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CRIMINAL LAW IN TENNESSEE IN 1974: A CRITICAL SURVEY*

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I. INTRODUCTION

The most significant development in the substantive criminal law of Tennessee in 1974[1] involved enactment of a mandatory death penalty statute,[2] prompted by a desire to provide for the death penalty in a constitutionally acceptable fashion.[3] The most notable procedural development during the past year was the decision of the Tennessee Supreme Court in *McKeldin v. State*,[4] extending the accused's right to counsel to preliminary hearings.[5]

1. This survey encompasses state and federal decisions reported in the National Reporter System during the calendar year 1974.

Frequent reference will be made to previous surveys by the author. The complete citations for these surveys are as follows: *Criminal Law in Tennessee in 1973: A Critical Survey*, 41 TENN. L. REV. 203 (1974); *Criminal Law in Tennessee in 1972: A Critical Survey*, 40 TENN. L. REV. 569 (1973); *Criminal Law in Tennessee in 1971: A Critical Survey*, 39 TENN. L. REV. 247 (1972); *Criminal Law in Tennessee in 1970: A Critical Survey*, 38 TENN. L. REV. 182 (1971); *Criminal Law in Tennessee in 1969: A Critical Survey*, 37 TENN. L. REV. 433 (1970); *Criminal Law in Tennessee in 1968: A Critical Survey*, 36 TENN. L. REV. 221 (1969). Hereinafter these surveys will be cited as follows: *1973 Survey*; *1972 Survey*; *1971 Survey*; *1970 Survey*; *1969 Survey*; *1968 Survey*.

2. TENN. CODE ANN. § 39-2406 (Supp. 1974).

3. *See* text accompanying notes 11-29 *infra*.

4. 516 S.W.2d 82 (Tenn. 1974).

5. *See* text accompanying notes 197-204 *infra*.

Significant decisions by the United States Supreme Court during 1974 presented further elaboration upon the subject of obscenity[6] and the scope of cross-examination protected by the right of confrontation.[7] In addition, the court extended the authority to search vehicles without a warrant[8] and limited the constitutional right to counsel on appeal to a first appeal.[9] Finally, the Court applied by analogy the constitutional limitation on increased punishment after a retrial by prohibiting the bringing of more serious charges against an accused seeking de novo appeal.[10]

II. OFFENSES

A. Against Person

1. Homicide

a. Murder

By its action in the 1972 decision of *Furman v. Georgia*,[11] the United States Supreme Court effectively eliminated the death penalty as a constitutionally permissible form of punishment, at least as then employed throughout the country. *Furman* is at best a thin precedent since the Court split five to four, with each of the nine Justices writing a separate opinion. The four dissenting Justices were prepared to sustain the death penalty as it was then being imposed,[12] and only two Justices on the prevailing side found the death penalty unconstitutional per se.[13] It was thus apparent, theoretically at least, that if the objections of but one of the three remaining Justices on the prevailing side[14] could be satisfied, the death penalty could be reinstated. From the legislative perspective, the point of least resistance appeared to be the view entertained, if not unequivocally advocated, by those three Justices: a mandatory death penalty following a determi-

6. *See* text accompanying notes 71-78 *infra*.
7. *See* text accompanying notes 177-89 *infra*.
8. *See* text accompanying notes 137-60 *infra*.
9. *See* text accompanying notes 205-11 *infra*.
10. *See* text accompanying notes 254-65 *infra*.
11. 408 U.S. 238 (1972).
12. Chief Justice Burger, Justices Blackmun, Powell, and Rehnquist.
13. Justices Brennan and Marshall.
14. Justices Douglas, Stewart, and White.

nation of guilt for a particular offense would eliminate discriminatory and capricious imposition of the punishment.[15] Several states quickly enacted mandatory death penalty statutes,[16] and a number of courts have sustained them.[17]

Tennessee joined these ranks by enacting a mandatory death penalty statute for first degree murder,[18] but only after amending the statutory definition of first degree murder so as to modify what had been essentially a codification of the common law.[19] The amended statute designates four categories of first degree murder:[20]

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15. It is questionable whether this in fact will be the result of a mandatory death penalty. While previously jurors may have capriciously and invidiously imposed the death penalty, if the death penalty is made mandatory for first degree murder, for example, juries may just as capriciously return verdicts of first or second degree murder (where the evidence will support the former) according to their predisposition toward punishment in the particular case.

16. *See* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1691 n.6 (1974), which cites statutes in twenty-six states.

17. State v. Dickerson, 298 A.2d 761 (Del. 1972); State v. Dixon, 283 So. 2d 1 (Fla. 1973); State v. Hill, 297 So. 2d 660 (La. 1974); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) (dicta); Jefferson v. Commonwealth, 214 Va. 747, 204 S.E.2d 258 (1974); State v. Baker, 87 Wash. 2d 281, 501 P.2d 284 (1972). More sophisticated is the Georgia response, GA. CODE ANN. §§ 27-2534.1 to -2537 (Supp. 1974), sustained in Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974). In that case the court stated:

> Georgia's new statutory scheme is designed to accomplish the following objectives to meet the U.S. Supreme Court's concern with arbitrariness. First, the new statute substantially narrows and guides the discretion of the sentencing authority to impose the death penalty and allows it only for the most outrageous crimes and those offenses against persons who place themselves in great danger as public servants. In addition, the new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence.
>
> These standards in the new Georgia Statute meet the criticism expressed by a majority of the U.S. Supreme Court in the Furman and Jackson decision [*sic*].

Id. at ____, 204 S.E.2d at 616.

18. TENN. CODE ANN. § 39-2406 (Supp. 1974).

19. The statute as amended in 1973 was declared unconstitutional under the state constitution in State v. Hailey, 505 S.W.2d 712 (Tenn. 1974), but was thereafter reenacted in proper form and now appears in TENN. CODE ANN. § 39-2402 (Supp. 1974).

20. TENN. CODE ANN. § 39-2402 (Supp. 1974).

> An individual commits murder in the first degree if:
>
> (1) he commits a willful, deliberate, malicious and premeditated killing or murder;
>
> (2) he commits a willful, deliberate, and malicious killing or murder, and:
>
> (a) the victim is an employee of the department of correction having custody of the actor,
>
> (b) the victim is a prison inmate in custody with the actor,
>
> (c) the victim is known to the actor to be a peace officer or fireman acting in the course of his employment,
>
> (d) the victim is a judge acting in the course of his judicial duties,
>
> (e) the victim is a popularly elected public official,
>
> (f) the offense is committed for hire; or,
>
> (g) the offense is committed while attempting to evade law enforcement officials;[21]
>
> (3) he hires another to commit a willful, deliberate, malicious and premeditated killing or murder, and such hiring causes the death of the victim;[22] or
>
> (4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

All other murders—that is, malicious killings not described within these designated categories—are denominated second degree murder,[23] now punishable by incarceration for ten years to life.[24]

Deleted from the former statutory definition of first degree murder are two seldom used common law bases of the offense—poisoning and lying in wait. The first category of the new statute is the most frequently employed verbalization of the com-

21. In some instances—a killing for hire, for example—it would be a rare case in which premeditation would not be present.

Three of the subcategories in the amended statute are taken from the Tenn. Crim. Code and Code of Crim. Proc. § 39-1105 (Proposed Final Draft, Nov. 1973) [hereinafter referred to as Proposed Criminal Code]: the victim as prison employee, the victim as peace officer, and the killing for hire.

22. This provision also is included in section 39-1105 of the Proposed Criminal Code.

23. TENN. CODE ANN. § 39-2403 (1955).

24. *Id.* § 39-2408 (Supp. 1974).

mon law definition of murder. The second category may well raise questions of capriciousness in the presumption that the killing of persons fulfilling certain public roles is inherently more serious than other murders, and thus deserving of greater punishment. The implication appears to be that certain lives are more valuable to society than others, a disturbing and perhaps constitutionally dubious presumption.[25] The third category appears wholly superfluous. In the situation described in that category, the principal is clearly chargeable under the second category of the statute with first degree murder, and the party hiring the principal is an accessory before the fact. Because accessories before the fact are chargeable with the same offense as the principal in Tennessee,[26] the hiring party would be chargeable with first degree murder even absent the third category of the statutory definition. The fourth category is a recodification of the felony-murder rule but differs from its predecessor in several respects: first, in the designation of the included felonies;[27] second, in the requirement of actual perpetration, rather than the mere attempt to perpetrate the felony;[28] and third, in requiring proof of willfulness and deliberation. The prior statute followed the common law felony-murder rule which did not require proof of premeditation, deliberation, and willfulness. Such elements were assumed to be implicit in the felonious conduct.[29]

b. Manslaughter

The interrelationship of premeditation, which will raise a

25. The definition goes far beyond the frequently heard argument that the death penalty is the only meaningful sanction imposable upon an inmate serving a life sentence without the possibility of parole. Insofar as prison killings are concerned, the statute encompasses *any* inmate.

26. TENN. CODE ANN. § 39-108 (1955). However, under TENN. CODE ANN. § 39-2407 (1955), if the principal has not been convicted, the punishment is life imprisonment. Ironically, after the abolition of the death penalty, this was a more severe punishment than that previously authorized for the principal (20 years to life). Ch. 23, § 4, [1829] Tenn. Pub. Acts 28 (codified at Tenn. Code Ann. § 39-2405 (1955)), *as amended*, TENN. CODE ANN. § 39-2405 (Supp. 1974).

27. The previous statute encompassed first degree murder, rape, larceny, burglary, arson, and robbery. Section 39-1105 of the Proposed Criminal Code is limited to kidnapping, aggravated rape, aggravated robbery, and burglary.

28. Section 39-1105 of the Proposed Criminal Code encompasses "an attempt to commit during the commission, or in immediate flight after the attempt or commission of the offense."

29. Proof of malice is independently required in all cases of murder. *See* TENN. CODE ANN. § 39-2401 (1955).

homicide charge to first degree murder, and provocation, which will reduce the offense from murder to voluntary manslaughter, arose in *Baxter v. State*,[30] a case decided by the Tennessee Court of Criminal Appeals. The defendant, under the apparently mistaken belief that the victim was having an affair with his wife, went to the city dump where the victim was operating a bulldozer and proceeded to shoot him four times with a single barrel shotgun. The majority had no difficulty in finding premeditation and concluded that "if premeditation exists, it is immaterial that the defendant was in a passion when that design was executed."[31]

The use of the term "passion" in the court's statement is ambiguous. If the court is merely saying that first degree murder may be perpetrated by a person in an emotional state, it is quite correct. If, on the other hand, it is suggesting that once premeditation has been formed, a homicide never can be committed "in the heat of passion," as the phrase is defined by the common law,[32] the pronouncement is far more questionable. Although initially the defendant may have premeditated a murder, it is conceivable that in the final analysis the actual killing was precipitated by an emotional state aroused by an assault by the victim or by unexpectedly finding the victim engaged in sexual relations with the defendant's wife. In either case the killing would be the result of a situation wholly unanticipated at the time the premeditation was formed.

In support of its conclusion in *Baxter*, the court cited *Presley v. State*,[33] a decision by the Tennessee Supreme Court, in which the same statement regarding premeditation and passion was made. Perhaps the holding in both these cases may be explained on the basis of the absence of an act arousing defendant's passion at the time of the killing. Support for this interpretation is suggested by the fact that *Presley* cited *Leonard v. State*[34] as authority for its holding. In *Leonard* the Tennessee Supreme Court more accurately observed that the question is "whether, if such provocation and passion existed, the homicide was the result of

30. 503 S.W.2d 226 (Tenn. Crim. App. 1973).

31. *Id.* at 229 (citation omitted).

32. TENN. CODE ANN. § 39-2409 (1955) describes voluntary manslaughter as "the unlawful killing of another without malice, either express or implied . . . upon a sudden heat . . . ."

33. 161 Tenn. 310, 30 S.W.2d 231 (1930).

34. 155 Tenn. 325, 292 S.W. 849 (1927).

such passion or of the previously settled purpose . . . to do the deed."[35]

The potential problem posed by the *Baxter* court's treatment of the relationship between premeditation and provocation is further complicated by the fact that in Tennessee, by virtue of *Whitsett v. State*,[36] the defense of provocation by marital infidelity does not require that the accused see the parties together at all.[37] Thus, in his dissent in *Baxter*, Judge Galbreath argued that a first degree murder conviction had never been sustained in a factually comparable case in Tennessee and that the majority's holding was irreconcilable with *Whitsett*.[38] If this analysis is correct, *Baxter* may be read as impliedly overruling *Whitsett*, a not entirely unattractive development. Alternatively, *Whitsett* may be viewed as not so much a homicide precedent as a mental impairment precedent, holding that a heat of passion may be aggravated and sustained by a mental impairment short of insanity, which will have the effect of mitigating the offense.[39]

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35. *Id.* at 338, 292 S.W. at 853.

36. 201 Tenn. 317, 299 S.W.2d 2 (1957).

37. "[U]nexpectedly he met the debaucher of his wife and destroyer of his home within an hour after he had received information correctly convincing him of that fact." *Id.* at 327, 299 S.W.2d at 7.

38. A rather diligent search of the compiled decisions of our Supreme Court has failed to uncover a single opinion in which a slaying prompted by the jealous passion aroused by a firm conviction on the part of a husband that another man has debauched his wife has been held to be murder in the first degree. The suppressed frustration and resentment that naturally arises in the mind of a husband whose wife has been sexually active with another man is too well known to warrant elaborate discourse. That his powerful emotion may not subside even after days of worry and mental turmoil is also recognized. Thus it sometimes occurs that after days and nights of brooding, reflection and unsuccessful efforts to overcome the violence that is locked up inside, the reason is overcome and tragedy results.

The fact that the defendant appeared calm to witnesses who saw him before the shooting does not dispel the fact that in all likelihood he was, and had been for days, working himself up to the ultimate frenzy of jealousy that motivated his final outburst. This very appearance of calm and the effort to hide the real emotion has long been recognized as much worse than would be outbursts of vocal rage accompanied by crying and threats against the object of passion, others or himself. Shakespeare was right, as students of the emotion know, when he advised, "Give sorrow words. The grief that does not speak whispers the o'er burdened heart and bids it break."

503 S.W.2d at 232.

39. Interestingly, viewed in this perspective, *Whitsett* is as equally an aberrational decision when compared with cases discussing a mental impairment defense as when placed in the context of the law of homicide. *See, e.g.*, McElroy v. State, 146 Tenn. 442,

In another decision concerning provocation and voluntary manslaughter, *State v. Tilson*,[40] the Tennessee Supreme Court held that provocation may reduce a homicide from murder to voluntary manslaughter only when the victim was the source of the provocation. Although it appears that this issue had not previously arisen in Tennessee, the holding is consistent with the common law.[41] In *Howard v. State*[42] the court of criminal appeals held that because voluntary manslaughter is considered a lesser included offense of murder, evidence sufficient to warrant a conviction of murder would be sufficient to sustain a conviction of voluntary manslaughter, even though the crime was not committed in the heat of passion.

While malice necessary for a murder conviction may be presumed from the use of a deadly weapon,[43] the presumption is a rebuttable one. In *Lay v. State*[44] the Tennessee Court of Criminal Appeals concluded that the presumption was rebutted where the defendant, a blind man, shot at what he took to be an intruder in his home in the middle of the night. The court did find, however, that the blindness of the defendant would not justify a lesser standard of caution than that required of a sighted person and thus found the defendant "guilty of a degree of *culpable negligence* which sustains a conviction of an attempt to commit voluntary manslaughter."[45] The conclusion is puzzling for two reasons. First, while involuntary manslaughter may be based on a negligent act,[46] voluntary manslaughter requires proof of an express or implied intent to kill, a standard which seems to require more than "culpable negligence."[47] Second, irrespective of the mens rea required for actual commission of an offense, an

242 S.W. 883 (1921); Watson v. State, 133 Tenn. 198, 180 S.W. 168 (1915).

40. 503 S.W.2d 921 (Tenn. 1974).

41. *See* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 276, at 585 n.11 (R. Anderson ed. 1957) [hereinafter cited as WHARTON].

42. 506 S.W.2d 951 (Tenn. Crim. App. 1973). The court cited Reagan v. State, 155 Tenn. 397, 293 S.W. 755 (1926), as authority for its holding.

43. *See, e.g.*, Sharp v. State, 513 S.W.2d 189 (Tenn. Crim. App. 1974); Gunn v. State, 487 S.W.2d 666 (Tenn. Crim. App. 1972); Bailey v. State, 479 S.W.2d 829 (Tenn. Crim. App. 1972).

44. 501 S.W.2d 820 (Tenn. Crim. App. 1973).

45. *Id.* at 825 (emphasis added).

46. *See* Smith v. State, 212 Tenn. 510, 370 S.W.2d 543 (1963); Roe v. State, 210 Tenn. 282, 358 S.W.2d 308 (1962); *see also* 1 WHARTON § 290.

47. *See* Manier v. State, 65 Tenn. (6 Baxter) 595 (1872); *see also* 1 WHARTON § 274.

attempt to perpetrate the same offense always requires specific intent.[48]

In *Cole v. State*[49] a conviction of involuntary manslaughter was sustained by the court of criminal appeals when death resulted from a drag race in which one of the automobiles driven by the defendants collided with the vehicle driven by the victim. In an earlier decision, involving virtually identical facts, convictions of second degree murder were sustained by the Tennessee Supreme Court.[50]

B. Against Property

1. Larceny

When alternative statutes are equally applicable to a given situation, a canon of statutory construction directs that the statute of more specific application to the facts should govern.[51] In *Carmon v. State*[52] the defendant was convicted of larceny upon proof that he had stolen a telephone from a telephone booth. It was argued by the defense that the accused could only be charged under the statute prohibiting, *inter alia*, the injuring of telephone lines and appliances,[53] a less serious offense than larceny. While not denying that this statute could indeed encompass the conduct of the accused, the Tennessee Court of Criminal Appeals, focusing upon the purposes of the statutes, affirmed the conviction. The court observed that the purpose of the telephone statute was merely to punish the disruption of communication while the larceny statute was enacted to punish the wrongful conversion of property.

An essential element of the crime of larceny is an intent to deprive the owner of his property permanently.[54] This require-

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48. There must be an intent to commit a specific crime to constitute an attempt, even though the commission of the crime itself might not require such a specific intent. Thus, although murder may be committed without a specific intent to kill, as under the felony murder rule, there can be no attempt to commit murder without a specific intent to kill.

1 WHARTON § 73, at 155-56 (footnotes omitted).

49. 512 S.W.2d 598 (Tenn. Crim. App. 1974).

50. Stallard v. State, 209 Tenn. 13, 348 S.W.2d 489 (1961).

51. *See* 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5204, at 541-42 (3d ed. 1943).

52. 512 S.W.2d 595 (Tenn. Crim. App. 1974).

53. TENN. CODE ANN. § 39-4533 (1974).

ment has led to so-called "joy-riding" statutes, designed to cover situations in which a vehicle is taken without permission of the owner but later abandoned under circumstances indicating that it is highly probable that it will be retrieved by or returned to the owner. In *Spencer v. State*[55] the Tennessee Supreme Court determined for the first time[56] that the Tennessee "joy-riding" statute[57] was a lesser included offense of larceny,[58] and that the defendant on trial for larceny was prejudiced by the failure of the trial judge to include the "joy-riding" statutory option in his charge to the jury.[59]

2. Fraudulent Breach of Trust

In *Gaston v. State*[60] the defendant, a real estate broker, executed a contract for the sale of real property, under the terms of which the seller agreed to pay off the balance remaining on the real estate mortgage. The purchase price was paid to the defendant, and the buyer received a warranty deed which indicated that the property was unencumbered. Instead of paying the mortgage indebtedness on behalf of the seller, however, the defendant, without giving notice of the sale to the mortgage company, continued to pay monthly installments for a year and a half, after which time the total balance due had been paid. The defendant conceded that the indebtedness should have been paid off at the time of closing but that he did not do so because he was short of cash.

The appellate court affirmed a conviction for fraudulent breach of trust.[61] Unlike larceny, this offense does not require proof of an intent to steal at the time of the taking or anytime thereafter. It need only be shown that the defendant intended

54. *See* Fields v. State, 46 Tenn. (6 Coldwell) 431 (1869).

55. 501 S.W.2d 799 (Tenn. 1973).

56. *Cf.* Prince v. State, 220 Tenn. 587, 421 S.W.2d 627 (1967).

57. TENN. CODE ANN. § 59-504 (1955).

58. The court cited the following cases: State v. Blotzer, 188 Neb. 143, 195 N.W.2d 199 (1972); State v. Eyle, 236 Ore. 199, 388 P.2d 110 (1963); Commonwealth v. Nace, 222 Pa. Super. 329, 295 A.2d 87 (1972).

59. The court viewed such a charge as mandatory under TENN. CODE ANN. § 40-2518 (1955).

60. 506 S.W.2d 802 (Tenn. Crim. App. 1973).

61. The conviction was based on a violation of TENN. CODE ANN. § 39-4228 (1955). The offense of fraudulent breach of trust is defined in TENN. CODE ANN. § 39-4226 (1955).

fraudulently to appropriate the property of another to his own use, an intent which was supported by the record in *Gaston*.[62]

C. *Public Offenses*

1. Drug Offenses

The Tennessee Drug Control Act of 1971,[63] which was sustained against constitutional challenge by the Tennessee Court of Criminal Appeals in *Hilton v. State*,[64] exempts "casual exchanges" from its sale provisions.[65] The scope of this exception was considered in *State v. Helton*,[66] where the defendant had been convicted of selling heroin. The evidence showed that the defendant had purchased two packages of heroin for twenty-five dollars. He took the packages home and approximately twenty minutes later became sick from his first use of the purchased drug, which had occurred at the time of the sale. Two days later, he returned to the original seller with the two heroin packages, intending to get his money back. Ultimately, the two packages were exchanged for twenty dollars and two marijuana cigarettes. The defendant was prosecuted on the basis of this transaction. The prosecution contended that the "casual exchange" exception was inapplicable whenever money is given in exchange for a controlled substance. Considering this interpretation too narrow, the Tennessee Supreme Court reversed the defendant's conviction. The court reasoned that had the legislature wished the distinction to be drawn in the terms advocated by the prosecution, it could easily have done so. Furthermore, the language employed by the

62. *See also* Switzer v. State, 213 Tenn. 671, 378 S.W.2d 760 (1964).

63. TENN. CODE ANN. §§ 52-1408 to -1448 (Supp. 1974).

64. 503 S.W.2d 951 (Tenn. Crim. App. 1973).

65. TENN. CODE ANN. § 52-1432(a)(2) (Supp. 1974) provides as follows:

> It may be inferred from the amount of controlled substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing. It may be inferred from circumstances indicating a casual exchange among individuals of a small amount of controlled substances that the controlled substances so exchanged were possessed not with the purpose of selling or otherwise dispensing them in violation of the provisions of subsection (a) of this section. Such inferences shall be transmitted to the jury by the trial judge's charge and the jury will consider such inferences along with the nature of the substance possessed when affixing the penalty.

See Smithson v. State, 509 S.W.2d 526 (Tenn. Crim. App. 1974).

66. 507 S.W.2d 117 (Tenn. 1974).

statute suggested to the court that a casual exchange was to be determined by an examination of the relationship of the parties to the transaction and not on the basis of the presence or absence of a money exchange. In *Helton* there was evidence that the original seller was both an addict and a drug peddler, while the defendant was neither. The defendant's sole purpose had been to obtain a refund of his purchase money, having found the goods unsatisfactory. The court was persuaded that these circumstances fell within the casual exchange exemption provided by the Act.

2. Escape

In *Lacey v. State*[67] the defendant was involved in a work-release program under which he held a job in a factory during the day and returned to the state correctional facility each evening. On Christmas he was given a pass for the day but failed to return and was apprehended in a stolen automobile over a month later. He was prosecuted under a statute[68] which at that time provided: "If any inmate serving a term under the direct or indirect custody and supervision of the department of correction, or other state division or agency, shall escape or attempt to escape, he shall be indicted for an escape . . . ." The defendant contended that since he did not leave the correctional facility without permission, he was not chargeable with the offense of escape. Subsequent to the events upon which the charge was brought, the statute was amended to include explicitly escapes occurring while an inmate was "on furlough."[69] The defendant argued that this subsequent amendment indicated that such occurrences were not included in the prior statute. The court of criminal appeals disagreed, citing a Rhode Island decision[70] which on substantially identical facts, held that the subsequent legislative act merely clarified the law.

3. Obscenity

Two decisions were rendered by the United States Supreme

67. 506 S.W.2d 809 (Tenn. Crim. App. 1974).

68. Ch. 38, § 29, [1829] Tenn. Pub. Acts 71, *as amended*, TENN. CODE ANN. § 39-3802 (Supp. 1974).

69. TENN. CODE ANN. § 39-3802 (Supp. 1974).

70. State v. Furlong, 110 R.I. 174, 291 A.2d 267 (1972). The court also cited State v. Kiggins, 86 S.D. 612, 200 N.W.2d 243 (1972).

Court during 1974 which sought to clarify the holdings of the previous term in *Miller v. California*[71] and its progeny.[72] In overruling the finding by a trial court that the motion picture *Carnal Knowledge* was obscene, the Court in *Jenkins v. Georgia*[73] put to rest any notion that the *Miller* decision had precluded all review of jury determinations on obscenity. The Court concluded that the film could not be found patently offensive under the *Miller* test.

In *Hamling v. United States*[74] the Court held that it had not intended to stipulate any particular geographic unit by adopting "contemporary community standards" for the obscenity test. Rather, the intent was merely to permit jurors to rely upon their own experience in making judgments. Generally, this would mean experience gained in an area from which the jury was drawn—for example, a federal district. Standards of a broader community could be used, however. *Miller*, for instance, used the State of California as the community from which to draw its standard. The Court further observed in *Hamling* that a federal district court could "admit evidence of standards existing in some place outside of [its] particular district, if it felt such evidence would assist the jury in the resolution of the issues which they were to decide."[75]

On the authority of the *Miller* decision the Tennessee obscenity statute[76] was held unconstitutional in *Art Theatre Guild, Inc. v. State ex rel. Rhodes*.[77] A new obscenity statute[78] which codified the definition of obscenity in *Miller* was promptly enacted.

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71. 413 U.S. 15 (1973).

72. *See 1973 Survey* at 219-21.

73. 418 U.S. 153 (1974).

74. 418 U.S. 87 (1974).

75. *Id.* at 106.

76. Ch. 91, § 2, [1965] Tenn. Pub. Acts 322 (repealed 1974).

77. 510 S.W.2d 258 (Tenn. 1974). The court condemned both the statutory phrase "utterly without social importance" and the absence from the statute of specifically described sexual conduct. While the latter is compelled by *Miller*, the former is not constitutionally objectionable. The language of the statute, derived from Memoirs v. Massachusetts, 383 U.S. 413 (1966), merely states a narrower test for obscenity—an option available to the state.

78. TENN. CODE ANN. §§ 39-3010 to -3022 (Supp. 1974).

III. PARTIES

A. *Accessory Before the Fact*

An accessory before the fact is considered to be as culpable as the principal for any offenses resulting from their collaboration.[79] It is unnecessary that the accessory be present or in any way aid and abet the actual perpetration of the offense.[80] Furthermore, it is possible that the accessory will be held accountable for an offense not contemplated by the parties. The case of *Gant v. State*[81] illustrates this point. The defendant hired Holiday to kill the intended victim. Holiday attempted to carry out the charge, but instead killed the daughter of the intended victim. The killing by Holiday was clearly first degree murder under a theory of transferred intent[82] or felony-murder,[83] and, as an accessory before the fact, defendant Gant was likewise charged with first degree murder.

B. *Aiding and Abetting*

A party found guilty of aiding and abetting an offense is chargeable with the crime committed by the principal.[84] While the parties must share a common intent to perpetrate the offense, that intent may be proved by circumstantial evidence.[85] In *Robinson v. State*[86] the defendant, accompanied by Clark, parked his automobile near a furniture store. Entering the store without Clark, the defendant asked one of the two employees present to show him a bedroom suite. Less than a minute later, Clark entered the store and asked the other employee to show him a sofa-bed. When the latter employee leaned over to demonstrate the operation of the piece of furniture, Clark pressed a weapon against his back and forced him into a back room. Escaping through a rear door the employee quickly summoned the police. Shortly thereafter, Clark was shot and killed by an officer outside

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79. *Id.* § 39-108 (1955).
80. Mendolia v. State, 192 Tenn. 656, 241 S.W.2d 606 (1951).
81. 507 S.W.2d 133 (Tenn. Crim. App. 1973).
82. *See* Harper v. State, 206 Tenn. 509, 334 S.W.2d 933 (1960); Batts v. State, 189 Tenn. 30, 222 S.W.2d 190 (1946); *see also* 1 WHARTON § 193.
83. *See* Sullivan v. State, 173 Tenn. 475, 121 S.W.2d 535 (1938).
84. TENN. CODE ANN. § 39-109 (1955).
85. *See 1970 Survey* at 200.
86. 513 S.W.2d 156 (Tenn. Crim. App. 1974).

the store. The defendant, still on the premises, was then arrested. In his possession were an empty holster and several bullets for a revolver found on Clark's body. A money box from the furniture store, bearing Clark's fingerprints, was found in the defendant's automobile. The prosecution theorized that the defendant had held the attention of one employee to enable Clark to carry out the crime.[87] The Tennessee Court of Criminal Appeals found the evidence sufficient to support a conviction for robbery.[88]

IV. PROCEDURE

A. Arrest

1. Temporary Detention

The temporary detention of suspects under circumstances short of probable cause for an arrest was approved by the United States Supreme Court in *Terry v. Ohio*.[89] Such detentions must themselves satisfy constitutional standards of reasonableness, however.[90] In *Manning v. Jarnigan*[91] the Court found that stopping an automobile on the order of the Chief of Police "to check out all cars late at night," was not sufficiently justified under the reasonableness test. Similarly, even where a vehicle was legitimately stopped for a license check, the Sixth Circuit Court of Appeals held in *United States v. Cupps*[92] that the driver could not be required to exit the vehicle, absent probable cause to make an arrest. The court further observed that "[p]olice may not lawfully use their general inspection powers as a pretext for stopping motorists for the purpose of inquiring about their business on the public highways."[93]

In *Effler v. State*[94] the Tennessee Court of Criminal Appeals

87. Clark was a former employee of the furniture store and thus was familiar with the premises.

88. Judge Galbreath dissented, conceding that it was highly probable that the defendant was an accomplice but that the evidence was insufficient to support a finding of guilt.

89. 392 U.S. 1 (1968). Frequently, during such a confrontation the level of suspicion will reach the level of probable cause and justify an arrest. *See* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRETRIAL RIGHTS § 17, at 129-31 (1972) [hereinafter cited as PRETRIAL RIGHTS].

90. *See* PRETRIAL RIGHTS § 7, at 50-57.

91. 501 F.2d 408 (6th Cir. 1974).

92. 503 F.2d 277 (6th Cir. 1974).

93. *Id.* at 282.

94. 508 S.W.2d 809 (Tenn. Crim. App. 1974).

held that officers acted reasonably in detaining for investigation an automobile positioned crosswise in the road at nighttime, particularly where the absence of lights was itself an offense[95] committed in the presence of the officers.[96]

2. Misdemeanors

While apparently not constitutionally compelled,[97] at common law an arrest for a misdemeanor could only be made pursuant to a warrant or when the offense was committed in the presence of the arresting officer.[98] In *Williams v. State*[99] the Tennessee Court of Criminal Appeals held that "an offense is not committed in the presence of an officer when its commission is communicated to him by another."[100]

B. Search and Seizure

1. Sufficiency of Warrant

The fourth amendment requires that a search warrant describe with particularity the place to be searched.[101] The test for determining the sufficiency of the description is a pragmatic one: can the premises be located on the basis of the description in the warrant? Given this test, it follows that errors in the warrant may be tolerated if the description as a whole is unambiguous.[102] In the case of a multi-unit building, the Sixth Circuit Court of Appeals held in *United States v. Olt*[103] that the warrant must be limited to specific premises for which probable cause has been shown, unless the entire building has been used in common.

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95. TENN. CODE ANN. § 59-909 (Supp. 1974).

96. Evidence linking the defendant to a burglary was observed on the back seat of the automobile.

97. *See* PRETRIAL RIGHTS § 14, at 93 n.5.

98. *Id.* § 14, at 92.

99. 506 S.W.2d 193 (Tenn. Crim. App. 1973).

100. *Id.* at 197 (citations omitted); *but see* State v. Costa, 306 A.2d 36 (R.I. 1973).

101. *See* PRETRIAL RIGHTS § 27; Cook, *Requisite Particularity in Search Warrant Authorizations*, 38 TENN. L. REV. 496 (1971).

102. United States v. Frazier, 491 F.2d 243 (6th Cir. 1974); United States v. Shropshire, 378 F. Supp. 1187 (E.D. Tenn. 1972).

103. United States v. Olt, 492 F.2d 910 (6th Cir. 1974); *see also* People v. Coulon, 273 Cal. App. 2d 148, 78 Cal. Rptr. 95 (1969).

2. Execution of Warrant

In *Gooding v. United States*,[104] a narcotics case, the United States Supreme Court sustained the nighttime execution of a warrant for the search of a residence on the ground that the search was authorized by federal statute. The majority confined its analysis to a determination of whether the federal statute or the more restrictive District of Columbia Code provisions should apply. The dissenting Justices[105] took issue with the failure of the majority to consider the fourth amendment aspect of the case,[106] which, they contended, commanded a stronger showing of probable cause to authorize a nighttime search of a residence.[107] Noting the precedent established in *Camara v. Municipal Court*,[108] permitting a relaxed standard of probable cause for administrative inspections of urban residences,[109] the dissent argued that this principle was not a "one-way street, to be used only to water down

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104. 416 U.S. 430 (1974).

105. Justice Marshall, joined by Justices Douglas and Brennan.

106. [T]here are other concerns implicated in our interpretation of this congressional enactment restricting the issuance of search warrants—the protection of individual privacy which is the very purpose of the statute's search warrant requirement and which of course is given constitutional recognition in the Fourth Amendment. The Court seems totally oblivious to these constitutional considerations. Taking them into account, I find that the only acceptable interpretation of the statute is one which requires some additional justification for authorizing a nighttime search over and above the ordinary showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found upon the search.

416 U.S. at 461-62.

107. [T]here is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night. The idea of the police unnecessarily forcing their way into the home in the middle of the night—frequently, in narcotics cases, without knocking and announcing their purpose—rousing the residents out of their beds, and forcing them to stand by in indignity in their night clothes while the police rummage through their belongings does indeed smack of a "'police state' lacking in respect for . . . the right of privacy dictated by the U.S. Constitution."

Id. at 462 (citation omitted).

108. 387 U.S. 523 (1967).

109. The Court held that the quantum of probable cause required for issuance of an inspection warrant had to be determined at least in part by the reasonableness of the proposed search. The reasonableness was to be determined by balancing the need for search against the invasion of privacy which the search would entail. In finding that the search was reasonable the Court said, "[The inspections] involve a relatively limited invasion of the urban citizen's privacy." *Id.* at 537; *see also* PRETRIAL RIGHTS § 66.

the requirement of probable cause . . . ."[110]

A search warrant is issued on the belief that the enumerated items are presently to be found at the described premises. With the passage of time, the likelihood of the continued presence of the items becomes increasingly dubious; therefore the prompt execution of a search warrant is itself a constitutional requirement.[111] There are no hard and fast guidelines for determining prompt execution, however, since the possibilities may vary with the nature of the crime and the evidence. In *United States v. Wilson*[112] the Sixth Circuit Court of Appeals held that a six-day delay in the execution of a warrant for narcotics was not unreasonable.

3. Incident to Arrest

The constitutional standard for a warrantless search incident to arrest was established by *Chimel v. California*,[113] where the United States Supreme Court limited such searches to the person of the arrestee and the area in which he might reach for a weapon or destructible evidence. The decision was unclear as to whether the test was to be understood in spacial terms—that is, a certain area surrounding the arrestee—or in purposive terms—that is, the places the arrestee might actually reach.[114] The distinction becomes critical in cases such as *United States v. Isham*.[115] Although the arrestee in that case had been handcuffed outside his automobile prior to the search, the seizure of a rifle on the back seat, covered by a coat and throw rug, was sustained by the Sixth Circuit Court of Appeals.[116]

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110. "In some situations—and the search of a private home during nighttime would seem to be a paradigm example—this principle requires a showing of additional justification for a search over and above the ordinary showing of probable cause." 416 U.S. at 465 (citation omitted).

111. *See* PRETRIAL RIGHTS § 32, at 207 n.22.

112. 491 F.2d 724 (6th Cir. 1974).

113. 395 U.S. 752 (1969).

114. The writer has discussed the ambiguity in the *Chimel* decision in Cook, *Searches Incident to Arrest*, 24 ALA. L. REV. 607, 621-23 (1972).

115. 501 F.2d 989 (6th Cir. 1974).

116. Actually, the seizure was sustained on the even more dubious *Terry* stop-and-frisk theory. The court noted that the defendant was rolling up a window and thus "must have had his hands handcuffed in front of him." *Id.* at 991. Under these circumstances, the court concluded that the officers' seizure was reasonable "for their own self-protection within the *Terry* rationale." *Id.*

A purposive interpretation of *Chimel* was substantially compromised in *United States v. Robinson*,[117] where the person of the accused was searched incident to a custodial arrest for driving without a license. In the process of the search, the officer recovered a crumpled cigarette package which appeared to contain something other than cigarettes. Under a narrow, purposive reading of *Chimel*, the mere removal of the package would have been sufficient to take it out of the area of the accused's reach and thus to protect the safety of the officer and preclude the possible destruction of evidence, an examination of the contents of the package being unnecessary.[118] Nevertheless, the officer proceeded to open the package and found within it gelatin capsules containing heroin. The United States Supreme Court sustained the legality of the search. A similar result was reached in *Gustafson v. Florida*,[119] with the added factor that there was no ostensible indication that the cigarette box contained anything other than its customary contents. Again, the officer opened the box and discovered marijuana cigarettes. The Court held that the discovery of the object entitled the officer to examine it more meticulously.[120]

The *Robinson* and *Gustafson* cases also raised the question of the propriety of a warrantless search incident to an arrest for

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117. 414 U.S. 218 (1973).

118. *See id.* at 256 (Justice Marshall, joined by Justices Douglas and Brennan, dissenting):

> To begin with, after [Officer] Jenks had the cigarette package in his hands, there is no indication that he had reason to believe or did in fact believe that the package contained a weapon. More importantly, even if the crumpled-up cigarette package had in fact contained some sort of small weapon, it would have been impossible for respondent to have used it once the package was in the officer's hands . . . . It is suggested, however, that since the custodial arrest itself represents a significant intrusion into the privacy of the person, any additional intrusion by way of opening or examining effects found on the person is not worthy of constitutional protection. But such an approach was expressly rejected by the Court in *Chimel*.

119. 414 U.S. 260 (1973).

120. *See also* United States v. Crane, 499 F.2d 1385 (6th Cir. 1974); United States v. Kaye, 492 F.2d 744, 746 (6th Cir. 1974), where the court stated:

> Our question is whether [the] search may extend to the suitcase Appellant was carrying with him. We find that it can. . . . It is true, as Appellant contends, that Appellant had been subdued and presented no danger to the police at the time the suitcase was opened. Nor was there the possibility that the evidence in the suitcase would be destroyed as the suitcase was under the control of the police. However, the authority to conduct a search incident to an arrest, once established, still exists even after the need to disarm and prevent the destruction of evidence have [*sic*] been dispelled.

a traffic offense. In *Robinson* the officer had observed the respondent driving an automobile. Believing, by virtue of an investigation four days earlier, that his driver's license had been revoked, the officer stopped the vehicle and informed the respondent that he was under arrest. It was undisputed that the officer "effected a full-custody arrest."[121] The Court held that the resulting search and seizure of the cigarette package containing heroin capsules had been reasonable as incident to the lawful arrest of the respondent. In thereby sanctioning a search incident to an arrest for a traffic offense, the Court stressed the fact that the respondent was to be taken into custody, even prior to the discovery of the heroin.[122] In *Gustafson* an officer stopped the vehicle driven by the petitioner when he observed it weave across the center line several times. The petitioner was unable to produce a driver's license, whereupon the officer placed him under arrest. It was conceded by both the prosecution and the defense that the officer "took petitioner into custody in order to transport him to the stationhouse for further inquiry."[123] The reasonableness of the resulting search and seizure was sustained by the Court, citing *Robinson* as now being dispositive.[124]

In *United States v. Edwards*[125] the respondent was lawfully arrested late one night and charged with attempting to break into a post office. An investigation at the scene of the offense revealed that an attempt had been made to pry open a window, in the process of which paint chips had been left on the windowsill and

121. 414 U.S. at 221 (footnote omitted). This would appear to be the first instance of the use of this term by the Court. In a footnote the term is defined by reference to testimony at the evidentiary hearing as an arrest in which the party was to be transported to the station for booking. *Id.* at 221-23 n.2.

122. Nor are we inclined, on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their license has been revoked are less likely to possess dangerous weapons than are those arrested for other crimes. It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.

Id. at 234-35 (footnote omitted).

123. 414 U.S. at 262.

124. Justice Marshall, joined by Justices Douglas and Brennan, dissented in both cases.

125. 415 U.S. 800 (1974), *noted in* 41 TENN. L. REV. 932 (1974).

screen. The respondent was immediately incarcerated, and the following day clothing was purchased to substitute for the clothing he had been wearing from the time of the arrest. The exchange of clothing was made, and the items taken from the accused were thereafter examined for evidence. Paint chips matching those found at the scene of the crime were discovered on the clothing and were introduced in evidence at trial over the objection of the defense. The Sixth Circuit Court of Appeals reversed the conviction,[126] finding that the arrest was lawful but that the delayed seizure violated the fourth amendment. On certiorari, the Supreme Court reversed, finding ample precedent to support the principle that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."[127] The lower court had conceded as much but viewed the situation distinguishable "after the administrative process and the mechanics of the arrest have come to a halt."[128] The Supreme Court found such a distinction unjustified.[129]

4. Consent

The prosecution has the burden of proving consent to a warrantless search.[130] The consent must be voluntary and unequivocal,[131] but it is not always necessary that the suspect first be apprised of his fourth amendment rights.[132] Whether a valid consent has been given is determined after examining the totality of the circumstances.[133]

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126. United States v. Edwards, 474 F.2d 1206 (6th Cir. 1973), *rev'd*, 415 U.S. 800 (1974).

127. 415 U.S. at 803. The court cited Abel v. United States, 362 U.S. 217 (1960), and a number of federal courts of appeals decisions.

128. 474 F.2d at 1211.

129. This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. The police did no more on June 1 than they were entitled to do incident to the usual custodial arrest and incarceration.

415 U.S. at 805.

130. Bumper v. North Carolina, 391 U.S. 543 (1968); Bradley v. Cowan, 500 F.2d 380 (6th Cir. 1974); *see generally* PRETRIAL RIGHTS § 50.

131. *See* PRETRIAL RIGHTS § 50.

132. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Earls v. Tennessee, 379 F. Supp. 576 (E.D. Tenn. 1974); *see 1973 Survey* at 229-30.

133. *See* Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974); Earls v. Tennessee, 379

The effectiveness of third-party consent came before the United States Supreme Court in *United States v. Matlock*.[134] The respondent was arrested for robbery while standing in the yard of the house in which he lived with, among others, a woman to whom he was not married. The officers did not request that the respondent consent to a search of the premises, nor did they inquire as to which part of the premises he occupied. Instead, they went to the entrance of the house and were admitted by the woman, who then consented to a search of the house, including a portion purportedly occupied by the respondent and herself. In the jointly occupied bedroom the officers discovered a substantial amount of cash which later was introduced at the trial of the respondent.[135] The Court concluded that the consent by the woman was effective against the respondent and therefore that the evidence discovered in the jointly occupied premises could properly be introduced at the respondent's trial.[136]

5. Vehicles

Warrantless searches of vehicles are frequently sustained under a variety of circumstances. Most commonly, if officers have probable cause to believe that a vehicle contains seizable evidence, a warrantless seizure will normally be sustained since the inherent mobility of the vehicle makes obtaining a warrant impractical.[137] Occasionally, a court will consider whether the officers had reason to believe a particular vehicle would disappear if a warrant were sought.[138]

Even absent probable cause to believe that the vehicle contains seizable evidence, such vehicle may be subject to search because the police gain lawful custody of it by virtue of specific enabling statutes or by other justifiable circumstances.[139] Thus,

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F. Supp. 576 (E.D. Tenn. 1974) (presence of five or six law enforcement officers did not vitiate consent).

134. 415 U.S. 164 (1974), *noted in* 41 TENN. L. REV. 923 (1974).

135. Other seizures made in various portions of the house were not in issue here. *Id.* at 167 n.1.

136. *Id.* at 177.

137. Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Kemper, 503 F.2d 327 (6th Cir. 1974); *see generally* PRETRIAL RIGHTS § 61.

138. United States v. Young, 489 F.2d 914 (6th Cir. 1974).

139. *See* Cooper v. California, 386 U.S. 58 (1967), where a state statute, after defendant's arrest for a narcotics violation, authorized the police to seize the automobile used unlawfully to transport the narcotics; *see also* Harris v. United States, 390 U.S. 234

in *Capp v. State*,[140] during a temporary detention of a vehicle, the legality of which was not questioned, officers observed a firearm on the floorboard and arrested the occupants for a violation of the National Firearms Act.[141] Under the Contraband Seizure Act,[142] the vehicle thereupon became subject to seizure.[143] A subsequent inventory of the contents of the vehicle revealed other incriminating evidence, the seizure of which was sustained by the Tennessee Supreme Court.[144]

Recent decisions have extended the custody search rationale even to situations where there is no actual police custody of the vehicle. In *Cady v. Dombrowski*,[145] a 1973 decision, the United States Supreme Court held that the search of a vehicle taken to a private wrecker lot at the direction of the police was proper because the officers reasoned that the arrested driver, an off-duty policeman, might have had a service revolver with him.[146] Searches for a loaded weapon[147] and explosives[148] recently have been sustained under the *Cady* rationale.[149]

In *Cardwell v. Lewis*[150] the United States Supreme Court considered the propriety of the warrantless seizure of an automobile and the subsequent examination of the tire tread and the taking of paint scrapings from the exterior of the vehicle. In this case the respondent had been requested to appear at the police station in regard to a homicide investigation. By the time of his arrival, an arrest warrant had been obtained, and although no search warrant had been sought for the vehicle, the police had

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(1968), where the police, after arresting the defendant on robbery charges, lawfully gained custody of the defendant's automobile by impounding the vehicle for use as evidence to show that this vehicle was the one seen leaving the robbery site.

140. 505 S.W.2d 727 (Tenn. 1974).

141. 26 U.S.C. § 5861 (1970).

142. 49 U.S.C. § 781 (1970).

143. "That act requires that automobiles used to transport contraband, such as the illegal shotgun, be seized and forfeited." 505 S.W.2d at 728.

144. The court submitted alternatively that the discovery of the firearm gave rise to probable cause for a further search of the vehicle. *See also* United States v. White, 488 F.2d 563 (6th Cir. 1973).

145. 413 U.S. 433 (1973).

146. *See 1973 Survey* at 230-31.

147. United States v. Isham, 501 F.2d 989 (6th Cir. 1974).

148. United States v. Lewis, 504 F.2d 92 (6th Cir. 1974).

149. In both cases, however, unlike in *Cady*, the Sixth Circuit Court of Appeals found probable cause to support the search.

150. 417 U.S. 583 (1974).

probable cause to believe that his automobile had been used in the perpetration of the crime.[151] The respondent parked his automobile in a commercial lot a short distance from the station. Upon his arrest, he surrendered his car keys and the parking lot claim check. Thereafter, the vehicle was removed by officers to the police impoundment lot. The following day paint samples taken from defendant's car were found to match traces left on the automobile used by the victim. In addition, positive identification of the tire tread further indicated that the respondent's automobile had been used in the perpetration of the crime.

The Court inconclusively split four to four on the reasonableness of the search and seizure of the automobile, but the search and seizure was sustained by virtue of a concurring opinion on a nonsubstantive theory.[152] Building upon the unique considerations traditionally afforded vehicle searches, the plurality opinion found support for sustaining the search and seizure in this case in the *Katz*[153] reasonable expectation of privacy analysis:[154]

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.[155]

Moreover, in the present case the search did not intrude within the vehicle. Given the conceded probable cause to carry out the search, the Justices "fail[ed] to comprehend what expectation of privacy was infringed."[156]

The plurality opinion in *Cardwell* then turned to the ques-

151. It appeared that an automobile, thought to be that of the respondent, had pushed an automobile occupied by the victim over an embankment, causing his death. Casts of tire tracks and paint scrapings, both left by the assaulting vehicle, were taken at the scene of the offense.

152. Justice Powell, concurring, reiterated his position in a concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973), that federal collateral review of fourth amendment claims in a state trial should be limited to whether the petitioner "was denied a full and fair opportunity to litigate his claim in the state courts." 417 U.S. at 596.

153. Katz v. United States, 389 U.S. 347 (1967).

154. *Id.* at 351.

155. 417 U.S. at 590.

156. *Id.* at 591 (footnote omitted).

tion of the impoundment of the automobile without a warrant, a procedure which was not necessary to obtain the identification evidence. Instead, the police could have obtained a warrant for the seizure of the vehicle and postponed the examination for evidence until their possession was given judicial authorization; or, the police could have obtained the identification evidence at the commercial parking lot without moving the vehicle. Either alternative would have been less constitutionally intrusive than the course followed. The inherent mobility argument, which is frequently used to sustain warrantless searches of vehicles,[157] is far less persuasive when, as in *Cardwell*, the party controlling the vehicle is incarcerated. Nevertheless, the Justices concluded that the manner of the search was constitutionally reasonable, quoting a passage from *Chambers v. Maroney*[158] addressed to a comparable issue:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[159]

The difficulty of this argument is that it says too much. By this reasoning, *any* warrantless search could be sustained if in retrospect it was shown or conceded that probable cause existed. It is true that a warrantless search is no greater an intrusion on privacy than a warrant search. But the purpose of favoring warrants is to obtain a judicial ruling as to whether the search should be carried out *at all* and to have that determination made *prior* to the search. Ironically, in the *Katz* case the Court had conceded probable cause for an electronic eavesdrop but held the seizure unreasonable because no prior judicial authorization was obtained.

The four dissenting Justices contended that, in the absence of any argument that the vehicle would or could be moved, the justification for the vehicle exception was simply not present. Therefore, they maintained, the presumption favoring the use of warrants whenever possible should have been honored.[160]

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157. *See* note 137 *supra*.

158. 399 U.S. 42 (1970).

159. *Id.* at 52.

160. "The most fundamental rule in this area of constitutional law is that "searches

6. Fruits of Illegal Search

Once a search is determined to have been illegal, both the evidence seized and any derivative evidence is inadmissible.[161] A search warrant issued on the basis of information obtained by a previous illegal search is itself illegal.[162] The prosecution occasionally seeks to avoid this so-called "fruits" doctrine by employing the "inevitable discovery" notion—if it appears certain that the government would ultimately have gained the evidence in a legal manner, the illegality should not preclude admissibility.[163] In *United States v. Griffin*[164] officers made an illegal search of an apartment at five o'clock in the afternoon and returned four hours later with a search warrant which was obtained without the use of any information gained through the prior illegal search. The Sixth Circuit Court of Appeals refused to accept the contention that the evidence seized in the first search inevitably would have been legally discovered because to do so would "emasculate the search warrant requirement of the Fourth Amendment."[165]

7. Hearing on Admissibility

In *United States v. Matlock*[166] the United States Supreme Court held "that the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence."[167] In accordance with the Proposed Federal Rules of Evidence, the Court concluded that preliminary questions of admissibility "are matters for the judge and that in performing this function he is not

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conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." 417 U.S. at 596 (citations omitted).

161. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); *see* PRETRIAL RIGHTS § 71.

162. United States v. Stoner, 487 F.2d 651 (6th Cir. 1973).

163. *See* Comment, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88 (1974).

164. 502 F.2d 959 (6th Cir. 1974).

165. *Id.* at 961.

166. 415 U.S. 164 (1974).

167. *Id.* at 172-73 (footnote omitted). The Court quoted Brinegar v. United States, 338 U.S. 160, 173 (1949), which concerned not an exclusionary hearing but a proceeding for the determination of probable cause, as compared to a trial: "There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." 415 U.S. at 173.

bound by the Rules of Evidence except those with respect to privileges."[168] Analogizing this function to that of issuing arrest and search warrants, the Court concluded that the judge should simply "receive the evidence and give it such weight as his judgment and experience counsel."[169]

C. *Guilty Plea*

To be effective, a guilty plea must be voluntary and intelligently entered by the accused. Two cases decided during 1974 raised the issue of improper coercion exerted upon the accused by his own attorney. *Ray v. Rose*[170] was a habeas corpus proceeding attacking the validity of a guilty plea entered by James Earl Ray. Counsel had originally agreed to represent Ray in his prosecution for the murder of Dr. Martin Luther King, Jr. only if Ray made him his exclusive agent regarding any publishing contracts[171] and assigned him forty percent of all income received by Ray as a result of a publishing contract with William Bradford Huie.[172] Two days prior to the date set for trial, Ray discharged his attorney and retained another. Eventually, the contract rights were assigned to the new attorney, with the modification that counsel would receive sixty percent of the income from Huie's publications.[173] A little over a month later, Ray pled guilty to first degree murder and was sentenced to a term of ninety-nine years. Thereafter, Ray contended that the financial interests of his attorneys had resulted in conflicts of interest which had prejudiced his

168. 415 U.S. at 173-74. The Court referred to Proposed Federal Rules of Evidence 104(a) and 1101(d)(1) in reaching this conclusion. These particular rules were not amended when the Federal Rules of Evidence were enacted into law on January 2, 1975. 88 Stat. 1926 (U.S. CODE CONG. & AD. NEWS 1-37 (Jan. 15, 1975)).

169. 415 U.S. at 175 (footnote omitted).

170. 491 F.2d 285 (6th Cir. 1974).

171. Hanes was to act as "exclusive agent and attorney" for Ray "in the handling of his affairs, contracts, negotiations, and sale of any and all rights to information or privacy which he may have in and to his life or particular events therein to persons, groups or corporations for the purpose of writing, publishing, filming or telecasting in any form whatever."

Id. at 286.

172. Under the agreement negotiated with Huie, the attorney and Ray were each to receive 30 percent of the gross receipts from the sale of Huie's work. Under the agreement between the attorney and Ray, apparently the attorney got 40 percent of Ray's 30 percent. Thus, in the final analysis the attorney got 42 percent and Ray 18 percent of the gross receipts.

173. The author would receive 40 percent; Ray would receive nothing.

defense. He alleged that he was coerced to plead guilty because the contract rights would be virtually worthless if he was tried and acquitted.[174] The Sixth Circuit Court of Appeals held that the petitioner was entitled to an evidentiary hearing, for if the allegations were true, "[s]uch conduct would constitute an outrageous abrogation of the standards which the legal profession sets for itself and upon which its clients have a right to rely."[175]

In *Peete v. Rose*[176] counsel induced the defendant to plead guilty by advising him that if he went to trial he would have a "Ku Klux" jury that would send him to the electric chair. The United States District Court for the Western District of Tennessee concluded that, assuming a plea of guilty was considered by counsel to be in the best interests of his client, his advice nevertheless amounted to a threat which rendered the defendant's plea involuntary.

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174. Among the allegations contained in the habeas corpus petition were the following:

> . . . .
>
> (2) Ray felt that at trial it would be necessary for him to take the stand in his own defense so that he could explain his actions on the day of the murder. Hanes [first counsel] rejected the idea saying, "Why give testimony away when we can sell it?"
>
> (3) Ray urged Hanes to seek a continuance because of substantial, adverse pretrial publicity. Hanes refused because the contract with Huie provided that they must go to trial within a certain number of days.
>
> . . . .
>
> (5) Despite the urgings of Ray, Foreman [second counsel] refused to take any action to halt adverse, pretrial publicity.
>
> (6) On February 13, 1969, Foreman brought a document to the jail which he urged Ray to sign. Included therein was an authorization for Foreman to negotiate a guilty plea and also a waiver of any claim against either Huie or *Look* magazine for damaging Ray's chances for a fair trial . . . .

491 F.2d at 287-88 (footnotes omitted).

175. *Id.* at 289.

> It would be difficult to conjure up a more flagrant violation of an attorney's duty to his client or one more likely to prejudice him in the defense of his case. While a lawyer in some circumstances may appropriately advise his client to plead guilty if he has knowledge of the pertinent facts and his advice is honestly and conscientiously given, the opposite is true where the attorney induces a plea of guilty solely for his own gain and without performing the minimum service of investigating the true facts of the case. The latter is true in the present case if we accept, as we must, the allegations of the petitioner.

Id.

176. 381 F. Supp. 1167 (W.D. Tenn. 1974).

D. *Right of Confrontation*

1. Cross-examination

The sixth amendment right of an accused to cross-examine adverse witnesses may on occasion conflict with the fifth amendment privilege against self-incrimination of the witness. While the fifth amendment privilege will not be compromised, efforts will be made to minimize the resulting prejudice to the accused. For example, in *Douglas v. Alabama*[177] a co-conspirator was called as a witness by the prosecution and asked if he had made a confession of the crime charged. The witness asserted the fifth amendment privilege, whereupon the prosecutor proceeded to read the confession, a few sentences at a time, inquiring whether the witness had not so confessed. The confession implicated the defendant in the crime. The witness continued to assert the privilege both on direct and cross-examination. While not questioning the privilege of the witness, the United States Supreme Court held that the defendant had been denied the sixth amendment right of confrontation.

Similarly, in *United States v. Stephens*[178] a hearsay statement was properly admitted in evidence as a statement made by a co-conspirator in furtherance of the conspiracy. The defendant sought to call the maker of the statement as a witness but was denied the opportunity on the ground that the potential witness could properly assert the privilege against self-incrimination. The Sixth Circuit Court of Appeals conceded that the privilege was applicable to the witness but held that he nevertheless should have been required to take the stand and assert the privilege, thus entitling the defendant to at least this degree of confrontation.[179]

A second issue raised in the *Stephens* case was the appropriate judicial response when the witness has answered questions on direct examination but refuses to answer certain questions on cross-examination. The court delineated three categories of testimony in respect to which the issue might arise:[180]

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177. 380 U.S. 415 (1965).

178. 492 F.2d 1367 (6th Cir. 1974).

179. This may also be viewed as a deprivation of the sixth amendment right of compulsory process. *See* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—TRIAL RIGHTS § 3 (1974) [hereinafter cited as TRIAL RIGHTS].

180. The classification was derived from United States v. Caradillo, 316 F.2d 606 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963).

> If the answer sought would have been so closely related to the crime for which the defendants were being tried, that the defendants may be substantially prejudiced by being deprived of their right to test the truth of the witness' direct testimony, the entire testimony of the witness should be stricken. If the subject matter of the testimony is connected with only a part, but not all, of the case being tried, a partial striking of the witness' testimony might suffice. The third category consists of testimony involved in collateral matters or cumulative testimony concerning credibility. The refusal of a witness to submit to cross-examination on such matters as these does not require that any testimony be stricken, but can be handled by a charge to the jury.[181]

From a constitutional perspective, the court saw the issue as "whether there has been an adequate confrontation between the accused and the accusor to satisfy the confrontation clause of the Sixth Amendment."[182] Since in *Stephens* the question posited during cross-examination fell within the third category described above, the court concluded that it was within the discretion of the trial court to determine what, if any, testimony should be stricken.

In *Davis v. Alaska*[183] the United States Supreme Court considered the constitutional propriety of denying the defense the right to pursue a particular line of questioning on cross-examination.[184] The witness Green had identified the accused in a photographic display as the individual he had observed at a location where an abandoned stolen safe was later found. Green was on probation as a result of being adjudicated a juvenile delinquent. Prior to the taking of any testimony at the trial of the accused, the prosecution moved for a protective order to bar any reference by the defense to the juvenile record of Green. Counsel for the accused opposed the motion, indicating that while he was not interested in impeaching the witness generally by reference to his record, he hoped to show that because Green was on probation, his testimony might be subject to undue pressure resulting

181. 492 F.2d at 1375.

182. *Id.* (citations omitted).

183. 415 U.S. 308 (1974).

184. Justice White, joined by Justice Rehnquist, dissenting, was concerned with the precedential effect of entertaining such questions: "[T]he Court insists on . . . in effect inviting federal review of every ruling of a state trial judge who believes cross-examination has gone far enough." *Id.* at 321.

from the fear of possible probation revocation. The trial court nevertheless granted the protective order.

Precluded from inquiring into Green's probation, defense counsel endeavored to show the state of mind of the witness as effectively as possible[185] by suggesting that the witness feared the

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185. Defense counsel cross-examined Green, in part, as follows:

"Q. Were you upset at all by the fact that this safe was found on your property?

"A. No, sir.

"Q. Did you feel that they might in some way suspect you of this?

"A. No.

"Q. Did you feel uncomfortable about this though?

"A. No, not really.

"Q. The fact that a safe was found on your property?

"A. No.

"Q. Did you suspect for a moment that the police might somehow think that you were involved in this?

"A. I thought they might ask a few questions is all.

"Q. Did the thought ever enter your mind that you—that the police might think that you were somehow connected with this?

. . . .

"A. No, it didn't really bother me, no.

"Q. Well, but . . . .

"A. I mean, you know, it didn't—it didn't come into my mind as worrying me, you know.

"Q. That really wasn't—wasn't my question, Mr. Green. Did you think that—not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had something to do with this, that they might have that in mind, not that you . . . .

"A. That came across my mind, yes, sir.

"Q. That did cross your mind?

"A. Yes.

"Q. So as I understand it you went down to the—you drove in with the police in—in their car from mile 25, Glenn Highway down to the city police station?

"A. Yes, sir.

"Q. And then went into the investigators' room with Investigator Gray and Investigator Weaver?

"A. Yeah.

"Q. And they started asking you questions about—about the incident, is that correct?

"A. Yeah.

"Q. Had you ever been questioned like that before by any law enforcement officers?

"A. No.

"MR. RIPLEY: I'm going to object to this, Your Honor, it's a carry-on with rehash of the same thing. He's attempting to raise in the jury's mind . . . .

"THE COURT: I'll sustain the objection."

Id. at 312-13.

police might have suspected him of being implicated in the burglary. In response to a question by defense counsel, Green denied ever having been interrogated by the police prior to this instance, a response which the Supreme Court characterized as "a questionably truthful answer" which probably would not "have been given by Green absent a belief that he was shielded from traditional cross-examination."[186]

The Supreme Court concluded that the restriction on cross-examination denied the accused the right of confrontation.[187] It did not feel that the limited cross-examination afforded the defense a sufficient opportunity to attack the credibility of the witness.[188] While acknowledging that the state had a legitimate interest in protecting the juvenile offender from exposure of his record, the Court reasoned that that concern could not outweigh the accused's right of confrontation.[189]

2. Confession of Co-defendant

Under the holding of *Bruton v. United States*,[190] it is consti-

186. *Id.* at 314.

187. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.

Id. at 316.

188. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a rehash of prior cross-examination.

Id. at 318.

189. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Id. at 319.

190. 391 U.S. 123 (1968).

tutionally impermissible to introduce the confession of a defendant if the confession implicates a co-defendant and the confessing defendant does not elect to testify.[191] In *United States v. Crane*[192] the court appraised the use of a bifurcated trial in order to avoid the *Bruton* problem while retaining the judicial economy of a joint trial. The two defendants were tried together, but the jury first heard the evidence on the first count which only affected the co-defendant and did not include defendant's confession. After considering this evidence the jury returned a verdict of not guilty. Next, the jury heard evidence on the second count, involving only the defendant, and subsequently returned a verdict of guilty against him. Under these circumstances, the court concluded that the guilty defendant was not prejudiced by the joint trial, since the co-defendant was acquitted.[193] Furthermore, the court pointed out that the record convincingly supported a verdict of guilty as to the defendant.[194] The court, however, conceded that the result of this case was wholly fortuitous and concluded that because there would be no way to calculate the possibility of prejudice at the beginning of a joint trial,[195] "the safest course would appear to be the traditional use of the severance device."[196]

E. Right to Counsel

1. Preliminary Hearing

The right to counsel at a preliminary hearing was recognized by the Tennessee Supreme Court in *McKeldin v. State*.[197] Following his arrest, defendant was represented by appointed counsel who, it was later discovered, was neither trained nor licensed to

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191. *Cf.* Briggs v. State, 501 S.W.2d 831 (Tenn. Crim. App. 1973).

192. 499 F.2d 1385 (6th Cir. 1974).

193. Of course, the not-guilty verdict might simply indicate that the co-defendant's confession convinced the jury that the defendant was solely responsible for the crime.

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

195. If a jury were to find one of the defendants guilty, there could be a serious question whether the same jury could later give his codefendant the dispassionate and unprejudiced hearing required by due process and by the sixth amendment. In such a case the risk of prejudice would be unacceptably high. And of course the trial judge cannot predict at the beginning of the trial what the jury's verdict will be as to the defendant whose case is first presented.

499 F.2d at 1388.

196. *Id.*

197. 516 S.W.2d 82 (Tenn. 1974). The case was not reported until early 1975 but has been included in this survey because of its significance.

practice law. The defendant moved to dismiss the indictment on the ground that he had been denied effective assistance of counsel at his preliminary hearing, which he contended was a critical stage of the proceeding.

The result sought by the defendant was not unequivocally compelled by the Constitution.[198] The United States Supreme Court first recognized a right to counsel at a preliminary hearing in *White v. Maryland*,[199] but only because the defendant had been called upon to plead. In *Coleman v. Alabama*[200] the Court discussed the substantial benefits which accrue from representation by counsel at a preliminary hearing but required that actual prejudice be shown before a new trial would be granted.

In *McKeldin* the Tennessee Supreme Court found no material distinction between the Alabama statute involved in the *Coleman* case and the Tennessee preliminary hearing statute[201] and concluded that the preliminary hearing is a "pretrial type of arraignment where certain rights may be sacrificed or lost."[202]

> Every criminal lawyer "worth his salt" knows the overriding importance and the manifest advantages of a preliminary hearing. In fact the failure to exploit this golden opportunity to observe the manner, demeanor and appearance of the witnesses for the prosecution, to learn the precise details of the prosecution's case, and to engage in that happy event sometimes known as a "fishing expedition," would be an inexcusable dereliction of duty, in the majority of cases.
>
> To hold that an indigent defendant is not entitled to counsel during this critical event, is to ignore basic standards of competency and to disregard the accumulated learning and experience of the defense bar.[203]

The court therefore concluded that the right to counsel applied to the preliminary hearing and that the state must provide com-

198. *See* TRIAL RIGHTS § 26.

199. 373 U.S. 59 (1963).

200. 399 U.S. 1 (1970).

201. TENN. CODE ANN. §§ 40-1101 to -1131 (Supp. 1974). "In each state a preliminary hearing is simply a forum for determining (1) whether an offense has been committed, (2) whether there is reasonable ground to believe that the defendant is guilty of its commission and (3) whether and how much bail should be set." 516 S.W.2d at 85 (footnote omitted).

202. 516 S.W.2d at 85.

203. *Id.* at 85-86.

petent counsel to an indigent defendant at this stage of the proceeding. The case was remanded for a determination of whether the absence of effective counsel at the preliminary hearing was harmless error.[204]

2. On Appeal

In *Ross v. Moffitt*[205] the United States Supreme Court held that the right to counsel guaranteed in *Douglas v. California*[206] to indigents on their first appeal did not extend to discretionary appeals in state courts or applications for review to the United States Supreme Court. The Court acknowledged that the rationale for the *Douglas* and the earlier *Griffin*[207] decisions had "never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."[208]

Insofar as the due process rationale was concerned, the Court recognized a crucial distinction between the trial and appellate stages of a criminal proceeding. In the case of a trial the judicial machinery has been triggered by the state in an effort "to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt."[209] In such a context, it is fundamentally important that the accused be provided professional assistance to assure a fair trial. By contrast, it is ordinarily

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204. In making this determination the Court will follow the following procedural standards:

1. A full evidentiary hearing will be conducted.
2. If petitioner continues to be indigent counsel will be provided.
3. The burden of going forward with the evidence will be upon the petitioner.
4. A transcript of the hearing will be made.
5. The trial judge will rule upon the issue of prejudice and (a) award a new trial of (b) order the reinstatement of the conviction.
6. Either party may, as a matter of right, have the ruling of the trial judge considered by the Court of Criminal Appeals by simply filing with the Clerk of that Court, an authenticated transcript of the proceedings on remand.
7. Counsel may submit briefs, but oral argument will not be permitted.

Id. at 87.

205. 417 U.S. 600 (1974).

206. 372 U.S. 353 (1963).

207. Griffin v. Illinois, 351 U.S. 12 (1956).

208. 417 U.S. at 608-09 (footnote omitted).

209. *Id.* at 610.

the defendant who initiates the appellate process in an effort to overturn a finding of guilt at the trial level. Recognizing, as the Court had in *Douglas*, that the state need not provide any appeal at all, the Court concluded that "[t]he fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way."[210] Whatever unfairness may result is in no event a denial of due process; at most there is a denial of equal protection reflected in a disparate access to the appellate process because of poverty.

Turning then to the equal protection argument, the substance of the Court's response was to concede the necessity of line drawing:

> Despite the tendency of all rights "to declare themselves absolute to their logical extreme," there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages" . . . . The question is not one of absolutes, but one of degrees.[211]

By guaranteeing the effective assistance of counsel at the first appellate level under the *Douglas* holding, the Court concluded that the requisites of equal protection had been satisfied and that continued assistance of counsel at higher levels of appeal would be of limited additional value. Supporting this conclusion, the Court expressed a view of the purpose of discretionary review which emphasized the public significance of the issues to be adjudicated, rather than a determination of the correctness of the adjudication of guilt. Insofar as discretionary review to the United States Supreme Court was concerned, the Court noted further that it was inappropriate to accord the state responsibility for affording equal opportunity to all persons regardless of wealth since Congress rather than the state was responsible for the availability of such discretionary review.

3. Effective Assistance

The traditional standard for determining whether the assis-

210. *Id.* at 611 (citation omitted) (emphasis in original).
211. *Id.* at 611-12 (footnote and citations omitted).

tance of counsel was effective has been whether the trial is reduced to a farce or mockery of justice.[212] An increasing number of courts, however, have found this phrase inadequate to delineate a constitutional standard.[213] In *Beasley v. United States*[214] the Sixth Circuit Court of Appeals joined the growing list of courts critical of the standard by castigating the "farce and mockery" definition as "mere metaphorical gloss" and a "conclusory description."[215] In its place, the court held "that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance."[216] Under this standard a violation results if defense counsel "deprive[s] a criminal defendant of a substantial defense by his own ineffectiveness or incompetence."[217] And, "[i]t is a denial of the right to the effective assistance of counsel for an attorney to advise his client erroneously on a clear point of law if this advice leads to the deprivation of his client's right to a fair trial."[218]

State decisions continue to hold that the issue of effective assistance cannot be raised when counsel is retained by the defendant.[219] However, Judge Russell of the Tennessee Court of

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212. *See* TRIAL RIGHTS § 45, at 133 n.43.

213. *See, e.g.*, Robinson v. United States, 448 F.2d 1255 (8th Cir. 1971); United States *ex rel.* Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970); Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970); State v. Hager, 57 Wis. 2d 543, 205 N.W.2d 1 (1973); *see also* TRIAL RIGHTS § 45, at 135 n.43.1.

214. 491 F.2d 687 (6th Cir. 1974).

215. Phrases often take on a life of their own. Divorced from the context in which they were born, they spawn new results based on interpretations of themselves, rather than on a close scrutiny of the actual holding for which they were a description. Each case must stand on its own merits, and our application of constitutional rules must always relate back to the language and policies of the Constitution. The phrase "farce and mockery" has no obvious intrinsic meaning. What may appear a "farce" to one court may seem a humdrum proceeding to another. The meaning of the Sixth Amendment does not, of course, vary with the sensibilities and subjective judgments of various courts. The law demands objective explanation, so as to ensure the even dispensation of justice.

Id. at 692 (footnote omitted).

216. *Id.* at 696. "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations." *Id.* (citations omitted).

217. *Id.* (citations omitted).

218. *Id.* (citations omitted).

219. Waggoner v. State, 512 S.W.2d 627 (Tenn. Crim. App. 1974); Long v. State, 510 S.W.2d 83 (Tenn. Crim. App. 1974). *See also 1972 Survey* at 604; *1971 Survey* at 273; *1970 Survey* at 225; *1969 Survey* at 482; *1968 Survey* at 251; *see generally* TRIAL RIGHTS § 42.

Criminal Appeals, concurring in *Waggoner v. State*,[220] submitted that there was no justification for drawing such a distinction and cited a United States Supreme Court decision[221] in which the fact that counsel was retained apparently was not considered material by the Court in its determination of whether effective assistance was rendered. Notable also is the fact that a recent decision by the Sixth Circuit Court of Appeals held that the failure of *retained* counsel to perfect an appeal may deprive the defendant of constitutional rights.[222]

F. Confessions

1. Miranda Requirements

The standards prescribed by *Miranda v. Arizona*[223] are applicable only when a suspect has been subjected to custodial interrogation.[224] Warnings therefore are normally not required for on-the-scene investigations.[225] Also, spontaneous utterances are not barred by *Miranda*.[226] While the warnings must include the fact that an attorney will be provided if the accused is unable to afford one, in *Kilburn v. State*[227] the absence of this warning did not preclude admissibility of the defendant's statement to police, since the accused was not in fact indigent.[228] The *Kilburn* case also raised the question of whether a juvenile should be afforded the opportunity to consult his parents as well as counsel prior to questioning. While a few courts have deemed parental consultations to be as important and thus as constitutionally compelling as consultations with counsel,[229] in *Kilburn* the possibility was dismissed because the parents of the suspect were at home at the time he was taken into custody and were advised of the reason for and the place of custodial questioning.

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220. 512 S.W.2d 627 (Tenn. Crim. App. 1974).

221. Dukes v. Warden, 406 U.S. 250 (1972); *see also* Skinner v. State, 472 S.W.2d 903 (Tenn. Crim. App. 1971).

222. Boyd v. Cowan, 494 F.2d 338 (6th Cir. 1974).

223. 384 U.S. 436 (1966).

224. *See* TRIAL RIGHTS §§ 83-84.

225. Cole v. State, 512 S.W.2d 598 (Tenn. Crim. App. 1974); Abbott v. State, 509 S.W.2d 524 (Tenn. Crim. App. 1973).

226. Kilburn v. State, 509 S.W.2d 237 (Tenn. Crim. App. 1973).

227. *Id.*

228. *See* TRIAL RIGHTS § 81.

229. *Id.* § 80, at 314-15 n.57.

In *United States v. Vaughn*[230] the Sixth Circuit Court of Appeals held that the refusal of the suspect to sign a waiver form does not in itself preclude an effective waiver of rights.[231]

2. Tacit Admissions

In a critical footnote the *Miranda* opinion prohibited the prosecution from using "at trial the fact that [the accused] stood mute or claims his privilege in the face of accusation."[232] In *Glinsey v. Parker*[233] the Sixth Circuit Court of Appeals held it improper to infer acquiescence on the part of an individual who remains silent in the presence of another who makes a statement implicating him in criminal behavior. In *Collins v. State*[234] the defendant objected to an officer testifying that the defendant declined to talk to him. The Tennessee Court of Criminal Appeals held the statement properly admitted, with the admonition to the jury that it was to be considered only on the issue of mental competence, the defense having raised the issue of sanity.[235]

3. Fruits of Miranda Violations

A further retreat from the *Miranda* standard was evidenced by the United States Supreme Court's decision in *Michigan v. Tucker*.[236] The issue raised in that case was whether the testimony of a witness should have been excluded at trial because the identity of the witness was secured through interrogation of the respondent in violation of *Miranda*. Although the interrogation of the respondent had occurred prior to the decision in *Miranda*, his case was tried after that decision, and thus under the holding of *Johnson v. New Jersey*,[237] the *Miranda* standard was applicable.

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230. 496 F.2d 622 (6th Cir. 1974).

231. *See also* United States v. Caulton, 498 F.2d 412 (6th Cir. 1974); Bowling v. State, 458 S.W.2d 639 (Tenn. Crim. App. 1970); TRIAL RIGHTS § 87, at 341 n.49.

232. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966); *see* TRIAL RIGHTS § 86.

233. 491 F.2d 337 (6th Cir. 1974).

234. 506 S.W.2d 179 (Tenn. Crim. App. 1973).

235. [I]t is highly improbable that the jury inferred any consciousness of his guilt from the defendant's statement to the criminal investigator, in view of his insistence that he remembered nothing from the time he left the drive-in restaurant in Milan the night before until he awakened in jail after the killing, and in view also of the court's instruction to the jury concerning that statement.

Id. at 186-87; *see also 1972 Survey* at 606-07.

236. 417 U.S. 433 (1974).

237. 384 U.S. 719 (1966).

The Court in *Tucker* chose to make a distinction between the privilege against self-incrimination and "the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."[238] In that light, the Court reasoned that nothing in the series of events that occurred in *Tucker* could properly be construed as violative of the privilege against self-incrimination. Granting a violation of the *Miranda* standards, "[t]he question for decision [was] how sweeping the judicially imposed consequences of this disregard shall be."[239]

Given the fact that the police had complied with the prevailing constitutional standard at the time of the interrogation,[240] and that the only omission from the *Miranda* requirements was the failure to apprise the accused of the right to appointed counsel if he could not afford one, the Court saw little deterrent value in denying the use of the witness' testimony. Nor did the omission in the warnings in any way affect the trustworthiness of the testimony of the witness.[241] Acknowledging that the pervasive impact of *Miranda* had already been once compromised in *Harris v. New York*[242] by permitting statements obtained in violation of *Miranda* to be used for purposes of impeachment, the Court concluded that there was sufficient reason to create an additional exception in this case.

In a concurring opinion Justice Brennan, joined by Justice Marshall, sought to limit the holding to a finding that in cases involving interrogation prior to *Miranda* but resulting in trial after that decision, the *Miranda* standard was applicable only to "direct statements" made with insufficient prior warnings and was not applicable to the "fruits" obtained from those prior statements.[243] On the other hand, Justice White, concurring, preferred

238. 417 U.S. at 446.

239. *Id.* at 445.

240. Escobedo v. Illinois, 378 U.S. 478 (1964).

241. There is plainly no reason to believe that Henderson's testimony is untrustworthy simply because *respondent* was not advised of *his* right to appointed counsel. Henderson was both available at trial and subject to cross-examination by respondent's counsel, and counsel fully used this opportunity, suggesting in the course of his cross-examination that Henderson's character was less than exemplary and that he had been offered incentives by the police to testify against respondent.

417 U.S. at 449 (footnote omitted) (emphasis in original).

242. 401 U.S. 222 (1971).

243. I would confine the reach of *Johnson* v. *New Jersey* to those cases in

to hold more broadly that *Miranda* would not bar the testimony of persons whose identity was secured from statements inadmissible under *Miranda*.[244] Justice Douglas was the lone dissenter.[245]

G. Trial by Jury

1. Right in Contempt Proceedings

In *Bloom v. Illinois*[246] the United States Supreme Court held that the sixth amendment right to trial by jury was applicable in a contempt proceeding when the accused received a sentence of at least six months.[247] In *Taylor v. Hayes*[248] the issue was whether the right should apply if a sentence in excess of six months was imposed but thereafter reduced to less than six months. The Court saw no reason to make a distinction in terms of whether the punishment was limited before or after conviction and thus held that a jury trial was not constitutionally compelled in *Taylor*.

2. Intrusions in the Jury Room

The extent to which jurors may consider facts known to them but inconsistent with the evidence presented at trial arose in *Fairbanks v. State*.[249] In that case the defendant, charged with armed robbery, relied on an alibi established by a witness who testified that he observed the defendant in a restaurant approximately eight minutes after the crime was reported to police. He further testified that it would take approximately ten minutes to drive from the scene of the robbery to the restaurant. While this testimony was uncontradicted, several members of the jury who lived in the area in question informed their colleagues during deliberations that the distance could be traversed in four minutes at that time of night. Two of the jurors later conceded that this

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which the *direct statements* of an accused made during a pre-*Miranda* interrogation were introduced at his post-*Miranda* trial. If *Miranda* is applicable at all to the fruits of statements made without proper warnings, I would limit its effect to those cases in which the fruits were obtained as a result of post-*Miranda* interrogations.

417 U.S. at 458 (citations omitted).

244. *Id.* at 460-61.

245. *Id.* at 461.

246. 391 U.S. 194 (1968).

247. *See* TRIAL RIGHTS § 110.

248. 418 U.S. 488 (1974).

249. 508 S.W.2d 67 (Tenn. 1974).

information influenced them in reaching a verdict of guilty. The Tennessee Court of Criminal Appeals reversed the conviction relying on an early decision[250] which condemned the consideration of evidence coming from the jurors themselves. The Tennessee Supreme Court reinstated the judgment of the trial court, finding the principle employed by the lower court inapplicable when the statements of the jurors related to a matter put in evidence. The court concluded that "[j]urors are not bound to accept uncontradicted testimony if in the light of their common knowledge and experience they find such incredible."[251]

In *Smith v. Rose*[252] it was alleged that during jury deliberation at the close of the defendant's trial, several jurors communicated with female inmates of the county jail, located across an alley from the jury room. According to the petitioner, "these females treated the jurors to a 'strip-tease type' performance," and the "jurors reciprocated by holding up papers, indicating the numerical standing of the jury at various times and by sending them cigarettes, chewing gum and candy."[253] The trial judge, in a post-trial hearing, apparently found the allegations to be true, except for the "scorecard" allegation, but concluded that the events did not affect the fairness of the deliberation of the jury. On petition for habeas corpus, the federal court found no reason to disturb this factual determination.

H. Double Jeopardy

1. Trial De Novo

The implications of the protection against double jeopardy for a trial de novo came before the United States Supreme Court in *Blackledge v. Perry*.[254] Respondent had been convicted of assault with a deadly weapon in the district court division of the General Court of Justice of North Carolina, which had exclusive jurisdiction for the trial of misdemeanors. He received a six-month sentence and thereupon appealed to the appropriate superior court. State law granted an absolute right to a trial de novo

250. Lee v. State, 121 Tenn. 521, 116 S.W. 881 (1908).
251. 508 S.W.2d at 69.
252. 382 F. Supp. 519 (E.D. Tenn. 1974).
253. *Id.* at 520.
254. 417 U.S. 21 (1974).

without allegations of error in the original proceeding. Thus, when the appeal was taken, the prior conviction was annulled and the prosecution began anew. After the respondent had filed the notice of appeal, the prosecutor obtained an indictment from the grand jury, charging the respondent with assault with a deadly weapon with intent to kill resulting in infliction of serious bodily injury. This offense was a felony though based on the same conduct which had resulted in the initial conviction for the misdemeanor. The respondent pled guilty and was sentenced to a term of five to seven years in the penitentiary. Thereafter, he sought a writ of habeas corpus, alleging that the indictment on the felony charge constituted double jeopardy and deprived him of due process of law. While acknowledging that the case was distinguishable from *North Carolina v. Pearce*,[255] in that the discretion of the prosecutor rather than the judge or jury was at stake, the Court concluded that the opportunity for vindictiveness was nonetheless equivalent,[256] and that due process required a limitation comparable to the *Pearce* limitation against harsher sentencing on retrial. The fact that the prosecutor did not act in bad faith in seeking the indictment for the more serious offense was not deemed significant. The concern of the Court in *Pearce* had been that the "fear of such vindictiveness" would exert a chilling effect on the decision to appeal or attack collaterally a conviction.[257] The Court in *Blackledge* thus concluded that it was constitutionally impermissible to bring a more serious charge against the accused at a de novo trial.[258] The Court excepted from its holding

255. 395 U.S. 711 (1969).

256. A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formally convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brace the hazards of a *de novo* trial.

417 U.S. at 27-28.

257. We think it clear that the same consideration apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Id. at 28 (footnote and citation omitted).

258. *See also* Pettyjohn v. Evatt, 369 F. Supp. 865 (E.D. Tenn. 1974); Robinson v.

the situation in which it had been impossible to bring the more serious charge at the outset, as in *Diaz v. United States*.[259] In that case the accused had initially been charged with assault and battery, but after conviction and before retrial the victim died, giving rise to a homicide charge.

Although the original misdemeanor involved in *Blackledge* constituted a lesser included offense of the felony subsequently charged, the decision does not speak in terms of "lesser included offenses." If the Court's holding is to be understood to preclude the indictment of the accused for *any* more serious offense arising out of the same transaction, then the holding of the Tennessee Supreme Court in *Bray v. State*[260] has been repudiated. That case involved a situation substantially analogous to *Blackledge* except that the original charge under a municipal ordinance was prowling, and a subsequent indictment was brought for breaking and entering with intent to steal. Although the two charges arose out of the same transaction, the former was not a lesser included offense of the latter and the Supreme Court of Tennessee found no double jeopardy problem.[261] If, on the other hand, the *Blackledge* holding is interpreted as being applicable only to situations involving lesser included offenses, there appears to be no inconsistency with *Bray*. The second prosecution in *Bray* would have been permissible even had the petitioner not elected to take a de novo appeal from the first conviction.[262] Indeed, the petitioner was ultimately found guilty of both charges in *Bray*. This would not have been possible in *Blackledge* since the situation technically dealt with various degrees of the same statutory offense.[263]

In *State v. Jackson*,[264] a Tennessee Supreme Court decision

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Neil, 366 F. Supp. 924 (E.D. Tenn. 1973). Both of these decisions anticipate the holding in *Blackledge*.

259. 223 U.S. 442 (1912).

260. 506 S.W.2d 772 (Tenn. 1974).

261. Both the Constitutions of the United States and the State of Tennessee prohibit any person from being twice placed in jeopardy for the same "offense", and to accept petitioner's insistence would for all practical effect require rewriting both constitutions and substituting the word "episode" or "transaction" for the word "offense."

Id. at 774.

262. The court was not even sure that violating the prowling ordinance was a crime, although that should not influence the result in any case.

263. *See also* Dombrowski v. Johnson, 488 F.2d 68 (6th Cir. 1973).

264. 503 S.W.2d 185 (Tenn. 1973).

pre-dating but consistent with *Blackledge*, the court held unconstitutional a state statute[265] affording both a juvenile and the state a right to appeal to the circuit court for a trial de novo any disposition of a child by a juvenile court. The court held the statute violative of the protection against double jeopardy to the extent that it authorized a trial de novo after an acquittal in the juvenile court. Under the *Blackledge* holding imposing a constitutional limitation against bringing more serious charges following a de novo appeal, there would appear to be no circumstances under which the government could benefit by perfecting an appeal.

2. Harsher Sentence Following Withdrawal of Guilty Plea

In *North Carolina v. Pearce*[266] the United States Supreme Court precluded the imposition by a judge of a harsher sentence on retrial, absent intervening events justifying a more severe punishment. The application of this doctrine to a trial following the withdrawal of a guilty plea arose in *Williams v. State*,[267] a decision of the Tennessee Supreme Court. The defendant had pled guilty to three separate indictments for selling marijuana and had been sentenced to terms of one to three years on each charge, the sentences to run concurrently. Thereafter, the defendant told a parole investigator that he was not guilty of the offenses but had entered the pleas in order to get a lighter sentence. Upon being so informed, the trial judge conducted a hearing on the validity of the pleas and permitted them to be withdrawn. The defendant then went to trial, was convicted on all three charges, and received a sentence of one to three years on each charge, but this time the sentences were ordered to run consecutively. The Tennessee Court of Criminal Appeals had been concerned that the three sales had occurred on the same day with the same purchaser and that even if they were not part of a single transaction, to permit consecutive sentences would encourage undercover agents to make repetitious purchases in order to compound the charges. The Tennessee Supreme Court was unimpressed by this argument, since the determination whether sentences should run con-

265. TENN. CODE ANN. § 37-258 (Supp. 1974).
266. 395 U.S. 711 (1969).
267. 503 S.W.2d 109 (Tenn. 1973).

currently or consecutively was by statute a question of discretion for the trial judge.[268] Where, as in *Williams*, re-sentencing is involved, however, a constitutional question arises under *Pearce*. The court concluded that the *Pearce* holding was equally applicable to a trial following the withdrawal of the guilty plea and thus that the imposition of the more severe punishment, absent intervening events justifying the harsher sentence, constituted error.

268. TENN. CODE ANN. § 40-2711 (1955).