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with process;<sup>49</sup> whether the individuals who executed the subpoena are included in the suit; and which branch of government is abridging the individual's rights. It now appears that an individual's constitutional rights rest on precarious grounds. It is not apparent that the Constitution demands this result. The Court has avoided creating needless friction with legislators, but unfortunately the citizen has gotten the rub.

LINDA M. CASTLEMAN-ZIA

## CRIMINAL LAW—WITNESSES—SCOPE OF CROSS-EXAMINATION OF THE DEFENDANT

*State v. Booth*<sup>1</sup>

Defendant Booth was charged with second degree murder. At trial, defendant testified about the events leading to the killing and admitted the act, claiming self-defense. He concluded his testimony on direct examination by stating that he got into his car and left the scene. Over defendant's objection, the prosecutor was allowed to ask defendant what he had done with the alleged murder weapon after he left the scene. Defendant was convicted and appealed to the Missouri Court of Appeals for the St. Louis District. The court found that the trial court erred in allowing the prosecutor to ask defendant about his disposition of the murder weapon, because the subject was not referred to either directly or indirectly in the direct examination and was thus beyond the proper scope of cross-examination.<sup>2</sup> The court held, however, that this was not reversible error, because defendant failed to preserve the issue for review.<sup>3</sup>

At common law the defendant in a criminal case was incompetent to

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49. The U.S.S.F., if able to obtain jurisdiction over the New York bank, might obtain relief. Because the bank is involved in executing the legislative decision but is under no immunity, the court could issue an injunction against it. The U.S.S.F. could bring an action in New York against the bank under 42 U.S.C. § 1983. But under Fed. R. Civ. P. 19 it would have to be determined if Congress is an indispensable party. Assuming the court would proceed without the committee, it is questionable that the court would render a decision which would leave the bank with two conflicting orders to obey. This alternative open to the U.S.S.F. is unlikely to prove helpful.

A second source of relief would be for the bank to refuse to comply with the subpoena and thus be held in contempt. Standing problems may be presented if the bank attempts to assert the organization's defenses. See *California Banker's Assoc. v. Shultz*, 94 S. Ct. 1494, 1512 (1974); Note, 88 HARV. L. REV. 423 (1974).

1. 515 S.W.2d 586 (Mo. App., D. St. L. 1974).

2. See § 546.260, RSMo 1969. Missouri allows wide-open cross-examination of other witnesses in both criminal and civil proceedings. § 491.070, RSMo 1969.

3. Defendant did not set out the answer he was required to give or state how he was prejudiced in either his points relied on or his motion for new trial. 515 S.W.2d at 590. See Mo. R. CRIM. P. 27.20. The case was reversed for failure to instruct on self-defense. The court decided the cross-examination question because it might reoccur at retrial. 515 S.W.2d at 589.

testify. Missouri first removed this incompetency by statute in 1877.<sup>4</sup> The Missouri Supreme Court soon held that a defendant who chose to take the stand under the statute could be cross-examined on any relevant matter.<sup>5</sup> In response, the legislature enacted a statute limiting this wide scope of cross-examination.<sup>6</sup> A defendant or his spouse who chose to take the stand under the new statute would only be "liable to cross-examination, as to any matter referred to in his examination in chief."<sup>7</sup> What is a "matter referred to" has since been the source of considerable litigation, but is still difficult to determine.<sup>8</sup> The difficulty only arises when a criminal defendant or his spouse takes the stand. In 1905 the legislature codified the common law allowing wide-open cross-examination of all other witnesses. That provision is now section 491.070, RSMo 1969.

The rule has not imposed strict limits on the cross-examiner.<sup>9</sup> The supreme court has continually said that the state is not confined to a mere categorical review of the direct testimony,<sup>10</sup> that the cross-examination may cover any matter "within the fair purview"<sup>11</sup> of the direct,<sup>12</sup> and that a defendant who refers to a subject in a general way may be examined in detail on it.<sup>13</sup>

In fact, a general denial alone may subject the defendant to a wider scope of questioning than detailed alibi or self-defense testimony. In *State v. Scown*<sup>14</sup> the defendant denied performing an abortion on the night in question. The trial court allowed the prosecutor to ask a wide range of questions, most of which asked for explanations of the state's evidence regarding defendant's connection with the premises where the crime allegedly occurred. The supreme court found that the defendant's statement on direct amounted to a denial, not just of the crime, but of the state's evidence as well, and approved cross-examination on those matters.<sup>15</sup> In

4. Mo. Laws of 1877, at 356.

5. *State v. Clinton*, 67 Mo. 380 (1878).

6. § 1918, RSMo 1879. The statute is unchanged in its present form, § 546.260, RSMo 1969.

7. § 546.260, RSMo 1969. "Examination in chief" means the direct examination.

8. *State v. McClinton*, 418 S.W.2d 55, 59 (Mo. En Banc 1967); *State v. Williams*, 519 S.W.2d 576, 578 (Mo. App., D. St. L. 1975).

9. See, e.g., *State v. Miller*, 190 Mo. 449, 89 S.W. 377 (1905), where a defendant accused of establishing a lottery denied employment by the Mexican Lottery Company, he could be cross-examined with questions designed to show he had some connection with the organization. The court said the statute does not allow a defendant to take the stand, negate the state's evidence by answering a few carefully chosen questions, and then avoid cross-examination on the issues thus raised.

10. *State v. Dalton*, 433 S.W.2d 562 (Mo. 1968).

11. This refers to what actually was asked on direct, and not what could have been asked.

12. *State v. Harvey*, 449 S.W.2d 649 (Mo. 1970).

13. *State v. Scown*, 312 S.W.2d 782 (Mo. 1958).

14. *Id.*

15. *But see State v. Kelley*, 284 S.W. 801 (Mo. 1926), which held that defendant's general denial of robbery on direct was not a sufficiently broad refer-

*State v. Whiteaker*<sup>16</sup> the defendant claimed amnesia for the period during which the crime occurred. The court found no error in allowing the prosecutor to ask the defendant if he *could* have killed his wife.<sup>17</sup> *Whiteaker* is an indication that the more general the direct testimony is, the wider the allowable scope of cross-examination may become.

The limited cross-examination statute provides that the defendant "may be contradicted and impeached as any other witness."<sup>18</sup> Thus, although the prosecutor<sup>19</sup> cannot attempt to elicit answers covering factual areas not related to the direct examination, he can ask questions designed to test the defendant's memory or the accuracy of his testimony.<sup>20</sup> For example, in *State v. Phillips*<sup>21</sup> the defendant testified on direct that he was drunk and sleeping in a truck during the commission of the alleged burglary. The court held that he could be asked on cross-examination if he drove the truck away. Even though outside the scope of direct, the question was proper as bearing on the credibility of defendant's claim of drunkenness. Similarly, a defendant may be cross-examined about a previous confession, even though he did not refer to it on direct examination.<sup>22</sup> If the defendant asserts an alibi on direct examination, the prosecution can test his memory by asking him where he was on the same date of a prior month or year.<sup>23</sup> Thus, questions clearly designed to discredit the defendant's testimony need not be limited to the scope of direct. However, as the emphasis of the cross-examination shifts toward the addition of new evidence to the state's case, a closer relationship to the direct examination is required.

A survey of the cases prior to *Booth* indicates that few questions are outside the proper scope of cross-examination and even fewer constitute reversible error. Those rare cases often involve clear violations of the statute. An example is *State v. Black*,<sup>24</sup> where the defendant was accused of manslaughter, allegedly effectuated by beating his daughter. His wife<sup>25</sup> testified about defendant's treatment of their children on direct. It was held reversible error to allow the prosecutor to ask the wife if the defendant also beat her.<sup>26</sup>

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ence to the incident to allow the cross-examiner to ask if defendant got any money from the victim and, if so, how. *Id.* at 802.

16. 499 S.W.2d 412 (Mo. 1973), cert. denied, 415 U.S. 949 (1974).

17. *Id.* at 419.

18. § 546.260, RSMo 1969.

19. The statute also applies to questions by the court. *State v. McClinton*, 418 S.W.2d 55 (Mo. En Banc 1967); *State v. Grant*, 394 S.W.2d 285 (Mo. 1965).

20. *State v. Brown*, 312 S.W.2d 818 (Mo. 1958).

21. 480 S.W.2d 836 (Mo. 1972).

22. *State v. Kaufman*, 254 S.W.2d 640 (Mo. 1953).

23. *State v. Abbott*, 245 S.W.2d 876 (Mo. 1952); *State v. Davit*, 343 Mo. 1151, 125 S.W.2d 47 (1938).

24. 360 Mo. 261, 227 S.W.2d 1006 (1950).

25. Section 546.260 applies to both defendant and his spouse.

26. 360 Mo. at 270, 227 S.W.2d at 1011.

More common are situations such as the one in *State v. Northington*.<sup>27</sup> On direct, defendant testified that he had six rounds in his revolver before the encounter and that he shot in self-defense. The court found it within the proper scope of cross-examination to ask when he loaded his revolver and where the gun was the afternoon before the shooting. The decision may have been influenced by the fact that the defendant's answer to the question, which showed that he was a county constable authorized to carry the weapon, was favorable rather than harmful to him.

An attempt to summarize the cases and state a general rule delineating the allowable scope of cross-examination would be fruitless.<sup>28</sup> Many decisions have been expressly limited to their facts and courts have often disclaimed an ability to add definitiveness to the statute.<sup>29</sup>

Once a question has been found to be outside the proper scope of cross-examination, the court must determine whether its admission was prejudicial. The supreme court has stated two apparently conflicting views on this subject. In *State v. McClinton*<sup>30</sup> the court said that such cross-examination is "generally held to . . . constitute reversible error."<sup>31</sup> The authorities cited were *State v. Santino*,<sup>32</sup> which said prejudice would be presumed absent clear evidence to the contrary, and *State v. Pierson*,<sup>33</sup> which dealt with errors prejudicial under any test.<sup>34</sup> A year later, the court again cited *Pierson*, this time for the proposition that cross-examination beyond the scope of direct was not grounds for reversal unless "material or prejudicial to the accused's substantial rights."<sup>35</sup> Thus asking the defendant if he had been drinking prior to the crime was held not prejudicial, because the question was immaterial.<sup>36</sup> The trend of the cases seems to follow the latter rule by implication, but the status of the law is far from clear.

The handling of the question of prejudice in *Booth* is of little help in settling the law in this area. The court avoided a discussion of the issue by pointing to the defendant's failure to show how he was prejudiced.<sup>37</sup> Clearly this was not an application of the rule that prejudice will be presumed.<sup>38</sup> Yet the court, in finding the questions beyond the proper

27. 268 S.W. 57 (Mo. 1924).

28. The courts have not adequately defined what the phrase "referred to" in the statute means.

29. *State v. McClinton*, 418 S.W.2d 55 (Mo. 1967).

30. *Id.*

31. *Id.* at 59.

32. 186 S.W. 976 (Mo. 1916).

33. 331 Mo. 636, 56 S.W.2d 120 (1932).

34. Among other things, the prosecutor asked defendant if he was willing to go into the entire transaction or if there were some matters he would rather not discuss. *Id.* at 645, 56 S.W.2d at 123.

35. *State v. Moser*, 423 S.W.2d 804 (Mo. 1968). The *Pierson* court had required that the question be "on a material point or . . . prejudicial to the substantial rights of the defendant." 331 Mo. at 645, 56 S.W.2d at 123.

36. *State v. Moser*, 423 S.W.2d 804, 807 (Mo. 1968).

37. See note 3 *supra*.

38. See text accompanying note 32 *supra*.

scope of cross-examination, cited *McClinton*,<sup>39</sup> which purports to follow that rule.<sup>40</sup>

The statute provides little protection to the defendant, even when the trial court sustains his objection to cross-examination on matters not referred to on direct. When the defendant takes the stand, he waives his constitutional protection against self-incrimination and has only the statute to shield him.<sup>41</sup> Although there is some suggestion that the outer limits of cross-examination of a criminal defendant may be constitutionally imposed,<sup>42</sup> no case law requires the statutory rule.<sup>43</sup> The United States Supreme Court has even found a waiver of the right against self-incrimination by a defendant who voluntarily took the stand in a *civil* denaturalization proceeding.<sup>44</sup> In addition, although the statute may protect the defendant from the prosecutor's questions, it does not limit what the prosecutor may say in closing argument. Once the accused decides to testify, the prosecutor, in closing argument, may "make any legitimate comment upon his testimony"<sup>45</sup> including the defendant's failure to explain the state's evidence against him.<sup>46</sup> Thus, the jury is permitted to draw inferences which would be improper if the defendant chose not to testify at all.<sup>47</sup>

A clear ruling is needed to specify when allowing cross-examination to exceed the proper scope will be reversible error. A presumption of prejudice is not warranted because the questions will not always be prejudicial, as cases like *State v. Northington*<sup>48</sup> show. The requirement that the question be on a material point is equally hard to support. A question that exceeds the scope of direct is no less prejudicial because it is also immaterial; in fact, it may be more prejudicial for that reason. A more defensible position would be to require the appellant to demonstrate a clear likelihood of prejudice from the question. Deciding whether a question is prejudicial or merely harmless error should be no more difficult in these cases than it is for other instances of inadmissible evidence.

There appears to be no strong reason for limiting cross-examination of criminal defendants. In those jurisdictions that limit all cross-examination, the primary justification for the rule is that it requires the parties

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39. See text accompanying notes 30-31 *supra*.

40. The same court recently said that such questions were not reversible error unless "prejudicial to the substantial rights of the accused," citing *Moser*. *State v. Rice*, 519 S.W.2d 573, 575 (Mo. App., D. St. L. 1975).

41. *State v. Scown*, 312 S.W.2d 782, 786 (Mo. 1958).

42. C. McCORMICK, EVIDENCE § 26 (2d ed. 1972).

43. *Raffel v. United States*, 271 U.S. 494 (1926), held that defendant's "waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Id.* at 497.

44. *Brown v. United States*, 356 U.S. 148 (1958).

45. *State v. Drew*, 213 S.W. 106, 107 (Mo. 1919).

46. *State v. Ayres*, 314 Mo. 574, 285 S.W. 997 (1926).

47. § 546.270, RSMo 1969.

48. 268 S.W. 57 (Mo. 1924). See text accompanying note 28 *supra*.

to present their facts in order.<sup>49</sup> That reasoning has little application to the Missouri statute because the prosecutor must present his case before the defendant takes the stand. The statute does not place strict limits on the prosecutor, who can ask questions relating to impeachment and can comment in closing argument on the defendant's limited testimony even if defense counsel's questions have been carefully designed to restrict the cross-examination.<sup>50</sup>

The effect of the statute is to allow a defendant to make only a partial waiver of his right against self-incrimination, thus affording him greater protection than the Constitution requires. This additional protection may be important in at least two situations. First, a defendant being tried for two or more unrelated crimes may wish to testify as to one, but not the other. Second, where a defendant asserts an alibi at trial after remaining silent during arrest and detention, he can avoid questions like "Why didn't you tell this story to the police?" and thus prevent the jury from drawing improper inferences from his earlier exercise of fifth amendment rights. However, these minimal benefits are outweighed by the uncertainty surrounding the interpretation of the rule. The cases are so numerous, diverse, and contradictory that there is authority to support either side of most arguments regarding the proper scope of cross-examination. In addition, there is no clear rule delineating which improper questions constitute reversible error. The majority of cases holding a question or questions improper find that the questions did not constitute reversible error, an indication that the defendant seldom gains any protection from the statute. In short, the protections afforded a defendant by the statute in its present form do not seem worth the problems it causes. The two specific advantages mentioned above could be provided by statute without otherwise restricting cross-examination.<sup>51</sup>

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49. C. McCORMICK, EVIDENCE § 26 (2d ed. 1972).

50. See text accompanying notes 18-23, 45-47 *supra*.

51. See PROP. FED. R. OF EVID., Rule 611, Advisory Comms. note, subdivision (b) (1971), recommending unrestricted cross-examination.