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TENNESSEE LAW REVIEW

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CRIMINAL LAW IN TENNESSEE IN 1973: A CRITICAL SURVEY*

JOSEPH G. COOK**

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I. INTRODUCTION

The most notable developments in criminal law in 1973[1] in-

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1. The present survey encompasses cases published in the National Reporter System during the calendar year 1973. It therefore includes some cases decided in 1972 and does not include other cases decided during 1973 but not yet reported. Some of the latter cases have appeared in abbreviated form in the CRIMINAL LAW REPORTER, and reference to some

volved substantive offenses. Both federal and state cases raised important questions regarding sodomy.[2] Criminal abortion statutes were by-and-large rendered unconstitutional in *Roe v. Wade*[3] and *Doe v. Bolton*,[4] and new legislation was enacted to replace the Tennessee statute.[5] The long-pending series of obscenity cases was also finally decided.[6]

Procedurally, significant decisions were rendered by the Supreme Court relative to consent searches[7] and vehicle searches.[8] The right of appointed counsel in all cases where incarceration results was afforded retroactive application.[9]

II. OFFENSES

A. *Against Person*

1. Homicide

A conviction of first degree murder in Tennessee may rest upon any one of four theories: poison, lying in wait, the perpetration or attempted perpetration of any of six designated felonies, and any other killing shown to be malicious, willful, deliberate and premeditated.[10] If one of the first three theories is alleged, proof of the act described is sufficient; it is not necessary that the prosecution prove willfulness, deliberation and premeditation.[11] Malice, however, must always be shown.[12] In *Stricklin v. State*,[13]

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of these reports will be made in the footnotes.

Frequent references will be found to previous surveys in this series. The complete citations are as follows: *1968 Survey*, 36 TENN. L. REV. 221 (1969); *1969 Survey*, 37 TENN. L. REV. 433 (1970); *1970 Survey*, 38 TENN. L. REV. 182 (1971); *1971 Survey*, 39 TENN. L. REV. 247 (1972); *1972 Survey*, 40 TENN. L. REV. 569 (1973).

2. *See* pp. 206-13 *infra*.
3. 410 U.S. 113 (1973).
4. 410 U.S. 179 (1973).
5. *See* pp. 217-19 *infra*.
6. *See* pp. 219-21 *infra*.
7. *See* pp. 229-30 *infra*.
8. *See* pp. 230-31 *infra*.
9. *See* pp. 237-38 *infra*.
10. TENN. CODE ANN. § 39-402 (Supp. 1973).
11. It may be conceded that in most cases such additional proof would not be particularly onerous for the prosecution. For example, the very act of "lying in wait" to kill an individual would strongly suggest the presence of all four mental elements. Under the felony murder theory, the proof of the mens rea required for the underlying felony will frequently be equally effective to prove the mens rea required for first degree murder, with the possible exception of premeditation.
12. TENN. CODE ANN. § 39-2401 (1955). *See 1969 Survey* at 436-40.
13. 497 S.W.2d 755 (Tenn. Crim. App. 1973).

the court of criminal appeals found first degree murder proved by uncontradicted evidence that a lethal dose of arsenic had been orally ingested by the decedent and a lack of any evidence of accidental ingestion. In *Buchanan v. State*,[14] the Tennessee Supreme Court held that a jury verdict, "We the jury find the defendant guilty of murder in the perpetration of a robbery," was sufficient; it was not necessary that the jury include the phrase "murder in the first degree."

The use of a deadly weapon raises a strong presumption of malice, as in *Gunn v. State*,[15] where the assailants struck the deceased with two-by-two and two-by-four pieces of wood,[16] and in *Brooks v. State*,[17] where defendant slashed the throat of the victim with a straight razor.

Homicide committed in the heat of passion in response to adequate provocation is reduced to voluntary manslaughter. Two of the traditional categories of adequate provocation were present in *Wright v. State*[18] where death resulted from mutual combat involving the deceased and the paramour of his wife. However, the fact that the accused is in a highly emotional state at the time of the killing is insufficient in itself to reduce the crime to manslaughter. It must be shown that the reaction satisfies an objective, reasonable man standard.[19] Thus, in *Shanklin v. State*,[20] the fact that the defendant was genuinely angered by the suggestion of a patron in a barber shop that he go home, whereupon he shot the patron, was insufficient to reduce the crime to anything less than second degree murder.[21]

2. Crime Against Nature

In *Wainwright v. Stone*,[22] the United States Supreme Court

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14. 488 S.W.2d 724 (Tenn. 1973).

15. 487 S.W.2d 666 (Tenn. Crim. App. 1972).

16. For a decision concerning the use of a "deadly weapon" in Tennessee, see *1969 Survey* at 223-25.

17. 489 S.W.2d 70 (Tenn. Crim. App. 1972).

18. 497 S.W.2d 588 (Tenn. Crim. App. 1973).

19. *See* 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 276, at 585 (1957). [hereinafter cited as WHARTON].

20. 491 S.W.2d 97 (Tenn. Crim. App. 1972).

21. "In our considered view the facts of this case do not overcome the presumption in law that the killing in this case was anything other than second degree murder resulting from anger engendered by slight provocation before the unjustified emotion could subside." *Id.* at 99.

22. 414 U.S. 21 (1973).

was called upon to review the holding of a federal court[23] that the Florida crime against nature statute was void for vagueness. The critical portions of the Florida statute[24] were substantially similar to the present Tennessee statute.[25] The case was complicated by the fact that subsequent to the conviction of the petitioners, the Florida Supreme Court, in *Franklin v. State*,[26] had declared the statute void for vagueness. The court in *Franklin*, however, limited its opinion to prospective application,[27] and subsequently relief was denied to the present appellees.[28]

In a federal habeas corpus proceeding, the federal district court found the statute void for vagueness and ordered the release of the prisoner. The Court of Appeals for the Fifth Circuit agreed, quoting extensively from the *Franklin* decision which had nullified the statute. Rather than interpret the federal district court decision as compelling the state court to give its own decision retroactive application, the court of appeals reasoned that the lower federal court had independently determined that the statute was void for vagueness, and thus it afforded the appellees the benefit of that finding.[29] The court of appeals observed:

> [T]he instant case is little more than a situation where persons are currently confined pursuant to convictions obtained under a statute that has been determined by the federal court to have been void at the time petitioners performed the acts said to have violated it. Cast in those terms there can be little question that relief was surely appropriate.[30]

Nevertheless, the Supreme Court found the holding of the

---

23. Stone v. Wainwright, 478 F.2d 390 (5th Cir. 1973).

24. "Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years." FLA. STAT. ANN. § 800.01 (1969).

25. TENN. CODE ANN. § 39-707 (1955) provides: "Crimes against nature either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five (5) years nor more than fifteen (15) years."

26. Franklin v. State, 257 So. 2d 21 (Fla. 1971).

27. The only explanation for this result was "in view of our former decisions." *Id.* at 24.

28. Stone v. State, 264 So. 2d 81 (Fla. App. 1972).

29. "The District Court did not order relief because petitioners were held under a statute that was voided by the Florida courts; rather, the court below ordered petitioner released because they were being held in physical custody pursuant to convictions of violating a statute that the federal court found to be repugnant to the Fourteenth Amendment." Stone v. Wainwright, 478 F.2d 390, 395-96 (5th Cir. 1973).

30. *Id.* at 396.

court of appeals incorrect and reversed. The Court reasoned that "when appellees committed the acts with which they were charged, they were on clear notice that their conduct was criminal under the statute as then construed."[31] The fact that the statute was later declared unconstitutional by the state court was immaterial.

The decision is at best a perplexing one. If the statute is in fact *void* for vagueness, then why should not the determination of the Florida Supreme Court be afforded retroactive effect? Conversely, if the prior decisions of the Florida court had afforded the statutory language adequate specificity, then why did it abruptly become constitutionally void for vagueness when the *Franklin* case reached the Florida court? If the facts in *Franklin*[32] fell within the definition given the crime in prior decisions, then the defendant in that case was no more entitled to relief than the present petitioner. If the conduct fell without those parameters, then the conviction could be reversed for that reason, without invalidating the statute. In short, while the state court is certainly free to reconsider the question of constitutionality at anytime, to find the statute void and not afford retroactive effect to that determination is nonsensical.

By placing its imprimatur on the several decisions of the Florida Supreme Court, the United States Supreme Court acknowledged the propriety of non-retroactivity, citing in support *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*[33] There the Court had held that a finding that a railroad charged an excessive rate to a shipper did not have to be given retroactive application. Neither the *Sunburst* case nor any of the cases cited therein dealt with a criminal statute later declared constitutionally void.[34] Indeed, while non-retroactivity in constitutionally based decisions concerning criminal procedure is not uncommon,[35] the author has not found a single judicial decision, other

31. Wainwright v. Stone, 414 U.S. 21, 23 (1973).

32. The case included consenting adults.

33. 287 U.S. 358 (1932).

34. *See also* Schaefer, *The Control of Sunbursts: Techniques of Prospective Overruling*, 42 N.Y.U.L. REV. 631 (1967). Justice Schaefer likewise does not consider this possibility.

35. *See, e.g.*, Mackey v. United States, 401 U.S. 667 (1971) (self-incrimination and failure to comply with statutory mandate); Williams v. United States, 401 U.S. 646 (1971) (limitation on search incident to arrest); Desist v. United States, 394 U.S. 244 (1969) (inadmissibility of evidence obtained by electronic eavesdropping); DeStefano v. Woods,

than the *Stone* case, in which a person convicted under a statute declared void subsequent to his conduct, was not afforded the benefit of the holding.[36]

It may be argued, however, that the several holdings of the Florida Supreme Court are immaterial to the present litigation, and that the federal district court's determination of unconstitutionality is wholly independent of the decision of the state court on the same issue. Therefore, the Supreme Court should have addressed only the substantive question underlying the issuance of the writ of habeas corpus. Conceivably, this is all it did, but nevertheless, its sole reason for sustaining the statute against a charge of vagueness is the interpretation by the state court. Yet, in the *Franklin* case, the state court implicitly conceded that its prior interpretations were insufficient to save the statute. The state court's explanation for its change of course was murky at best:

> We have over a long period of time upheld the statute despite earlier constitutional challenges. We are persuaded that these holdings and this statute require our reconsideration. One reason which makes this apparent is the transition of language over the span of the past 100 years of this law's existence. The change and upheaval of modern times are of drastic proportions. People's understandings of subjects, expressions and experiences are different than they were even a decade ago. The fact of these changes in the land must be taken into account and appraised. Their effect and the reasonable reaction and understanding of people today relate to statutory language. . . .
>
> A further reason dictating our reexamination here is the expansion of constitutional rulings on the invasion of private rights by state intrusion which must be taken into account in the consideration of this statute's continuing validity.[37]

If this was all true in 1971, is it credible that it was not equally true one year earlier when the present appellee first appealed his conviction? Indeed, if we are concerned with the evolution of

392 U.S. 631 (1968) (jury trial for serious contempts); Linkletter v. Walker, 381 U.S. 618 (1965) (inadmissibility of illegally seized evidence in state proceedings).

36. Cases are collected in Annot., 10 A.L.R.3d 1371 (1966). All cases cited involve a later ruling expanding statutory coverage or overruling a previous finding of unconstitutionality. Retroactivity was consistently denied because of the ex post facto effect of making conduct criminal which was not so at the time it occurred.

37. Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971).

linguistic usage over the past century, is it not reasonable to afford all persons presently incarcerated for violating the statute the benefit of the contemporary realization of the vagueness of the language?

The only defensible interpretation for the result reached by the Supreme Court would be to assume that the Court independently determined to its own satisfaction that the interpretation of the statute to render copulation per os and per anum criminal obviates the problem of vagueness. It would further be saying implicitly that the *Franklin* decision, declaring the statute void for vagueness, was wrong, or, at least, a result not compelled by the due process clause of the fourteenth amendment.

The proper interpretation of the opinion of the Supreme Court in *Stone* is pertinent to two recent Tennessee decisions. In *Stephens v. State*,[38] the court of criminal appeals held that "crime against nature" was equivalent to the common law offense of sodomy, which in its broadest sense "includes all acts of unnatural copulation."[39] So understood, the court concluded that the statute was not unconstitutionally vague. The court reasoned:

> There is no danger that some kind of sexual perversion apart from unnatural carnal copulation, unnatural sexual intercourse, could be embraced in the definition and description as plaintiff in error contends.[40]

These words ring hollow in light of the later holding in *Locke v. State*[41] that cunnilingus is a crime against nature within the statute.[42] While *Locke* involved a forcible assault, force or want of consent are not elements of a crime against nature, and the holding clearly is not based on this fact.[43] To support its dubious

38. 489 S.W.2d 542 (Tenn. Crim. App. 1972).
39. *Id.* at 543.
40. *Id.*
41. 501 S.W.2d 826 (Tenn. Crim. App. 1973).
42. This decision was not reported until January 1974, but has been included in this survey because of its obvious relevance to the other cases herein discussed.
43. The court conceded that the statute so interpreted might be unenforceable under certain circumstances: "We express no opinion as to the constitutionality of the application of this statute to the private acts of married couples, a question inapplicable to the facts of this case, and not briefed herein. Nor does the case sub judice involve the application of the statute to consenting adults." 501 S.W.2d at 828.

See also United States v. Brewster, 363 F. Supp. 606, 607 (M.D. Pa. 1973). "The broad 'victimless' Pennsylvania sodomy statute involved in the instant case certainly cannot even claim a purpose as weighty as that of the abortion statutes struck down as unconsti-

pronouncement, the court turned to a single decision in Maine.[44] Indeed, there was nowhere else to turn for favorable judicial authority in the last half century. There would appear to be but one earlier decision supporting the result, a Georgia court of appeals decision[45] in which the majority was apparently too embarrassed to write an opinion.[46] In contrast, the Supreme Courts of Mississippi[47] and Washington[48] have refused to recognize such behavior as constituting sodomy. Such is the "weight of authority" which the court submitted "supports the view which we follow." For the notion that its result is the "better reasoned," the court cited a legal encyclopedia which would appear to say quite the opposite.[49]

The broadest, yet quite legitimate, interpretation of the *Locke* decision is that any contact between the sexual organ of one person and any portion of the body of another, other than the sexual organ of a member of the opposite sex, is a crime against nature.[50] Yet, cunnilingus is a sufficiently common incident of sexual conduct to be viewed as a "natural" form of behavior, should the phrase "crime against nature" be approached as descriptive.[51] Indeed, Judge Galbreath in dissent contended that the

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tutional, where harm to the fetus was brought into question." *Cf.* State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973). The sodomy statute is inapplicable to married adults, but applicable to other consenting adults.

44. State v. Townsend, 145 Me. 384, 71 A.2d 517 (1950).

45. Comer v. State, 21 Ga. App. 306, 94 S.E.2d 314 (1917).

46. Not so, the dissenting opinion indicated: "Construing this statute strictly, as all criminal statutes must be construed, I think it means that the carnal knowledge must be by man with man, or in the *same* unnatural manner by man with woman." *Id.* at 307, 94 S.E. at 314.

47. State v. Hill, 179 Miss. 732, 176 So. 719 (1937).

48. State v. Olsen, 42 Wash. 2d 733, 258 P.2d 810 (1953).

49. "Other authorities, however, which seem to preponderate, and to be supported by the better reasoning, hold that sodomy as used in connection with statutes prohibiting the crime against nature includes all acts of unnatural carnal copulation with mankind or beast, and that the crime of sodomy or the crime against nature is committed where the act consists of penetration of the mouth. As stated by one court in construing the statute on this subject, since no particular opening of the body into which penetration can be made is specified, it follows that the actual penetration of the virile member into any orifice of the human body except the vaginal opening of a female is sufficient for the establishment of the crime in question." 48 AM. JUR. *Sodomy* § 2 (1943) (footnotes omitted).

This volume has now been replaced by 70 AM. JUR.2d *Sodomy* (1973). The above passage is not to be found, and the most direct reference to the present question is the following: "Oral copulation construed as sodomy . . . has included cunnilingus." *Id.* at § 6. Only one case is cited, in which the point is dictum, and the statute involved refers specifically to contact by mouth.

50. This of course only speaks to the "mankind" portion of the statute.

51. More likely, the ultimate derivation is in Thomistic natural law. *See* T. AQUINAS,

extension of the statute to encompass this conduct is unrealistic, given the widespread acceptance of such behavior among consenting heterosexual adults.[52] It may be suggested that any sexual practice frequently engaged in by consenting adults is by that fact "natural."[53] In this respect, concern may be engendered because of the socializing effect of court decisions. Given the concession of the court that its holding likely would be unenforceable, at least against married consenting adults, the fact remains that the court has said that in Tennessee individuals engaged in such conduct are committing a felony punishable by imprisonment from five to fifteen years, and although they may escape the pale of the law in some instances because of independent constitutional impediments to prosecution, this in no way assuages the moral and social condemnation of the statute as interpreted by the court. If the justification of the criminal prohibition is solely a moral one, there is a substantial question as to the propriety of such legislation,[54] particularly where the moral suasion codified is not necessarily shared by a majority of those subject to the law.

The conduct involved in the *Locke* case would be criminal under the Proposed Criminal Code because of the absence of consent.[55] However, the same activity between consenting adults would not be prohibited. Under the Proposed Code, the crime against nature statute is replaced by a section captioned "sexual abuse" which proscribes the occurrence of certain conduct "without the other person's consent."[56] Other sections of the Proposed

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SUMMA THEOLOGICA, Part II, Q. 94, Art. 3, Rep. Obj. 3.

52. "To hold that cunnilingus (an act approved by almost 90% of adults between 18 and 34 according to an exhaustive study) is a crime would seem to me to be judicial legislation of the plainest kind." 501 S.W.2d at 828-29.

53. *Cf.* Connor v. State, 490 S.W.2d 114, 115 (Ark. 1973): "Whether it is called sodomy, buggery, or crime against nature—as it often is called interchangeably—it boils down to a simple definition that it is an unnatural sex act which is condemned. It is the opposite of a natural sex act; the manner of a *natural* sex act is well known, even to the young and uneducated." If, as Justice Stewart said of obscenity, sodomy cannot be particularly defined, but, "I know it when I see it," Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion), perhaps the courts are well advised to take judicial notice of public attitudes toward sexual practices, including those of the young and uneducated.

54. *Cf.* Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

55. TENN. CRIM. CODE AND CODE OF CRIM. PROC. § 39-1304 (Proposed Final Draft, Nov. 1973) [hereinafter cited as CRIMINAL CODE].

56. *Id.* § 39-1304 provides in part:

> (b) The intercourse is without the other person's consent under one or more of the following circumstances only:

Code concern sexual abuse of a child,[57] and public lewdness.[58]

3. Incest

A conviction for a felony in Tennessee cannot be based on the uncorroborated testimony of an accomplice.[59] This rule has particular significance in sodomy cases. The majority view would appear to be that a child is incapable of consenting, and therefore is a victim rather than an accomplice.[60] In Tennessee, however, the burden falls on the prosecution to prove that the witness-participant, even if a child,[61] did not consent to the act, and therefore should be considered a victim.[62]

This stringent requirement of proof was recently recognized in two cases of purported incest with a child. In *Henley v. State*,[63] the court of criminal appeals held the testimony of the fifteen-year-old daughter of defendant insufficient to support a conviction.[64] A like result was reached on appeal in *Ballew v. State*[65] where defendant had been convicted of incest with his fourteen-

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(1) the actor compels the other person to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances; or

(2) the actor compels the other person to submit or participate by any threat that would prevent resistance by a person of ordinary resolution; or

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist; or

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the deviant sexual intercourse incapable either of appraising the nature of the act or of resisting it; or

(5) the other person has not consented and the actor knows the other person is unaware that deviant sexual intercourse is occurring; or

(6) the actor knows that the other person submits or participates because of the erroneous belief that he is the other person's spouse; or

(7) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge.

57. *Id.* § 39-1308.

58. *Id.* § 39-2641.

59. *See* cases cited in *1969 Survey* at 457 n.136.

60. 3 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 647, at 356 (1973).

61. *See, e.g.*, Boulton v. State, 214 Tenn. 94, 377 S.W.2d 936 (1964); Sherrill v. State, 204 Tenn. 427, 321 S.W.2d 811 (1959).

62. Davis v. State, 442 S.W.2d 283 (Tenn. Crim. App. 1969).

63. 489 S.W.2d 53 (Tenn. Crim. App. 1972).

64. "The rule in this State requiring corroboration of the testimony of an accomplice has been applied in sex cases even where the accomplice is a child." *Id.* at 55.

65. 498 S.W.2d 918 (Tenn. Crim. App. 1973).

year-old married daughter. While recognizing that the prosecution had proffered some evidence for the purpose of corroboration, the court found it insufficient to the task.[66] The Proposed Criminal Code does not include a corroboration requirement in the definition of incest,[67] and the comment expressly recognizes and approves the distinction drawn in Tennessee decisions between victims and accomplices.[68]

4. Kidnapping

In *McCracken v. State*,[69] the court of criminal appeals held that asportation is an essential element of the crime of kidnapping[70] in Tennessee. Examining the critical phrase, "confines, inveigles or entices away," the court concluded that the final term was "a common word with a well understood meaning,"[71] which modified the three preceding verbs. At common law asportation was an essential element of the crime of kidnapping,[72] and it continues to be so recognized in modern decisions.[73] The element of asportation may be deemed appropriate to distinguish the offense of kidnapping from false imprisonment,[74] but statutory modifications may, of course, provide a broader definition of

66. "In corroboration the state offered the testimony of two of Wanda's aunts and her husband, Robert Dale McKinney, age 18. These aunts were infrequent visitors in the home and testified that the defendant touched Wanda's breasts and legs two or three times in their presence. One of these occasions occurred when Wanda was 11 or 12 years old. The husband tells that the defendant put his hands on Wanda's legs when he visited them. This testimony of these witnesses does not show acts of undue familiarity which would lead the guarded discretion of a reasonable man to believe in the existence of an incestuous disposition between the parties involved and is too remote and insignificant for corroboration of the accomplice. Demonstrations of affection must be considered by the jury in the light of the kinship of the parties." *Id.* at 920.

67. CRIMINAL CODE § 39-1502.

68. "This judicial policy is deemed preferable to a blanket corroboration statute in the incest area, which include both consensual and nonconsensual relationships. Nonconsensual relationships, of course, can be prosecuted as sexual offenses." *Id.* comment at 108.

69. 489 S.W.2d 48 (Tenn. Crim. App. 1972).

70. TENN. CODE ANN. § 39-2601 (1955).

71. "It may be more awkward to apply it to the word 'confines' than to 'inveigles' and 'entices' but it fits in some cases and grammatically it is an adverb that modifies all three verbs." 489 S.W.2d at 52.

72. 4 W. BLACKSTONE, COMMENTARIES 259 (1822); Note, 53 COLUM. L. REV. 540 (1953).

73. People v. Adams, 389 Mich. 222, 205 N.W.2d 415 (1973); Aikerson v. State, 274 So. 2d 124 (Miss. 1973).

74. *See* 389 Mich. at 230, 205 N.W.2d at 419. False imprisonment is now a common law offense in Tennessee. It is codified in the CRIMINAL CODE § 39-1202.

kidnapping, and it would appear the language quoted above from the Tennessee statute need not be confined to the common law meaning. A recent Pennsylvania case[75] construed the language, "takes, or carries away, or decoys or entices away, or secretes a person,"[76] as not requiring "movement or change in position of the person or object taken."[77] Even closer in point is an Oklahoma decision[78] construing the phrase "confined or imprisoned"[79] sufficient to sustain a kidnapping conviction without proof of asportation.

In the present case, the court confessed to some awkwardness when applying the adverb "away" to the verb "confines," but nevertheless concluded that such a grammatical construction was proper and necessitated a requirement of asportation. Even more perplexing is the existence of a prior decision, *Cowan v. State*,[80] cited by the court in the present case, which reached the opposite result. In *Cowan*, two teen-age couples were parked in a field off a secluded road. Defendant, who lived about a quarter of a mile away, went to the automobile and threatened to use a pistol in his possession if they attempted to leave. He demanded and was given the ignition key to the automobile, and for the next seven hours, he unsuccessfully made sexual advances to the two girls. A conviction for kidnapping was affirmed. Ironically, the court quoted the kidnapping statute insofar as pertinent here, as follows: "Any person who forcibly or unlawfully confines . . . another . . . ."[81] Thus, the court avoided the problem of interpreting "away" by simply excluding it as not pertinent.[82]

Assuming that asportation is now required for a conviction of kidnapping, what result is reached when B.B. Wolf "entices" R.R. Hood to a woodland cottage by telephone, and once she enters, slams the door and will not let her leave? Has there been

75. Commonwealth v. Russell, 310 A.2d 296 (Pa. 1973).

76. PA. STAT. tit. 18, § 4723 (1973).

77. 310 A.2d at 297.

78. Jenkins v. State, 508 P.2d 660 (Okla. Crim. App. 1973).

79. OKLA. STAT. ANN. tit. 21, § 741 (1958).

80. 208 Tenn. 512, 347 S.W.2d 37 (1961).

81. *Id.* at 515, 347 S.W.2d at 39.

82. "There can be no question but that the great preponderance of the evidence in this case establishes it as a fact that Cowan forcibly and unlawfully confined these two couples at an isolated place during the night time for a period of seven hours for the purpose of thereby coercing one or both of these girls to have sexual intercourse with him. On principle the acts of this defendant fall within the meaning and intent of our kidnapping statute." *Id.* at 516, 347 S.W.2d at 39.

an asportation? Certainly there is not as that term is used elsewhere, such as in larceny cases where the asportation does not begin until a "taking" has occurred. Yet the conduct would seem the type for which the kidnapping statute was intended.

The Proposed Criminal Code would appear to eliminate this ambiguity by clearly dispensing with the requirement of asportation. The relevant section provides that an individual "commits kidnapping if by force, threat, or fraud he intentionally or knowingly detains another, or intentionally or knowingly moves another from the vicinity where he is found. . . ."[83]

B. *Against Property*

1. Larceny

An essential element of the crime of larceny is a specific intent to steal.[84] Circumstantial proof of this element arose in two recent cases. In *Hall v. State*,[85] defendant was apprehended while breaking into a residence. To sustain a charge of burglary it was necessary that the prosecution prove a specific intent to commit larceny. The court concluded that "intent to steal may be inferred from the breaking and entering of a building which contains things of value or from the attempt to do so."[86]

Similarly, in *Russell v. State*,[87] defendant was charged with attempted larceny. The victim, a customer in a supermarket, observed that her purse was open after she was bumped twice by defendant. Nothing was removed from the purse, however. A security officer had observed defendant bump into two other women in a comparable fashion. The court concluded that there was sufficient evidence of an intent to steal.

C. *Against Person and Property*

1. Robbery

The crime of robbery is an "aggravated larceny,"[88] and there-

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83. CRIMINAL CODE § 39-1201. Identical language is used to define false imprisonment. *Id.* § 39-1202. The sections differ in respect to the intent which accompanies the abduction.

84. *See* 2 WHARTON § 453, at 83.

85. 490 S.W.2d 495 (Tenn. 1973).

86. *Id.* at 496. *See also* Lee v. State, 489 S.W.2d 61 (Tenn. Crim. App. 1972).

87. 489 S.W.2d 535 (Tenn. Crim. App. 1972).

88. Crews v. State, 43 Tenn. 350, 353 (1866).

fore all the elements of larceny must be proven to support a conviction. Proof of a specific intent to steal has been a recurring problem in Tennessee decisions.[89] In *Young v. State*,[90] defendant, an inmate of the county jail, gained possession of a revolver and escaped from the facility by threatening a deputy sheriff with the weapon. He took a set of jail keys from the deputy, ordered him into the cell, and locked the door. The keys were discarded in a field adjoining the jail and not found for several months. Among the charges brought against defendant was robbery in the taking of the keys. The supreme court held that there was insufficient proof of an intent to steal.

The decision is reminiscent of *Black v. State*,[91] where in the process of a brutal assault, defendant grabbed a toolbox held by the victim. The toolbox was abandoned a short distance from the assault. The court found a sufficient asportation for larceny, but, over a vigorous dissent, declined to consider the question of the presence of an intent to steal.[92]

The robbery statute[93] provides for a heavier punishment when a deadly weapon is employed. In *Powell v. State*,[94] the court of criminal appeals held that when a pistol is used with no reason to believe the weapon is a toy or only designed to fire blanks, the burden of proof falls upon the defendant to prove that it was not a deadly weapon.[95]

D. *Public Offenses*

1. Abortion

By its decision in *Roe v. Wade*,[96] the United States Supreme Court rendered void prohibitory abortion statutes in the majority of states, including Tennessee. Resorting once more to a constitutional right of privacy,[97] the Court concluded that that right

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89. *See 1971 Survey* at 252-53; *1970 Survey* at 190-91; *1969 Survey* at 440-42.
90. 487 S.W.2d 305 (Tenn. 1972).
91. 443 S.W.2d 523 (Tenn. Crim. App. 1969).
92. Discussed in *1969 Survey* at 440-42.
93. TENN. CODE ANN. § 39-3901 (Supp. 1973).
94. 489 S.W.2d 538 (Tenn. Crim. App. 1972).
95. Even if the weapon is demonstrably incapable of firing bullets, it remains possible that it may be deemed a deadly weapon if usable as a bludgeon. See *1968 Survey* at 223-25.
96. 410 U.S. 113 (1973).
97. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Katz v. United States, 389 U.S. 347 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[98] although "this right is not unqualified and must be considered against important state interests in regulation."[99] The compromising standard promulgated by the Court was: (1) during the first trimester, the decision and method of termination of pregnancy is not within the regulatory powers of the state; (2) beyond the first trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health";[100] (3) subsequent to viability (generally, the third trimester), the state may regulate and even prohibit abortions, except where necessary for the preservation of the life and health of the mother.

In a companion case, *Doe v. Bolton*,[101] the Court found unconstitutional Georgia statutes requiring that all abortions be performed only in hospitals or accredited hospitals, that abortions be approved by a hospital committee, that two co-practitioners concur in the decision to perform an abortion, and that abortions only be available to residents of the state. The Court, however, saw nothing unconstitutionally vague in a statute making it a crime for a physician to perform an abortion except when it is "based upon his best clinical judgment that an abortion is necessary."[102]

Responsive to these decisions, the Tennessee legislature repealed the state abortion statutes[103] and replaced them with a series of provisions designed to be consistent with constitutional mandates.[104] The act permits abortions in the first trimester "with the pregnant woman's consent and pursuant to the medical judgment of the pregnant woman's attending physician." After the first trimester, the abortion must be performed by the pregnant woman's attending physician in a hospital operated by the state or federal government or licensed by the Department of Public Health. After viability, an abortion is only permissible if the attending physician certifies that the abortion is necessary to

98. 410 U.S. at 135.
99. *Id.*
100. *Id.* at 140.
101. 410 U.S. 179 (1973).
102. GA. CODE § 26-1202(a) (Supp. 1973).
103. TENN. CODE ANN. §§ 39-301-302 (1955).
104. TENN. CODE ANN. § 39-301 (Supp. 1973).

preserve the life or health of the mother. Finally, the act provides that no abortion shall be performed unless the woman provides satisfactory evidence that she is a bona fide resident of Tennessee, a provision which would appear palpably unconstitutional under the *Doe* holding.[105]

2. Obscenity

The United States Supreme Court concluded its most recent term with a series of decisions on obscenity, the key decision being *Miller v. California*,[106] the first case since *Roth v. United States*[107] in which a majority of the Court joined in an opinion on the definition of obscenity. The Court proffered a three-pronged standard for the determination of obscenity:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[108]

The Court expressly renounced the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*,[109] which, it noted, "has never commanded the adherence of more than three Justices at one time."[110] Confident in its belief that the standard proposed would not seriously threaten first amendment values, the Court observed:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed.[111]

105. The Court provided only a faint suggestion of a possible rationale for such a restriction: "There is no intimation . . . that Georgia facilities are utilized to capacity in caring for Georgia residents." 410 U.S. at 179.

106. 413 U.S. 15 (1973).

107. 354 U.S. 476 (1957).

108. 413 U.S. at 24.

109. 383 U.S. 413 (1966).

110. 413 U.S. at 25.

111. *Id.* at 27.

Nevertheless, substantial skepticism has been garnered by the further determination that the "community standards" referred to in the test are local as opposed to national standards. If this is indicative of a readiness on the part of the Court to give absolute deference to jury determinations of obscenity, assuming the proper test is articulated, then effectively there is no objective constitutional standard. Whatever may be the present inclination of the Court, such a posture cannot endure in the face of substantially inhibitory determinations at local levels.[112] The solution will most likely come in an objectification of the third prong of the standard, a result which may be reached without substantial damage to the holding in *Miller*.

Other dimensions of the obscenity problem were explored in separate decisions. In *Paris Adult Theater I v. Slaton*,[113] the Court resolved that the privacy doctrine of *Stanley v. Georgia*[114] could not be extended to an "adult" theater exhibiting obscene films to consenting adults.[115] The Court further held that expert testimony would not be required to establish obscenity,[116] thus promoting the impression of an unrestrained subjective standard. In *United States v. 12 200-Ft. Reels of Super 8MM. Film*,[117] the Court held that Congress could prohibit the importation of obscene materials, even when intended solely for personal use. Nor, according to *United States v. Orito*,[118] is it impermissible to prohibit obscene materials from interstate commerce, irrespective of the ultimate destination. In *Kaplan v. United States*,[119] the Court held that textual materials could be found obscene under the

112. For example, the Court presently has pending a Georgia case in which the motion picture *Carnal Knowledge*, a film which received an "R" rating by the industry, was found obscene. Jenkins v. Georgia, 42 U.S.L.W. 3200 (U.S. Oct. 27, 1973).

113. 413 U.S. 49 (1973).

114. 394 U.S. 557 (1969).

115. "[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . These include the interest of the public in the quality of life and the total community environment, the total of commerce in the great city centers, and, possibly, the public safety itself." 413 U.S. at 57-58.

116. "This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. . . . No such assistance is needed by jurors in obscenity cases; indeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." *Id.* at 56 n.6.

117. 413 U.S. 123 (1973).

118. 413 U.S. 139 (1973).

119. 413 U.S. 115 (1973).

Miller test; it was unnecessary that the work contain any pictorial representations.

The proper procedure for the seizure of a purportedly obscene film was considered by the Court in *Roaden v. Kentucky*[120] and *Heller v. New York*.[121] In the *Roaden* case, the sheriff and prosecutor observed a film at a drive-in theater, concluded that it was obscene, and immediately arrested the manager of the theater and seized the film. A conviction for exhibiting an obscene film followed. The Supreme Court reversed the conviction, holding that the film was illegally seized, absent prior judicial authorization. On the other hand, in the *Heller* case, a judge accompanied a police officer to witness the commercial exhibition of a motion picture. At the conclusion of the film, the judge immediately signed warrants for the seizure of the film and for the arrest of the manager, projectionist and ticket-taker. The Court sustained the legality of the procedure, holding that an adversary proceeding prior to the seizure was not essential.[122] The critical fact was that there *had* been a judicial determination of obscenity prior to the seizure. The Court observed that there had been "no showing that the seizure of a copy of the film precluded its continued exhibition,"[123] nor had the petitioner objected to any delay in the expeditious determination of the obscenity issue in an adversary proceeding.

A recently enacted statute[124] has declared operation of an adult book or magazine store, adult motion picture house or adult peep show house against public policy. The statute provides further that leases or rental contracts on real estate or buildings for these purposes are likewise against public policy and not enforceable.[125]

3. Miscellaneous Statutes

Solicitation of a criminal offense, long recognized as a crime

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120. 413 U.S. 496 (1973).

121. 413 U.S. 483 (1973).

122. *Cf.* A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961).

123. 413 U.S. at 490.

124. Ch. 184, § 1, [1973] Tenn. Pub. Acts 207.

125. In Airways Theatre, Inc. v. Canale, 366 F. Supp. 343 (W.D. Tenn. 1973), the court held a state nuisance statute, [Tenn. Code Ann. § 23-301 *et seq.* (1973)], unconstitutional by virtue of language irreconcilable with the *Stanley* and *Roaden* decisions.

at common law, has been made a statutory offense.[126] The statute departs from the common law offense in specifying certain matters that will not constitute a defense: (1) that the solicitation was unsuccessful; (2) that the person solicited could not be guilty of the offense solicited; (3) that the person solicited was unaware of the criminal nature of the conduct solicited; and (4) that the person solicited was unable to commit the crime solicited because of a lack of capacity, status, or characteristic needed to commit the intended crime, if the solicitor was unaware of this fact. It is a defense to the charge, however, "that the defendant, after soliciting another person to commit an offense, prevented the commission of the crime under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[127]

New statutory provisions were enacted to prohibit the manufacture, importation, purchase, sale, disposition, or possession of certain firearms, except as authorized;[128] to prohibit loitering on school and church property;[129] and to prohibit spying and peeping in any dwelling or other building.[130] A unique innovation for the apprehension of persons littering from motor vehicles was also enacted.[131] The statute provides that any person witnessing littering from a motor vehicle "may record [*sic*] the date and time of day of the littering and the license plate registration number and state of registration to any state or local law enforcement authority."[132] The license plate number is prima facie evidence that the littering was done by the person to whom the vehicle is registered. The witness is required to appear in any resulting prosecution.

Several constitutional arguments regarding the Tennessee Drug Control Act[133] were considered in *Fell v. Armour*.[134] Citing extensive authority, a federal district court sustained the provision of the Act permitting the warrantless seizure for purpose of forfeiture of a conveyance believed to have been used in violation of the Act. Nor was the court constitutionally offended[135] by the

126. Ch. 62, § 1, [1973] Tenn. Pub. Acts 137.
127. *Id.* § 2.
128. Ch. 67, [1973] Tenn. Pub. Acts.
129. TENN. CODE ANN. § 39-1211 (Supp. 1973).
130. *Id.* § 39-1212.
131. Ch. 254, § 1, [1973] Tenn. Pub. Acts 779.
132. *Id.*
133. TENN. CODE ANN. §§ 52-1404-1448 (Supp. 1973).
134. 355 F. Supp. 1319 (M.D. Tenn. 1972).
135. "Were it not for the historically peculiar nature of the law relevant to forfei-

absence of notice and hearing prior to the seizure. However, the process accorded the property owner after seizure was found inadequate in several respects. First, the Act failed to provide notice to the party that the seizure had occurred, nor did it specify the procedure for challenging the seizure.[136] Thus, the court held:

> [T]he notice must necessarily state the reasons for the seizure and the procedure by which he may seek recovery of his vehicle, including the time periods in which he must present his claim for recovery, and the penalty for failure to file within the time period.[137]

Second, the Act improperly placed the burden on the property owner to disprove that the vehicle had been used in violation of the Act.[138] The property owner could, however, be required to prove that he came within any exemption or exception provided in the Act. Finally, the cost bond provision of the Act was found to deny due process to property owners unable to post the required bond.[139] The constitutionality of the provisions of the Act relating to the possession of marijuana were sustained in *Lee v. State*.[140]

III. Defenses

A. *Entrapment*

Tennessee courts have consistently held that entrapment is no defense in this state,[141] a position reiterated in several recent

tures, the Court would be strongly inclined to apply the holdings and rationale of recent United States Supreme Court due process cases as to notice and hearing prior to seizure." *Id.* at 1326.

136. *See* Fuentes v. Shevin, 407 U.S. 67 (1972); Schroeder v. New York, 371 U.S. 208 (1962).

137. 355 F. Supp. at 1329.

138. "[T]he State must prove by a preponderance of the evidence that the vehicle was used in violation of the Act." *Id.* at 1331.

139. "As to these indigent owners, the effect of the $250 cost bond requirement is to grant to the seizing police officer the effective right to extinguish all property interests. As to those too poor to afford a hearing, this exercise of raw power can only lead to arbitrary state action in that no neutral hearing officer or judicial official will have the opportunity to review the evidence and determine the propriety of the forfeiture or the claim for recovery. Thus, the indigent owner may be deprived of property without due process of law in that the deprivation may occur without any process whatsoever." *Id.* at 1333.

140. 498 S.W.2d 909 (Tenn. Crim. App. 1973).

141. Warden v. State, 214 Tenn. 398, 381 S.W.2d 247 (1964); Roden v. State, 209 Tenn. 202, 352 S.W.2d 227 (1961).

decisions.[142] The continued acceptability of this rule was put to the test in *United States v. Russell*,[143] where the accused sought to have the defense of entrapment elevated to a constitutional protection within the due process clause. An undercover agent had gone to the home of the defendant and offered to supply him with a chemical essential to the manufacture of an illegal narcotic in exchange for half of the drug produced. The defendant had agreed, and sometime after the completion of the transaction he had been arrested and ultimately convicted for the manufacture of the narcotic. On appeal, defendant contended that the level of involvement of the government agent "was so high that a criminal prosecution for the drug's manufacture violates the fundamental principles of due process."[144] The Supreme Court declined to accept the opportunity to establish a constitutional standard, at least given the facts of this case.[145] Nor was it prepared to broaden the nonconstitutional standard for entrapment in federal courts to encompass the conduct involved.[146]

142. Halquist v. State, 489 S.W.2d 88 (Tenn. Crim. App. 1972); Shadden v. State, 488 S.W.2d 54 (Tenn. Crim. App. 1972).

143. 411 U.S. 423 (1973).

144. *Id.* at 430.

145. "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, *cf. Rochin v. California*, 342 U.S. 165 (1952), the instant case is distinctly not of that breed. Shapiro's contribution of propanone to the criminal enterprise already in process was scarcely objectionable. The chemical is by itself a harmless substance and its possession is legal. While the government may have been seeking to make it more difficult for drug rings, such as that of which respondent was a member, to obtain the chemical, the evidence described above shows that it nonetheless was obtainable. The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 431-32.

146. "Respondent also urges, as an alternative to his constitutional argument, that we broaden the nonconstitutional defense of entrapment in order to sustain the judgment of the Court of Appeals. The Court's opinions in *Sorrells v. United States*, [287 U.S. 435 (1932)], and *Sherman v. United States*, [356 U.S. 369 (1958)], held that the principal element in the defense of entrapment was the defendant's predisposition to commit the crime. Respondent conceded in the Court of Appeals, as well he might, 'that he may have harbored a predisposition to commit the charged offenses.' 459 F.2d at 672. Yet he argues that the jury's refusal to find entrapment under the charge submitted to it by the trial court should be overturned and the views of Justices Roberts and Frankfurter, concurring in *Sorrells* and *Sherman*, respectively, which make the essential element of the defense turn on the type and degree of governmental conduct, be adopted as the law. We decline to overrule these cases. *Sorrells* is a precedent of long standing that has already been once re-examined in *Sherman* and implicitly there reaffirmed. Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." *Id.* at 432-33.

IV. PROCEDURE

A. *Due Process*

In *Cool v. United States*,[147] the Supreme Court found a denial of due process in an instruction to the jury to ignore defense testimony unless it believed beyond a reasonable doubt that the testimony was true. The Court saw the instruction as substantially reducing the burden of proof for the government.[148] In *Gagnon v. Scarpelli*,[149] the Court held that due process required a preliminary and final hearing prior to revocation of probation.

B. *Arrest*

Events occurring during a temporary detention may raise the level of suspicion to probable cause, thereby justifying an arrest. In *Norwell v. City of Cincinnati*,[150] the petitioner, a sixty-nine-year-old employee of a liquor store, left the premises on foot after closing at 10:30 on Christmas night. An officer, who had been told there was a "suspicious man" in the neighborhood, approached him and asked if he lived in the area. The petitioner ignored the officer, turned around and walked away. Twice the officer attempted to stop him, but on each occasion, the petitioner threw off his arm and said, "I don't tell you people anything." The officer thereupon arrested him for disorderly conduct and, according to his testimony, had to "push the man approximately half a block to get him into the police car. He didn't understand why he was being arrested."[151] The conviction for disorderly conduct was reversed by the Supreme Court.

> [T]he petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him. Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.[152]

If officers have probable cause to make an arrest, it is imma-

147. 409 U.S. 100 (1972).

148. "By creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence, the trial judge reduced the level of proof necessary for the Government to carry its burden." *Id.* at 104.

149. 411 U.S. 778 (1973).

150. 414 U.S. 14 (1973).

151. *Id.* at 15.

152. *Id.* at 16.

terial that the arrest was made for the wrong offense.[153] Frequently, complaint is made regarding the time lag between the presence of probable cause and the consummation of the arrest. In *Hoffa v. United States*,[154] the Supreme Court held that there is no constitutional right to be arrested. Nevertheless, as the Tennessee court recognized in *Halquist v. State*,[155] constitutional rights of the accused may be violated "if the delay results in prejudice to him or was part of a deliberate, purposeful and oppressive design for delay."[156] In contested situations the accused carries the burden of proving the delay was unreasonable and prejudicial.[157] And it should be noted that "[a] valid reason for such a reasonable delay is the legitimate governmental interest in keeping the identity of its undercover agents secret for a reasonable time."[158]

While an illegal arrest is a violation of the fourth amendment,[159] standing alone it does not constitute reversible error.[160] The fruits of an illegal arrest, such as a confession, are inadmissible as evidence,[161] unless the relationship between the arrest and confession is so attenuated as to dissipate the taint of the illegality.[162]

C. *Search and Seizure*

1. Search Warrants

An affidavit for a search warrant must allege facts with sufficient particularity to enable the magistrate to make an independent determination of the presence of probable cause.[163] Conclu-

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153. United States v. Dunavan, 485 F.2d 201 (6th Cir. 1973). *See also* Ramirez v. Rodriguez, 467 F.2d 822 (10th Cir. 1972); People v. Clark, 30 Cal. App. 3d 549, 106 Cal. Rptr. 147 (1973).

154. 385 U.S. 293 (1966).

155. 489 S.W.2d 88 (Tenn. Crim. App. 1972).

156. *Id.* at 93.

157. *Id.*

158. *Id. See also* United States v. Mahoney, 355 F. Supp. 418 (E.D. La. 1973); Neal v. State, 506 P.2d 936 (Okla. 1973).

159. Henry v. United States, 361 U.S. 98 (1959); Giordenello v. United States, 357 U.S. 480 (1958).

160. State v. Manning, 490 S.W.2d 512 (Tenn. 1973); Graves v. State, 489 S.W.2d 74 (Tenn. Crim. App. 1972).

161. Hale v. Henderson, 485 F.2d 266 (6th Cir. 1973).

162. United States v. Cassity, 471 F.2d 317 (6th Cir. 1972), *cert. denied*, 411 U.S. 947 (1973) (incriminating statement made twenty-six days after illegal arrest).

163. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

sory statements of the affiant are insufficient because they effectively usurp the judicial function.[164] The mere association of the suspect with "known traffickers in narcotics" is insufficient in itself to establish probable cause for a search.[165] The identity of an informant need not be divulged to the accused when the question of probable cause is in issue.[166] The scope of the search authorized by the warrant should be coextensive with the probable cause contained in the affidavit.[167]

2. Incident to Arrest

For the search incident to arrest exception to apply, it is not always essential that an arrest actually occur. In *Cupp v. Murphy*,[168] following the murder of his wife, the respondent went to the police station on his own initiative for questioning. While he was at the station, police observed a dark spot on his finger which they thought might be dried blood. The respondent refused a request to take a scraping from under his fingernail, whereupon the sample was taken over his protest. The sample contained traces of skin and blood. After the sample was taken, the respondent was allowed to leave and was not formally arrested for another month. The scrapings ultimately formed a portion of the evidence used to convict him of second degree murder. The Supreme Court found, as had the lower courts, that at the time the scrapings were taken the police had probable cause to arrest. Therefore, the search was justifiable as incident to an arrest[169] and the fact that there had been no immediate arrest was immaterial. The Court took special note of the "ready destructibility of the evidence."[170]

Courts continue to grapple with the permissible scope of a search incident to an arrest in light of *Chimel v. California*.[171] In

164. *See* Flanagan v. Rose, 478 F.2d 222 (6th Cir. 1973); United States v. Hatcher, 473 F.2d 321 (6th Cir. 1973); Earls v. State, 496 S.W.2d 464 (Tenn. 1973).

165. United States v. Hatcher, 473 F.2d 321 (6th Cir. 1973).

166. United States v. Willis, 473 F.2d 450 (6th Cir.), *cert, denied*, 412 U.S. 908 (1973).

167. United States v. Combs, 468 F.2d 1390 (6th Cir. 1972) (warrant to search for large quantity of firearms was properly extended to the house, out buildings, vehicles and any and all adjacent properties).

168. 412 U.S. 291 (1973).

169. *See* Chimel v. California, 395 U.S. 752 (1969).

170. 412 U.S. at 296.

171. 395 U.S. 752 (1969).

United States v. Becker,[172] the propriety of a search of a closed drawer in a desk three to five feet from the arrestee was sustained. A cigar box under the mattress of a bed on which an arrestee was lying was held properly searched in *Rhineheimer v. State*.[173] However, in *Griffin v. Hudson*,[174] the court found that the search of a locked safe incident to an arrest was unreasonable under the *Chimel* standard. Similarly, a search of the clothing of the arrestee some ten hours after the consummation of an arrest was found unreasonable in *United States v. Edwards*.[175]

3. Plain View

An officer may seize incriminating evidence which comes within plain view when he is in a place in which he has a right to be.[176] And plain view may be enhanced by the use of a flashlight.[177] An increasing number of courts are paying deference to a plurality view in *Coolidge v. New Hampshire*,[178] submitting that the plain view doctrine can only be relied upon where the discovery of the evidence is inadvertent.[179] The doctrine requires that the seizable item be literally in plain view. Thus, the fact that an innocuous brown paper bag is in plain view does not render permissible a search within the bag.[180]

4. Exigent Circumstances

The requirement of a warrant may be dispensed with when

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172. 485 F.2d 51 (6th Cir. 1973). "[T]he situation was not completely under control, since the appellant was still resisting and trying to move in directions other than those prescribed by the officers. He had not been handcuffed or bound when the pills were discovered and the officer who opened the drawer stated that his purpose was to secure the desk to make sure there were no weapons." *Id.* at 55.

173. 487 S.W.2d 669 (Tenn. Crim. App. 1972).

174. 475 F.2d 814 (6th Cir. 1973).

175. 474 F.2d 1206 (6th Cir. 1973), *rev'd*, 94 S. Ct. 1234 (1974) [Eds.].

176. Armour v. Totty, 486 S.W.2d 537 (Tenn. 1972).

177. *Id.*

178. 403 U.S. 443 (1971).

179. Lewis v. Cardwell, 476 F.2d 467 (6th Cir. 1973). "[W]hen law enforcement officers have prior knowledge amounting to probable cause establishing the nexus between the article sought and the place of seizure a warrant must be obtained in order to protect the fourth amendment principle that warrantless seizures are *per se* unreasonable in the absence of exigent circumstances." *Id.* at 470.

180. United States v. Shye, 473 F.2d 1061 (6th Cir. 1973). *See also* United States v. Gray, 484 F.2d 352, 356 (6th Cir. 1973). "Since the rifles were not incriminating evidence at the time Trooper Brodt removed them from the closet and copied down the serial numbers, this police action cannot be sanctioned under the plain view doctrine."

exigent circumstances justify an immediate search.[181] Such a situation was presented in *United States v. Dunavan*,[182] where passers-by found defendant in a disabled automobile, "foaming at the mouth and unable to talk."[183] They removed him from the vehicle and then went through it for identification, thereby discovering a social security card, a sizeable amount of cash, a motel key, a car rental agreement and two locked brief cases. All these items were turned over to a deputy sheriff who, after having defendant taken to a hospital, proceeded to the motel. Keys to one of the brief cases were found and it was opened, ostensibly in search of information which might have been useful to the hospital. The brief case was filled with money which was identifiable as stolen. In light of a factual determination that defendant was still unconscious at the time the briefcase was opened, the court sustained the search as reasonably related to "a legitimate lifesaving purpose."[184]

The recent occurrence of a fire was held in *United States v. Gargotto*[185] to provide the exigent circumstances for a search by an arson investigator and a police officer.[186]

5. Consent

What constitutes effective consent to search received expansive treatment by the Supreme Court in *Schneckloth v. Bustamonte*.[187] The accused was one of six individuals riding in an automobile which was stopped because of equipment violations. An officer requested permission to search the vehicle, and one of the occupants replied, "Sure, go ahead." There was apparently no opposition from any of the parties. Under the rear seat the officer found three stolen checks, for the possession of which

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181. *See also 1972 Survey* at 589-90; *1971 Survey* at 265-66.

182. 485 F.2d 201 (6th Cir. 1973).

183. *Id.* at 202.

184. *Id.* at 204. The court was unconcerned with the search of the second briefcase, which also contained stolen money, and which was not searched until after defendant was conscious. The apparent explanation for this is that the contraband found in the second briefcase was cumulative evidence, and therefore assuming the search was illegal, the error was harmless if the search of the first briefcase was valid.

185. 476 F.2d 1009 (6th Cir. 1973).

186. *See also* United States v. Green, 474 F.2d 1385 (5th Cir. 1973); Steigler v. Anderson, 360 F. Supp. 1216 (D. Del. 1973); People v. Connolly, 303 N.E.2d 409 (Ill. 1973); People v. Tyler, 213 N.W.2d 221 (Mich. App. 1973).

187. 412 U.S. 218 (1973).

the accused was convicted. Upon a petition for writ of habeas corpus, the federal court of appeals on appeal held that consent was not effective unless the party understood that it could be withheld. The Supreme Court granted certiorari and reversed. Eschewing a *Miranda* waiver approach, the Court said that the issue of voluntariness is one of fact,[188] in respect to which knowledge of the right to refuse was a factor to be considered.[189] The requirement of a "knowing and intelligent waiver," the Court reasoned, was only applicable to trial rights and pre-trial stages where rights were designed "to protect the fairness of the trial itself. . . . The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial."[190] The *Miranda* standard was further distinguished by the absence of the factor of custody. In this regard the Court left open the possibility that a different result might be reached were the accused in custody at the time consent was sought.[191]

In *McCravy v. Moore*,[192] the Court held that the wife of the accused could effectively consent to a search of the jointly occupied premises. The power was in no way diminished by the fact that the couple were experiencing marital difficulties at the time of the consent.[193]

6. Vehicles

Courts continue to adhere to the principle that, given probable cause to believe that seizable items will be found, a warrant is not required for the search of a vehicle.[194] Even without probable cause, however, a warrantless search of a vehicle may be

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188. "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. *See also* Earls v. State, 496 S.W.2d 464 (Tenn. 1973).

189. The government need not establish such knowledge as the sine quo non of an effective consent. 412 U.S. at 234.

190. *Id.* at 242.

191. Justices Douglas, Brennan and Marshall dissented. *See also* United States v. Luton, 486 F.2d 1021 (5th Cir. 1973).

192. 476 F.2d 281 (6th Cir. 1973).

193. *Id.* at 283.

194. United States v. Averitt, 477 F.2d 1009 (6th Cir. 1973); United States v. Sprouse, 472 F.2d 1167 (6th Cir. 1973); United States v. Preston, 468 F.2d 1007 (6th Cir. 1972); McGregor v. State, 491 S.W.2d 619 (Tenn. Crim. App. 1972).

permissible where officers have legitimately gained custody of the vehicle.[195] The formality of the custody requirement was substantially relaxed by the Supreme Court in *Cady v. Dombrowski*,[196] where the accused, a policeman by occupation, was involved in an automobile accident and was found to be in a state of intoxication by the investigating officers. The police expected him to have a service revolver in his possession, but none was found on his person or in the interior of the vehicle. After the accused had been arrested for drunken driving and the vehicle towed to a privately owned service station, an officer returned to the vehicle to search further for the service revolver. In the process of this search, various evidentiary items were discovered which were later used to convict the accused of first degree murder.

The Court held the search reasonable, noting two significant factual characteristics. First, the police had exercised "a form of custody or control" over the vehicle. Because the presence of the vehicle on the highway constituted a nuisance, it was important that it be removed as quickly as possible, and the accused was in no condition to make the arrangements himself. Second, the belief that a weapon might be contained in the vehicle was reasonable, and a search for its recovery was justified "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands."[197] The fact that the vehicle was not in the immediate custody of the police afforded additional support for the search.[198]

D. Bail

The Tennessee statute providing for admission to bail[199] was replaced by the legislature with a far more detailed statute.[200]

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195. *See* Barker v. Johnson, 484 F.2d 941 (6th Cir. 1973), applying the rationale of Harris v. United States, 390 U.S. 234 (1968).

196. 413 U.S. 433 (1973).

197. *Id.* at 443.

198. "The police did not have actual, physical custody of the vehicle as in *Harris* and *Cooper*, but the vehicle had been towed there at the officers' directions. These officers in a rural area were simply reacting to the effects of an accident—one of the recurring practical situations that results from the operation of motor vehicles and with which local police officers must deal every day." *Id.* at 446.

199. TENN. CODE ANN. § 40-1202 (1955) previously read: "When the defendant has been held to answer for any bailable offense, he may be admitted to bail by the committing magistrate, or by any judge of the circuit or criminal courts."

200. TENN. CODE ANN. § 40-1202 (Supp. 1973).

Under the new act, a defendant may be admitted to bail by a committing magistrate, a judge of the circuit or criminal court, a county judge, or by the clerk of any circuit or criminal court. Bail authority is vested in the clerk of a court only when the judge is not present and the clerk reasonably believes that he will not be present within three hours. When bail is set by the clerk, defendant must be given notice of his right to petition the judge of the court if he believes the bail is excessive. The statute further provides maximum limits on the amount of bail when set by a clerk: $1,000 for a misdemeanor; $10,000 for a felony not involving a crime against a person; $50,000 for a felony involving a crime committed against a person; $100,000 for homicide.

E. *Indictment by Grand Jury*

In *Shadden v. State*,[201] the court of criminal appeals held that the absence of persons between the ages of eighteen and twenty-one in the pool of prospective jurors did not result in constitutionally impermissible discrimination. To establish such a violation, the court held that defendant must first "prove that the group of persons allegedly excluded constitute a distinct and separate class. . . ."[202] Second, "[i]f such a discrete and cognizable class is shown, then the defendant has the further burden of proving that members of this class were purposefully and systematically excluded. . . ."[203] As defendant could not meet the first requirement, the possibility of systematic exclusion was immaterial.[204]

F. *Speedy Trial*

Once it is determined that an accused has been denied a speedy trial, the only effective remedy is dismissal of the charges.[205] In *Strunk v. United States*,[206] the Supreme Court noted

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201. 488 S.W.2d 54 (Tenn. Crim. App. 1972).

202. *Id.* at 60. "This record is barren of any evidence and we cannot assume that the attitudes and propensities and predilections and viewpoints of persons in this age group are peculiar to them and are any different than, say, those of persons in the age group of 21-25, nor that those in the younger bracket are endowed with any greater capacity for perceptiveness and discernment and impartiality." *Id.* at 59.

203. *Id.* at 60. The court cited Hernandez v. Texas, 347 U.S. 475 (1954).

204. *See also* Hopkins v. State, 311 A.2d 483 (Md. App. 1973).

205. Strunk v. United States, 412 U.S. 434 (1973); State v. Bishop 493 S.W.2d 81 (Tenn. 1973).

206. 412 U.S. 434 (1973).

that unintentional delays resulting from overcrowded courts or understaffed prosecutors are "weighed less heavily" than intentional delays.

In *State v. Bishop*,[207] defendant, while serving a federal sentence in Atlanta, requested that Tennessee officials bring him to trial promptly. The supreme court held that the state was under a duty to make a good faith effort to bring defendant to trial,[208] and "[t]he lack of financial resources for this purpose on the part of the State of Tennessee is not a legally justifiable reason to deny defendant his constitutional right to a speedy trial."[209] The court concluded, however, that defendant had not been critically prejudiced by the delay of a little over two years. It further held that the strength of the case for the prosecution may be considered in deciding whether defendant had been prejudiced by the delay.[210]

G. *Guilty Plea*

In *Tollett v. Henderson*,[211] the Supreme Court held that an objection to discrimination in the selection of the grand jury was waived by a plea of guilty.[212]

H. *Compulsory Process*

The right to compulsory process of witnesses, secured to the accused by the sixth amendment,[213] may not be frustrated by the trial court. In *Webb v. Texas*,[214] before the only witness for the defense was permitted to testify, the trial judge severely admonished her regarding the penalty for perjury.[215] As a result, the

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207. 493 S.W.2d 81 (Tenn. 1973).

208. *See* Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374 (1969). *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRETRIAL RIGHTS § 101, at 514 (1972) [hereinafter cited as PRETRIAL RIGHTS].

209. 493 S.W.2d at 84.

210. *Id.* at 85.

211. 411 U.S. 258 (1973).

212. "[R]espondent must not only establish the unconstitutional discrimination in selection of grand jurors, he must also establish that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the 'range of competence demanded of attorneys in criminal cases.' " *Id.* at 268.

213. Washington v. Texas, 388 U.S. 14 (1967).

214. 409 U.S. 95 (1972).

215. " 'If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood [*sic*] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind

witness refused to testify. The Supreme Court held that "the judge's threatening remarks, directed alone at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law. . . ."[216] Similarly, in *Cool v. United States*,[217] the Court found it improper to instruct the jury to disregard the testimony of a defense witness unless they were "convinced it is true beyond a reasonable doubt" because it impermissibly obstructed the right to compulsory process. Nevertheless, the right to compulsory process is to a degree within the discretionary power of the trial court, and no error will be found where the testimony sought would be "incompetent and irrelevant."[218]

Closely related to the matter of compulsory process is the question whether the prosecution may be compelled to reveal the identity of a party who has played a major role in the investigation and preparation of the case, thereby enabling the accused to call the party as a witness if he wishes. In *Roviaro v. United States*,[219] the Court held that "[w]here the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause,"[220] the privilege of secrecy must give way. This issue arose in *Roberts v. State*,[221] where the accused was charged with selling marijuana, and during cross-examination an undercover agent declined to identify the person who he claimed was with him when the sale was made. The court of criminal appeals determined that the testimony of the unidentified party might well be critical to the defense,[222] and under the

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on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazards you are taking.' " *Id.* at 96.

216. *Id.* at 98.

217. 409 U.S. 100 (1972). *See also* Chambers v. Mississippi, 410 U.S. 284 (1973), *discussed in* notes 232 and 233 *infra*.

218. Conte v. Cardwell, 475 F.2d 698, 701 (6th Cir. 1972).

219. 353 U.S. 53 (1957).

220. *Id.* at 60-61.

221. 489 S.W.2d 263 (Tenn. Crim. App. 1972).

222. "Only he can corroborate the truth of agent Whitlatch's assertion that the

circumstances the accused had been denied his statutory right[223] to compulsory process of witnesses in his favor. It declared:

> If the State introduces proof that there was a witness to the crime that might be in a position to assist the defense in countering the accusation but refuses to disclose his identity, then the defendant is effectively deprived of the important right to have his witnesses.[224]

I. Right of Confrontation

1. Presence at Trial

The most fundamental aspect of the sixth amendment right of confrontation is the right of the accused to be present at his trial. The accused may waive the right,[225] however, a possibility which came before the Supreme Court in *Taylor v. United States*.[226] On the first day of his trial on a narcotics charge, the petitioner failed to return to the courtroom following the lunch recess. The trial judge recessed the case until the next day, at which time the petitioner still did not appear. A motion for a mistrial by defense counsel was denied,[227] and the judge ordered the trial continued in the absence of the petitioner, relying upon a provision of the federal rules.[228] The Supreme Court found that

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defendant sold him the marijuana and dispute the testimony of the defendant and his sister-in-law which, if true, would force the recognition that the primary witness was either not telling the truth or perhaps was mistaken in the identification of the isolated location of the home of the defendant and had mistaken him for the actual person from whom the marijuana was purchased. If the agent was not testifying truthfully, as the defendant contends, then in all probability there was no third party witness to the crime since the defendant committed no crime. On the other hand, if the crime occurred as the jury found that it did, and we must here assume that they found the facts correctly, then the missing witness, who had already revealed himself to the defendant and his family according to the State, would have undoubtedly sealed the fate of the defendant and perhaps laid the groundwork for charges of perjury against any witness found to have willfully falsified his or her testimony." *Id.* at 265.

223. TENN. CODE ANN. § 40-2405 (1955).

224. 489 S.W.2d at 266.

225. *See* Diaz v. United States, 223 U.S. 442 (1912).

226. 414 U.S. 17 (1973).

227. Counsel "asserted that the jurors' minds would be tainted by petitioner's absence and that continuation of the trial in his absence deprived him of his Sixth Amendment right to confront witnesses against him." *Id.* at 17-18.

228. FED. R. CRIM. P. 43 provides *inter alia*:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecu-

the petitioner had voluntarily absented himself from the trial, that continuing the trial was authorized by the rule, and that the rule was not unconstitutional.[229]

2. Cross-Examination of Witnesses

In *Chambers v. Mississippi*,[230] defendant called as a witness an individual who had confessed to the crime with which defendant had been charged, but who had later repudiated his confession. After the prosecution elicited on cross-examination that the confession had been retracted, defendant sought to examine further the confessant as an adverse witness. The request was denied because of a common law rule denying a party the right to impeach his own witness. The state supreme court upheld the ruling of the trial court, finding that the witness was not adverse to the defendant, because "[n]owhere did he point the finger at Chambers."[231] The Supreme Court held that the "voucher" rule, relied upon by the state courts, denied the defendant the right of confrontation.[232] The Court further held that the prior statements of the witness were themselves admissible in evidence and were improperly excluded.[233]

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tions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

229. "[I]t reflects the long-standing rule recognized by this Court in Diaz v. United States, 223 U.S. 442, 445, 32 S. Ct. 250, 254, 56 L. Ed. 500 (1912)":

> [W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present. (Citations ommitted).

414 U.S. at 18-19.

230. 410 U.S. 284 (1973).

231. *Id.* at 292.

232. "[A]s applied in this case, the 'voucher' rule's impact was doubly harmful to Chambers' efforts to develop his defense. Not only was he precluded from cross-examining McDonald, but, as the State conceded at oral argument, he was also restricted in the scope of his direct examination by the rule's corollary requirement that the party calling the witness is bound by anything he might say. He was, therefore, effectively prevented from exploring the circumstances of McDonald's three prior oral confessions and from challenging the renunciation of the written confession." *Id.* at 296-97 (citations omitted).

233. "The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder occurred. Second, each one was corroborated by

The *Bruton* rule,[234] precluding the use of a confession of a co-defendant which implicates another co-defendant when the confessor does not testify,[235] is frequently circumvented by a finding of harmless error.[236] If all references to the non-confessing co-defendant are excised, no violation of *Bruton* occurs.[237]

J. Right to Counsel

1. Nature of the Right

Argersinger v. Hamlin,[238] affording an indigent accused the right to appointed counsel in all cases in which incarceration results from conviction, was given retroactive effect in *Berry v. City of Cincinnati*.[239]

While an accused availing himself of the right to appointed counsel is not entitled to select counsel of his choice,[240] when counsel is retained, the accused "should be afforded the opportunity to employ counsel of his own choice."[241] When an accused, whether affluent or impoverished, indicates a desire to waive counsel, it is the responsibility of the trial court to determine if he is competent to make the decision and whether it has been made understandingly and intelligently.[242] A conviction obtained at a trial at which the accused was denied the right to counsel may not subsequently be used for purposes of impeachment.[243]

In *Gagnon v. Scarpelli*,[244] the Supreme Court held that the

some other evidence in the case—McDonald's sworn confession, the testimony of an eyewitness to the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest." *Id.* at 300-01 (citation omitted).

234. Bruton v. United States, 391 U.S. 123 (1968).

235. *See, e.g.*, Taylor v. State, 493 S.W.2d 477 (Tenn. Crim. App. 1972).

236. Brown v. United States, 411 U.S. 223 (1973); Williams v. State, 491 S.W.2d 862 (Tenn. Crim. App. 1972); Hodges v. State, 491 S.W.2d 624 (Tenn. Crim. App. 1972).

237. White v. State, 497 S.W.2d 751 (Tenn. Crim. App. 1973); Taylor v. State, 493 S.W.2d 477 (Tenn. Crim. App. 1972) (dicta); Hodges v. State, 491 S.W.2d 624 (Tenn. Crim. App. 1972).

238. 407 U.S. 25 (1972). *See 1972 Survey* at 602.

239. 414 U.S. 29 (1973).

240. *See, e.g.*, Johnson v. Russell, 469 S.W.2d 511 (Tenn. Crim. App. 1971).

241. United States v. Blount, 479 F.2d 650, 652 (6th Cir. 1973).

242. Hendon v. State, 489 S.W.2d 271 (Tenn. Crim. App. 1972).

243. Fee v. State, 497 S.W.2d 748 (Tenn. Crim. App. 1973), *citing* Loper v. Beto, 405 U.S. 473 (1972).

244. 411 U.S. 778 (1973).

right to counsel was not essential in all probation and parole revocation cases, but that in some cases it would be essential to fundamental fairness and therefore required to guarantee due process.[245]

2. Proceeding *Pro Se*

While the position of the Supreme Court remains unclear,[246] a number of lower courts, including the Sixth Circuit Court of Appeals,[247] have found a constitutional right to defend one's self in a criminal prosecution. In *United States v. Capps*,[248] prior to the beginning of his trial, defendant had requested that the court permit his appointed counsel to withdraw in order that he might conduct his own defense. The request was denied. On appeal following conviction, the court reversed, recognizing a constitutional right of the accused to represent himself and further noting that it was unnecessary to prove prejudice resulted from the denial. While, under some circumstances, the right might not be entirely waivable,[249] no exception was shown in the present case.

K. *Identification*

During 1973 the Supreme Court rendered several decisions

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245. "It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record." *Id.* at 790-91.

246. *See* Adams v. United States, 317 U.S. 269 (1942).

247. United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969).

248. 477 F.2d 597 (6th Cir. 1973) (unpublished opinion).

249. "There may be cases where a defendant may be expected to accept the assistance of counsel because of lack of intelligence, lack of familiarity with courtroom procedure or because of the possibility of deliberate disruption of the trial." *Id.* at 1046.

concerning processes of identification. In *Gilbert v. California*,[250] the Court had held that, while a courtroom identification might have a source independent of an illegal confrontation,[251] evidence of a post-indictment identification confrontation without the benefit of counsel could not itself be introduced in evidence. In *Neil v. Biggers*,[252] the Court retreated from this principle, holding that the out-of-court identification itself could be admitted in evidence absent "a very substantial likelihood of. . . misidentification."[253] The *Neil* case factually predated the *Wade* and *Gilbert* decisions and therefore was subject to analysis as a due process case rather than a right to counsel case.[254] Thus, post-*Gilbert* cases may still apply a strict rule of inadmissibility to the out-of-court identification. Yet, the *Neil* standard will likely apply in all cases where formal charges have not been brought against the accused at the time of the identification, thus rendering *Wade* inapplicable.[255] Identification occurring shortly after the perpetration of the offense is frequently held admissible.[256]

Previously, in *Simmons v. United States*,[257] the use of a photographic identification of the accused was sustained although the case involved a pre-indictment identification, and therefore the future application of the *Wade* rationale was not foreclosed. Undue suggestiveness might still be found in a particular case.[258] Indeed, a number of lower courts had found a right to counsel in

250. 388 U.S. 263 (1967).

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

252. 409 U.S. 188 (1972).

253. *Id.* at 198. The phrase comes from Simmons v. United States, 390 U.S. 377, 384 (1968), with the deletion of the word "irreparable."

> The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process . . . . Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall v. Denno* . . . when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

Id. at 199.

254. *See* Stovall v. Denno, 388 U.S. 293 (1967).

255. *See* Kirby v. Illinois, 406 U.S. 682 (1972).

256. Hastings v. Cardwell, 480 F.2d 1202 (6th Cir. 1973); Russell v. State, 489 S.W.2d 535 (Tenn. Crim. App. 1972); Bracken v. State, 489 S.W.2d 261 (Tenn. Crim. App. 1972).

257. 390 U.S. 377 (1968).

258. Workman v. Cardwell, 471 F.2d 909 (6th Cir. 1972).

such circumstances,[259] particularly when the accused was in custody at the time of the identification.[260] However, when the Supreme Court finally confronted the issue in *United States v. Ash*,[261] it concluded that the right to counsel did not apply.[262]

In *United States v. Dionisio*[263] and *United States v. Mara*,[264] the Supreme Court sustained the power of a grand jury to compel the production of voice exemplars and handwriting exemplars, respectively, for purposes of identification.

L. *Self-Incrimination*

1. Comments of Prosecutor

It is a violation of the privilege against self-incrimination for the prosecutor to comment on the failure of the accused to testify.[265] However, the prosecution is not precluded from observing in closing argument that its case is uncontradicted.[266] It is also permissible for the prosecutor to comment on the failure of the defense to call witnesses,[267] although this may not be deviously employed to comment indirectly on failure of the accused to testify.[268]

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259. *See* United States v. Ash, 461 F.2d 92 (D.C. Cir. 1972), *rev'd*, 413 U.S. 300 (1973); People v. Cotton, 197 N.W.2d 90 (Mich. App. 1972).

260. *See* United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970); Baier v. State, 124 Ga. App. 334, 183 S.E.2d 622 (1971); State v. Williams, 257 S.C. 265, 185 S.E.2d 529 (1971), *cert. denied*, 407 U.S. 916 (1972).

261. 413 U.S. 300 (1973).

262. "Even if we were willing to view the counsel guarantee in broad terms as a generalized protection of the adversary process, we would be unwilling to go so far as to extend the right to a portion of the prosecutor's trial-preparation interviews with witnesses. Although photography is relatively new, the interviewing of witnesses before trial is a procedure that predates the Sixth Amendment. In England in the 16th and 17th centuries counsel regularly interviewed witnesses before trial. 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 226-28 (1926). The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself." *Id.* at 317-18.

263. 410 U.S. 1 (1973).

264. 410 U.S. 19 (1973).

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

266. Holder v. State, 490 S.W.2d 170 (Tenn. Crim. App. 1972).

267. McCracken v. State, 489 S.W.2d 48 (Tenn. Crim. App. 1972).

268. "We do not wish to be understood to say that an argument literally restricted to a comment on failure to produce other witnesses always will avoid comment on failure of the accused himself to testify. Such an argument may be and unfortunately sometimes is a vehicle used by the State to get over to the jury by indirection and inference that the accused is guilty because he has not testified. The argument is particularly suspect when it contains a reference to the accused's common law presumption of innocence as his only

2. Multiple Charges

When an accused elects to waive his privilege against self-incrimination and testifies, he is subject to cross-examination to the same extent as any other witness.[269] This may be particularly troublesome when the accused is charged with more than one count in a single indictment, and he would like to controvert by his own testimony fewer than all the charges. Courts have frequently held that the dilemma thus facing the accused does not infringe on the privilege against self-incrimination.[270] In *Conte v. Cardwell*,[271] the trial court took the extraordinary move of permitting the accused to testify regarding one count and rely upon the privilege as to another, an advantage that the appellate court noted it "was not legally impelled to grant."[272]

3. Inference of Guilt

In *Barnes v. United States*,[273] the Supreme Court reaffirmed[274] the constitutionality of an inference from the unexplained possession of recently stolen property that the party knew the property to be stolen.[275]

4. Documents

Because the privilege against self-incrimination is a personal right, "individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges."[276] A

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witness. The comment never should be allowed as a part of the argument that the State's proof is unrefuted or otherwise because it borders so perilously on the proscribed area. Even in a case such as this where the evidence of guilt is clearly made out we would not hesitate to reverse and remand if we thought an argument, however subtle and indirect, told the jury it could infer the accused was guilty because he did not take the witness stand." *Id.* at 51.

269. Crampton v. Ohio, 402 U.S. 183 (1971).

270. Kirk v. United States, 457 F.2d 400 (6th Cir. 1972); United States v. Lee, 428 F.2d 917 (6th Cir. 1970).

271. 475 F.2d 698 (6th Cir. 1972).

272. *Id.* at 700.

273. 412 U.S. 837 (1973).

274. *See also* Turner v. United States, 396 U.S. 398 (1970); Yee Hem v. United States, 268 U.S. 178 (1925).

275. *See also* Brown v. State, 489 S.W.2d 855 (Tenn. Crim. App. 1972); *1971 Survey* at 278-79.

276. United States v. White, 322 U.S. 694, 699 (1944). *See also* United States v. Peter, 479 F.2d 147 (6th Cir. 1973).

difficult question is presented where material that falls within the protection of the privilege against self-incrimination has been entrusted to another by the accused. In *Couch v. United States*,[277] in the process of an investigation of the tax liability of the accused, a summons was directed to her accountant to produce relevant documents. The Court reiterated the general principle that the privilege was personal to the accused and concluded that possession, not simply ownership, of the material in question would be required in order to assert the privilege.[278] The Court conceded that "situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact,"[279] but here such was not the case.[280]

M. Confessions

1. Reassertion of *Miranda* Rights

The fact that an accused waives his *Miranda*[281] rights and responds to questions does not preclude a reassertion of the privilege against self-incrimination or the right to consult with counsel at any time.[282] Just as it is improper to introduce evidence that the accused stood silent in the face of accusation,[283] it is equally improper to introduce evidence of the reassertion of rights.[284] It is not, however, necessary that the accused be advised of his right to reassert his rights.[285]

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277. 409 U.S. 322 (1973).

278. "To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. It would hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her accountant by letter, conversations in which the accountant took notes, in addition to the accountant's own workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant." *Id.* at 331.

279. *Id.* at 333.

280. *See also* United States v. Widelski, 452 F.2d 1 (6th Cir. 1971).

281. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

282. Mock v. Rose, 472 F.2d 619 (6th Cir. 1972), *cert. denied*, 411 U.S. 971 (1973); Mays v. State, 495 S.W.2d 833 (Tenn. Crim. App. 1972); Russell v. State, 489 S.W.2d 535 (Tenn. Crim. App. 1972).

283. 384 U.S. at 469 n.38.

284. Mays v. State, 495 S.W.2d 833 (Tenn. Crim. App. 1972).

285. Mock v. Rose, 472 F.2d 619 (6th Cir. 1972), *cert. denied*, 411 U.S. 971 (1973); Russell v. State, 489 S.W.2d 535 (Tenn. Crim. App. 1972).

N. Jurisdiction

Normally, once punishment for an offense has been served, the legality of the judgment becomes moot and therefore will not be entertained by a court. However, if significant collateral consequences spring from a conviction, a discharge upon completion of sentence does not prevent further review.[286] In *Holt v. State*,[287] the court of criminal appeals concluded that such was the case when the conviction might subsequently be employed for sentence enhancement under the habitual criminal statute.[288]

O. Venue

By statute in Tennessee,[289] a criminal charge is to be tried in the county in which the offense occurred.[290] In *Daniel v. State*,[291] the accused was convicted of receiving stolen property, the property being located in Bradley County. The only evidence connecting the accused with the offense was his fingerprint found on one of the stolen items and the fact that he was observed riding in an automobile in the county subsequent to the theft. The court held that "[t]his total lack of essential proof that the defendant committed the crime charged in Bradley County . . . means . . . that venue was not established."[292] More persuasive was the view of Judge Russell in dissent who submitted that the court misconceived the issue as one of venue. Rather, there was no question that the stolen property had been concealed in Bradley County, thus establishing proper venue in that county; the real concern of the majority was with whether there was sufficient proof of perpetration of the offense by the accused.

P. Fair Trial

1. Discovery

In *Wardius v. Oregon*,[293] the Supreme Court acknowledged

286. *See* Sibron v. New York, 392 U.S. 40 (1968).

287. 489 S.W.2d 845 (Tenn. Crim. App. 1972).

288. TENN. CODE ANN. § 40-2801 *et seq.* (1955).

289. TENN. CODE ANN. § 40-104 (1955).

290. Prior decisions have firmly established that venue is considered a matter of jurisdiction in Tennessee. *See, e.g.*, Harvey v. State, 213 Tenn. 608, 376 S.W.2d 497 (1964).

291. 489 S.W.2d 852 (Tenn. Crim. App. 1972).

292. *Id.* at 854.

293. 412 U.S. 470 (1973).

the propriety of a state statute requiring the accused to give notice of an intention to use an alibi defense,[294] but held that "reciprocal discovery rights" must be afforded the accused.[295] In *Graves v. State*,[296] the court of criminal appeals held that a district attorney general lacked authority to compel witnesses by subpoena to come before him and supply information regarding criminal matters.[297]

2. Requiring Accused to Testify First

The Tennessee statute requiring the accused to testify first or not at all for the defense was declared unconstitutional in *Brooks v. Tennessee*.[298] The holding, however, has been denied retroactive application by Tennessee courts "to cases where the accused either testified or where he failed to testify, and, in fact, made no attempt to do so after other defense witnesses had appeared."[299] No decision has been reached on retroactivity for cases in which "the precise *Brooks* factual situation is present."[300]

Q. Trial by Jury

In *Ham v. South Carolina*,[301] the Supreme Court held that where the issue is properly raised, it is the responsibility of the trial court to examine potential jurors for racial bias. At the same time, however, the Court found no error in the failure of the trial judge, pursuant to the request from the accused, to examine the potential jurors as to their prejudice against persons with beards.[302] The fact that one potential juror is excused because of

294. *See* Williams v. Florida, 399 U.S. 78 (1970).

295. "[I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The state may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." 412 U.S. at 475.

296. 489 S.W.2d 74 (Tenn. Crim. App. 1972).

297. "However, utilizing apparent police powers the attorney general does not possess with the cooperation of the sheriff to do that which a defendant in a suspected crime may not do smacks of official oppression which should not be tolerated, and it is strongly urged that the practice be abandoned." *Id.* at 81.

298. 406 U.S. 605 (1972).

299. Franklin v. State, 496 S.W.2d 885, 886 (Tenn. 1973). *See also* Sneed v. State, 498 S.W.2d 626 (Tenn. Crim. App. 1973); Robbins v. State, 496 S.W.2d 524 (Tenn. Crim. App. 1972); Gunn v. State, 487 S.W.2d 666 (Tenn. Crim. App. 1972).

300. 496 S.W.2d at 886.

301. 409 U.S. 524 (1973).

302. "The inquiry as to racial prejudice derives its constitutional stature from the

the divulgence during voir dire of his preconceived opinion of guilt of the accused was held in *Graves v. State*[303] not to serve to disqualify other jurors "unless it appears that the expression so influenced them that they shared the preconceived opinion."[304]

The use of the so-called "Allen"[305] charge came before the Sixth Circuit in *Jones v. Norvell*.[306] Upon learning that the jury was split eleven to one on its verdict, the trial judge instructed:

> [I]t is your duty to reach a verdict if you can possibly do so—you 12 people are the only ones that can do it. The Court can't do it, nor anyone else. You twelve people are the only ones.[307]

After ascertaining that the split was in favor of guilt, he sent them back out to "see if you can make any progress." Within five minutes the jury returned with the verdict of guilty. The court of appeals found that there had been an improper invasion of jury secrecy,[308] and a coercive charge[309] underscored by the quick return of the verdict following the charge.[310] As a result, it concluded that the accused had been denied a fair and impartial jury trial as guaranteed by the sixth amendment.

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firmly established precedent of *Aldridge* and the numerous state cases upon which it relied, and from a principle purpose as well as from the language of those who adopted the Fourteenth Amendment. The trial judge's refusal to inquire as to particular bias against beards, after his inquiries as to bias in general, does not reach the level of a constitutional violation." *Id.* at 528. *Cf.* Justice Douglas, dissenting on the issue, said:

> The prejudices invoked by the mere sight of non-conventional hair growth are deeply felt. Hair growth is symbolic to many of rebellion against traditional society and disapproval of the way the current power structure handles social problems. Taken as an affirmative declaration of an individual's commitment to a change in social values, non-conventional hair growth may become a very real personal threat to those who support the *status quo*. For those people non-conventional hair growth symbolizes an undesirable life-style characterized by unreliability, dishonesty, lack of moral values, communal ('communist') tendencies, and the assumption of drug use. If the defendant, especially one being prosecuted for the illegal use of drugs, is not allowed even to make the most minimal inquiry to expose such prejudices, can it be expected that he will receive a fair trial?

Id. at 530.

303. 489 S.W.2d 74 (Tenn. Crim. App. 1972).

304. *Id.* at 81.

305. Allen v. United States, 164 U.S. 492 (1896).

306. 472 F.2d 1185 (6th Cir. 1973).

307. *Id.*

308. Parker v. Gladden, 385 U.S. 363 (1966); Turner v. Louisiana 379 U.S. 466 (1965); Brasfield v. United States, 272 U.S. 448 (1926).

309. Jenkins v. United States, 380 U.S. 445 (1965).

310. United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).

R. Cruel and Unusual Punishment

In the wake of *Furman v. Georgia*,[311] declaring the death penalty unconstitutional, a unique problem came before the Tennessee Supreme Court in *Bowen v. State*.[312] Defendant had received the death penalty, but the sentence had been commuted to ninety-nine years by the governor. Defendant sought a re-trial on the question of punishment, contending that even had the penalty not been commuted he would have been so entitled as a result of *Furman*, and he might have received a more lenient sentence. The court disagreed, finding that the conviction was not voided and holding that the *Furman* decision required nothing more than that the death penalty not be enforced.[313] The commutation in this case had occurred prior to the *Furman* decision. Arguably, a different result might have been reached had the commutation been an acceptance of the inevitable, and a concerted effort made to give the defendant the maximum allowable punishment with the least effort, rather than as a matter of grace.

In *French v. State*,[314] the court of criminal appeals rejected an argument that a fifteen year sentence amounted to a life sentence because of the poor health of defendant and that it therefore constituted cruel and unusual punishment.[315]

S. Double Jeopardy

1. When Jeopardy Attaches

In *Illinois v. Somerville*,[316] the accused had been indicted for theft, but before any evidence had been presented, the prosecutor

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311. 408 U.S. 238 (1972).

312. 488 S.W.2d 373 (Tenn. 1972).

313. "[I]t cannot validly be arged [*sic*] that the bare fact that the prisoner might receive a lesser sentence in the event of a jury trial, requires that his case be remanded. These legal principles establish that the judgment of death, though subject to avoidance, was yet valid at the time the Governor commuted it to ninety-nine years, that this commutation became effective without the consent of the defendant, and its legal effect was to leave the judgment as though it had first been pronounced as a judgment sentencing the defendant to ninety-nine years in the penitentiary. And, the unconstitutional part, that of death, being removed, the judgment is valid and enforceable." *Id.* at 377.

314. 489 S.W.2d 57 (Tenn. Crim. App. 1972).

315. "The law in this State is that if the punishment is within the limits prescribed by statute for the offense, it does not violate constitutional proscriptions against cruel and unusual punishment." *Id.* at 60.

316. 410 U.S. 458 (1973).

discovered that the indictment was fatally deficient because of a failure to allege an essential element of the offense. Under state law, an indictment was the only means by which the charges could be brought, and the omission in the case could not be cured by amendment. Over the objection of defendant, the prosecution requested and was granted a mistrial. Thereafter, defendant contended that prosecution on a new indictment would constitute double jeopardy. The Supreme Court disagreed, holding that the mistrial met the "manifest necessity" requirement of its previous decisions.[317] Were a mistrial not permissible, reasoned the Court, the prosecution would have no alternative but to try the case on the faulty indictment, await the inevitable reversal on appeal, and then retry the defendant, "thus wasting time, energy, and money for all concerned."[318]

In *State v. Sluder*,[319] defendant had pled guilty, but before a jury had been impaneled for the determination of punishment, as required by statute,[320] the trial judge granted the motion of the prosecution to nolle prosequi the case. On appeal, the Tennessee Supreme Court held that a subsequent trial did not constitute double jeopardy because jeopardy would not attach until the jury was impaneled and sworn.

2. Multiple Jurisdictions

Waller v. Florida,[321] barring successive prosecutions by state and municipal governments,[322] was accorded full retroactive application in *Robinson v. Neil*.[323] The rule, however, does not bar successive federal and state prosecution.[324]

317. Logan v. United States, 144 U.S. 263 (1892). *Cf.* United States v. Jorn, 400 U.S. 470 (1971), *discussed in 1971 Survey* at 286-87.

318. 410 U.S. at 469.

319. 493 S.W.2d 467 (Tenn. 1973).

320. TENN. CODE ANN. § 40-2310 (Supp. 1973).

321. 397 U.S. 387 (1970).

322. *See 1970 Survey* at 241-42. *Cf.* Bray v. State, 13 CRIM. L. REP. 2313 (Tenn. Crim. App. May 15, 1973), sustaining successive convictions under state law for burglary and municipal law for prowling.

323. 409 U.S. 959 (1973). For the resolution of the case on remand see Robinson v. Neil, 366 F. Supp. 924 (E.D. Tenn. 1973). A de novo appeal of the municipal conviction does not erase the attachment of jeopardy. Pettyjohn v. State, 13 CRIM. L. REP. 2344 (Tenn. June 4, 1973).

324. *See* Martin v. Rose, 481 F.2d 658 (6th Cir. 1973), recognizing the continued vitality of Bartkus v. Illinois, 359 U.S. 121 (1959).

3. Multiple Offenses

Tennessee decisions frequently hold that multiple convictions cannot be sustained for offenses arising out of the same transaction if the same criminal intent is required for each offense.[325] However, where there are separate criminal intents, multiple convictions may result. Thus, in *Ward v. State*,[326] defendant and another escaped from jail, and in the process assaulted the jailer, taking his pistol, a shotgun, and the personal belongings of inmates, including cash. The court of criminal appeals sustained conviction of both escape and robbery. Similarly, in *Russell v. State*,[327] convictions of escape, armed robbery, and temporarily taking an automobile without the consent of the owner were sustained.

4. Greater Offense on Retrial

An interesting problem was raised in *Solomon v. State*.[328] At the first trial of defendant for first degree murder, a mistrial was declared when the jury was unable to reach a verdict. A poll of the jury at the time indicated that five jurors thought him not guilty, six thought him guilty of involuntary manslaughter at most, and one thought him guilty, without further explanation. Defendant contended that he had thereby been found not guilty of first and second degree murder and voluntary manslaughter and argued that instructions as to these three offenses at his subsequent trial violated the protection against double jeopardy. The court rejected the contention, strongly implying that counsel should have clarified the ambiguous position of the twelfth juror before the jury was dispersed.[329] Judge Oliver, concurring, thought it improper to poll the jury at all before a verdict was announced; therefore, the accused should not be permitted to use that information fortuitously obtained to make a double jeopardy argument.[330]

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325. *See 1972 Survey* at 614-15.

326. 486 S.W.2d 292 (Tenn. Crim. App. 1972).

327. 499 S.W.2d 945 (Tenn. Crim. App. 1973).

328. 489 S.W.2d 547 (Tenn. Crim. App. 1972).

329. At the second trial, defendant was denied the right to call the former juror to explain his position. The court sustained the ruling. *Id.*

330. Judge Galbreath dissented:

> In essence the jury said: "We find the defendant not guilty of murder in the first and second degree and are unable to agree on manslaughter." If these words had

5. Greater Sentence on Retrial

Resolving an issue that had created a split among the courts in Tennessee,[331] the Supreme Court held in *Chaffin v. Stynchcombe*[332] that the *Pearce* rule,[333] precluding the rendition of a greater sentence on retrial absent exceptional circumstances, was inapplicable to sentencing by a jury unless the jury was informed of the prior sentence or vindictiveness was shown in some other way. The Court reasoned that the evil sought to be remedied by the *Pearce* holding was not the risk of a greater sentence but the risk of a vindictive sentence, prompted by the pursuit of appellate remedies by the accused following the previous conviction. *Pearce* was denied retroactive application in *Michigan v. Payne*.[334]

6. Collateral Estoppel

In *Wiggins v. State*,[335] two defendants were jointly charged in a two count indictment with larceny and concealing stolen property. The jury found both not guilty on the first charge but guilty on the second. On appeal, they contended that the only issue of fact in the case was proof of theft, and the proof precluded a finding that anyone other than defendants had stolen the property. Therefore, they contended, when the jury found them not guilty of larceny, they necessarily concluded that the property was not stolen, and thus they could not be guilty of concealing stolen property. The court rejected the contention, quoting Justice Holmes in *Dunn v. United States*[336] to the effect that consistency in jury verdicts is not essential.[337]

> been literally used, would there be any doubt as to the defendant's acquittal of murder? Frankly, I think it would be good practice for the court to make specific inquiry in cases involving lesser included offenses when it appears the jury is unable to reach overall agreement to ascertain if they have unanimously reached a verdict on any of the offenses. If a jury of his peers has reached a verdict of not guilty, this should acquit, and it is my position that a judgment of acquittal should have been entered by way of correction of the former judgment of mistrial.

Id. at 552-53.

331. *See 1972 Survey* at 615-16; *1971 Survey* at 208; *1970 Survey* at 245-46.

332. 412 U.S. 17 (1973).

333. North Carolina v. Pearce, 398 U.S. 711 (1969).

334. 412 U.S. 47 (1973).

335. 498 S.W.2d 92 (Tenn. 1973).

336. 284 U.S. 390 (1932).

337. "The most that can be said in such cases is that the verdict shows that either

The court probably reached the right result but for the wrong reason. It would appear from the recitation of the facts that it was unnecessary to accept the hypothesis of defendants that if they were not guilty of larceny then they could not be guilty of concealing stolen property. According to the court, a customer in a beer tavern discovered that his wallet, which he had placed on the table after paying for his meal, was missing. The police were summoned, and all the patrons were requested not to leave. They announced that no one would be arrested if whoever had the wallet would throw it on the floor. When no one did so, the police left, but thereafter they observed defendant Woodrow leave the tavern and secrete an object behind a gas meter which turned out to be the missing wallet. Woodrow testified that defendant Wiggins had given her the wallet after the police had arrived, but that she did not know what it was. Wiggins testified that he had seen the wallet near the table at which he was seated and had picked it up. When the owner announced that his wallet was missing, Wiggins was afraid to return it, because he feared that the owner and others present would assume that he had stolen it. Indeed, the owner himself testified that after the police left, Wiggins told him that he had the wallet and had given it to Woodrow. On the basis of this testimony, the jury could reasonably have concluded that defendants lacked intent to steal at the time of the taking, a requisite for a conviction of larceny. While defendants were correct that there was no suggestion in the record that anyone other than they stole the property, the error in their argument was in the assumption that concealing stolen property can only lie if larceny occurs. Defendants might well have been vulnerable to some theft charge other than larceny that would not require the intent to steal at the time of the taking—wrongful appropriation of property found, for example.[338] For this offense, the intent to steal could have arisen subsequent to gaining possession when the true owner was identified. If such a charge was provable, then the wallet would still be stolen property, and a conviction for conceal-

in the acquittal or conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than an assumption of a power which they had no right to exercise, but to which they were disposed through lenity. . . . That the verdict may have been the result of compomise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 393-94.

338. TENN. CODE ANN. § 39-4223 (1955).

ing stolen property would be entirely appropriate.[339] Therefore, the verdicts rendered in the present case are not inherently inconsistent.

Nevertheless, rather than dealing with the specifics of the contention, the court assumed that the verdicts were inconsistent, and, citing the *Dunn* decision, found nothing improper in such a result.[340] The difficulty presented by this approach is the failure of the court to grapple with the possibility that the *Dunn* decision has been implicitly overruled on constitutional grounds by *Ashe v. Swenson*,[341] wherein the Supreme Court applied the principle of collateral estoppel to successive criminal prosecutions as a concomitant of the protection against double jeopardy. There appears to be little judicial consideration of the applicability of *Ashe* to the inconsistent verdict problem,[342] and *Ashe* may be limited to successive prosecutions. One commentator[343] has suggested that *Dunn* may survive by virtue of its rationale "that a verdict is not to be impeached solely because the jury may have compromised in defendant's favor in reaching it."[344] Whatever the outcome of this ostensible contradiction between the assumptions of jury logicality in the *Ashe* case and the assumption of the efficacy of jury illogicality of the *Dunn* case,[345] the decision of the Tennessee Supreme Court to ignore the issue is no solution.

339. The phrase "stolen property" encompasses more than property taken by larceny. *See, e.g.*, Hill v. State, 159 Tenn. 297, 17 S.W.2d 913 (1929).

340. "Consistency in verdicts for multiple count indictments is unnecessary as each count is a separate indictment. Therein lies the essential reasoning. An acquittal on one count cannot be considered res judicata to another count even though both counts stem from the same criminal transaction. This Court will not upset a seemingly inconsistent verdict by speculating as to the jury's reasoning if we are satisfied that the evidence establishes guilt of the offense upon which the conviction was returned." 498 S.W.2d at 93-94.

341. 397 U.S. 436 (1970). *See 1970 Survey* at 243-44.

342. *See* Chief Judge Bazelon concurring in United States v. Fox, 433 F.2d 1235, 1239 (D.C. Cir. 1970).

343. Comment, 71 COLUM. L. REV. 321 (1971).

344. *Id.* at 332.

345. Professor Bickel defended the *Dunn* rule in that it "permits a sensible compromise between the necessity of convicting some likeable people, or defendants who have committed a momentarily popular crime, and the tendency of juries to be reluctant to do so." Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 652 (1950).