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# Criminal Law in Tennessee in 1971 - A Critical Survey

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# CRIMINAL LAW IN TENNESSEE IN 1971—A CRITICAL SURVEY*

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## I. INTRODUCTION

Developments in criminal law in 1971[1] were relatively low-keyed in comparison to recent years. Perhaps the most significant and controversial United States Supreme Court decision was *Harris v. New York*[2] which recognized a substantial exception to the application of

1. For purposes of convenience, coverage has been limited to those decisions that appeared in advance sheets of the National Reporter System during 1971. As a result, some 1970 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 headings.

2. 401 U.S. 222 (1971).

*Miranda*.[3] Further pronouncements were made by the Court concerning the practice of working off fines[4] and the right of indigent defendants to transcripts.[5] *United States v. White*[6] reaffirmed the approval of the Court of the use of secret agents in law enforcement.[7] Finally, in *Santobello v. New York*[8] the Court considered the legal effect of an unfulfilled promise following a bargained plea of guilty.[9]

## II. OFFENSES

### *A. Against Person*

#### 1. Homicide.

If an individual fails to accomplish a criminal act because of an impossibility, he cannot be convicted of the substantive offense.[10] Thus, for example, where the accused intends to steal the book of another but takes a book that belongs to himself, the crime of larceny has not been committed. Impossibility as a defense to a charge of first degree murder was potentially present in *Bailey v. State*.[11] The deceased and one of the defendants had participated in a dice game following which the deceased had accused the defendant of cheating him and shot him in the arm. The following day, the defendant and his father were walking with the deceased and another. The father took a pistol from his pocket and shot the deceased in the head. He then handed the pistol to the defendant, remarked of the incident of the previous day, and said, "Now you kill him." Defendant shot the deceased several times, then remarked, "Say, I told you all I would kill him. There he lays." The defendant and his father were convicted of first degree murder.[12] Had it been shown that the act of the father

3. *See* pp. 280-83 *infra*.
4. *See* pp. 258-59 *infra*.
5. *See* pp. 259-61 *infra*.
6. 401 U.S. 745 (1971).
7. *See* pp. 266-68 *infra*.
8. 92 S. Ct. 495 (1971).
9. *See* p. 271 *infra*.
10. Whether a conviction of attempt may be sustained will depend upon whether the impossibility is viewed as legal or factual. *See* CLARK & MARSHALL, CRIMES §§ 4.11, 4.12 (7th ed. 1967).
11. 460 S.W.2d 380 (Tenn. Crim. App. 1970).
12. Both defendants testified at their joint trial, and both stated that the father was not present at the time of the shooting. The foregoing is the court's summation of the proof of the prosecution.

was wholly independent and that the deceased was dead before the defendant fired the pistol, then the defendant would not be chargeable with homicide, since the purported victim would not be a "creature in being" as required by the statute.[13] Of course, if an intent to kill shared by the pair preceded the act, and the first shot fired by the father was in pursuance of that common intent, then the defendant was an accessory before the fact,[14] or possibly an aider and abettor,[15] and as such punishable as a principal offender.[16]

### *B. Against Property*

#### 1. Larceny

Where an individual is discovered in the possession of recently stolen property, a presumption arises that he knows the property is stolen.[17] The propriety of the use of this presumption arose in two cases. In *Poole* v. *State*[18] officers found the defendant in possession of a stolen automobile about fifteen minutes after and two blocks from the point of the theft. It had been partially wrecked, and the defendant was attempting to mount the spare tire. The keys were found in his pocket. The court held that the presumption was sufficient to rebut the declaration of the defendant that he had agreed to change the tire in exchange for a ride promised him by two unknown men who had disappeared, and a conviction of grand larceny was affirmed.[19]

However, a different result was reached in *Thomas v. State*[20] where the defendant was convicted of the petit theft of a wheelbarrow. The connection between the defendant and the wheelbarrow was established by proof that he had sold it to another nearly a month after

13. TENN. CODE ANN. § 39-2401 (1955).

14. *Id.* § 39-107.

15. *Id.* § 39-109.

16. *Id.* § 39-108, 109. Actually, the court did not address itself to this issue, presumably because the defendant did not raise it. Indeed, the defendant testified that he fired the fatal shot and sought to raise the defense of self-defense.

17. *See, e.g.*, Myers v. State, 470 S.W.2d 848 (Tenn. Crim. App. 1971); Smith v. State, 451 S.W.2d 716 (Tenn. Crim. App. 1969); Rayson v. State, 447 S.W.2d 391 (Tenn. Crim. App. 1969). *See also* Cook, *Criminal Law in Tennessee in 1970—A Critical Survey*, 38 TENN. L. REV. 182, 189-90 (1971) (hereinafter cited *1970 Survey*).

18. 426 S.W.2d 256 (Tenn. Crim. App. 1970).

19. The court was not persuaded by the fact that the owner had reported two men occupying the vehicle as it was driven from his driveway.

20. 463 S.W.2d 687 (Tenn. 1971).

the theft. The defendant and two relatives testified in an effort to explain his possession. The trial judge instructed the jury that the law presumed the guilt of the possessor "unless the attending fact or other elements so far overcome the presumption thus raised as to create a reasonable doubt in the mind of the jury as to the guilt of the defendant."[21] The court conceded that this was a proper statement of the law, noting however, that in most jurisdictions such possession was merely treated as an evidentiary fact tending to establish guilt. While not prepared to depart from its prior decisions, the court felt that two circumstances in the present case justified a reversal. First, there was no evidence connecting the defendant to the offense other than mere possession. Second, the extended lapse of time between the offense and the proven possession of the defendant stretched the requirement that the possession be "recent". While declining to give the term an objective definition, the court felt it essential that the jury be more fully instructed on its meaning.[22]

### 2. Embezzlement

The proliferation of theft statutes in Tennessee has lead to fine lines of distinction between various offenses. One such distinction is found in the requirement that for a charge of embezzlement the property in question must never have passed through the hands of the owner; the property must be entrusted to the defendant *for* the owner, not *by* the owner.[23] If the latter transfer occurs, the proper charge is appropriation of property by a person having custody.[24] In most jurisdictions, either relationship would support a charge of embezzlement.[25] In *Briggs v. State*[26] the defendant was a municipal employee whose responsibility it was to take money from city parking meters and deliver it to the city treasury. He was charged with embezzlement,[27] the proof showing that money had been removed from the

21. *Id.* at 688 (italics deleted).

22. The court quoted 50 AM. JUR. 2d *Larceny* § 162 (1970): "The test of recency is whether the interval is so short as to render it morally or reasonably certain that there could have been no intermediate change of possession."

23. *See* Hill v. State, 159 Tenn. 297, 17 S.W.2d 913 (1929); State v. Matthews, 143 Tenn. 463, 226 S.W. 203 (1920).

24. TENN. CODE ANN. § 39-4224 (Supp. 1971).

25. *See* 2 WHARTON, CRIMINAL LAW AND PROCEDURE § 513 (1957) (hereinafter cited WHARTON), PERKINS, CRIMINAL LAW 288 (2d ed. 1969).

26. 463 S.W.2d 161 (Tenn. Crim. App. 1970).

27. TENN. CODE ANN. § 39-4231 (1955).

meters and never turned in to the treasury. The conviction was affirmed. The critical question, not discussed by the court, would appear to be whether the money in the parking meters was to be considered constructively in the possession of the employer. If so, then embezzlement was not the proper charge. If the defendant were a parking lot attendant and pocketed money paid to him by his clientele, a charge of embezzlement would clearly lie. On the other hand, if the defendant received the money from a parker, placed it in his employer's cash register, and later removed it and converted it to his own use, appropriation of property by a person having custody would appear the more likely charge. The present case falls between these examples. The more persuasive resolution would appear to be that the money in the meter is in the constructive possession of the employer, if for no better reason than the absence of a credible alternative.

### *C. Against Person and Property*

#### 1. Robbery

The robbery statute provides that where robbery is accomplished by the use of a deadly weapon the crime is a capital offense.[28] In two recent cases, the definition of "deadly weapon" came into issue.[29] In *Campbell v. State*[30] the court rejected the suggestion that an unloaded gun did not qualify as a deadly weapon.[31] In *Beaty v. Neil*[32] a flare pistol was held to be a deadly weapon on the theory that such an instrument "fired point blank at a person at close range could cause death or grievous bodily harm."[33]

Robbery is described as an "aggravated larceny"[34] and therefore an intent to steal must be present at the time of the taking.[35] In *Crumsey v. State*[36] an undercover agent for the police entered a

28. TENN. CODE ANN. § 39-3901 (Supp. 1971).

29. *See* Cook, *Criminal Law in Tennessee in 1968—A Critical Survey*, 36 TENN. L. REV. 221, 223-25 (1969) (hereinafter cited *1968 Survey*).

30. 464 S.W.2d 334 (Tenn. Crim. App. 1971).

31. The court relied on Turner v. State, 201 Tenn. 562, 300 S.W.2d 920 (1957). *But see* 1 WHARTON § 361, p. 723, text accompanying note 16.

32. 467 S.W.2d 844 (Tenn. Crim. App. 1971).

33. *Id.* at 847. "A deadly weapon is any weapon or instrument which, from the manner in which it is used or attempted to be used, is likely to produce death or cause great bodily injury." *Id.*

34. Crenshaw v. State, 43 Tenn. 350, 353 (1866).

35. *See 1970 Survey* at 190-91.

36. 460 S.W.2d 858 (Tenn. Crim. App. 1970).

house of prostitution investigating complaints of theft from patrons. He purchased the services of two girls who took the money to the defendant upstairs. When they returned, the officer identified himself and advised them that they were under arrest. A commotion ensued, whereupon the defendant confronted the officer with a loaded pistol. According to the officer, the defendant cocked the pistol and ordered the officer to give him the rest of his money. The defendant grabbed his wallet when he took it from his pocket. According to the defendant, he was merely protecting his girls; he asked the officer for identification, and the latter threw the wallet at the defendant. Before the matter could proceed any further, other officers entered the building, and the defendant, holding the wallet, was arrested. The appellate court sustained the conviction holding that the jury had evidently rejected the defendant's version of the facts, and the evidence did not preponderate against that verdict.

### 2. Burglary

In *Wyatt v. State*[37] the court held that a hotel room occupied by a paying guest was a "dwelling-house" for the purpose of proving the elements of burglary.[38] A short time thereafter, this decision was ratified by the legislature through an amendment to the burglary and second degree burglary statutes extending coverage to

> any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging either permanently or temporarily and whether as owner, renter, tenant, lessee or paying guest.[39]

Insofar as the issue raised in the *Wyatt* case is concerned, the statutory amendment is superfluous as that decision simply reflected the rule at common law.[40] However, there is some authority for the notion that where the occupant is a mere transient, the premises will be considered the dwelling house of the landlord, whether or not the landlord lives on the premises.[41] This distinction only becomes of

37. 467 S.W.2d 811 (Tenn. Crim. App. 1971).
38. TENN. CODE ANN. §29-901 (1955).
39. TENN. CODE ANN. §§ 39-901, 903 (Supp. 1971).
40. *See* 2 WHARTON § 425.
41. PERKINS, CRIMINAL LAW 206 (2d ed. 1969); CLARK AND MARSHALL, CRIMES 990-91 (7th ed. 1967).

significance where the accused is himself the landlord, and he argues that the dwelling-house is not "of another" as required at common law. The statutory amendment removes this possibility by making the dwelling-house that of the occupant, whether the occupancy is of a permanent or temporary nature.

Burglary in the third degree consists of "the breaking and entering into a business house, out house, or any other house of another, other than a dwelling house."[42] In 1964, in *Fox v. State*,[43] the Supreme Court of Tennessee was called upon to determine the applicability of this statute to a defendant who entered a public telephone booth and broke into the coin receptacle. Conceding that entering the telephone booth was lawful and therefore could not amount to a breaking, the court turned to another section of the code which provided that breaking after entry could satisfy the breaking element of burglary.[44] However, this provision was explicity applicable only to dwelling houses, not to premises included in burglary in the third degree.[45] Nevertheless, citing its prior decision in *Page v. State*,[46] the court held "the same reasoning" was applicable to burglary in the third degree. The *Page* court cited authority for the notion that at common law breaking can occur after entry.[47] However, the passage cited was wholly in reference to the breaking of an inner *door*. Such was the situation in the *Page* case.

The result in the *Fox* case flies in the face of at least three rules of statutory construction. If the position of the court is that it is simply applying a common law definition to "breaking" then the statute concerning breaking after entry is superfluous, a result inconsistent with the presumption that the legislature will not pass a meaningless statute.[48] If the court is holding that the breaking after entry statute is to be applied to the burglary in the third degree statute, despite its express disclaimer, the holding is inconsistent with the rules of interpretation that statutes in derogation of the common law

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42. TENN. CODE ANN. § 39-902 (1955).

43. 214 Tenn. 694, 383 S.W.2d 25 (1964), *cert. denied*, 380 U.S. 933 (1965).

44. TENN. CODE ANN. § 39-902 (1955).

45. Arguably, the section would also be applicable to burglary in the second degree. TENN. CODE ANN. § 39-903 (Supp. 1971). The critical language is "the premises mentioned in sec. 39-901." *Id.* § 39-902 (1955). These are the same premises mentioned in § 39-903, second degree burglary simply eliminating the requirement that the offense occur at nighttime.

46. 170 Tenn. 586, 98 S.W.2d 98 (1936).

47. *See* 2 WHARTON § 416.

48. SUTHERLAND, STATUTORY CONSTRUCTION § 4510 (1943).

are to be strictly construed,[49] and criminal statutes are to be strictly construed in favor of the accused.[50]

In light of the dubious underpinnings for the *Fox* decision, in *Heald v. State*,[51] where again a defendant was charged with breaking into a coin box in a telephone booth, the defendant urged on appeal that the court overrule *Fox*. The court of criminal appeals declined to consider the possibility, as it felt bound by the prior decision of the supreme court. The latter court denied certiorari.[52]

### *D. Public Offenses*

In *Baxter v. Ellington*[53] student leaders at the University of Tennessee brought a class action for a declaratory judgment and injunctive relief from several statutes alleged to proscribe activities protected by the first and fourteenth amendments. Addressing itself to the disorderly conduct statute,[54] the court found the terms "offensive or boisterous conduct or language" and "indecent" overbroad and declared the first clause of the statute unconstitutional. The court next considered the constitutionality of a recently enacted statute making criminal the interference with normal activities of campus buildings or facilities.[55] The offense was found to consist of three elements: "(1) presence at a school facility; (2) acts interfering, or tending to interfere with normal, orderly, peaceful or efficient conduct of the school facility; and (3) failure to leave the facility when ordered to do so by an administrative official."[56] The court held the final element to be constitutionally intolerable because of its chilling impact on first amendment freedoms.[57] Several other statutes, also

49. *Id.* § 6201.
50. *Id.* §§ 5604, 5605.
51. 472 S.W.2d 242 (Tenn. Crim. App. 1970).
52. *Id.*
53. 318 F. Supp. 1079 (E.D. Tenn. 1970).
54. TENN. CODE ANN. § 39-1213 (Supp. 1971).
55. *Id.* § 39-1215.
56. 318 F. Supp. at 1086.
57. "Little imagination is required to conceive of acts interfering or tending to interfere with the normal, orderly, peaceful or efficient conduct of an educational facility which fall within the protection of the First Amendment. An obvious danger is that the administrator's hostility to the acts committed will influence his decisions. The entire statute is vague and overbroad." *Id.*

challenged in the petition, survived constitutional scrutiny.[58]

In *McCoy v. State*[59] the defendant was convicted of allowing a minor to loiter where alcoholic beverages were sold.[60] The evidence most favorable to the prosecution indicated that a nineteen-year-old girl[61] had been observed seated in a booth drinking beer with two male companions. The trial court charged the jury in the terms of the statute.[62] Following the charge, defense counsel requested that its special charge defining loitering[63] be submitted to the jury. The request was denied, the trial judge indicating that as the statute provided no definition, it would be left to the jury. On appeal, the court held that the trial court should have given the requested instruction as the term loiter might "be susceptible to many definitions by a jury of laymen."[64]

The question of the quantum of proof necessary to establish possession of marijuana[65] arose in *Dishman v. State*.[66] Pursuant to a warrant, officers carried out a search of defendant Dishman's residence for marijuana and narcotic drugs. At the time of the search Dishman and defendant Henry were seated in the living room but were not smoking. On the coffee table between them "was an ashtray with three smoked cigarettes or cigarette butts, two packages of ciga-

58. TENN. CODE ANN. § 39-1216 (Supp. 1971) (not constitutionally overbroad or vague); *Id.* § 39-1217 and § 39-5116 (possible arbitrary classification of persons subject to differing penalties, but as no first amendment issue involved, state courts should resolve issue); *Id.* § 39-2805 (prior adjudication [Armstrong v. Ellington, 312 F. Supp. 1119 (W.D. Tenn. 1970)] resolved constitutionality.)

59. 466 S.W.2d 540 (Tenn. Crim. App. 1971).

60. TENN. CODE ANN. § 57-221 (Supp. 1971).

61. Presumably, TENN. CODE ANN. § 1-313 (Supp. 1971), changing the age of "legal responsibility" to eighteen, would prevent the facts in the present case from coming within the loitering statute.

62. "It shall be unlawful for the management of any place where any beverage licensed hereunder is sold to allow any minor to loiter about such place of business, and the burden of ascertaining the age of minor customers shall be upon the owner or operator of such place of business." TENN. CODE ANN. § 57-221 (Supp. 1971).

63. Definition of loiter as provided by Black's law dictionary—"To be dilatory, to be slow in movement, to stand around, to spend time idly, to saunter, to delay, to idle, to linger, to lag behind." 466 S.W.2d at 542.

64. *Id.* "The minor girl's presence on the premises is not of itself sufficient to sustain a conviction." *Id.* at 543. *See also* Hooper v. State, 194 Tenn. 600, 253 S.W.2d 765 (1952).

65. TENN. CODE ANN. § 52-1303 (1965 Replacement). This section was repealed by TENN. PUBLIC ACTS 1971, ch. 163, § 44, and replaced by TENN. CODE ANN. § 52-1432 (Supp. 1971).

66. 460 S.W.2d 855 (Tenn. Crim. App. 1970).

rette papers and some loose greenish material and seed."[67] Evidence was also found at several other locations in the house.[68] Henry denied any complicity in the possession or use of marijuana, submitting that Dishman had asked him to help repair a television antenna. The court sustained the conviction of Dishman, finding ample evidence to support the conclusion that he was in possession of marijuana in his home. However, the prosecution failed to disprove Henry's contention that he lacked any knowledge of the presence of marijuana, and his conviction was reversed.[69]

The Tennessee Drug Control Act of 1971[70] resulted in a substantial overhaul of the statutory regulation of narcotics, the most notable aspect being the creation of six categories of controlled substances with graduated criminal sanctions correlated to the danger posed by each grouping. The mere possession of a controlled substance, without intent to manufacture, deliver or sell, was made a misdemeanor, as was the possession of marijuana not in excess of one-half ounce for distribution without remuneration. Other legislative enactments made criminal the distribution of publications without the name of the publisher or person responsible for the contents appearing thereon,[71] and the copying of audio recordings without the consent of the owner.[72]

## III. DEFENSES

### *A. Self-Defense*

A proper plea of self-defense is a complete defense to a charge of homicide. In order to rely on the defense, the defendant must have no reasonable alternative to the use of deadly force for self-protection.[73] In *Spears v. State*,[74] the defendant traveled some seven

67. *Id.* at 856.

68. "Under the couch on which Henry was sitting and close to his feet, there was an open plastic bag of marijuana. On a table across the room from Henry, there were three open plastic bags with loose material similar in appearance. The officers also found in a bedroom a partly smoked home-rolled cigarette." *Id.*

69. *See also* Thornton v. State, 481 P.2d 484 (Okla. 1971); Commonwealth v. Florida, 272 A.2d 476 (Pa. 1971). *Cf.* People v. Davis, 29 Mich. App. 443, 185 N.W.2d 609 (1971).

70. TENN. CODE ANN. §§ 952-1408-1448 (Supp. 1971).

71. *Id.* § 39-5201.

72. *Id.* §§ 39-4244-4250.

73. *See 1968 Survey* at 323-33.

74. 466 S.W.2d 543 (Tenn. Crim. App. 1970).

miles from the scene of the affray, armed himself, returned and shot the deceased. The court did not consider the claim of self-defense credible.[75] A legitimate claim of self-defense was found in *Hughes v. State*[76] where the defendant was assaulted by another inmate in the state penitentiary.[77] In *Lewelling v. State*[78] the court held that the record did not sustain the finding that the victim, who shot at the defendant, had acted in self-defense, and therefore the defendant was guilty of second degree murder. Rather, the court held the defendant himself had a legitimate claim of self-defense which should have been entertained by the trial court.

## IV. PROCEDURE

### *A. Equal Protection*

#### 1. Working Off Fines

The constitutional propriety of converting a penal fine to a period of incarceration came before the United States Supreme Court in *Tate v. Short*.[79] The petitioner had accumulated fines totaling $425 for traffic offenses which he was unable to pay because of indigency. The fine was thereupon converted at the rate of one day for each five dollars,[80] to a term at the prison farm. The previous year in *Williams v. Illinois*,[81] the Court, considering a convicton for petty theft which was punishable by both imprisonment and fine,[82] had held that where the period of confinement exceeded that permitted by statute for the particular offense, the defendant had been denied equal protection.[83] By implication the Court held that if the sentence, determined by converting dollars to days, did *not* exceed the maximum term for the offense, the device was constitutional.[84] The *Tate* court distinguished

75. *Cf.* Gray v. State, 203 Tenn. 332, 313 S.W.2d 246 (1968).

76. 465 S.W.2d 892 (Tenn. Crim. App. 1970).

77. *Cf.* May v. State, 220 Tenn. 541, 420 S.W.2d 647 (1967).

78. 460 S.W.2d 847 (Tenn. 1970).

79. 401 U.S. 395 (1971).

80. This was authorized by TEX. CODE CRIM. PROC., art. 45.53 (1966), and HOUSTON, TEX., CODE § 35-8.

81. 399 U.S. 235 (1970).

82. The defendant had been given a year in prison, a $500 fine and five dollars in court costs.

83. *See 1970 Survey* at 202-03.

84. This may be read not as a sanctioning of the conversion formula but a recognition that an equivalent directly applied sentence falls within legal limits.

*Williams* since the state had adopted a "fines only" approach to traffic offenses. In this instance, *any* period of incarceration would violate the equal protection clause.[85] The Court reiterated its observations in *Williams* that states could innovate alternative means of enforcing payments of fines by those presently unable to pay, such as the provision for the payment of the fine in installments.[86] It further observed that imprisonment was not precluded, even in the case of "fines only" offenses, when the defendant had the means to pay a fine but refused or neglected to do so. Finally, the Court left open the question of the constitutionality of imprisonment where alternative means have been unsuccessful, notwithstanding the reasonable effort of the defendant to comply.[87]

### 2. Right to Transcript

In 1956, in *Griffin v. Illinois*,[88] the United States Supreme Court held that the equal protection clause required that an accused incapable of affording a transcript of his trial be provided one without cost where such was needed for an effective appeal and where such transcripts were available to those who could afford them. In *Mayer v. City of Chicago*,[89] the appellant was convicted of disorderly conduct and interference with a police officer and given a $250 fine on each count.[90] He sought to appeal the convictions on the grounds that the evidence was insufficient and that misconduct on the part of the prosecutor had denied him a fair trial. Illinois rules of procedure provided for a transcript without cost only where the defendant was convicted of a felony.[91] The Supreme Court held that the distinction drawn between felony and non-felony offenses was not a legitimate classification within the scope of the due process clause of the four-

85. "Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant can't pay because he is indigent and his imprisonment, rather than aid collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment." 401 U.S. at 399.

86. *Id.* at 400 n.6. *See also* State v. Walding, 10 CRIM. L. REP. 2196 (Tenn. Crim. App., November 12, 1971).

87. "[T]he determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case." 401 U.S. at 401.

88. 351 U.S. 12 (1956).

89. 404 U.S. 189 (1971).

90. The statutory maximum for each offense was $500.

91. Ill. Sup. Ct. Rule 607(b).

teenth amendment.[92] Nor did the fact that the appellant was subject only to a fine affect the case.[93] At the same time the Court made it clear that it was not recognizing an automatic right to a transcript in all criminal appeals. It quoted *Draper v. Washington*[94] for the notion that an alternative to a transcript might provide a "record of sufficient completeness" in some cases and in others portions of the transcript would be enough.[95] The extent of the right would turn upon the nature of the errors alleged by the appellant. The errors alleged in the present case were of such nature that the right to a complete transcript was presumptively established, pending the possible showing of a suitable alternative, an issue not explored by the courts below.

In a companion case, *Britt v. North Carolina*,[96] the petitioner requested a transcript of his first trial, which ended in a mistrial, in order to prepare for his second trial. Again, a party able to afford such a transcript could obtain one. The Court identified two factors relevant in determining the need for a transcript:

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92. "The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case." 404 U.S. at 196. *See also* Groppi v. Wisconsin, 400 U.S. 505 (1971) (discussed in text accompanying note 247 *infra*).

93. "*Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." 404 U.S. at 196-97.

94. 372 U.S. 487 (1963).

95. "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might be all adequate substitutes, equally good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review." *Id.* at 495-96.

96. 404 U.S. 226 (1971).

> (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.[97]

The Court was virtually ready to assume that the transcript would have been materially beneficial to the petitioner.[98] However, the denial of a transcript was sustained because of an alternative means of fulfilling the need—the availability of the court reporter to read back to counsel any portions of the transcript in which he had an interest.[99] This, coupled with the fact that the two trials were but a month apart and the memories of petitioner and counsel could accomplish a sizeable reconstruction of the trial, adequately protected the rights of the petitioner.

### *B. Arrest*

#### 1. Occurrence of

If a suspect voluntarily accompanies an officer to the stationhouse, an arrest has not occurred and therefore a showing of probable cause is not required.[100] A careful scrutiny of the facts may be required where the accused contends he did not believe he was free to go, notwithstanding statements of the officer to the contrary.[101] A stationhouse detention of an individual against his will, without probable cause, violates the fourth amendment and thus any fruits of the detention are inadmissible. Contrasting results are to be found in

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97. *Id.* at 227.

98. "Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case." *Id.* at 228.

99. "The trial of the case took place in a small town where, according to petitioner's counsel, the court reporter was a good friend of all the local lawyers and was reporting the second trial. It appears that the reporter would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request." *Id.* at 229.

100. *See, e.g.*, United States v. Cortez, 425 F.2d 453 (6th Cir. 1970) (discussed in *1970 Survey* at 205-06); Law v. Cox, 329 F. Supp. 849 (D. Va. 1971); Shephard v. United States, 274 A.2d 413 (D.C. App. 1971); Commonwealth v. Wilson, 276 N.E.2d 283 (Mass. 1971).

101. *See* State v. Mambaugh, 481 P.2d 443 (Ariz. 1971); Robinson v. United States, 278 A.2d 458 (D.C. App. 1971); State v. Murphy, 249 So. 2d 560 (La. 1971). *See generally* Cook, *Subjective Attitudes of Arrestee and Arrestor as Affecting Occurrence of Arrest*, 19 KAN. L. REV. 173 (1971).

*Davis v. Mississippi*[102] where fingerprints obtained during such a detention were ruled inadmissible,[103] and in *Morales v. New York*[104] where the Court remanded a case in which a confession obtained during a stationhouse detention was at issue, suggesting that the lower court might find that the suspect had voluntarily accompanied the officers to the station. In *United States v. Holland*[105] the accused, while at F.B.I. headquarters, was photographed, and the photograph was subsequently used for purposes of identification. The court held that the *Davis* rationale was inapplicable because the accused had voluntarily accompanied the agents to the headquarters.

### 2. Probable Cause

Unique probable cause to arrest issues arose in two cases before the United States Supreme Court during the past year. In *Hill v. California*[106] officers with probable cause went to the petitioner's apartment to arrest him on a charge of robbery. A person answered the door who fit the description of Hill, and they arrested him. The person arrested denied that he was Hill and produced identification bearing a different name. The officers were not convinced and proceeded to search the entire apartment.[107] It was later determined that the party arrested was in fact not Hill. The prosecution, however, still had an interest in sustaining the legality of the arrest, because the search, only justifiable as being incident thereto, produced evidence used against the real Hill at his trial. The Court upheld the arrest, because (1) the officers had probable cause to arrest Hill, and (2) they reasonably and in good faith believed the person they arrested was Hill. The case then fell within the well-honored maxim that the legality of an arrest is to be determined on the basis of the information known to the police at the time of the arrest. Usually this rule is cited in the converse situation—where the officer lacks probable cause at the time of the arrest but turns out to be right. Such an after-the-fact

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102. 394 U.S. 721 (1969).

103. *See* Cook, *Criminal Law in Tennessee in 1969—A Critical Survey*, 37 TENN. L. REV. 433, 471-72 (1970) (hereinafter cited *1969 Survey*).

104. 396 U.S. 102 (1969).

105. 438 F.2d 887 (6th Cir. 1971).

106. 401 U.S. 797 (1971).

107. The search was found reasonable under pre-*Chimel* standards. *See* text accompanying note 123 *infra*.

rationalization cannot meet fourth amendment standards.[108] The reasoning is equally applicable in the present instance; the fact that the officers turn out to be wrong is immaterial to the question of probable cause at the time of the arrest.[109]

In *Whiteley v. Warden*[110] an arrest was made by a patrolman in reliance upon a radio bulletin directing the arrest of the petitioner for breaking and entering. It was subsequently determined that the warrant for arrest, upon which the radio bulletin was made, was invalid. Nevertheless, the prosecution sought to sustain the arrest on the theory that the arresting officer could reasonably rely upon the radio bulletin in making the arrest. The Court was quick to acknowledge the propriety of officers relying upon information received from other officers. And, indeed, when the totality of information possessed by the police reaches the level of probable cause, the fact that the arresting officer himself does not personally know sufficient facts to support the arrest will not invalidate it.[111] But where the combined information does not reach the level of probable cause—and here the corroborating data known to the police was insufficient—then the radio bulletin could not create a basis for the arrest where none existed.

The most straight-forward manifestation of probable cause to arrest is found where a crime is committed in the presence of the arresting officer. In *Lederer v. Tehan*[112] an officer observed the appellant in a rented truck breaking up a statuary of a llama[113] and extracting small packets therefrom. Various weapons and tools were scattered around the floor of the truck. The court held that had the officer not concluded he had probable cause to arrest for a narcotics offense, he "would have been notably lacking in commonsense."[114] In *Radcliffe v. Cartwell*[115] an officer responded to the activation of a

108. *See, e.g.*, Sibron v. New York, 392 U.S. 401 (1968); Henry v. United States, 361 U.S. 98 (1959); United Stats v. Di Re, 332 U.S. 581 (1948).

109. For other cases involving mistake as to the identity of the arrestee, *see* Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317, 319-21 (1971).

110. 401 U.S. 560 (1971).

111. *See, e.g.*, United States v. Ventresca, 380 U.S. 102 (1965). *See also* Hebron v. State, 13 Md. App. 134, 281 A.2d 547 (1971); Muggley v. State, 478 S.W.2d 470 (Tex. Crim. App. 1971).

112. 441 F.2d 295 (6th Cir. 1971).

113. According to the court, counsel had dubbed the proceedings "The Case of the Hashish Llama."

114. 441 F.2d at 297.

115. 446 F.2d 1141 (1971).

burglar alarm at a residence. He observed an automobile emerge from the street on which the residence was located, with the squealing of tires and a fish-tail motion. He stopped the vehicle and placed its occupants under arrest. The court held that the officer reasonably concluded that the occupants of the automobile had been involved in the burglary, and the arrest was legal.

### C. *Search and Seizure*

#### 1. Attacking the Affidavit

A question still unresolved by the United States Supreme Court is whether an accused should be permitted the opportunity to attack the veracity of allegations contained in an affidavit for a search warrant.[116] Some courts have been unwilling to go behind the affidavit and warrant where the facts alleged constituted probable cause.[117] Others have taken the position that if the allegations are untrue, then probable cause was not present to justify the issuance of the warrant.[118] This would seem particularly persuasive where the false allegations have been deliberate.[119] Tennessee courts have refused to permit an attack on an affidavit for a search warrant,[120] with the caveat that a different result would be reached should the defendant be able

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116. *See* Rugendorf v. United Stats, 376 U.S. 528, 531-32 (1964): "Petitioners attack the validity of the search warrant. This court has never passed directly on the extent to which a court may permit such an examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause'."

For arguments supporting such attack, *see* Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971); Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9 (1970).

117. *See, e.g.*, United States v. Bowling, 351 F.2d 236, 242 n.2 (6th Cir. 1965); People v. Stansberry, 47 Ill. 2d 541, 268 N.E.2d 431 (1971), *cert. denied*, 404 U.S. 873 (1971); State v. Anselmo, 256 So.2d 98 (La. 1971); Mason v. State, 280 A.2d 753 (Md. App. 1971).

118. *See, e.g.*, United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971); United States v. Roth, 391 F.2d 507 (7th Cir. 1967).

119. *See, e.g.*, United States v. Dunnings, 425 F.2d 836 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970); People v. McDonald, 480 P.2d 555 (Colo. 1971); State v. Carluccio, 116 N.J. Super. 49, 280 A.2d 853 (1971); Commonwealth v. D'Angelo, 437 Pa. 331, 263 A.2d 441 (1970).

120. Owens v. State, 217 Tenn. 544, 399 S.W.2d 507 (1965); O'Brien v. State, 205 Tenn. 405, 326 S.W.2d 759 (1959); Solomon v. State, 203 Tenn. 583, 315 S.W.2d 99 (1958); Gallimore v. State, 173 Tenn. 178, 116 S.W.2d 1001 (1938); Reed v. State, 162 Tenn. 643, 39 S.W.2d 749 (1931).

to show "fraud or collusion."[121] This standard was reaffirmed in *Poole v. State*.[122]

### 2. Incident to Arrest

The limitations placed upon searches incident to arrest by *Chimel v. California*[123] continue to be a prime source of litigation. In *Williams v. United States*[124] the Supreme Court determined that the *Chimel* decision would not be applied retroactively.[125] While *Chimel* ostensibly left little room for exceptions to the strictures of its holding, lower courts have persistently created exceptions, particularly where common sense supported the reasonableness of a given search. In *Goodner v. State*,[126] the defendant was arrested on a charge of armed robbery in the living room of a residence where he had been sleeping on a couch in his underwear. Before ordering him to dress, the officers searched his clothing and found a loaded gun and money in the pockets of the coat he was to put on. The court found the search reasonable, noting that a contra result would have permitted the arrestee to arm himself.[127]

### 3. Exigent Circumstances

The presumptive requirement of a warrant as a condition precedent to a valid search may be foregone when the exigent circumstances render the securing of a warrant impractical. A common instance, exemplified by *Warden v. Hayden*,[128] involves the arrest and incidental search executed by police in "hot pursuit."[129] In *United States v.*

121. Solomon v. State, 203 Tenn. 583, 315 S.W.2d 99 (1958); Reed v. State, 162 Tenn. 643, 39 S.W.2d 749 (1931).

While these words are not used in Owens v. State, 217 Tenn. 544, 399 S.W.2d 507 (1965), the court talked in terms of an affidavit containing "facts upon which the affiant bases his reasonable belief," *id.* at 553, 399 S.W.2d at 511, which produces the equivalent understanding.

122. 467 S.W.2d 826 (Tenn. Crim. App. 1971) (the court quoted from *Owens, supra*).

123. 395 U.S. 752 (1969). *See 1969 Survey* at 476.

124. 401 U.S. 646 (1971).

125. *See also* Hill v. California, 401 U.S. 797 (1971).

126. 464 S.W.2d 339 (Tenn. Crim. App. 1970).

127. *See also* United States v. Titus, 445 F.2d 577 (2d Cir. 1971); Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971); United States *ex rel.* Falconer v. Pate, 319 F. Supp. 206 (N.D. Ill. 1970); People v. Giacalone, 23 Mich. App. 163, 178 N.W.2d 162 (1970); People v. Mann, 61 Misc. 2d 107, 505 N.Y.S.2d 23 (1969).

128. 387 U.S. 294 (1967).

129. *See 1969 Survey* at 477-78.

*Rose*[130] officers located an automobile used in a bank robbery less than two hours after the crime. Footprints in the snow led from the automobile to an apartment house a short distance away. There, wet footprints continued up the stairs. A downstairs occupant informed the officers that the vehicle had been parked shortly prior to their arrival and its two occupants had gone upstairs. The officers knocked at each of the upstairs apartments[131] and received no response. They then proceeded to an unmarked door, slightly ajar, knocked and announced their presence and purpose. When there was no response, one of the officers pushed the door further open and observed one of the defendants holding a rifle, and a large amount of money on a bed. He, and the other defendant, also found in the apartment, were arrested and weapons and the money were seized. The court found the arrests and seizures reasonable, citing the *Hayden* decision.[132]

### 4. Vehicle Searches

Warrantless searches of vehicles continue to be frequently sustained on the authority of *Chambers v. Maroney*[133] where the officer has probable cause to believe the vehicle contains seizable evidence.[134] Similarly, *Cooper v. California*[135] provides authority for the warrantless search of a vehicle where it is legally held by the police as evidence in a forfeiture proceeding.[136]

### 5. Misplaced Confidence

The United States Supreme Court has consistently held that no constitutional rights are violated when officers employ a special agent or informant to gain the confidence of a suspect and engage in a conversation which is subsequently recounted by the participant or is

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130. 440 F.2d 832 (6th Cir. 1971), *cert. denied*, 404 U.S. 838 (1971).

131. The downstairs occupant advised them that only one of the apartments should be occupied.

132. *See also* Chappell v. United States, 342 F.2d 934 (D.C. Cir. 1965).

133. 399 U.S. 42 (1970). *See 1970 Survey* at 214-16.

134. Figer v. Perini, 440 F.2d 661 (6th Cir. 1971); United States v. Strickland, 329 F. Supp. 1345 (E.D. Tenn. 1970); Cook v. State, 466 S.W.2d 530 (Tenn. Crim. App. 1971); Yocum v. State, 469 S.W.2d 538 (Tenn. Crim. App. 1970); Graybeal v. State, 463 S.W.2d 159 (Tenn. Crim. App. 1970).

135. 386 U.S. 68 (1966).

136. United States v. Mills, 440 F.2d 647 (6th Cir. 1971), *cert. denied*, 404 U.S. 837 (1971).

heard or recorded by another officer.[137] In *United States v. White*[138] the Court was called upon to determine whether the misplaced confidence decisions had been implicitly overruled or modified by *Katz v. United States*[139] which reconceptualized the fourth amendment protection in terms of a right of privacy. In *White*, eight separate conversations between the respondent and a government informant were transmitted through radio equipment concealed on the person of the informant to officers located nearby.[140] The government was unable to produce the agent who had participated in the conversations, but they were permitted to introduce the testimony of the officers who conducted the electronic surveillance. The lower court had concluded that *Katz* had overruled *On Lee v. United States*,[141] in which a comparable surveillance tactic had been upheld. The Supreme Court[142] found the cases distinguishable. The problem, in terms of the *Katz* standard, was not whether a particular suspect may have relied on the discretion of his companions. The question was rather what expectation of privacy was constitutionally "justifiable." If nothing in the constitution protects an individual from the decision of a confidant to testify respecting statements made by the accused,

> [f]or constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with the defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person . . . ; (2) or carries equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency.[143]

Nor, submitted the Court, should the unavailability at trial of the

137. Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).

138. 401 U.S. 745 (1971), *rehearing denied*, 402 U.S. 990 (1971).

139. 389 U.S. 347 (1967).

140. In four instances, the conversations were also overheard by an agent concealed in a closet within earshot.

141. 343 U.S. 747 (1952).

142. Only four Justices concurred in the opinion of the Court. Justice Black concurred separately, relying on his dissent in *Katz* which denied the application of the fourth amendment to conversations. Justice Brennan concurred separately for the reason, also noted in the plurality opinion, that *Katz* should not be given retrospective application. Justices Douglas, Harlan and Marshall dissented.

143. 401 U.S. at 745. *See also* United States v. Hoffa, 437 F.2d 11 (6th Cir. 1971).

agent who participated in the conversation have any bearing on the scope of the protection of the fourth amendment.[144]

### D. Preliminary Hearing

A significant addition to the rights of persons accused of crime was accomplished legislatively by the provisions,

> [i]n all criminal cases, prior to presentment and indictment, whether the charge be a misdemeanor or a felony, the accused shall be entitled to a preliminary hearing upon his request therefore, [*sic*] whether the grand jury be in session or not.[145]

The statute may be read to mean the initiative for such a hearing must be taken by the defendant, and thus he could conceivably be denied the right through ignorance. While there is no *constitutional* right to a preliminary hearing, to cause the utilization of the statutory right to be limited to those aware of it would likely be viewed as a denial of equal protection of the law under the fourteenth amendment.[146] In any event, it is clear that where a preliminary hearing is held, the accused is entitled to the sixth amendment right to counsel.[147]

### E. Speedy Trial

When an accused claims that his right to a speedy trial under the sixth amendment has been violated, a court may find it appropriate to review the reasons for the delay. The right to a speedy trial is relative and depends upon the circumstances.[148] The mere passage of time is not enough.[149] A delay explained as unavoidable for the pur-

144. "His unavailability at trial and proffering the testimony of other agents may raise evidentiary problems or pose issues of prosecutorial misconduct with respect to the informer's disappearance, but they do not appear critical to deciding whether prior events invaded the defendant's Fourth Amendment rights." 401 U.S. at 754.

145. TENN. CODE ANN. § 40-1131 (Supp. 1971).

146. *Cf., e.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1956): "It is true that a State is not required by the federal constitution to provide appellate courts or a right of appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

147. Coleman v. Alabama, 399 U.S. 1 (1970).

148. *See* United States v. Beard, 381 F.2d 325 (6th Cir. 1967); Welsh v. United States, 348 F.2d 885 (6th Cir. 1965); Bullock v. United States, 265 F.2d 683 (6th Cir. 1959); State v. Gossage, 470 S.W.2d 39 (Tenn. Crim. App. 1971).

149. Short v. Cardwell, 444 F.2d 1368 (6th Cir. 1971).

pose of preparing the case for the prosecution may be viewed as reasonable.[150] Thus in *Barker v. Wingo*[151] the trial of the defendant was delayed until the completion of the trial of an accomplice. The testimony of the accomplice was considered essential to the prosecution of the defendant, and it was known that he would effectively invoke the privilege against self-incrimination if called as a witness prior to the completion of his own trial. The delay for this purpose extended over four years and three months. The court appeared to find the purpose of the delay reasonable, but rested its decision on the absence of two factors considered essential for a successful claim: (1) a demand for trial on the part of the defendant,[152] and (2) a showing of prejudice resulting from the delay.[153] In *United States v. Heard*[154] the court was sympathetic with the fact that the prosecutor's office had been short-staffed and had therefore tried defendants who were presently in jail before trying defendants who were on bail. Again, the court emphasized the absence of demand and a showing of prejudice. Even where the defendant is presently serving another sentence, he will be expected to make a demand for a speedy trial before a complaint will be heard.[155]

### *F. Guilty Plea*

Entering a guilty plea is the functional equivalent of a verdict of guilty by judge or jury, and nothing remains to be done but the entering of judgment and sentence.[156] Because of the finality of the decision to plead guilty it may not be done by counsel against the wishes of the defendant.[157] When effectively entered, it stands as a waiver of all prior non-jurisdictional defects.[158] Complaint will be

150. *See, e.g.*, United States v. Dickerson, 347 F.2d 783 (2d Cir. 1965); State v. Anonymous, 278 A.2d 151 (Conn. 1971); People v. Collins, 66 Misc. 2d 340, 320 N.Y.S.2d 683 (1970).

151. 442 F.2d 1141 (6th Cir. 1971).

152. *See also* Short v. Cardwell, 444 F.2d 1368 (6th Cir. 1971); Pruitt v. State, 460 S.W.2d 385 (Tenn. Crim. App. 1970); State *ex rel.* Lewis v. State, 447 S.W.2d 42 (Tenn. Crim. App. 1969).

153. *See also* State v. Gossage, 470 S.W.2d 30 (Tenn. Crim. App. 1971); State v. McCullough, 470 S.W.2d 50 (Tenn. Crim. App. 1971); Edmaiston v. State, 452 S.W.2d 677 (Tenn. Crim. App. 1970).

154. 443 F.2d 856 (6th Cir. 1971).

155. Short v. Cardwell, 444 F.2d 1368 (6th Cir. 1971).

156. Boykin v. Alabama, 395 U.S. 238 (1969); Kercheval v. United States, 274 U.S. 220 (1927).

157. Palfy v. Cardwell, 448 F.2d 328 (6th Cir. 1971).

158. Austin v. Perini, 434 F.2d 752 (6th Cir. 1970).

heard only where the accused can show that the guilty plea itself is the fruit of the prior illegal conduct of officials.[159] Such an argument was made in *Cunningham v. Wingo*[160] where it was contended that mistreatment while in jail had coerced a guilty plea. The appellant was suspected in connection with a jailbreak and as a result was subjected to the most austere living conditions for some sixty days.[161] The court was quick to concede that the treatment accorded the defendant amounted to cruel and unusual punishment.[162] Nevertheless, it could not be said that the abuse had prompted the plea, because the appellant had expressed a desire to plead guilty three weeks prior to the punitive treatment. At that time the appellant had sought a ten year sentence, and the court found if he had received such, the validity of the plea would never have been challenged. The appellant actually received a twenty-one year sentence, and the issue therefore became, according to the court, whether he had been promised anything less. The court concluded that he had not, and therefore the plea was valid. The reasoning of the court is subject to criticism for the failure to properly distinguish two distinct bases for attacking a guilty plea: that the accused voluntarily entered the plea and that he entered the plea understanding the consequences. When the appellant first explored the possibility of entering a plea of guilty, it may be assumed that his decision was wholly voluntary. Presumably, he did not and would not enter a plea at that time because the prosecution would not accept his terms. At the time he entered the plea, he may have understood that he would receive a greater sentence than he sought, but it does not necessarily follow that the plea was voluntary; perhaps the appellant gave up on bargaining for a plea because of the unbearable conditions of his existence. His previous willingness to negotiate a plea should not preclude a factual determination of the

159. *See* Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); Chambers v. Florida, 309 U.S. 227 (1940).

160. 443 F.2d 195 (6th Cir. 1971).

161. "At the time of the attempted jail break, appellant was deprived of all food for a period of four days; and from there on was given only one meal every three days for a period of two weeks. He was then transferred to the 'black cat', a punishment cell, and received one meal a day thereafter during his detention in the jail until his plea of guilty. In the 'black cat', there was no mattress on the steel cot, and only one window for ventilation which was not permitted to be opened by anyone except an officer. That window was kept closed. On the ceiling of the cell were four large light bulbs, which were burning day and night. With the window closed, the heat from the light bulbs would as appellant expressed it, 'kill you.' " *Id.* at 198-99.

162. *Id.* at 204 n.3.

possible coercion brought to bear prior to the entering of the plea.

The problem of the unfulfilled promise came before the Supreme Court in *Santobello v. New York*.[163] There, following negotiations, the prosecutor agreed to permit the petitioner to plead guilty to a lesser included offense and to make no recommendation as to the sentence. When the case eventually reached the sentencing stage, the prosecutor with whom the petitioner had negotiated had been replaced. The new prosecutor recommended the maximum sentence of one year. Over the objection of the petitioner, the sentencing judge imposed the maximum sentence, although assuring the counsel that the recommendation of the prosecutor had no influence on his decision. The Court held that whether the recommendation had actually influenced the sentence was immaterial. The plain fact was that the petitioner had been promised that no recommendation would be made, and that promise had not been kept.

> [W]hen a plea rests in any significant degree on a promise or agreement by the prosecutor, so that it can be said to be part of the inducement or consideration such promise must be fulfilled.[164]

Nor did the fact that the breach of the agreement was inadvertent require a different result.[165]

### *G. Right of Confrontation*

#### 1. Cross-Examination of Witnesses

Fundamental to the sixth amendment right of confrontation is the opportunity of the accused to cross-examine the witnesses against him. In *United States v. Beasley*[166] the appellant complained of the failure of the prosecution to call as a witness the laboratory technician who processed his latent palm print from the scene of the crime. The court held that the technician, who merely "brought out" the latent prints on a piece of paper, was not a witness "against" the appellant. At the same time, the expert who had matched the print with that of the appellant was a witness against him, and he had been

163. 404 U.S. 257 (1971).
164. *Id.* at 262.
165. *Id.*
166. 438 F.2d 1279 (6th Cir. 1971).

cross-examined by the appellant.[167] In *Canady v. State*[168] a tape recording made from broadcasts from squad cars during an attempted apprehension which resulted in the deaths of two officers was introduced at their murder trial. The court found the tape had been properly authenticated and as a part of the res gestae constituted an exception to the right of confrontation.

### 2. Confession of Co-Conspirator

As a result of *Bruton v. United States*,[169] decided in 1968, a substantial amount of litigation has involved the introduction into evidence of a statement of a co-conspirator inculpating the defendant.[170] In *Bruton* the confession of a co-defendant was introduced in evidence, but the confessor elected not to testify in his own defense. The Court held that the implicated defendant had been denied the right of confrontation. In an earlier case, *Douglas v. Alabama*,[171] a witness, not a defendant in the present action, was called to testify, and the prosecutor systematically read his confession into the record, which implicated the defendant, stopping after every few sentences to ask if the witness had not so confessed. Each time the witness asserted his privilege agaist self-incrimination and did the same when cross-examination was attempted. The Court found a denial of the right of confrontation.

Generally, if the confessor takes the stand and is subject to cross-examination, the right of the defendant has been satisfied.[172] In *Nelson v. O'Neil*[173] the co-defendant took the stand but denied that he had made the out-of-court statement which incriminated the defendant and claimed that its substance was false. The Court found nothing improper in the procedure, holding

> where a co-defendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defen-

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167. *See also* Kay v. United States, 255 F.2d 476 (4th Cir. 1958); Commonwealth v. Harvard, 253 N.E.2d 346 (Mass. 1969); Robinson v. Commonwealth 211 Va. 62, 175 S.E.2d 260 (1970). *But see* Gilleylen v. State, 255 So. 2d 661 (Miss. 1971).

168. 461 S.W.2d 53 (Tenn. Crim. App. 1970).

169. 391 U.S. 123 (1968).

170. *See 1969 Survey* at 464-66; *1970 Survey* at 222.

171. 380 U.S. 415 (1965).

172. United States v. Cale, 418 F.2d 897 (6th Cir. 1969); Woodall v. Neil, 328 F. Supp. 571 (E.D. Tenn. 1970); Walden v. Neil, 318 F. Supp. 968 (E.D. Tenn. 1970).

173. 402 U.S. 622 (1971).

> dant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments.[174]

In *Holbrook v. United States*[175] the appellant complained of the use of statements of a co-indictee, not a co-defendant, which were presented by another witness under an exception to the hearsay rule. In absence of any claim by the appellant that he had attempted to call the co-indictee as a witness, the court was not persuaded to hear a claimed *Bruton* violation. If the defendant has in some way ratified the accusatory statement of another,[176] any *Bruton* error will probably be viewed as harmless.[177]

### *H. Right to Counsel*

#### 1. Effective Assistance

In order to establish ineffective assistance of counsel, courts normally require that the trial be reduced to a farce or a mockery of justice.[178] Tennessee courts have consistently held that the issue of effective assistance cannot be raised where counsel is retained because the assistance does not constitute state action.[179] Ineffective assistance may be found where the attorney has had insufficient time to prepare a defense.[180] Tactical errors are an insufficient basis for establishing ineffective assistance.[181] Where a single counsel represents more than one defendant, and the defenses of the various defendants are inconsistent, the assistance of counsel may be inadequate.[182] It does not follow, however, that joint representation is per se prejudicial.[183] In

174. *Id.* at 629-30.

175. 441 F.2d 371 (6th Cir. 1971).

176. Miller v. Cardwell, 448 F.2d 186 (6th Cir. 1971).

177. *See* Harrington v. California, 395 U.S. 250 (1969).

178. Palfy v. Cardwell, 448 F.2d 328 (6th Cir. 1970); Nelson v. State 470 S.W.2d 32 (Tenn. Crim. App. 1971); Daugherty v. State, 470 S.W.2d 865 (Tenn. Crim. App. 1971).

179. Woodall v. Neil, 328 F. Supp. 571 (E.D. Tenn. 1970); Leeper v. State, 472 S.W.2d 240 (Tenn. Crim. App. 1971); Washington v. Tollett, 470 S.W.2d 841 (Tenn. Crim. App. 1971); Brewer v. State, 470 S.W.2d 47 (Tenn. Crim. App. 1970); Beaty v. Neil, 467 S.W.2d 844 (Tenn. Crim. App. 1971). *See also 1968 Survey* at 251.

180. United States v. Knight, 443 F.2d 174 (6th Cir. 1971).

181. Daugherty v. State, 470 S.W.2d 865 (Tenn. Crim. App. 1971); Blankenship v. State, 469 S.W.2d 530 (Tenn. Crim. App. 1971).

182. Moran v. State, 472 S.W.2d 238 (Tenn. Crim. App. 1971).

183. United States v. Jones, 436 F.2d 971 (6th Cir. 1971). *See also 1969 Survey* at 484.

*Daugherty v. State*[184] the defendant was tried jointly with his minor son for burglary, the two being represented by the same attorney. The strategy employed by the defense was to place the full responsibility for the offense on the defendant and completely exonerate the son, a strategy which proved to be successful: the son was found not guilty and the defendant received the minimum sentence. The court found the assistance of counsel to be commendable and the defendant without grounds to object. It would not appear that the defendant had argued conflict of interest on the appeal. Presumably, a different result might be reached if the familial relationship between the two parties had not existed.[185] In *Manuel v. Salisbury*,[186] the court found that a conflict of interest was not demonstrated by the fact that the defendant had discussed his case with an attorney whose partner later assisted in the prosecution.

### 2. Assistance other than Counsel

An increasing number of cases raise the issue of the need for varities of assistance other than counsel, either as an adjunct to the sixth amendment right or as a requirement of fourteenth amendment due process.[187] In *United States v. Stifel*[188] the prosecution sought the use of neutron activation analysis evidence in its case. The court determined that the evidence was admissible, but because of the potential for abuse in the use of such scientific evidence, it would be necessary to permit the defendant to make similar tests, and at government expense if the defendant was an indigent. In *United States v. Jones*[189] counsel for an indigent requested additional assistance in the form of an investigator to research newspapers to determine the possible presence of adverse pre-trial publicity, and a fingerprint comparison analysis for the purpoe of evaluating the opinion of a prosecution witness who identified a thumb-print found at the scene of the crime as that of the defendant. As to the first request, the work

184. 470 S.W.2d 865 (Tenn. Crim. App. 1971).

185. *See also* United States v. Cale, 418 F.2d 897 (6th Cir. 1969), discussed in *1970 Survey* at 226.

186. 446 F.2d 453 (6th Cir. 1971).

187. *See, e.g.*, Lee v. Habib, 424 F.2d 891 (D.C. Cir. 1970); United Staes v. Johnson, 238 F.2d 565 (2d Cir. 1956); United States v. Germany, 32 F.R.D. 343 (M.D. Ala. 1963); Comment, 16 VILL. L. REV. 323 (1970).

188. 433 F.2d 431 (6th Cir. 1970).

189. 320 F. Supp. 901 (E.D. Tenn. 1971).

required involved no expertise was and therefore could be shouldered by counsel himself. Less persuasive was the response of the court to the second request: counsel had made "a searching and advised cross-examination" of the prosecutor's expert witness and had been unable to shake his opinion. Thus, the court concluded, nothing could be gained by allowing counsel to go "shopping" for another analyst who might provide a contrary opinion.

### 3. Identification Procedures

As a result of the recognition of a right to counsel at line-ups[190] and the presence of a potential due process issue in all identification procedures,[191] the method by which a witness identifies an accused has become a prime source of litigation.[192] While a line-up identification made without the presence of counsel representing the accused is inadmissible at his trial,[193] the witness is not thereby precluded from identifying the defendant at his trial if the prosecution can satisfy the burden of proving the courtroom identification had a source independent of the improper line-up.[194]

While indicating that a participant in a line-up should be allowed to summon his own attorney, the Supreme Court left open the possibility that substitute counsel might "suffice when presence of the suspect's own counsel would result in prejudicial delay."[195] The Court has not since had occasion to elaborate upon this possibility, but the question has arisen in a number of lower court decisions.[196] In *Brown v. State*[197] the defendant was advised of his rights preceding a line-up and said he wanted an attorney. He knew no local counsel, where-

190. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

191. Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967).

192. *See 1969 Survey* at 485-87; *1970 Survey* at 224-25.

193. Whether *Wade* should apply to pre-indictment lineups is an open question. *Compare* Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969), *with* United States v. Roth, 430 F.2d 1137 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1970).

194. Johnson v. Salisbury, 448 F.2d 374 (6th Cir. 1971); Brown v. State, 470 S.W.2d 39 (Tenn. Crim. App. 1971).

195. United States v. Wade, 388 U.S. 218, 237 (1967).

196. *See, e.g.*, United States v. Queen, 435 F.2d 66 (D.C. Cir. 1970); United States v. Valez, 431 F.2d 622 (8th Cir. 1970); United States v. Kirby, 427 F.2d 610 D.C. Cir. 1970); United States v. Sanders, 322 F. Supp. 947 (E.D. Pa. 1971); State v. Sigh, 470 S.W.2d 503 (Mo. 1971).

197. 470 S.W.2d 39 (Tenn. Crim. App. 1971).

upon the officers called upon a prominent local attorney to represent him. The attorney consulted with him for some thirty minutes and was present during the line-up. Ultimately, the defendant was represented by a different attorney, but counsel from the line-up was called as a witness by the defense and testified at the trial. The court held that the representation afforded the defendant at his line-up satisfied the *Wade* standard. Indeed, it might well be said that the defendant was more fortunate than most. Counsel at a line-up serves both as an advisor and a witness. At trial, it is normally impossible for counsel to take the stand as a witness for the defense and still retain his role as advocate. Defendant in this case was not confronted with this dilemma, and at the same time, his counsel at the line-up was no mere witness. He did in fact counsel the defendant and was, at least for the time being, his representative and advocate.

Where the witness is confronted with a single suspect for identification the possibility of suggestiveness is much stronger.[198] Nevertheless subsequent courtroom identifications have frequently been sustained.[199] In *United States v. DeBose*[200] the court concluded that the fact that the witness was an experienced police officer offset any possibility that he would be susceptible to suggestiveness.

The particular suggestibility of a line-up is occasionally appraised by the courts.[201] The lack of confidence of the witness in making the identification goes to the credibility of the evidence, not its admissibility.[202] A number of decisions have sustained identifications taking place at judicial hearings prior to the trial of the defendant,[203] but in *United States v. Luck*[204] the court found such a procedure impermissibly suggestive.[205] Courts are generally unclear as to the role to be played by counsel.[206] In *United States v.*

198. *See, e.g.*, United States *ex rel.* Rivera v. McKendrick, 448 F.2d 30 (2d Cir. 1971); Browning v. Salisbury, 325 F. Supp. 1183 (S.D. Ohio 1971).

199. United States *ex rel.* Penachio v. Kropp, 448 F.2d 110 (6th Cir. 1971).

200. 433 F.2d 916 (6th Cir. 1970), *cert. denied*, 401 U.S. 920 (1971).

201. United States v. DeBose, 433 F.2d 916 (6th Cir. 1970) (error harmless); Brown v. State, 470 S.W.2d 39 (Tenn. Crim. App. 1971).

202. United States v. Toney, 440 F.2d 590 (6th Cir. 1971).

203. *See, e.g.*, United States v. Jackson, 448 F.2d 963 (9th Cir. 1971); United States v. Hardy, 448 F.2d 423 (3d Cir. 1971); United States v. Pollack, 427 F.2d 1168 (5th Cir. 1970), *cert. denied*, 400 U.S. 831 (1970).

204. 447 F.2d 1333 (6th Cir. 1971).

205. *See also* Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969).

206. *See, e.g.*, Doss v. United States, 431 F.2d 601 (9th Cir. 1970); United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970); Sprigs v. Wilson, 419 F.2d 759 (D.C. Cir. 1969);

*Gholston*[207] the court defined counsel's principal function to be "to witness the line-up so that the entire proceeding may be reconstructed by him during cross-examination at trial, in order to diminish the weight given by the jury to eye-witness testimony."[208] The defendant may, of course, waive counsel at the line-up.[209] If the defendant testifies at his trial and concedes the issue of identity, he thereby waives any objection to impropriety in the identification procedure.[210]

*Simmons v. United States*[211] sanctioned the use of photographs for identification purposes and held a subsequent courtroom identification proper absent a procedure "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[212] Photographic identifications are frequently sustained employing this standard.[213]

## *I. Self-Incrimination*

### 1. Comment on Failure to Testify

The privilege against self-incrimination permits the accused to elect not to testify at his trial and precludes the prosecution and the court from commenting adversely upon such a decision.[214] Indirect comment is equally prohibited.[215] But in *Hollbrook v. United States*[216] the statement by the prosecutor, "I think you are entitled to hear from the defendants," was held, when taken in context, to be a reference to counsel rather than the defendants themselves.[217] In *Scott v.*

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United States v. Allen, 408 F.2d 1287 (D.C. Cir. 1969); People v. Williams, 92 Cal. Rptr. 6, 478 P.2d 942 (1971). *See also* Quinn, *In the Wake of Wade: The Dimensions of the Eye-Witness Identification Cases*, 42 U. COLO. L. REV. 135 (1970).

207. 437 F.2d 260 (6th Cir. 1971).

208. *Id.* at 263.

209. Garner v. State, 469 S.W.2d 542 (Tenn. Crim. App. 1971).

210. Jordan v. State, 467 S.W.2d 840 (Tenn. Crim. App. 1971).

211. 390 U.S. 377 (1968).

212. *Id.* at 384.

213. United States v. Serio, 440 F.2d 827 (6th Cir. 1971); United States v. DeBose, 433 F.2d 916 (6th Cir. 1970). *Cf.* United States v. Fried, 436 F.2d 784 (6th Cir. 1971), *cert. denied*, 403 U.S. 934 (1971).

214. Griffin v. California, 380 U.S. 609 (1965).

215. *See* Huckaby v. State, 457 S.W.2d 872 (Tenn. Crim. App. 1970), discussed in *1970 Survey* at 227.

216. 441 F.2d 371 (6th Cir. 1971).

217. "Now Mr. Darvanan, counsel for the defendants, will have occasion to speak to you and to argue to you on the evidence in the way most favorable to his clients, but I want you to listen for a few things when he is talking to you. I think there is a very definite explanation

*Perini*[218] the court held that comment by the prosecutor on the failure of a co-defendant to take the stand was prejudicial to the defendant.[219]

### 2. Presumptions

In *Lothridge v. United States*[220] the appellant challenged the instruction given the jury pursuant to a statutory presumption to the effect that the possessor of certain drugs knew that they were unlawfully imported.[221] The jury instruction read:

> [w]henever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.[222]

The appellant contended that a fair reading of this instruction would lead the jury to conclude that the defendant must personally explain the possession of the drugs, which resulted in penalizing him for electing not to testify. The court, however, found that elsewhere in the instruction the judge had unequivocally admonished the jury that the failure of the defendant to testify did not create any presumption against him and should not weigh in the slightest against him.[223] Thus, concluded the court, to reach the conclusion suggested by the defendant, the court would have to assume the jury had ignored the

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needed by him in order for you to make the proper determination. *I think you are entitled to hear from the defendants* as to why Attorney Weitzman would come in and would testify that this document was drawn up between the hours of nine and five, whereas Mrs. Harris and Mrs. Holbrook testified that it was drawn up in their presence with the secretary there, without the lawyer being present. Why is there this inconsistency?" *Id.* at 373 (emphasis added).

218. 437 F.2d 1066 (6th Cir. 1971).

219. *See also* Kinser v. Cooper, 413 F.2d 730 (6th Cir. 1969), discussed in *1969 Survey* at 459-60. *Cf.* United States v. Wells, 431 F.2d 434 (6th Cir. 1970), *cert. denied*, 400 U.S. 997 (1970).

220. 441 F.2d 919 (6th Cir. 1971).

221. "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." 21 U.S.C. § 174 (1956). The constitutionality of this statute was sustained in Turner v. United States, 396 U.S. 398 (1969).

222. 441 F.2d at 921.

223. "I charge you that the failure of a defendant to take the witness stand and testify in his or her own behalf does not create any presumption whatever against such defendant, and I further charge you that you must not permit that fact to weigh in the slightest degree against the defendants." *Id.* at 922.

latter portion of the instruction, an assumption the court would not entertain. While analytically the latter charge may extinguish any ambiguity in the meaning of the earlier instruction, the distinction may not be so clear to a jury receiving an oral charge. Certainly it would be preferable that any instructions on presumptions include an internal clarification that precludes a possible understanding that the silence of the accused supports the presumption.

### 3. Confessions

a. *Spontaneous Utterances.* The warnings required under *Miranda v. Arizona*[224] are inapplicable as a pre-requisite to the admissibility of a statement of the accused typified as a spontaneous utterance.[225] This possibility arose in three recent cases in Tennessee. In *Spears v. States*,[226] the sheriff arriving at the scene of the offense observed the defendant standing over the deceased holding a pistol. He asked what happened, and the defendant responded, "I shot him." In *Campbell v. State*,[227] as the defendant, one of three participants in an armed robbery was being arrested, he said, "It wasn't none of me. They made me go with them." In *Brewer v. State*,[228] the petitioner ran out into the street and waved down the police. When one of the officers asked, "What's going on?" the petitioner responded that he did not mean to shoot the boy. In all three instances the Tennessee court held that the statements were spontaneous utterances, unaffected by *Miranda*.

b. *Custodial Interrogation.* Normally the notion of custodial interrogation arouses images of questioning by policemen in the stationhouse, but in *Underwood v. State*,[229] the application of the *Miranda* requirements to interrogation by a judge arose. A clergyman reported to the trial judge that the minor daughter of the defendant had told him the defendant had been having sexual relations with him. The judge had the girl brought to his office, and she confirmed the story. The defendant, who operated a concession stand in the courthouse, was called into an office where he found the judge and

224. 384 U.S. 436 (1966).
225. *1970 Survey* at 231.
226. 466 S.W.2d 543 (Tenn. Crim. App. 1970).
227. 469 S.W.2d 506 (Tenn. Crim. App. 1971).
228. 470 S.W.2d 47 (Tenn. Crim. App. 1970).
229. 465 S.W.2d 884 (Tenn. Crim. App. 1970).

two officers. The judge said, "Now, we're going to have to get all of our marbles on the table." He told the defendant his daughter was in the next office and repeated her accusation. The defendant then made a full oral confession which, after he left, the judge reduced to writing which he and the two officers witnessed. The court held that the defendant had been "deprived of his freedom of action in a significant way and the *Miranda* warnings were required."[230] Thus the confession was improperly admitted.

c. *Impeachment.* A substantial in-road upon the *Miranda* protection was produced by *Harris v. New York*.[231] The petitioner was charged with twice selling heroin to an undercover agent. Testifying in his defense, the petitioner denied the first sale and submitted that the purported second transaction actually involved a transfer of a packet of baking powder rather than heroin. On cross-examination, the petitioner was asked if he had not made certain statements, inconsistent with his present testimony, immediately following his arrest. The petitioner indicated he did not remember any of the questions or answers. The statements attributed to the petitioner had been obtained from him in violation of the *Miranda* requirements. The trial judge instructed the jury that the statements attributed to the petitioner were to be considered only for purposes of determining his credibility, not as evidence of guilt. The petitioner was found guilty on one of the two counts.

While conceding that the statements were inadmissible as evidence of guilt because of the *Miranda* violations, the Court significantly observed, "Petitioner makes no claim that the statements made to the police were coerced or involuntary."[232] The Court reasoned that merely because evidence was inadmissible in the prosecution's case in chief did not mean that it was inadmissible for all purposes, "provided of course that the trustworthiness of the evidence satisfies legal standards."[233] The Court then quoted from *Walder v. United States*,[234] a case upholding the use of illegally seized evidence for impeachment:

> It is one thing to say the Government cannot make an affirmative

230. *Id.* at 886.
231. 401 U.S. 222 (1971).
232. *Id.* at 224.
233. *Id.*
234. 347 U.S. 62 (1954).

> use of evidence unlawfully obtained. It is quite another to say the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.[235]

Concluding that *Miranda* could not "be perverted into a license to use perjury by way of a defense,"[236] the conviction was affirmed.

The disconcerting implication of *Harris*, perhaps far more significant than the result, is the recognition of a distinction between confessions inadmissible because involuntary and confessions inadmissible because obtained in violation of the *Miranda* standard. While it cannot be gainsaid that even where *Miranda* has been complied with *de facto* involuntariness may still be shown,[237] it does not follow that *Miranda* is properly to be viewed as an alternative to voluntariness. Rather, the spirit of *Miranda* would appear to be that if certain procedural safeguards are not satisfied, there arises a conclusive presumption of involuntariness. Thus, a confession obtained in violation of *Miranda* is by definition an involuntary confession. *Harris* apparently held that this is not a proper understanding of *Miranda*; the failure to comply with that decision does not render the evidence untrustworthy. Having taken this step, it may next be argued that if a confession is "reliable" enough for impeachment purposes, why is it not equally reliable for purposes of substantive proof. Having pointed itself in this direction, the Court may find such an argument irresistible. The explanation for the about-face would be that *Miranda* was never intended as an absolute rule but merely as a suggested practice to achieve the standard of voluntariness.[238] Thus the Court would be ready to accept the position of the Omnibus Crime Control and Safe Streets Act of 1968 which had as its objective the overruling of *Miranda*.[239]

From an analytical perspective the holding in *Harris* is wholly

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235. *Id.* at 65.

236. 401 U.S. at 226.

237. *See 1970 Survey* at 230-31.

238. Here the Court could quote the *Miranda* loophole: "[U]nless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it." 384 U.S. at 444.

239. After stating, *inter alia*, the *Miranda* requirements: "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession." 18 U.S.C. § 3501 (1968).

indefensible, a point effectively made by the dissent.[240] First, the *Walder* case is clearly distinguishable, because the illegally seized evidence was there used to impeach the testimony of the defendant on matters collateral to the crime charged. Testifying in his own defense to a narcotics charge, the defendant said he had never possessed narcotics in his entire life. Thereafter, the prosecution was allowed to introduce the evidence seized two years previous which was totally unrelated to the present charge. In sustaining the admissibility of the evidence solely for the purpoe of impeachment, the Court was careful to distinguish the situation where the testimony of the defendant was a denial of complicity in the crime charged.[241] The majority, while conceding this distinction in the *Walder* case, dismissed it as not "a difference in principle."[242]

Second, as the dissent observed, the answer to the issue in the present case is provided by *Miranda*, itself. Arguing from the broad policy perspective of *Griffin v. California*[243] that the use of the privilege against self-incrimination should not be fettered in any way, the Court observed,

> The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner . . . [S]tatements merely intended to be exculpatory by the defendant are often *used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*[244]

Again, the point was conceded by the majority, the feeble response being "discussion of that issue was not at all necessary to the Court's

240. Justice Brennan, joined by Justices Douglas and Marshall. Justice Black also dissented.

241. "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U.S. at 65.

242. 401 U.S. at 225. It may be argued that the rejection of this distinction casts serious doubt upon the continued viability of Bruton v. United States, 391 U.S. 123 (1968). There the Court held that a jury could not be expected to engage in the "mental gymnastics" of considering a confession as evidence of guilty of but one co-defendant when it inculpated another. In *Harris*, the Court apparently held that a jury can consider a confession only for purposes of impeachment, notwithstanding its relevance to the proof of the crime charged.

243. 380 U.S. 609 (1965).

244. 384 U.S. at 476-77 (emphasis as added in the *Harris* dissent).

holding and cannot be regarded as controlling."[245]

d. *State Action.* From time to time it becomes incumbent upon the courts to reiterate the fundamental notion that constitutional protections serve as inhibitions only against state action. In *West v. State*[246] the defendant objected to the testimony of a newspaper reporter who had interviewed him while in jail. The statements made by the defendant had been exculpatory but were inconsistent with other statements attributed to him, also put in evidence. Having determined that the reporter was not functioning as an undercover agent and that the defendant had voluntarily talked with him understanding the purpose of the interview, the court held the evidence admissible.

## *J. Fair Trial*

### 1. Change of Venue

In *Groppi v. Wisconsin*[247] the Supreme Court addressed the constitutionality of a state statute restricting the right to a change of venue to felony prosecutions. The prosecution contended that the accused misdemeanant was not entitled to a jury trial under the fourteenth amendment and therefore he could not complain in this fashion when he was afforded a trial by jury. The Court held it mattered not whether the defendant had a right to a jury trial. The issue was simply what the fourteenth amendment commands once a trial by jury has been given the accused. Having reached this point, the Court found no rational basis for assuming community prejudice could not be aroused in a misdemeanor case and thus the judicial machinery for a change of venue was unneeded. While it would be a rare case in which a misdemeanor prosecution aroused passions against the accused, this was not a sufficient reason to deny the defendant the opportunity to prove that a change of venue was required in his case.

The reasoning of the Court is analogous to that employed in numerous cases concerning grand jury proceedings. To date, the fifth amendment right to an indictment by a grand jury has not been

245. 401 U.S. at 224.
246. 466 S.W.2d 524 (Tenn. Crim. App. 1971).
247. 400 U.S. 505 (1971).

extended to the states, and therefore state prosecutions may proceed by way of information. However, if a state elects to initiate charges by grand jury indictment, the fourteenth amendment requires that there be no invidious discrimination in the selection of jurors.[248]

### 2. Presentation of Evidence

In Tennessee by statute[249] an accused who elects to testify in his own behalf must be the first witness for the defense. In *Harvey v. State*[250] the defendant contended that this requirement impeded his right to conduct his defense and was premised on the presumption that an accused would not tell the truth if not required to testify first. As a result, he submitted, the statute violated the fifth, sixth and fourteenth amendments. In rejecting the argument the court initially noted that the defendant had shown no prejudice resulting from the enforcement of the rule, but that in any event the issue had been resolved in 1893 in *Clemons v. State*.[251] In truth, all the *Clemons* court did was to observe that the state was unambiguous and contained no exceptions. That court did not speak to the constitutional issues here raised, and not surprisingly since the fifth and sixth amendment protections were not to be extended to the states for another half century. The *Harvey* decision may simply be read as a refusal on the part of the court to consider the merits of a constitutional assault upon the statute.

In *Campbell v. State*[252] the defendants were charged with armed robbery. When each testified in his behalf, he sought to adorn himself with a stocking mask, similar to those worn by the culprits, apparently to demonstrate the difficulty of identification by the witnesses. The trial court refused to permit them to present such demonstrative evidence. On appeal, the court found it error to deny the defendant's request[253] but in light of the over-whelming evidence concluded it was harmless.[254]

248. *See, e.g.*, Patton v. Mississippi, 332 U.S. 463 (1947).
249. TENN. CODE ANN. § 40-2403 (1955).
250. 468 S.W.2d 731 (Tenn. 1971).
251. 92 Tenn. 282, 21 S.W. 525 (1893).
252. 469 S.W.2d 506 (Tenn. Crim. App. 1971).
253. The court cited Lipes v. State, 83 Tenn. 125 (1885).
254. *See* Harrington v. California, 395 U.S. 250 (1969).

### 3. Discovery

A person charged with a criminal offense may by statute inspect and copy "books, papers, documents or tangible objects, obtained from or belonging to the defendant."[255] The privilege does not extend to any work product or any statement of a witness other than the defendant.[256] In *McKenzie v. State*[257] the court held that under the statute an accused had no right to examine the statement of a co-defendant.

A more serious problem is presented when the accused alleges the suppression of evidence by the prosecution. In *Branch v. State*[258] the accused was charged with murder and claimed self-defense. He and others testified that he and the deceased became involved in an argument in a cafe and that the latter threatened him with a knife. Later the defendant left the cafe, the deceased followed him brandishing the knife, and the defendant shot him. The operator of the cafe testified that she had searched both parties when they entered the cafe and neither was armed. Another witness for the prosecution observed the shooting but saw no knife in the possession of the deceased. The investigating officer reported finding no weapon at the scene. The defendant was convicted of second degree murder. On appeal he contended that the prosecution knew a knife was found at the scene of the killing but withheld that fact from the defense. Passing references had been made to the knife during the course of the trial, and at the hearing on a motion for a new trial, the prosecutor conceded that a knife had been brought to the police by an unidentified person. The court held that the presence of a knife was so critical to the defense in this case that it was error for the prosecution to keep this information from the defense, notwithstanding the fact that the evidence had not been authenticated to the extent that it would be admissible at trial.[259] Relying on *Brady v. Maryland*,[260] the court held that

255. TENN. CODE ANN. § 40-2044 (Supp. 1971).

256. Hudgins v. State, 458 S.W.2d 627 (Tenn. Crim. App. 1970); Elliott v. State, 454 S.W.2d 187 (Tenn. Crim. App. 1970).

257. 462 S.W.2d 243 (Tenn. Crim. App. 1970).

258. 469 S.W.2d 533 (Tenn. Crim. App. 1969).

259. "That information could very well have enabled defense counsel to conduct further and possibly fruitful investigation regarding the finding of the knife. The mere fact that the police did not get the name of the person who delivered the knife to them could not in any way affect the duty of the Assistant District Attorney General to inform the defendant or his counsel of the fact." *Id.* at 534.

260. 373 U.S. 83 (1963).

this suppression of evidence amounted to a denial of due process.[261] Nor was it necessary that there be any showing of bad faith on the part of the prosecutor.[262]

#### 4. Trial by Jury

a. *Membership.* The equal protection clause of the fourteenth amendment commands that there be no invidious discrimination on the basis of race in the selection of juries.[263] However, it does not follow that an accused has the right to the presence of members of a particular group on his jury; it simply must be shown that no discrimination occurred in the selection of the *pool* of jurors from which the panel was selected.[264] Even beyond this, in *Alexander v. State*,[265] the court found no significance in the fact that only three of fity-nine potential jurors were black, notwithstanding that 20% of the population of the county was black, where systematic exclusion was not shown.[266]

### *K. Double Jeopardy*

#### 1. When Attaches

Among the more significant Supreme Court decisions of the previous year was *United States v. Jorn*,[267] in which the Court was called upon to determine the point in a criminal proceeding at which it may be said that jeopardy has attached. The defendant was charged with tax fraud. Five of the witnesses for the prosecution were taxpayers whom he had assisted in the preparation of their returns. After the first witness was called, defense counsel suggested that the witnesses be warned of their constitutional rights. While the first

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261. Also cited was the concurring opinion in Giles v. Maryland, 386 U.S. 66 (1967), wherein Justice Fortas observed that it was no answer that the evidence in question would have been inadmissible at trial.

262. *See* Brady v. Maryland, 373 U.S. 83 (1963).

263. Neal v. Delaware, 103 U.S. 370 (1881); Strauder v. West Virginia, 100 U.S. 303 (1880).

264. Swain v. Alabama, 380 U.S. 202 (1954); Johnson v. State, 456 S.W.2d 864 (Tenn. Crim. App. 1970), *cert. denied*, 400 U.S. 997 (1971).

265. 469 S.W.2d 521 (Tenn. Crim. App. 1971).

266. Nevertheless, discrimination can be shown by circumstantial evidence, as in Neal v. Delaware, 103 U.S. 370 (1881), where no black had ever been summoned as a juror.

267. 400 U.S. 470 (1971).

witness indicated he had been apprised of his rights, the trial judge refused to permit him to testify until he had consulted an attorney. He further inquired of the prosecutor if the remaining four witnesses were similarly situated. The prosecutor responded that they also had been warned of their rights, but the trial judge, feeling the warnings might have been inadequate, proceeded to discharge the jury. The case was set for retrial before another jury, at which point the defendant moved for a dismissal on the ground of former jeopardy.

The Supreme Court held that jeopardy had attached, and the defendant could not be retried. While eschewing a "mechanical rule" prohibiting retrial whenever a jury was discharged without the consent of the defendant, the Court found that the trial court had abused its discretion in light of the assurances given him that the witnesses had been properly warned, and in not considering the possibility of a trial continuance. This being the case, the Court was disposed to honor the defendant's "valued right to have his trial completed by a particular tribunal."[268]

In sharp contrast to the *Jorn* decision is *State v. Brooks*.[269] There the indictment charged robbery by "use of a deadly weapon, . . . to wit: a pistol." At the trial, however, the evidence for the state showed that a rifle had been used. Upon discovering this discrepancy, the prosecution moved for a directed verdict of not guilty, which was entered. The defendants were reindicted for robbery with a rifle, their plea of former jeopardy was overruled, and they were convicted. The appellate court affirmed the conviction, holding that the crime charged in the second indictment was distinct from that previously charged, and therefore the plea of former jeopardy was not valid.[270]

In *Dunbar v. State*,[271] the court held that jeopardy did not attach where the court hearing the case lacked jurisdiction and therefore its judgment was a nullity.[272]

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268. *Id.* at 484 [*quoting from* Wade v. Hunter, 336 U.S. 684, 689 (1949)].

269. 462 S.W.2d 491 (Tenn. 1970).

270. The case is, of course, analytically distinguishable from the *Jorn* decision, although the reason for *Jorn* would appear equally applicable here. Indeed, there may be stronger reason to hold in favor of the defendant when it is the prosecution rather than the judge who has blundered. The simple solution to the *Brooks* problem would appear to be to allow the prosecution to amend the indictment in the course of the trial, if this could be accomplished without denying the defendant his fifth amendment right to know in advance the nature and cause of the accusation against him.

271. 470 S.W.2d 846 (Tenn. Crim. App. 1971).

272. A general sessions judge had heard a felony case.

### 2. Multiple Offenses

Tennessee courts continued to frown upon multiple convictions arising from a single criminal transaction,[273] even though such results would not appear compelled by the protection against double jeopardy.[274] Thus it was held that convictions of burglary and larceny[275] and convictions of involuntary manslaughter and driving while intoxicated[276] could not be sustained when arising out of the same facts. On the other hand, in *Hayes v. State*,[277] where the defendant first committed robbery and thereafter attempted rape, convictions for both were sustained.

### 3. Retrial

While *North Carolina v. Pearce*[278] all but eliminated the possibility of giving a defendant a greater sentence on retrial after his previous conviction was reversed, Tennessee courts have held that the rule is inapplicable when punishment at the retrial was determined by a jury rather than a judge, on the assumption that the jury would not know of the prior conviction or sentence.[279] In one instance, however, a writ of habeas corpus was issued by a federal court which saw no distinction to be drawn for constitutional purposes.[280] A recent state decision, *Brown v. State*,[281] has again recognized the distinction, acknowledging the intervening federal decision, but observing that the state court was not bound by rulings of lower federal courts.

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273. *See 1970 Survey* at 242-43.

274. *See, e.g.*, Gore v. United Stats, 357 U.S. 386 (1958).

275. Lawson v. Neil, 319 F. Supp. 550 (E.D. Tenn. 1969); McAfee v. State, 463 S.W.2d 141 (Tenn. Crim. App. 1970).

276. Ritter v. State, 462 S.W.2d 247 (Tenn. Crim. App. 1970).

277. 470 S.W.2d 950 (Tenn. Crim. App. 1971).

278. 395 U.S. 711 (1969).

279. Britt v. State, 455 S.W.2d 625 (Tenn. Crim. App. 1969); State *ex rel.* Pinkard v. Henderson, 452 S.W.2d 908 (Tenn. Crim. App. 1969), *cert. denied*, 402 U.S. 946 (1971), discussed in *1970 Survey* at 245-46.

280. Pinkard v. Neil, 311 F. Supp. 711 (M.D. Tenn. 1970). *See also* Pendergrass v. Neil, 9 CRIM. L. REP. 2152 (M.D. Tenn., April 1, 1971), reaffirming *Pinkard*.

281. 470 S.W.2d 39 (Tenn. Crim. App. 1971).