d 835 (Tenn. Crim. App. 1969); Morgan v. State, 445 S.W.2d 477 (Tenn. Crim. App. 1969). *See 1968 Survey* at 251.

But see Williamson v. State, 6 CRIM. L. REP. 2141 (Tenn. Crim. App., Oct. 16, 1969): "The trial court dismissed the habeas corpus petitions largely on the ground that retained counsel's misrepresentations are not 'state action' against which relief can be granted. This is not a sufficient ground for rejecting the petition. We are impressed by the rule of Rice v. Davis, 336 S.W.2d 153 (Ky. 1963), that a defendant can be as much prejudiced by ineffective assistance of retained counsel as by that of appointed counsel."

A unique assistance of counsel issue was raised in *United States v. Smith*.[321] The defendant was adequately represented by appointed counsel up to the point of the return of the jury verdict. At this time, some two days after the jury had begun deliberations, the court was advised that counsel for the defendant was ill and could not be present in court. The trial judge nevertheless called upon the jury for their verdict, which was guilty. The issue, apparently never previously considered in the Sixth Circuit, was whether the involuntary absence of defense counsel at the time of the return of the jury verdict was a denial of the sixth amendment right to counsel. Authority from other jurisdictions was in conflict. Two fifth circuit decisions held the absence of counsel to be inconsequential;[322] a tenth circuit holding viewed the matter as reversible error.[323]

Relying on *United States v. Wade*,[324] the court concluded that the defendant had been denied the effective assistance of counsel. The *Wade* decision recognized the right to counsel at a lineup identification because it was a critical stage in the proceedings. The court here held that the return of the verdict was equally critical.[325] Addressing itself to the nature of the potential prejudice inherent in the situation, the court noted that the fact that the trial judge had polled the jury did not eliminate the possibility of assistance from counsel.

> From a reading of the record it is impossible to determine the tone of voice of the jurors when they individually announced their decision, the hesitancy of their responses, and other possibilities that could have taken place and had significant meaning. Had counsel been present and something of this nature occurred, the defendant would have had the benefit of his legal advice.[326]

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321. 411 F.2d 733 (6th Cir. 1969).

322. Kent v. Sanford, 121 F.2d 216 (5th Cir. 1941), *cert. denied*, 315 U.S. 799 (1949); Martin v. United States, 182 F.2d 225 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950). Both of these cases involved the "voluntary" absence of counsel, a distinction which is underlined by the court in the principal case. However, the difference would seem immaterial, since it is the *defendant's* right we are concerned with. Once it is determined that the rendering of the verdict is a "critical stage" in the proceeding, unless there is a waiver by the defendant himself the circumstances surrounding the absence of counsel would seem irrelevant.

323. Thomas v. Hunter, 153 F.2d 834 (10th Cir. 1946).

324. 388 U.S. 218 (1967). *See text* accompanying notes 333 *et seq. infra*.

325. "To consider the point of the proceedings as 'non-critical' is to take an unrealistic view of a criminal prosecution. Little imagination is required to foresee situations in which the rights or the position of the accused could be prejudiced by failure to have the 'guiding hand of counsel' at the moment when the jury returns its verdict." 411 F.2d at 736.

326. *Id.* at 736-37. In the only related United States Supreme Court decision, Frank v. Mangum, 237 U.S. 309 (1915), the defendant and his counsel were advised to leave the court room prior to the rendering of the verdict because of

In *United States v. Long*[327] three defendants were represented by the same appointed counsel and all were convicted of escaping from a federal correctional institution.[328] It was argued on appeal that they had been denied effective assistance of counsel by not each having separate counsel for his defense. The court held that the assignment of a single counsel to represent co-defendants was not prejudicial unless an actual conflict of interest could be shown.[329] The fact that counsel directed his efforts primarily to the establishment of a defense for one of the three defendants was not persuasive in view of the fact that this defendant "was the only one of his clients who had any semblance of defense."[330] Finally, it was argued that while it was in the interest of one of the defendants to testify, this was in conflict with the interests of the other two defendants as it made possible the introduction of an out-of-court statement by the testifying defendant which was incriminating as to the other defendants.[331] The court was unimpressed by this argument, holding that even if the testifying defendant had not taken the stand and the out-of-court statement had still been introduced, the evidence against them was so overwhelming as to render the error harmless.[332]

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potential mob violence. The Court found it unnecessary to consider the issue here presented, because the matter had not been raised in a motion for a new trial.

In a recent decision, Miolen v. State, 6 CRIM. L. REP. 2081 (Tenn. Crim. App., Sept. 26, 1969), the court held, "While it is true that it is unnecessary for the trial court to appoint counsel to represent a petitioner in a habeas corpus case where the petition shows on its face that the petitioner is not entitled to any relief . . . it is otherwise where an evidentiary hearing is required."

327. 415 F.2d 307 (6th Cir. 1969).

328. 18 U.S.C. § 751 (1964).

329. *See* United States v. Berriel, 371 F.2d 587 (6th Cir. 1967), cited by the Court.

330. 415 F.2d at 308. *Cf.* Holland v. Boles, 225 F. Supp. 863 (N.D. W. Va. 1963).

331. *See* Bruton v United States, 391 U.S. 123 (1968), *and see* text accompanying notes 197 *et seq. supra.*

332. *See* Harrington v. California, 395 U.S. 250 (1969), *and see* text accompanying notes 206-08, *supra.*

See also the following, yet-unreported decisions: Burris v. State, 5 CRIM. L. REP. 2101 (Tenn. Crim. App., March 25, 1969): "While an attorney has the duty to point out to a client the dangers inherent in a not guilty plea, it is doubtful if under any circumstances he should influence a client to plead guilty unless and until a free and voluntary admission of guilt is made to him in confidential consultation. If a defendant is not sincere enough in his averments of guilt to acknowledge his misdeeds to his own attorney, then he should not be urged to make such an admission to the court, a completely impartial tribunal. Counsel for the defendant was an officer of the court and he should have made known to the court the fact that the defendant was insisting on his innocence by pleading guilty only because of a fear engendered by the attorney that a more severe penalty would probably be meted out after a full trial. The trial court could not and would not have accepted a plea of guilty if aware the defendant was not sincere in the plea." This case involved a juvenile. There is no in-

4. *Lineups.* In *United States v. Wade*,[333] decided in 1967, the United States Supreme Court held that since a pretrial identification lineup is a "critical stage of the prosecution," a suspect is protected by the right to counsel under the sixth amendment during such a proceeding.[334] Among the more interesting possibilities raised by the *Wade* and *Gilbert* decisions is this: Suppose the police believe *X* to be the perpetrator of a robbery and desire an identification by the victim. *X* is asked if he wishes to have an attorney at a lineup, and he responds in the affirmative. The victim comes to the station, and *X, Y* and *Z* are presented in a lineup, with *X*'s attorney observing. The victim exclaims, "You caught him alright. It's *Z*." There is no attorney present representing Z. Does the presence of *X*'s attorney adequately protect *Z*'s rights, or must the police either avoid putting anyone in the lineup who could conceivably have committed the crime other than their prime suspect for whom counsel is allowed, or allow an attorney for every party appearing in the lineup? It may be observed that there is very little that counsel can do in this situation in any event.[335] At most, he stands as a witness of the fairness of the lineup procedure should any question be raised as to improper influence of the victim at a later time. On the other hand, it may be contended that what the Court is requiring is an *advocate,* not simply an impartial observer.[336] Beyond the availability of the attorney as a witness, should that become necessary, the presence of counsel is the best assurance of adequate confrontation of the accuser—victim or witness—when the identification is made at the trial.[337] The observer

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dication in this report whether counsel was appointed or retained.

Williams v. State, 4 CRIM. L. REP. 2436 (Tenn. Crim. App., Jan. 27, 1969): "It is not necessary to appoint counsel for every application [for a writ of habeas corpus]. If an application raises no claim cognizable in a post-conviction proceeding, it is not necessary to appoint counsel to determine solely if the applicant has some grounds not stated in his original application."

333. 338 U.S. 218 (1967). *See also* Gilbert v. California, 388 U.S. 263 (1967).

334. The *Wade* court, applying the test of Wong Sun v. United States, 371 U.S. 471 (1963), held that if the in-court identification had an "independent source," it would be admissible notwithstanding the improper lineup. 388 U.S. at 240.

335. *Cf.* Schmerber v. California, 384 U.S. 757 (1966), rejecting the right to counsel during the taking of a blood sample simply because counsel could serve no useful purpose.

336. "The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." 388 U.S. at 227. *Cf.* Anders v. California, 386 U.S. 738 (1967).

337. "Since it appears that there is grave potential for prejudice, intentional or not in the pretrial lineup, which may not be capable of reconstruction at the trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid . . . as at the trial itself.'" 388 U.S. at 236-37.

of the lineup should, therefore, have the perspective of attorney to client from the outset.[338]

Greer v. State,[339] presenting a less extreme case than the hypothetical above, clearly indicated that the loyalty of the attorney-observer to the participant in the lineup must be unequivocal. The two defendants were suspected as principals in a robbery. Both declined to waive their rights to an attorney at a lineup. *X* requested the presence of a named attorney. *Y* was then asked whom he wished, and, according to an officer, he replied that *X*'s attorney was acceptable to him. The requested attorney was present at the lineup; he knew *X* but did not know *Y* and was not told that he was expected to represent *Y*'s interests as well.[340] He observed nothing improperly suggestive in the lineup. After the lineup he advised *X* to make no statements but did not thereafter represent *X* or *Y* in the proceedings. While the identification of *X* at the trial was unassailable, the court held that in regard to *Y*, "an attorney was present at the lineup but not on his behalf,"[341] and therefore his courtroom identification, stemming from the lineup identification, was improper. Nor did the absence of any evidence of impropriety in the lineup procedure render the absence of counsel immaterial.[342]

The *Wade* standard is only applicable to identifications subsequent to its decision. However, according to *Stovall v. Deno*[343] pre-*Wade* lineup identifications may taint subsequent courtroom identification where the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."[344] Such a situation was found in *Foster v. California*,[345] where the petitioner was first put in a lineup with two men, both of whom were six or seven inches shorter than he, and when no positive identifi-

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338. The Court did leave a small loophole: "[W]e leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay." *Id.* at 237.

339. 443 S.W.2d 681 (Tenn. Crim. App. 1969).

340. "It is obvious . . . that this attorney did not consider that he represented Dunbar at the lineup." *Id.* at 685.

341. *Id.* at 686.

342. "A trial court reviewing a challenged pretrial confrontation is not to inquire whether that confrontation was conducted in a fair or unfair manner, but rather it is to inquire whether that confrontation occurred at a 'critical stage' of the prosecution. If so, regardless of the demonstrated fairness of the confrontation, if defense counsel is not present for an accused at the confrontation, identification testimony which is the fruit of that confrontation must be barred at trial." *Id.* at 686-87.

343. 388 U.S. 293 (1967).

344. *Id.* at 302.

345. 394 U.S. 440 (1969).

cation was made, he was placed alone face-to-face with the witness. The Court held this to be a compelling example of unfair lineup procedure.[346]

In *Black v. United States*[347] two witnesses of a robbery were taken to pre-trial hearings in Chicago to observe the suspects, without the knowledge of the latter, although they were accompanied by their counsel at the time. The court held the identifications were not unduly suggestive as the robbery had occurred in broad daylight, and the witnesses had had an opportunity to see the perpetrators at close range.

G. *Confessions*

1. *Involuntary.* While the focal point of most confession cases now centers on compliance with the *Miranda* standards,[348] it is still possible for a confession to be adjudged inadmissible because of involuntariness in fact, irrespective of the administering of the *Miranda* warnings.[349] Such was the case in *Townsend v. Henderson*,[350] where the defendant was charged with escape from a state prison farm. The confession was obtained while the defendant was in solitary confinement, suffering from a head wound received the previous day. The court found the confession to be involuntary, and suggested that the same result would be reached even if the defendant had first been advised of his right to counsel.[351]

2. *In Custody.* An essential requirement for the application of the *Miranda* protections is "custodial interrogation."[352] Much of the language in *Miranda* emphasized the coercive aura of the police sta-

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346. *Id.* at 443.

347. 412 F.2d 687 (6th Cir. 1969).

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

349. *See, e.g.*, Lyter v. State, 2 Md. App. 654, 236 A.2d 432 (1968); State v. Atkins, 466 P.2d 660 (Ore. 1968).

350. 405 F.2d 324 (6th Cir. 1968). This was a pre-*Miranda* case. The court agreed with defense counsel that the predecessor of *Miranda*, Escobedo v. Illinois, 378 U.S. 478 (1964), was applicable, but not decisive.

351. "Terry was faced with stark realities, not with the question of fringe benefits. In his world as viewed through the bars of his dark cell, the right to counsel was of secondary importance. His mind had to be on more pressing matters: how long would he be held in solitary confinement; when would he receive further medical treatment if that was required; when would his diet of bread and water be supplemented; and what additional punishment would be imposed on him. Since these were factors which Terry had to consider, they are also factors which must be considered by us in determining whether his confession was voluntary." 405 F.2d at 327-28.

352. Miranda v. Arizona, 384 U.S. 436, 458-465 (1966). *See* Humphreys, *Custodial Interrogation*, 35 TENN. L. REV. 604 (1968).

tion.[353] However, *Orozco v. Texas*[354] clearly established that *Miranda* was germane to interrogations transpiring even in the home of the suspect. Police arrived at the boarding house at which defendant lived at about four in the morning and arrested him for murder. Without being advised of his constitutional rights, the defendant was asked several questions and gave incriminating responses which were used against him. The Court held that the fact that the questioning took place on the bed of the defendant did not render the case distinguishable.

An absence of custody was held to render *Miranda* inapplicable in *United States v. Harris*,[355] where the defendant made incriminating statements to his parole officer, and *United States v. Norman*,[356] where the defendant made incriminating statements while voluntarily appearing before his draft board.[357]

3. *Right to Remain Silent.* Acknowledging the "absolute constitutional right to remain silent,"[358] the *Miranda* court in a significant footnote held that "[t]he prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."[359] The application of this mandate arose in *State v. Flanagan*,[360] where an officer testified that after the defendant talked on the telephone to his lawyer he declared, "Well, I'm not going to tell you anything further. I don't have anything to say." The court held that *Miranda* did not preclude the introduction of the statement relying on the words, "in the face of accusation."[361]

While the conclusion of the court is supported by a literal reading of this passage from *Miranda*, it is doubtful that the holding is reconcilable with the policy objective at stake. *Miranda* is simply

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353. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against interrogation or trickery." 384 U.S. at 461.

354. 394 U.S. 324 (1969).

355. 412 F.2d 471 (6th Cir. 1969).

356. 301 F. Supp. 53 (M.D. Tenn. 1968).

357. *Miranda* likewise has no application to spontaneous confession made in the absence of interrogation. United States v. DeBose, 410 F.2d 1273 (6th Cir. 1969).

358. Escobedo v. Illinois, 378 U.S. 478, 491 (1963).

359. Miranda v. Arizona, 384 U.S. 436, 468 n.37. Applied in United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969). *See 1969 Survey* at 253-54.

360. 443 S.W.2d 25 (Tenn. 1969). Noted in 37 TENN. L. REV. 644 (1970).

361. "The footnote sentence we think assails the situation where a defendant remains mute or asserts his right so to do when questioned about participating in criminal acts, a silence in the face of accusation or interrogation with respect to crime, from which an inference of guilt might be drawn." *Id.* at 26.

acknowledging the frequently applied principle that once a constitutional right is recognized a defendant should not be penalized for availing himself of that right.[362] In the present case, the defendant has done no more than assert his intended reliance on what is unquestionably a constitutional right. If that assertion is being used to suggest to the jury an inference of guilt, and there would appear no other reason for the eliciting of this testimony by the prosecution, then it would seem patently obvious that the defendant has been penalized for exercising the privilege against self-incrimination. The privilege and the *Miranda* mandate are not co-extensive, and the ability of the court to distinguish the case from certain language in that decision does not avoid the broader constitutional issue.[363]

4. *Harmless Error.* In *McClain v. State*[364] it was acknowledged by the court that statements had been obtained from the defendant without first properly advising her of her constitutional rights. While a written statement had been excluded by the trial court, an interrogating officer was permitted to testify as to her oral statements, which were of an exculpatory nature.[365] The court held that this evidence was improperly admitted, but as the defendant chose to take the stand and testified to the identical facts, the error was harmless. This would appear to be the first case in which a Tennessee court has held a *Miranda* error harmless. The court relied on *Hill v. United States,*[366] a case which is distinguishable as it involved the non-constitutional question of the admissibility of particular testimony of a witness. While holding, first, that the testimony was proper, the court further said there could be no prejudicial error in any event, since the defendant substantially repeated the testimony when he took the stand. This situation, unlike the present case, does not raise the issue of self-incrimination, unless the defendant contends that he would not have taken the stand had it not been necessary to rebut the evidence illegally

362. *See, e.g.,* Griffin v. California, 380 U.S. 609 (1965) (privilege against self-incrimination); Simmons v. United States, 390 U.S. 377 (1968) (protection against illegal search and seizure); United States v. Jackson, 390 U.S. 570 (1968) (right to trial by jury).

363. The failure to advise a suspect of his right to appointed counsel where he was not an indigent was held harmless error in Jackson v. State, 4 CRIM. L. REP. 2370 (Tenn. Crim. App., Jan. 24, 1969).

In the yet-unreported case, McGee v. State, 6 CRIM. L. REP. 2102 (Tenn. Crim. App., Oct. 2, 1969), the court held that the suspect effectively waived his rights by nodding his head. Galbreath, J., dissented.

364. 445 S.W.2d 942 (Tenn. Crim. App. 1969).

365. So intended, but not so taken by the jury or the appellate court. *See* prior discussion, text accompanying notes 106-08, *supra.*

366. 363 F.2d 176 (5th Cir. 1966).

introduced by the prosecution.[367] To date, relatively few cases have applied the harmless error rule to *Miranda* violations.[368]

5. *Application of Miranda to Retrials.* In *Jenkins v. Delaware*[369] the United States Supreme Court resolved a growing conflict in the lower courts[370] by holding that the *Miranda* standards were not applicable to re-trials where the first trial occurred prior to its decision, June 13, 1966.[371]

H. *Guilty Plea*

In *Boykin v. Alabama*[372] the petitioner was arrested on a charge of armed robbery, a capital offense. Counsel was appointed to represent him. At his arraignment, the petitioner plead guilty to all counts. Apparently he was asked no questions by the judge and did not address the court. A jury was empaneled for the determination of punishment and sentenced him to death on each of the five indictments. The United States Supreme Court held that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmation showing that it was intelligent and voluntary."[373] According to *Weston v. Henderson*,[374] a plea of guilty in a state court can only be effective if the accused had the right to assistance of counsel at the time the plea was entered.[375]

I. *Speedy Trial*

The sixth amendment right to a speedy trial was extended to state prosecution in *Klopfer v. North Carolina*.[376] In *Smith v. Hooey*[377]

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367. *See* Harrison v. United States, 392 U.S. 219 (1968).
368. *See, e.g.*, Soolook v. State, 447 P.2d 55 (Alaska 1968); Guyette v. State, 438 P.2d 244 (Nev. 1968); State v. Gillespie, 100 N.J. Super. 71, 241 A.2d 239 (1968); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968).
369. 395 U.S. 213.
370. *See* Note, 36 TENN. L. REV. 58 (1968).
371. The Supreme Court of Tennessee had previously so held. Patten v. State, 221 Tenn. 337, 426 S.W.2d 503 (1968); Murphy v. State, 221 Tenn. 351, 426 S.W.2d 509 (1968).
372. 395 U.S. 238 (1969).
373. *Id.* at 242. As to the substantive standard, *see, e.g.*, Smith v. O'Grady, 312 U.S. 278 (1941).
See also Burris v. State, 5 CRIM. L. REP. 2101 (Tenn. Crim. App., March 3, 1969), critical of effective urging by counsel to enter a guilty plea where the defendant unwaveringly claimed innocence, *and* Williamson v. State, 6 CRIM. L. REP. 2141 (Tenn. Crim. App., Oct. 16, 1969), where the court held that a misunderstanding as to the place of confinement did not render the guilty plea invalid.
374. 415 F.2d 343 (6th Cir. 1969).
375. While the court relied on Gideon v. Wainwright, 372 U.S. 335 (1963), in reaching its decision, more compelling would appear to be White v. Maryland, 373 U.S. 83 (1963).
376. 386 U.S. 213 (1962).
377. 393 U.S. 374 (1969).

the petitioner had been under a state indictment for six years but had not been brought to trial because he was serving a sentence in a federal penitentiary. The state conceded that had the petitioner been free for the period and had repeatedly demanded to be brought to trial, as he had here, the state would be constitutionally obligated to try him. But, it argued, it was relieved of this duty because the petitioner was incarcerated. The United States Supreme Court disagreed, holding that the state "had a constitutional duty to make a diligent, good-faith effort to bring him before the . . . court for trial."[378]

Where a defendant succeeds in having a conviction set aside and is thereafter retried, he cannot claim a denial of a speedy trial, even though his second trial was more than ten years subsequent to the date of the alleged offense.[379]

J. *Fair Trial*

1. *Venue.* Proof of the venue of the offense is a state constitutional right in Tennessee and must be proved by a preponderance of the evidence.[380] However, the right to a fair and impartial trial[381] entitles the defendant to a change of venue for his trial.[382] This issue arose in *Moore v. Russell* [383] where the petitioner was among those charged with a jailhouse murder. There had been considerable publicity on the crime for the two months between its occurrence and the trial. In denying the request for change of venue, the trial judge refused to consider any of the proffered evidence of the defense in support of its motion. Relying principally on *Caldwell v. State*[384] the court held that it was improper for the trial judge to base his ruling

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378. *Id.* at 383. While the decision turns on the failure of the state to attempt to secure the petitioner for trial, the policy reasons discussed justifying the need for a speedy trial would be equally compelling had the state tried but failed to gain custody of the petitioner.

A prior sixth circuit decision involving analogous facts appeared to anticipate *Hooey*, refusing to compel the state district attorney to bring the petitioner to trial, but acknowledging the right of the petitioner to trial, but acknowledging the right of the petitioner to claim a violation of his right to a speedy trial per *Klopfer*. Dixon v. Tennessee, 404 F.2d 27 (6th Cir. 1968).

379. Rivera v. State, 443 S.W.2d 675 (Tenn. Crim. App. 1968). The first trial had been within seven months of the crime charged. *See also* Lewis v. State, 5 CRIM. L. REP. 2299 (Tenn. Crim. App., June 11, 1969).

380. Jones v. Russell, 299 F. Supp. 970 (E.D. Tenn. 1969), citing Harvey v State, 213 Tenn. 608, 376 S.W.2d 497 (1964).

381. TENN. CONST. art. 1, § 9.

382. TENN. CODE ANN. § 40-2201 (1955).

383. 294 F. Supp. 615 (E.D. Tenn. 1968).

384. 164 Tenn. 325, 48 S.W.2d 1087 (1932).

on his personal knowledge and conclusions on the impact of adverse publicity.[385]

2. *Severance.* The granting of a severance is a matter within the discretion of the trial judge.[386] When the question has arisen, Tennessee courts have been inclined to employ a balancing process, giving due consideration to the interest of the state in maintaining a single prosecution.[387] On appeal, the defendant must show not merely an abuse of discretion but actual prejudice which resulted from the refusal to grant the severance.[388] In *Hunter v. State*[389] the defendants contended that they had been prejudiced by the denial of a severance in the following respects: (1) All but one of the prospective jurors said that he would find it difficult to keep the facts concerning the nine defendants separate. (2) The defendants were subject to the impact of several confessions implicating some of their number and exonerating others. (3) The rebuttal testimony used to attack the credibility of two of the defendants affected the case against all of them. The court found none of the arguments persuasive.[390] First, the court found that the trial court had conscientiously sought to aid the jurors throughout the trial to sort out the evidence, and the defendants had the benefit of a fair and impartial jury. Second, no prejudice resulted from the cross-implications of confessions as each of them took the stand and was available for cross-examination by the co-defendants.[391] The jury was also carefully instructed on the limitations on the use of the confessions. Finally, the court found no

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385. "The trial judge has no judicial power as contradistinguished from the power of the law. His discretion is a legal discretion to be exercised in discerning the proper course prescribed by law with the consequent duty to follow that course. His will as a person is not to be done, but rather the will of the law." 294 F. Supp. at 620.

386. Hunter v. State, 440 S.W.2d 1 (Tenn. 1969). Cited: Stallard v. State, 187 Tenn. 418, 215 S.W.2d 807 (1948); Tomlin v. State, 207 Tenn. 281, 339 S.W.2d 10 (1960); Ellis v. State, 218 Tenn. 297, 403 S.W.2d 293 (1966). *See also* Thompson v. State, 171 Tenn. 156, 101 S.W.2d 467 (1937); Dykes v. State, 194 Tenn. 477, 253 S.W.2d 555 (1952).

387. "The State, as well as the person accused, is entitled to have its rights protected, and when persons are charged jointly with a single crime, we think the State is entitled to have the fact of guilt determined and punishment assessed in a single trial, unless to do so would unfairly prejudice the rights of the defendant." Woodruff v. State, 164 Tenn. 530, 539, 51 S.W.2d 843, 845 (1932).

388. Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843 (1932); Turner v. State, 187 Tenn. 309, 213 S.W.2d 281 (1948); Stallard v. State, 187 Tenn. 418, 215 S.W.2d 807 (1948); Stanley v. State, 189 Tenn. 110, 222 S.W.2d 384 (1949).

389. 440 S.W.2d 1 (Tenn. 1969).

390. There would appear to be no Tennessee cases in which the trial judge was found to have abused his discretion in this matter.

391. *See* text accompanying notes 195 *et seq. supra.*

substance to the argument that the testimony of a rebuttal witness had prejudiced the case of other defendants.[392]

In *Moore v. Russell*,[393] where the defendant was one of several charged with a brutal jailhouse murder, the court indicated that a severance should be carefully considered by the trial judge where the defendant was a misdemeanant and he would be surrounded at his trial by several co-defendants, all of whom were charged with felonies, two with murder.

3. *Consolidation of Offenses.* In *Burum v. State*[394] the defendant had been tried by the same jury on two separate indictments, one containing three counts concerning breaking and entering of a dwelling house, the other containing three counts dealing with the burglary of an entirely separate business house. The jury convicted the defendant under the first indictment and acquitted him as to the second. He argued that it was error to consolidate the two cases, submitting that separate attorneys had been appointed to represent him in the two instances, the defense theories were different and incompatible, there was no connection between the cases, they occurred some twenty miles apart, there were no witnesses or material facts common to both cases, and it would be impossible for the jury to isolate the evidence submitted by the prosecution in reference to one case from that submitted in inference to the other.

The court concluded that the defendant's argument was meritorious, relying principally on *Bruce v. State*,[395] where a conviction of receiving stolen property was reversed because the defendant had been charged with the unrelated offense of assault and battery at the same trial. Distinguished were *Hardin v. State*,[396] where the charges of second degree murder and driving while intoxicated arose out of the same facts, and *Bullard v. State*,[397] where the defendant was convicted at one trial of the separate offenses of violating the Bad Check Law and public drunkenness. There apparently the court felt that because of the unrelatedness of the two offenses and the fact that one of them was

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392. A vigorous dissent by Humphreys, J., suggested that the illogic of the sentences handed down by the jury was evidence of their inability to properly associate the evidence with the various defendants.

393. 294 F. Supp. 615 (E.D. Tenn. 1968).

394. 445 S.W.2d 946 (Tenn. Crim. App. 1969).

395. 213 Tenn. 666, 378 S.W.2d 758 (1964).

396. 210 Tenn. 116, 355 S.W.2d 105 (1961).

397. 208 Tenn. 641, 348 S.W.2d 303 (1961).

a petty misdemeanor the defendant could not have been prejudiced.[398] In the present case the court felt that the likely confusion in the minds of the jurors as to the relevancy of the evidence submitted by the prosecution to the various counts resulted in prejudicial error.[399]

4. *Participation of Defendant.* In *Rivera v. State*[400] the court held that the appearance of the defendant before the jury in handcuffs would not amount to a denial of due process where the defendant had a history of violent resistance to law enforcement officers. In fact, the court determined that none of the jurors had seen the defendant handcuffed but indicated that it would not have been improper if he had been kept handcuffed for the entire trial.[401] In *United States v. King*[402] the court held that an admonishment of the defendant by the trial judge for his tardy appearance in court was harmless.

While requiring the defendant to perform various acts at his trial does not constitute self-incrimination,[403] under some circumstances he may successfully claim a denial of the right to a fair trial.[404] *United States v. Doremus*[405] held that having the defendant execute a handwriting exemplar "had no tendency to disgrace or insult" him.

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398. The distinction between this case and the *Bullard* decision is extremely fragile. *Bruce* dismisses *Bullard* as an application of harmless error rule, but nowhere in *Bullard* does the court concede that there was error at all. In light of the principal case it may be concluded that greater reliance may be accorded *Bruce* than *Bullard*.

399. "In separate trials, of course it is elementary that evidence relating exclusively to the offenses charged in one of these discrete indictments would not have been admissible in a trial upon the other. Under this record, there can be little doubt that the jury, confronted with all the evidence and the testimony of a number of witnesses relating to both cases very understandably was most likely bewildered and puzzled and simply yielded to the temptation to conclude that where there is so much smoke there is bound to be some fire, and thus arbitrarily selected one offense for conviction out of the three separate offenses charged in each of the two separate indictments." 445 S.W.2d at 949. *See generally* Annot., 59 A.L.R.2d 841 (1958).

400. 443 S.W.2d 675 (Tenn. Crim. App. 1969).

401. *See* Poe v. State, 78 Tenn. 673 (1882); State v. Meadows, 215 Tenn. 668, 389 S.W.2d 256 (1965).

402. 415 F.2d 737 (6th Cir. 1968).

403. *See generally* 2 WHARTON'S CRIMINAL EVIDENCE § 660 (Anderson ed. 1955); 8 WIGMORE ON EVIDENCE § 2265 (McNaughton Rev. 1961). *Cf.* Stokes v. State, 64 Tenn. 619 (1875), holding it improper to require a defendant to make a footprint in a pan of mud before the jury. The later decision of Dennis v. State, 198 Tenn. 325, 279 S.W.2d 512 (1955), distinguished *Stokes* where the defendant had chosen to take the stand.

404. "A trial is not a dramatic spectacle and to require the performance of indecent acts as requiring demonstration that would have a tendency to degrade, humiliate, insult or disgrace the defendant would deprive him of his constitutional guarantee to a fair and impartial trial." State v. Taylor, 99 Ariz. 85, 92, 407 P.2d 59, 64 (1965).

405. 414 F.2d 252 (6th Cir. 1969).

5. *Trial by Jury: (a) Right to.* In 1968 in *Duncan v. United States*[406] the United States Supreme Court applied the right to trial by jury of the sixth amendment to the states at least where the potential punishment was two years' imprisonment. Similarly, in *Bloom v. Illinois*[407] the right to trial by jury in criminal contempt proceedings was recognized where the actual sentence was two years.[408] In *Duncan* the Court indicated that the right would probably not be available for "petty" offenses where the punishment did not exceed six months. Without expressly so holding, language in *Frank v. United States*[409] lends support to the belief that the Court has determined that six months is the line of demarcation.[410] In *Frank,* however, the petitioner, cited for criminal contempt, was convicted, but rather than being sentenced was placed on probation for three years. The Court held that such a disposition did not require a right to trial by jury.[411]

(b) *Improper Influence.* In the 1965 decision, *Turner v. Louisiana,*[412] two deputy sheriffs who were the principal witnesses for the prosecution were also the custodians of the jury during the three-day trial. While it was clear that the deputies had freely mingled with the jury during the course of the trial, there was no indication that they had even talked to any member of the jury about the case. The Court, however, felt that a crucial matter in the case was the jury's determination of the credibility of these two witnesses, and the impact of this direct association would go far to offset the impact of any cross-examination during the trial. This would be true if the jury were allowed to associate with *any* of the witnesses; the possibility was compounded by the official capacity of the parties in question. Thus the decision was reversed and the case remanded. Analogous facts were presented in *Shepherd v. Wingo,*[413] but the court distinguished

406. 391 U.S. 145 (1968).

407. 391 U.S. 194 (1968).

408. *See 1968 Survey* at 261.

409. 395 U.S. 147 (1969).

410. The government conceded that a jury trial would have been mandatory if the petitioner had received a sentence for contempt in excess of six months.

411. Chief Justice Warren, joined by Justice Douglas, dissenting, argued that the decision opened the door to the imposition of oppressive conditions of probation for extended time periods. The conditions in the present case were as follows: "Petitioner is required to make monthly reports to his probation officer, associate only with law abiding persons, maintain reasonable hours, work regularly, report all changes to his probation officer, and not leave the probation district without the permission of his probation officer." 395 U.S. at 151 n.6. Justice Black also dissented.

412. 379 U.S. 466 (1965).

413. 414 F.2d 274 (6th Cir. 1969).

Turner on the basis of the findings of the lower court that the fraternization with the jurors had not been of comparable degree and the credibility of the deputy had not been as crucial to the case.[414]

K. *Punishment*

1. *Cruel and Unusual.* Rarely will a court interlope into matters which come within the designation of "prison discipline."[415] Judicial intervention is a possibility where the circumstances are extreme.[416] In *Hancock v. Avery*[417] the plaintiff contended that his solitary confinement, as authorized by a Tennessee statute,[418] amounted to cruel and unusual punishment. The environment in which the plaintiff was confined was alleged to be quite austere,[419] and his daily routine restricted to a level below the minimally tolerable levels of civilized living.[420] It was countered by the defendant prison officials that these

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414. The court, however, noted that the petitioner could renew his petition for writ of habeas corpus if he could allege facts comparable to *Turner*. *See also* Parker v. Gladden, 385 U.S. 363 (1966).

415. *See, e.g.,* Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) (limiting number of persons prisoner could correspond with); Carey v. Settle, 351 F.2d 483 (8th Cir. 1965) (limiting correspondence course materials prisoner could keep in cell); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (restrictions on activities of Black Muslims). *Cf.* Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) (prisoner should be allowed to subscribe to Negro magazines). *And see* Barnett v. Rodgers, 410 410 F.2d 995 (D.C. Cir. 1969) (concerning request by Muslims of one pork-free diet each day).

416. *See, e.g.,* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), holding the use of the strap for disciplinary purposes cruel and unusual punishment.

417. 301 F. Supp. 786 (M.D. Tenn. 1969).

418. TENN. CODE ANN. § 41-707 (1955): "Solitary confinement for violation of rules—If any convict neglects or refuses to perform the labor assigned him or wilfully injures any of the materials, implements, or tools, or engages in conversation with another convict, or in any other manner violates any of the regulations of the penitentiary, he may be punished by solitary confinement for a period not exceeding thirty (30) days for each offense, at the discretion of the warden, or person acting in his place."

419. "The dry cell in which petitioner is confined measures approximately five by eight feet, is of concrete construction, and has a single steel door. The cell is unlighted save for dim artificial light which seeps into the cell from the outside corridor through two small slit screens in the cell door. Plaintiff alleges that he is thus being deprived of adequate light and ventilation for the entire duration of his stay in the cell.

"The interior of the cell is devoid of furnishings except that there is at the rear of the cell a hole constructed to receive bodily wastes. There is, however, no mechanism within the cell to allow an occupant to flush waste material from the hole. Rather, the flushing operation is controlled by a guard operating a flushing device located outside of the cell. This operation is carried out only five times every twenty-four hours, three times during daylight hours and twice at night. As a result of this infrequent flushing, objectionable odors often permeate the cell." 301 F. Supp. at 788-89.

420. "Plaintiff has been forced to remain in the dry cell without any means of cleaning his hands, body or teeth. He is denied the use of soap, towel, toilet paper, and other hygienic materials. No means have been provided which would enable him to clean any part of his body at anytime. He is fed three times a

maximum security conditions were justified, because the plaintiff had twice attempted suicide, was implicated in the stabbing of a prison guard, and had twice attempted escape from less secure cells. It was submitted that the matter came within the discretion of the prison administrators. The court was disinclined to agree that the conduct was non-justiciable when allegations of such oppressive treatment were made, and noted that maximum security procedures had come within judicial cognizance in the past.[421] It concluded that "requiring a prisoner to live, eat and sleep in such degrading circumstances does violence to civilized standards of human decency,"[422] and that such practices should be enjoined.

2. *Involuntary Servitude.* The practice of requiring convicted persons to serve jail terms in lieu of payment of fines and costs has come under increasing judicial scrutiny in recent years.[423] Three possibilities arise. (1) The defendant may be fined a specified amount as part of his sentence, and upon failure to pay the amount, the fine is converted into an equivalent number of days of incarceration.[424] This would appear to present no constitutional problem unless the total period of incarceration exceeds the maximum term imposable for the offense.[425] (2) The defendant may be charged with jail fees accumulated while awaiting trial. Incarceration to work off such debts has been held unconstitutional as a deprivation of equal protection, since they would not be incurred by a defendant capable of posting bail.[426] (3) The defendant may be charged with court costs accruing from his trial. The Tennessee Court of Criminal Appeals found nothing unconstitutional in requiring a defendant to work off these

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day, a slice of bread at breakfast and supper, and a regular meal at noon. The noon meal is folded into a paper container and given to plaintiff by sliding it through a small crack in the cell door. It is apparent from the foregoing facts that plaintiff is thus forced to handle and eat his food without any provision for cleanliness or even minimal sanitary conditions.

"During the term of his confinement in the dry cell, plaintiff has not been permitted to wear clothing of any kind and is being forced to remain in the cell entirely nude. As a result, he is forced to sleep on the bare concrete floor. Even though he has requested a blanket, its use has been denied him." *Id.* at 789.

421. Jordon v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Graham v. Willingham 384 F.2d 367 (10th Cir. 1967); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).
422. 301 F. Supp. at 792.
423. *See 1968 Survey* at 233-35.
424. The rate has now been raised from two dollars a day to five dollars a day. TENN. CODE ANN. § 41-1223 (Supp. 1969).
425. Sawyer v. District of Columbia, 238 A.2d 314 (D.C. App. 1968); State v. Allen, 104 N.J. Super, 187, 249 A.2d 70 (1969); People v. Seffore, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1968). *But see* People v. Williams, 41 Ill. 511, 244 N.E.2d 197 (1969); Wade v. Carsley, 221 So.2d 729 (Miss. 1969).
426. State *ex rel.* Hawkins v. Luttrell, 221 Tenn. 32, 424 S.W.2d 189 (1968).

costs in *Wilson v. Sloan*.[427] However, a recent federal decision, *Anderson v. Ellington*,[428] has gone the other way. The plaintiff there sought an injunction against his incarceration for the non-payment of court costs in the amount of $892.38. The court held in favor of the defendant on the ground that the imprisonment constituted involuntary servitude in violation of the thirteenth amendment.[429] The crux of the problem was whether the amount in issue should be considered a part of the punishment, as the state argued, or more in the nature of a debt, in which instance the thirteenth amendment would be relevant. The court found that the state substantively and procedurally had not treated costs as a part of punishment, because (1) the statutes defining various crimes and the general penalty sections did not include costs as a part of punishment, (2) costs were not fixed by the jury in their determination of punishment, (3) an executive pardon does not extend to the costs,[430] and (4) the costs bear no reasonable relationship to the offense committed. Finally, the court considered the argument of the state that non-imprisonment would deny equal protection to defendants who were capable of paying costs as they would incur an additional penalty. To this it was countered that the courts have the same power to enforce judgments for costs by execution in criminal cases as in civil cases.[431]

L. *Double Jeopardy*

In *Benton v. Maryland*,[432] the United States Supreme Court applied the fifth amendment protection against double jeopardy to the states. The petitioner had been convicted of burglary and acquitted of larceny. On appeal, the conviction was reversed and the case remanded for retrial. At the second trial, the petitioner was again charged with larceny and burglary, and this time he was found guilty on both charges. Reversing the long-standing holding of *Palko v. Connecticut*,[433] the Court held that the protection against double jeopardy

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427. 438 S.W.2d 75 (Tenn. Crim. App. 1968) (litigation taxes cannot be worked off, however).

428. 300 F. Supp. 789 (M.D. Tenn. 1969).

429. It would appear that only one other court has previously so held. Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968). *See also* Galbreath, J., dissenting, in Wilson v. Sloan, 438 S.W.2d 75 (Tenn. Crim. App. 1968).

430. Spellings v. State, 99 Tenn. 201, 41 S.W.2d 444 (1897); State *ex rel.* Barnes v. Garrett, 135 Tenn. 617, 188 S.W. 58 (1915); State v. Hill, 43 Tenn. 98 (1866); Smith v. State, 74 Tenn. 637 (1881).

431. TENN. CODE ANN. § 40-3205 (1955).

432. 395 U.S. 784 (1969).

433. 302 U.S. 319 (1937).

was "fundamental to the American scheme of justice" and therefore must be applied with full force to state prosecutions. As to whether the procedure here came within the aegis of the protection, the Court turned to *Green v. United States,*[434] where the analogous situation in federal court was held to constitute double jeopardy.

In a companion case, *North Carolina v. Pearce,*[435] the application of the protection against double jeopardy was raised where the petitioner, following a reversal of his conviction, received a greater sentence on retrial than he had received at his first trial. The Court held that the increased sentence vitiated neither the protection against double jeopardy nor the equal protection clause. It did, however, raise a due process question where the sentencing judge had in effect penalized the defendant for exercising a right to appeal.[436] Thus, the Court concluded, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."[437] In a separate issue, the Court held that the protection against double jeopardy "absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense."[438]

Brown v. State,[439] decided prior to *Benton* and *Pearce,* would appear distinguishable. There the defendant obtained a reversal of a conviction of grand larceny and a sentence of four years. On retrial, he was again indicted for larceny and, for the first time, charged as an habitual criminal.[440] He was convicted on both counts and received three to five years for grand larceny and life imprisonment on the

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434. 354 U.S. 184 (1957).

435. 395 U.S. 711 (1969).

436. *Cf.* United States v. Jackson, 390 U.S. 570 (1968).

437. 395 U.S. at 726. "Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*

In light of the holding, Rivera v. State, 443 S.W.2d 675 (Tenn. Crim. App. 1969), would appear to be clearly incorrect, subject to the question of retroactive application of *Pearce. See also* United States v. King, 415 F.2d 737 (6th Cir. 1969).

It will be noted that the focus of attention in *Pearce* is on *judge*-imposed sentences. A yet-unreported decision of the Tennessee Court of Criminal Appeals has held *Pearce* inapplicable where the harsher sentence was imposed by a jury. Pinkard v. Henderson, 6 CRIM. L. REP. 2148 (Tenn. Crim. App., Oct. 28, 1969). To same effect, *see* Branch v. State, 445 S.W.2d 756 (Tex. Crim. App. 1969).

438. 395 U.S. at 718.

439. 445 S.W.2d 669 (Tenn. Crim. App. 1969).

440. TENN. CODE ANN. § 40-2801 (1955).

habitual criminal charge. While on the authority of *Pearce,* the sentence for larceny may be reducible to a maximum of four years, no objection would appear available for the life sentence, as the defendant had never been placed in jeopardy on this charge. Presumably, even if the first larceny conviction had not been overturned, the state could subsequently have convicted the defendant as an habitual criminal and sentenced him to life imprisonment.