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Criminal Law in Tennessee in 1977-1978 - A Critical Survey

Joseph G. Cook

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CRIMINAL LAW IN TENNESSEE IN 1977-1978—A CRITICAL SURVEY

JOSEPH G. COOK*

* B.A., J.D., University of Alabama; L.L.M., Yale Law School; Professor of Law, University of Tennessee.

I. INTRODUCTION

In the past eighteen months[1] there has been a flurry of activity by the United States Supreme Court concerning the rights of the accused, with significant decisions regarding searches incident to arrests,[2] the potential conflict of interest in representing more than one codefendant at trial,[3] the identification of suspects,[4] and double jeopardy.[5] Both the United States Supreme Court and the Supreme Court of Tennessee handed down decisions concerning the right of an accused to attack the accuracy of a facially sufficient affidavit for a warrant.[6] The state supreme court also sought to clarify the law of attempted crimes[7] and established standards for the acceptance of guilty pleas.[8]

II. OFFENSES

A. *Against the Person*

1. Homicide

The recognition of voluntary manslaughter as a lesser included offense of murder is anomalous to the theory of lesser included offenses because more is involved than the elimination of one or more of the elements of the greater offense. Voluntary manslaughter is homicide committed in a sudden heat of passion

1. This survey encompasses decisions published in the National Reporter System from mid-1977 to the end of 1978. While the focus is upon Tennessee criminal law and procedure, federal cases are included insofar as they concern constitutional standards and therefore impact upon state criminal proceedings.

Citations to the following have been abbreviated as indicated: J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRETRIAL RIGHTS (1972) [hereinafter PRETRIAL RIGHTS]; J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—TRIAL RIGHTS (1974) [hereinafter TRIAL RIGHTS]; J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—POST-TRIAL RIGHTS (1976) [hereinafter POST-TRIAL RIGHTS]; Cook, *Criminal Law in Tennessee in 1976-1977—A Critical Survey*, 45 TENN. L. REV. 1 (1977) [hereinafter *1976-1977 Survey*]; Cook, *Criminal Law in Tennessee in 1971—A Critical Survey*, 39 TENN. L. REV. 247 (1972) [hereinafter *1971 Survey*].

2. *See* text accompanying notes 168-95 *infra*.
3. *See* text accompanying notes 233-45 *infra*.
4. *See* text accompanying notes 253-82 *infra*.
5. *See* text accompanying notes 487-515 *infra*.
6. *See* text accompanying notes 157-67 *infra*.
7. *See* text accompanying notes 32-51 *infra*.
8. *See* text accompanying notes 415-18 *infra*.

produced by adequate provocation,[9] a consideration wholly immaterial to second degree murder.[10] The decision by the Tennessee Supreme Court in *State v. Mellons*[11] helped clarify the propriety of an instruction on voluntary manslaughter when the defendant has been charged with murder.

When the defendant requests such an instruction, if there is evidence that, if believed, would warrant the jury finding the defendant guilty of voluntary manslaughter instead of murder, the instruction is mandatory.[12] Error does not result, however, from failure to give an instruction on a lesser included offense for which there is no evidentiary support,[13] and indeed such instructions should be avoided.[14]

In other cases, the defendant charged with murder may object to an instruction on voluntary manslaughter or a finding of that offense. A conviction of voluntary manslaughter will nevertheless be affirmed if, according to *Mellons*,

> the evidence demands a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal of the greater crime, or if there is, the verdict of the jury clearly indicates that the evidence in support of acquittal was disbelieved . . . .[15]

Under these circumstances the defendant has not been prejudiced by the finding of the less serious offense.[16] The *Mellons* court, however, recognized one situation in which giving an instruction on voluntary manslaughter over the objection of the defendant is reversible error—if the evidence would support a finding of either murder or involuntary manslaughter but not voluntary manslaughter. Such a situation was present in *Mellons*, but the jury returned a verdict of voluntary manslaughter and

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9. *See* TENN. CODE ANN. § 39-2409 (1975), *construed in* Smith v. State, 212 Tenn. 510, 370 S.W.2d 543 (1963), and Capps v. State, 478 S.W.2d 905 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1972).

10. TENN. CODE ANN. §§ 39-2401, -2403 (1975); *id.* § 39-2402 (Cum. Supp. 1978).

11. 557 S.W.2d 497 (Tenn. 1977).

12. *See* State v. Staggs, 554 S.W.2d 620, 626 (Tenn. 1977); Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975).

13. Owen v. State, 188 Tenn. 459, 221 S.W.2d 515 (1949).

14. Whitwell v. State, 520 S.W.2d 338, 343-44 (Tenn. 1975).

15. 557 S.W.2d at 499.

16. *See also* Reagan v. State, 155 Tenn. 397, 293 S.W. 755 (1927); Howard v. State, 506 S.W.2d 951 (Tenn. Crim. App. 1973), *cert. denied, id.* (Tenn. 1974).

imposed the minimum permissible sentence. This sentence, the court concluded, "suggests that they would not have found the defendant guilty of second degree murder if given the choice, as they should have been, between that crime and involuntary manslaughter,"[17] and the conviction was therefore set aside.

2. Rape

The admissibility of evidence regarding the victim of an alleged rape was the subject of two decisions. In *Forbes v. State*[18] defendant moved prior to trial for a psychological examination of the victim for the purpose of introducing "expert testimony to impugn the credibility of the prosecutor and otherwise question her competency as a witness and truthfulness."[19] The trial judge denied the motion on the ground that there was no right to have the victim examined. The court of criminal appeals affirmed the conviction, finding "no authority in Tennessee that a trial judge has the power, discretionary or otherwise, to compel such an examination."[20] While affirming on certiorari, the Supreme Court of Tennessee did not agree that the trial court lacked power to order such an examination upon timely motion "supported by compelling reasons or a showing of a particularized necessity for such an examination."[21] At the same time, the court was unpersuaded by the idea of a mandatory rule,[22] which it considered to be inimical to the public policy favoring the alleviation of suffering of rape victims.[23] Instead, the court recognized the inherent

17. 557 S.W.2d at 500.

18. 559 S.W.2d 318 (Tenn. 1977).

19. *Id.* at 320.

20. *Id.*

21. *Id. See also* Ballard v. Superior Ct., 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); Annot., 18 A.L.R.3d 1433 (1968).

22. The argument was made in Wigmore: "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3A WIGMORE, EVIDENCE § 924a (Chadbourn rev. ed. 1970).

23. A woman raped is shorn of all her dignity. She is the victim of the most humiliating, degrading and debasing of all crimes. We know judicially that an alarming percentage of rape victims never make public complaint. This must be attributed in substantial part to the fact that she is subjected to examination and cross-examination on the most initimate details of the penetration and must testify to matters that are not even discussed among intimate friends, but are the legitimate sub-

power of a trial court to compel a psychiatric or psychological examination of the victim "where such examination is necessary to insure a just and orderly disposition of the cause."[24]

A state statute[25] bars the introduction into evidence of prior consensual sexual activity of a rape victim except when relevant to the issue of consent. In *Shockley v. State*[26] the Tennessee Court of Criminal Appeals held that the statute was intended "to eliminate the unjustified besmirching of a woman's reputation by examining her prior sexual activities when such testimony is of such a highly dubious relevance to the issue of her later consent or her credibility."[27] That purpose was overshadowed in *Shockley* by the fact that the strongest evidence against the accused was the pregnancy of the prosecutrix and medical testimony that conception could have occured at the time she claimed to have been raped. Under these circumstances evidence that the pregnancy was the result of intercourse with another male would have been relevant to the issue of guilt, and therefore the statute could not be used to bar the introduction of such evidence. The court emphasized that it was not declaring the statute unconstitutional but merely limiting its application to the perceived legislative purpose.

3. Incest

Under conventional rules of statutory construction, when two statutes are applicable to a set of facts, but one of the provisions is more particular in its application, the more particular provision should control.[28] In *State v. Nelson*[29] the accused sought to rely on this principle in moving to dismiss indictments for carnal knowledge of a female under twelve[30] because the acts charged

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ject of inquiry in a courtroom crowded with the participants, the court's retinue and the curiosity seekers.

559 S.W.2d at 320.

24. *Id.* at 321. "Such power should be invoked only for the most compelling reasons, all of which must be documented in the record." *Id.*

25. TENN. CODE ANN. § 40-2445 (Cum. Supp. 1978).

26. TENN. ATT'Y GEN. ABSTRACT, Vol. IV, No. 2, p.5 (Tenn. Crim. App., Feb. 8, 1978).

27. *Id.*

28. *See* 1A SANDS, SUTHERLAND, STATUTORY CONSTRUCTION, §§ 23.09, 23.16 (5th ed. 1973) [hereinafter 1A SANDS].

29. TENN. ATT'Y GEN. ABSTRACT, Vol. IV, Nos. 5, 6, p.7 (Tenn. Crim. App. Oct. 3, 1978).

30. TENN. CODE ANN. § 39-3705 (Cum. Supp. 1978).

came within the offense of incest.[31] The Tennessee Court of Criminal Appeals held that the rule of construction was inapplicable because neither of the two provisions in question was more particular than the other. In the court's view the principle of statutory interpretation could come into play only if one of the offenses could be subsumed within the other. While the facts alleged in *Nelson* would fit within either statute, the incest statute could not be considered a more particular provision because the carnal knowledge statute did not encompass all of the acts prohibited by the incest statute.

4. Attempt

Attempt crimes have always been a source of confusion in Tennessee, largely because the pertinent statute[32] is lodged among a series of assault offenses[33] and indeed is partially defined in terms of assault.

> *Assault with intent to commit felony—Attempt to commit felony—Penalty.*—If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500).[34]

In *State v. Staggs*[35] the supreme court made a laudable effort to clarify the law of attempt. While the practical result of the holding is clear, the reasoning of the court is extraordinarily puzzling. Defendant was indicted and convicted of assault with intent to commit robbery with a deadly weapon.[36] On appeal defendant complained of the trial court's denial of a jury instruction for attempt to commit a felony under section 39-603. The court of

31. *Id.* § 39-705 (1975).

32. *Id.* § 39-603 (1975).

33. *Id.* §§ 39-601, -602, -603, -607 (Cum. Supp. 1978); *id.* §§ 39-603, -604 (1975); *id.* §§ 39-605, -606 (repealed by 1978 Tenn. Pub. Acts ch. 937, § 10).

34. *Id.* § 39-603.

35. 554 S.W.2d 620 (Tenn. 1977).

36. TENN. CODE ANN. § 39-607 (1975) (amended by 1977 Tenn. Pub. Acts ch. 68, § 2).

criminal appeals concluded that the trial court had committed reversible error, and the Tennessee Supreme Court affirmed.

The state maintained that section 39-603 was intended to reach all attempts at crimes unspecified in sections 39-604 through 39-607 and also attempts at all crimes specified in these sections when the attempts did not involve assaults. At the time of the *Staggs* decision, sections 39-604 through 39-607 proscribed assaults with intent to murder,[37] to rape,[38] to sexually abuse a child,[39] and to rob.[40] The state contended that because the attempt to rob in the present case took the form of assault, the particular assault statute, section 39-607, rather than section 39-603, was clearly the applicable provision. Moreover, a *non sequitur* would result if section 39-603 were made a lesser included offense of the other assault statutes. Since an assault is itself an attempt (in the context of these statutes), a charge under section 39-603 would require proof of an attempted attempt.

Ostensibly rejecting the state's interpretation, the court said that "all assaults are attempts"[41] and that section 39-603 was the "general attempt statute"[42] in Tennessee. Therefore, while the statute apparently defines two crimes, both are encompassed in the rubric of attempt.[43] This interpretation of the statute is eminently reasonable. The court's statement that the "most compelling reason" for its conclusion is that "[w]e have no other such statute"[44] is, however, less than satisfactory. Although the absence of a general attempt statute might well be a compelling reason for the legislature to pass such a statute, it is not a compelling reason for the court to create one.

The court ventured upon even thinner ice by insisting that if the state's interpretation of section 39-603 were adopted, "we would [for example] have no such crime as an attempt to commit murder or rape."[45] As an examination of the state's position makes clear, the court's reasoning is simply incorrect. Under the

37. *Id.* § 39-604.
38. *Id.* § 39-605 (repealed by 1978 Tenn. Pub. Acts ch. 937, § 10).
39. *Id.* § 39-606 (repealed by 1978 Tenn. Pub. Acts ch. 937, § 10).
40. *Id.* § 39-607 (Cum. Supp. 1978).
41. 554 S.W.2d at 623.
42. *Id.* at 624.
43. *Id.* at 623.
44. *Id.*
45. *Id.* at 624.

state's interpretation of the statute, as quoted by the court,[46] if murder were attempted by means of an assault, the crime would be prosecuted under the assault with intent to commit murder provision.[47] If murder were attempted without an assault, then the crime would be prosecuted under section 39-603. Indeed, the state's interpretation is entirely consistent with the court's objective in reading section 39-603 as a general attempt statute. The section would cover all attempted felonies except when murder, rape, sexual abuse of a child, or robbery were attempted by means amounting to an assault. The legislature has determined that the conduct in these instances deserves more severe punishment than other attempts, and therefore these attempts by assault have been particularly defined and accorded independent ranges of punishment. The state's interpretation does not result in the gap in the law feared by the court.

The court also ostensibly rejected the state's contention that application of section 39-603 to the assault statutes would result in a charge of attempted attempt. "Sec. 39-603 does not proscribe an attempt to commit an assault with intent to commit a felony; it proscribes an attempt (by assault or otherwise) to commit a substantive offense, in this case robbery."[48] This reasoning, however, is tantamount to conceding the state's argument that the attempt statute does not apply to the assault statute but rather to the robbery statute.[49]

Defendant in *Staggs* was not charged with robbery since no property was taken but, instead, was charged with assault with intent to commit robbery. If defendant is entitled to an attempt instruction based on a lesser included offense theory, the attempt must relate to the offense with which he was charged. Ultimately, the court so held, noting that an attempt under section 39-603 "is a lesser included offense within *any* felony"[50] if no punishment for attempt is otherwise prescribed.

The court concluded that "assault with intent to commit robbery by means of a deadly weapon . . . embraces and includes: a. Assault with intent to commit simple robbery (without a deadly weapon) . . . . b. Attempt to commit a felony . . . . c.

46. *Id.* at 623.
47. *See* TENN. CODE ANN. § 39-604 (1975).
48. 554 S.W.2d at 624.
49. *See* TENN. CODE ANN. § 39-3901 (Cum. Supp. 1978).
50. 554 S.W.2d at 624 (emphasis added).

Assault and battery . . . . d. Simple assault . . . . "[51] While listing these potential charges under the heading "Lesser Included Offenses," the court implicitly recognized that assault and battery is not a lesser included offense since proof of a battery is not required for the greater offense. Defendant was therefore not entitled to an instruction on that offense.

The court's reasoning suggests that the *Staggs* holding does not mean a defendant is automatically entitled to an attempt instruction whenever an aggravated assault is charged. In *Staggs* the question whether an assault had occurred was apparently a disputed issue. While defendant had a sawed-off shotgun in his possession at the time of the attempted robbery, the proof was undisputed that he did not point it at the victim. The jury might have concluded that an assault had not occurred (either with or without a deadly weapon), in which event the evidence would still support a finding of attempt to commit a felony. The jury in *Staggs* was denied this alternative by the trial court's refusal of an attempt instruction. When the occurrence of an assault is not disputed, *Staggs* does not necessarily require an instruction on attempt under section 39-603.

B. Against Property

1. False Pretenses

The accused in *Horn v. State*[52] had been indicted for taking property under false pretenses[53] by selling clover seed under the false representation that the seed was of a superior quality. The trial court dismissed the indictment on the accused's motion that he could be charged only with a misdemeanor under the Tennessee Seed Law[54] because that law addressed the conduct described in the indictment more specifically and should be construed as superseding the general criminal provision where applicable. While not disputing the theory of statutory construction urged by the accused,[55] the Tennessee Supreme Court was not persuaded that the Seed Law was applicable.[56] The pertinent provisions of

51. *Id.* at 626.
52. 553 S.W.2d 736 (Tenn. 1977).
53. TENN. CODE ANN. § 39-1901 (1975).
54. *Id.* §§ 43-921 to 934 (Cum. Supp. 1978).
55. *See* 1A SANDS, *supra* note 28, § 23.26.
56. The court's position is well taken. A subsequently enacted specific

the Seed Law prohibited sale of seeds "having a false or misleading labeling" or about which "there has been false or misleading advertisement."[57] Since the indictment did not indicate that the accused had engaged in any such activities, his conduct did not clearly fall within the provisions of the Seed Law. Moreover, the pertinent provisions of the Seed Law established a strict liability misdemeanor punishable by a fine.[58] The crime of false pretenses required proof of fraudulent intent and was apparently directed to more serious instances of criminal behavior. Conceivably, depending upon the evidence adduced at trial, the Seed Law prohibition might be a lesser included offense, but this possibility is quite a different matter from concluding that the lesser offense precludes a charge of the greater.

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statute implicitly repeals those provisions of the general statute with which the specific statute is in irreconcilable conflict. Tennessee-Carolina Transportation, Inc. v. Pentecost, 211 Tenn. 72, 362 S.W.2d 461 (1962). When the statutes do not irreconcilably conflict, however, the general statute is not repealed and the specific statute merely exists as an exception to its terms. That two statutes overlap in that both prohibit the same act does not, without more, make them conflicting. 1A SANDS, *supra* note 28, §§ 23.09, 23.16. *See also* Chadwick v. State, 175 Tenn. 680, 137 S.W.2d 284 (1940) (no implied repeal without identity of subject matter and legislative purpose).

57. TENN. CODE ANN. § 43-925 (Cum. Supp. 1978).

58. Justice Henry, dissenting, did not agree that the Seed Law had created a strict liability offense.

> To follow the majority's reasoning is to hold that it is made a criminal offense in Tennessee to sell seeds that are merely incorrectly labelled, irrespective of intent and scienter. False and misleading labelling to my mind connotes affirmative, knowledgeable, false and deceptive action as opposed to passive conduct in failing to insure that seeds are labelled correctly.

553 S.W.2d at 739 (Henry, J., dissenting). It suffices to say that the language of the Seed Law, "having a false or misleading labeling," refers to the label itself vis-à-vis the commodity labeled and makes no reference, express or implicit, to the party doing the labeling. "Regulatory" and "public welfare" penal statutes quite often do not require *mens rea*. 1 WHARTON'S CRIMINAL LAW § 23 (14th ed., C. Torcia ed. 1978). *See, e.g.*, United States v. Johnson, 221 U.S. 488 (1911) (selling misbranded articles). Even if it be conceded, however, either that the legislature did not intend to create a strict liability offense or that such an interpretation would be inimical to due process in some instances, it does not follow that the only alternative is to read a requirement of fraudulent intent into the statute. To the contrary, the more likely construction would be a requirement that the seed seller either know of the mislabeling or be negligent in failing to discover it. *E.g.*, ALI MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962) (acting negligently as culpable mental state). Under such a construction false pretenses would continue to require a higher degree of culpability.

2. Fraud

In prosecutions for drawing checks without sufficient funds[59] a presumption of intent to defraud and of knowledge of the insufficiency arises if the maker fails to pay the holder the amount due within five days after receiving notice of nonpayment by the drawee.[60] In *Stines v. State*[61] the accused received this statutory notice after a preliminary hearing had been held and he had been bound over to the grand jury. The accused argued that had he paid the amount upon receiving notice he would have been compounding the offense.[62] How this act would tend to compound the offense as defined in the statute is not at all clear, and, not surprisingly, the Tennessee Court of Criminal Appeals rejected the argument.[63] The offense of drawing a check with insufficient funds is committed, if at all, at the time the check is drawn or delivered. While under the previous version of the statute[64] the giving of written notice was an element of the offense,[65] as a result of the 1967 revision, refusal to pay after notice merely creates a presumption of knowledge and intent; the prosecution may prove the mens rea in other ways.[66]

3. Forgery

In *Anderson v. State*[67] the Tennessee Court of Criminal Appeals distinguished the crimes of forgery[68] and uttering a forged instrument[69] and held that an accused could be convicted of both as a result of a single transaction. Defendant obtained a valid check made payable to another individual and endorsed the name

59. TENN. CODE ANN. § 39-1959 (Cum. Supp. 1978).

60. *Id.* § 39-1960.

61. 556 S.W.2d 234 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

62. TENN. CODE ANN. § 39-3102 & -3103 (1975).

63. "Payment at that time of the amount certainly owed as a civil debt would do no more than nip in the bud any statutory presumption of guilty knowledge and fraudulent intent." 556 S.W.2d at 235.

64. TENN. CODE ANN. § 39-1904 (1955).

65. *See* Meadows v. State, 220 Tenn. 615, 421 S.W.2d 639 (1967); Jones v. State, 197 Tenn. 667, 277 S.W.2d 371 (1955); State v. Crockett, 137 Tenn. 679, 195 S.W. 583 (1917).

66. *See also* Jett v. State, 556 S.W.2d 236 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

67. 553 S.W.2d 85 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

68. TENN. CODE ANN. § 39-1701 (1975).

69. *Id.* § 39-1704.

of the payee upon it in the presence of a grocery store cashier who honored the full amount of the check. Defendant was convicted of both offenses and given consecutive sentences.[70] The appeals court affirmed, holding that defendant committed forgery when he signed the check and uttered a forged instrument upon offering to transfer the paper to the cashier. The court recognized that the two offenses were committed at the same place and virtually at the same time, with the purpose of achieving a single result. The court concluded, however, that "[u]nity of intent does not merge the offenses,"[71] and there was no evidence that the legislature had intended a merger.

The dissent argued that, since the two crimes were proved by the same evidence, a merger should be recognized.[72] At common law, however, forgery was defined as the false making or material alteration, with intent to defraud, of any writing that, if genuine, might be of apparent legal efficacy.[73] The writing must be of such nature that the rights of another might be prejudiced by the forgery, but actual injury was not required.[74] While apparently a matter of first impression in Tennessee, forgery and uttering a forged instrument have been recognized as separately punishable offenses elsewhere.[75]

In *Grizzle v. State*[76] the court of criminal appeals recognized that uttering a forged instrument is a "specific and particular species of false pretenses."[77] The charge of uttering a forged instrument, therefore, should be used whenever applicable to the facts.

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70. *See* text accompanying notes 432-34 *infra*.

71. 553 S.W.2d at 88.

72. Indeed, the multiple convictions could then be found to violate the protection against double jeopardy. *See* POST-TRIAL RIGHTS, *supra* note 1, § 63.

73. Carr v. United States, 278 F.2d 702 (6th Cir. 1960); Mallory v. State, 179 Tenn. 617, 168 S.W.2d 787 (1943). *See also* 2 WHARTON'S CRIMINAL LAW & PROCEDURE § 621, at 396 (R. Anderson ed. 1955).

74. Ratliff v. State, 175 Tenn. 172, 133 S.W.2d 470 (1939); Girdley v. State, 161 Tenn. 177, 29 S.W.2d 255 (1930). *See also* 2 WHARTON'S CRIMINAL LAW & PROCEDURE § 646, at 435 (R. Anderson ed. 1955).

75. *See* United States v. Peters, 434 F. Supp. 357 (D.D.C. 1977); Bronstein v. State, 355 So. 2d 817 (Fla. Ct. App. 1978).

76. TENN. ATT'Y GEN. ABSTRACT, Vol. IV, Nos. 5, 6, p.8 (Tenn. Crim. App., Sept. 11, 1978).

77. *Id.*

4. Concealing Stolen Property

The word "concealing," as used in the offense of concealing stolen property, is a term of art and should not be interpreted literally.[78] In *State v. Hatchett*[79] the owner of two bird dogs discovered that his dogs had been stolen. The following day the owner asked defendant, a dealer in dogs, if he knew of the dogs' whereabouts. Defendant replied that he had purchased two dogs from an unidentified man on the previous day and had since sold them to another. After reimbursing the purchaser $200 and recovering the dogs, the owner swore out a warrant for defendant's arrest, whereupon defendant paid him $500 for expense and trouble incurred. In sustaining defendant's conviction for concealing stolen property,[80] the Tennessee Supreme Court relied upon the principle that unexplained possession of recently stolen goods may lead to the inference that the possessor knew the goods were stolen.[81] Defendant had no less concealed the dogs simply because he had transported them to the purchaser in an open truck.[82] The fact that the sale was made within a very short time of acquisition was evidence of an intent to make discovery of the theft more difficult. While the admission of the sale the following day was of some evidentiary weight, the repayment could be viewed as consciousness of guilt. All in all, the proof was sufficient to support the conviction.

C. Against Person and Property

1. Larceny from the Person

The statutory definition of larceny from the person provides that "[t]he theft must be from the person; it is not sufficient that the property be merely in the presence of the person from whom it is taken."[83] In *Prigmore v. State*[84] defendant took the

78. *See* 2 WHARTON'S CRIMINAL LAW & PROCEDURE § 570, at 290 (R. Anderson ed. 1955).

79. 560 S.W.2d 627 (Tenn. 1978).

80. The court of criminal appeals had reversed the conviction. *Id.* at 630.

81. *See, e.g.*, State v. Veach, 224 Tenn. 412, 456 S.W.2d 650 (1970); Tackett v. State, 223 Tenn. 176, 443 S.W.2d 450 (1969).

82. "The crime of concealing stolen property does not require an actual hiding or secreting of the property; it is sufficient to show any acts which render its discovery more difficult and prevent identification, or which will assist those stealing it in converting the property to their own use." 560 S.W.2d at 630.

83. TENN. CODE ANN. § 39-4206(2)(a) (Cum. Supp. 1978).

84. 565 S.W.2d 897 (Tenn. Crim. App. 1977).

purse of a woman seated on a park bench with her arm extended over the purse at her side. Even though the victim had been unaware of the seizure until she saw the thief running away, the Tennessee Court of Criminal Appeals held that the accused's taking the purse satisfied the requirement of the statute.[85]

A second issue raised by the defense was the refusal of the trial judge to instruct the jury on the offenses of a grand and petit larceny. The offense of larceny is inevitably proven whenever larceny from the person is proven, but the court nevertheless was unwilling to recognize the applicability of the lesser included offense principle. The problem is a puzzling one analytically because, unlike robbery, larceny from the person cannot be said to be an aggravated larceny.[86] The punishment prescribed for larceny from the person, three to ten years imprisonment, is identical to that for grand larceny and is more than the punishment for petit larceny.[87] Larceny is therefore an included offense but only petit larceny is a lesser included offense. The latter possibility is not pertinent in the present case because the value of the goods taken was sufficient to constitute grand larceny. Whether the accused was convicted of larceny from the person or grand larceny would seem unimportant since both carry the same potential punishment. The defense might, however, believe that punishment would more likely fall within the low end of the range if a conviction of simple larceny were returned. The position of the *Prigmore* court was that offenses of larceny and larceny from the person are exclusive, with the latter being applicable to "those cases where the ordinary forms of larceny do not apply."[88] This explanation is curious since, had the prosecution in the present case chosen to charge mere larceny, the conviction apparently would have been sustained. Indeed, in the early case of *Fanning v. State*,[89] the court sustained a conviction of larceny upon an indictment for larceny from the person because larceny was "necessarily included in the offense charged."[90] While conceding

85. "The purse was within the area between her arm and body, a natural and normal place for it to be." *Id.* at 899.

86. Compare State v. Scates, 524 S.W.2d 929 (Tenn. 1975); Watson v. State, 207 Tenn. 581, 341 S.W.2d 728 (1960).

87. TENN. CODE ANN. § 39-4204 (1975).

88. Prigmore v. State, 565 S.W.2d at 899.

89. 80 Tenn. 651 (1883).

90. *Id.* at 652.

this, the *Prigmore* court nevertheless maintained that the offense of larceny from the person was distinguishable because the value of the property taken was immaterial.[91] Since the evidence would support a conviction for this offense, instruction as to any other offense was unnecessary.

D. Public Offenses

1. Gambling

Proof that an accused is guilty of professional gambling[92] may be established by the frequency and amount of his wagers.[93] In *Stroup v. State*[94] the Tennessee Court of Criminal Appeals held that the acceptance of over three thousand dollars in bets from an undercover agent during a two-week period was sufficient to establish the offense. The court attached no significance to defendant's nonparticipation in the exchange of money or to his lack of profit from the operation.

If the proceeds are dedicated exclusively to charitable purposes, however, criminal prohibitions are inapplicable.[95] In *Vance v. State*[96] the court of criminal appeals held that proof that the operation was church-related was insufficient to satisfy the statutory requirement that "no part of the gross receipts inures to the benefit of any private shareholder, member or employee of such organization,"[97] and that no part of the gross receipts go to other than charitable purposes.[98] While generally the burden of proof rests on the prosecution to prove the elements of the offense charged, "where certain categories of activities similar to the acts which constitute a crime are exempted from criminal liability by an independent section of the act defining the particular crime,

91. The court relied upon English v. State, 219 Tenn. 568, 411 S.W.2d 702 (1966), in which the court had said just that.

92. TENN. CODE ANN. § 39-2032 (1975).

93. Squires v. State, 525 S.W.2d 686 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1975).

94. 552 S.W.2d 418 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

95. TENN. CODE ANN. § 39-2033(8) (1975).

96. 557 S.W.2d 750 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

97. TENN. CODE ANN. § 39-2033(8) (1975).

98. The statute defines "charitable organization" as organizations subject to exemption under the Internal Revenue Code of 1954, § 501(c)(3). *See* TENN CODE ANN. § 39-2033(8) (1975).

it is up to the defendant to bring himself within the exemption."[99] The court cited a single case, *Villines v. State*,[100] decided in 1896, in which defendant had been convicted of unlawfully dispensing pharmaceuticals. Defendant in *Villines* had contended on appeal that the indictment failed to state that he did not come within the statutory exception for physicians. In affirming the conviction, the *Villines* court relied on a United States Supreme Court decision[101] for the notion that the dispositive consideration was the relationship of the exception to the definition of the crime: "Is it so incorporated with the substance of that clause as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense?"[102] If so, then the inapplicability of the exception should be alleged in the indictment. In *Vance*, since the charitable purposes exception was not a material part of the description of the offense, the burden of proof was at least initially on defendant.

At this point the proper result in *Vance* becomes problematical. The remainder of the opinion is an extended quotation from a treatise on criminal evidence,[103] generally supportive of the *Villines* holding cited by the *Vance* court. Judge Galbreath, dissenting, however, quoted the same section in the same treatise: "By weight of authority, when evidence appears which tends to bring the defendant within an exception not located in the enacting clause, the burden of proof is on the prosecution, on the whole case, to overcome the evidence beyond reasonable doubt."[104] The majority and the dissent disagreed whether evidence in the record indeed tended to bring defendant within the exception. The dissent submitted that "[s]ubstantial proof was adduced that religious services and charitable works had been conducted by and on behalf of the church,"[105] but the majority did not see this as the crucial question of fact. The majority viewed the significant point to be that "no evidence was presented tending to show that no person benefited individually or that all of the gross receipts

99. 557 S.W.2d at 751.

100. Villines v. State, 96 Tenn. 141, 33 S.W. 922 (1896).

101. United States v. Cook, 84 U.S. (17 Wall.) 168, 176 (1872).

102. 96 Tenn. at 145, 33 S.W. at 923 (citing United States v. Cook, 84 U.S. (17 Wall.) 168, 176 (1872)).

103. 1 WHARTON'S CRIMINAL EVIDENCE § 20 (13th ed., C. Torcia, ed. 1972).

104. *Id.*

105. 557 S.W.2d at 753.

were used for benevolent, charitable or religious purposes."[106] Defendant testified that the money derived from the gambling activity "went into the general fund of the church,"[107] but there was no indication how the funds thus acquired were dispersed by the church.

Since the enforcement of the statute may require a court to pass judgment on church expenditures, a potential constitutional problem of governmental entanglement in religion obviously is presented.[108] The allocation of a portion of income from gambling sponsorship to a minister's salary probably could be justified as coming within the exception. At the other extreme, should the proceeds from gambling operations be allocated by the church exclusively as compensation for the minister, particularly if this is the major source of church income, statutory exemption appears unlikely. In any case, if there is some evidence of a bona fide religious organization,[109] judicial scrutiny of its operations may be constitutionally impermissible.[110] In the final analysis, the majority simply did not take defendant's religious pretensions seriously. This attitude might cause some pause but for the fact that defendant apparently did not take the pretensions too seriously himself since he filed a two sentence brief on appeal that did no more than reiterate the statute.[111]

III. DEFENSES

A. Mental Impairment

1. Competency to Stand Trial

A defendant is considered competent to stand trial if "he has mind and discretion which would enable him to appreciate the

106. *Id.* at 751.

107. *Id.* at 752 (quoting defendant's testimony at trial).

108. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674, 691 (1970); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 869-70 (1978).

109. In a concluding rhetorical flourish, the dissent submitted that the organization served by defendant had been recognized as a church by both the state and the Internal Revenue Service. 557 S.W.2d at 754. This observation would appear to be a particularly strong argument for the defense were not an inscrutable footnote appended: "It is not clear that documents admitted for identification purposes only purporting to establish tax exempt status were in effect at the time of appellant's arrest." *Id.* at 754 n.1.

110. *See* note 108 *supra.*

111. 557 S.W.2d at 751.

charge against him, the proceedings thereon, and enable him to make a proper defense."[112] In *State v. Stacy*[113] the Tenneseee Court of Criminal Appeals found "nothing offensive in allowing a defendant's competency to stand trial to be induced by the use of tranquilizing medication."[114]

In *State v. Patty*[115] the accused was arrested in connection with the shooting of five people and sent to a state mental hospital for psychiatric evaluation.[116] He was thereafter indicted on three charges of first degree murder and two charges of felonious assault, whereupon the prosecution moved that he be transferred back to the county jail "for evaluation by independent psychiatric experts." The trial court ruled that the prosecution lacked authority to demand an independent psychiatric evaluation, and at the ensuing hearing the accused was found incompetent to stand trial. The prosecution appealed the denial of its motion, and the court of criminal appeals affirmed.[117] Just as the defense is not entitled to the appointment of a private psychiatrist,[118] so too the statute does not authorize the prosecution to obtain an independent evaluation, and the denial of the motion by the trial court was not an abuse of discretion.

2. Insanity

When the jury is given an instruction on insanity,[119] both the prosecution and the defense may wish to apprise the jury of what would happen to the defendant if he were found not guilty by reason of insanity. The prosecution may wish to impress upon the jury that a verdict of not guilty by reason of insanity is a verdict

112. Jordan v. State, 124 Tenn. 81, 88, 135 S.W. 327, 329 (1911).

113. 556 S.W.2d 552 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

114. *Id.* at 557. "In this modern age, the administering of drugs under proper medical supervision has effectively restored many mentally ill citizens to a useful life in which they can function as normally as other citizens not so impaired." *Id.* at 557-58.

115. 563 S.W.2d 911 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

116. TENN. CODE ANN. § 33-708 (1977).

117. 563 S.W.2d at 913.

118. Graham v. State, 547 S.W.2d 531 (Tenn. 1977).

119. The ALI Model Penal Code test for criminal responsibility was adopted by the Tennessee Supreme Court in Graham v. State, 547 S.W.2d 531 (Tenn. 1977). *See 1976-1977 Survey, supra* note 1, at 18-20. *Graham* was accorded retroactive effect in Sampson v. State, 553 S.W.2d 345 (Tenn. 1977).

of not guilty and, therefore, the defendant will be released from custody as the result of such a verdict. The defense may wish to assure the jury that following such a verdict the defendant would still be vulnerable to civil commitment proceedings, possibly initiated by the prosecution. Tennessee courts have held that all such instructions respecting the effect of finding the defendant not guilty by reason of insanity are improper. In *Edwards v. State*[120] the Tennessee Supreme Court held that a defendant was not entitled to such an instruction because it would not be relevant to the issue of guilt and "the trial judge is not supposed to tell the jury what the legal effect of their verdict is."[121] A majority of jurisdictions are apparently in accord with *Edwards*.[122]

The authority of *Edwards* was challenged in *Glasscock v. State*,[123] in which defendant had been denied an instruction on the possibility of hospitalization if he were found not guilty by reason of insanity.[124] Defendant contended that such an instruction was mandatory because of a passage in *Graham v. State*[125] acknowledging "a deficiency in Tennessee law relating to the disposition of a criminal defendant found not guilty by reason of insanity," and noting that "the district attorney-general *may*

120. 540 S.W.2d 641 (Tenn. 1976).

121. *Id.* at 648.

122. United States v. Borum, 464 F.2d 896 (10th Cir. 1972); Pope v. United States, 372 F.2d 710 (8th Cir. 1967); United States *ex rel.* Hand v. Redman, 416 F. Supp. 1109 (D. Del. 1976); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977); State v. Holmquist, 173 Conn. 140, 376 A.2d 1111, *cert. denied*, 434 U.S. 906 (1977); McCarthy v. State, 372 A.2d 180 (1977); Malo v. State, 361 N.E.2d 1201 (Ind. 1977); State v. Dyer, 371 A.2d 1079 (Me. 1977); State v. Bott, 246 N.W.2d 48 (Minn. 1976); State v. Black Feather, 249 N.W.2d 261 (S.D. 1976); Granviel v. State, 552 S.W.2d 107 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); State v. McDonald, 89 Wash. 2d 256, 571 P.2d 930 (1977); Dodge v. State, 562 P.2d 303 (Wyo. 1977). *Contra* Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955); Wheeler v. State, 344 So.2d 244 (Fla. 1977); State v. Liesk, 326 So. 2d 871 (La. 1976); Commonwealth v. Mutina, 366 Mass. 810, 323 N.E.2d 294 (1975); People v. Cole, 382 Mich. 695, 172 N.W.2d 354 (1969); Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977).

123. 570 S.W.2d 354 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

124. The requested instruction read: "When a person charged with a criminal offense is acquitted of the charge on a verdict of not guilty by reason of insanity, the district attorney general may seek hospitalization of the defendant under [TENN. CODE ANN.] § 33-603 or § 33-604 as appropriate, if he determines hospitalization to be justified." *Id.* at 355.

125. 547 S.W.2d 531 (Tenn. 1977).

seek hospitalization."[126] The court of criminal appeals in *Glasscock* dismissed this language as dicta addressed to the legislature, largely prompted by the fact that such action on the part of the prosecution was purely discretionary. The *Glasscock* court saw no reason to believe the *Graham* court had intended to disturb its previous conclusion in *Edwards*.

In fact, the court noted legislative response had been forthcoming, albeit not in effect until some three months following Glasscock's trial. The jury must now be instructed whenever insanity is an issue "that a verdict of not guilty by reason of insanity . . . shall result in automatic detention of the person so acquitted in a mental hospital or treatment center."[127]

In the converse situation the Supreme Court of Tennessee relied on *Edwards* in *Sampson v. State*,[128] holding it error to instruct the jury that if they found defendant not guilty or not guilty by reason of insanity, that "in either of these events the defendant would be a free man."[129] Once again, in light of the legislative response, such an instruction is now simply untrue.[130]

126. *Id.* at 544.

127. TENN. CODE ANN. § 33-709(e) (Cum. Supp. 1978).

128. 553 S.W.2d 345 (Tenn. 1977).

129. *Id.* at 349 (emphasis deleted).

130. Few jurisdictions have addressed the precise issue raised in *Sampson*. A similar instruction was held to constitute reversible error in People v. Morales, 62 App. Div. 2d 946, 404 N.Y.S.2d 344 (1978), because it unfairly prejudiced defendant's insanity defense. An analogous situation arose in State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976). In his closing argument the district attorney claimed that defendant would be "returned to this community" if the jury returned a verdict of not guilty by reason of insanity. *Id.* at 601. The trial court's instruction to disregard the statement was held insufficient to cure the prejudice to the defense. Rather, the trial court should have informed the jury of the appropriate statutory commitment procedures. Similarly, in Johnson v. State, 265 Ind. 639, 359 N.E.2d 525 (1977), the court observed that although a defendant is not normally entitled to an instruction on dispositional consequences, if the jury is misinformed or misled (as by prosecutor comment), the court should immediately inform the jury of the actual dispositional alternatives. *But cf.* Jewell v. Commonwealth, 549 S.W.2d 807 (Ky. 1977) (where there is no realistic provision for detention of violent deranged people, prosecutor may remind jury that there is little assurance the defendant will not go free if found not guilty by reason of insanity); Commonwealth v. McColl, 376 N.E.2d 562 (Mass. 1978) (trial court's instruction that defendant might be found to be sane at a subsequent hearing, in which case he would go free, was not error).

IV. PROCEDURE

A. *Arrest*

1. Warrants

Arrest warrants may be issued only by a "neutral and detached magistrate,"[131] a requirement that is primarily aimed at precluding issuance by a party associated with prosecutorial authority.[132] In *Connally v. Georgia*[133] the United States Supreme Court found the admonition equally applicable to the issuance of a search warrant by a justice of the peace who received a fee when a warrant was issued but no fee when a warrant was refused.[134] In Tennessee justices of the peace are authorized to issue arrest and search warrants[135] and are compensated in the same manner as was the case in Georgia.[136] In *In re Dender*[137] the Tennessee Supreme Court held that the issuance of warrants by nonsalaried justices of the peace violated both the federal and state constitutions.[138]

2. Probable Cause

The prevalence of drug traffic through commercial airports has led the Drug Enforcement Administration (DEA) to develop a "drug courier profile" that may be communicated to concerned airport personnel. The profile includes the following factors: (1) youthfulness; (2) the use of small denomination currency in the purchase of tickets; (3) travel to and from major drug import centers over short periods of time; (4) travelling alone; (5) empty suitcases or no luggage at all; (6) nervousness; and (7) use of an

131. Johnson v. United States, 333 U.S. 10, 13-14 (1948). *See also* United States v. Evans, 574 F.2d 352 (6th Cir. 1978).

132. *See generally* PRETRIAL RIGHTS, *supra* note 1, § 16.

133. 429 U.S. 245 (1977).

134. "His financial welfare, therefore, is enhanced by positive action and is not enhanced by negative action." *Id.* at 250.

135. TENN. CODE ANN. § 19-312 (Cum. Supp. 1978).

136. *Id.* § 8-2115(A)I(1)(b) (Cum. Supp. 1978).

137. 571 S.W.2d 491 (Tenn. 1978).

138. *Id.* at 492 (specifically found to violate U.S. CONST. amend. XIV; TENN. CONST. art. I, § 8). The court approved the same result reached earlier in the year by the court of criminal appeals in an unreported case involving the issuance of a search warrant by a justice of the peace. Birdsong v. State, Tenn. Crim. App., Feb. 22, 1978 (unreported).

alias.[139] In *United States v. Lewis*[140] a ticket agent reported to a DEA agent that a suspicious person, later the defendant, had just purchased a one-day round trip ticket to Los Angeles with small bills. He had checked a small suitcase that seemed empty but for one item that slid around inside. The drug agent checked the address that corresponded with the phone number provided the airline by the purchaser and thereby determined not only that an alias had probably been used in purchasing the ticket but also that, according to the apartment manager, the individual had been under surveillance by local law enforcement officers regarding suspected narcotics traffic. Further investigation disclosed that the occupant of the apartment had been arrested for possession of heroin some two years earlier and that the description in the police file matched that of the individual observed at the airport. DEA agents met the return flight, informed defendant that they believed he was in possession of heroin, and requested him to accompany them to a small office. After receiving the *Miranda* warnings, defendant unlocked the suitcase, and the agent found a quantity of heroin. On appeal to the Sixth Circuit Court of Appeals from a conviction for unlawful possession of heroin, defendant contended that at the time of the apprehension and the search of the suitcase probable cause to arrest was lacking. In an earlier decision the same court had held that the drug courier profile could not, *by itself*, provide either probable cause to arrest or even sufficient suspicion for a temporary detention.[141]

The *Lewis* court held that the drug courier profile "was not a relevant factor"[142] in the determination of probable cause to arrest. The court reached this conclusion because first, the profile was "too amorphous to be integrated into a legal standard"[143] and second, use of the profile "would engage this Court in an improper analysis."[144] By the latter point, the court believed it was being

139. United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Lewis, 556 F.2d 385 (6th Cir.), *cert. denied*, 434 U.S. 863 (1977).

140. 556 F.2d 385 (6th Cir.), *cert. denied*, 434 U.S. 863 (1977).

141. United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977).

142. 556 F.2d at 389.

143. *Id.* The court found that this profile, as the one in *McCaleb*, " 'was not written down, nor was it made clear to agents exactly how many or what combination of the characteristics needed to be present in order to justify an investigative stop or an arrest.' " *Id.* (quoting United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977)).

144. *Id.*

asked to weigh "individual" layers of probable cause, as opposed to the "laminated total."[145] The distinction being drawn is quite fine, for the court acknowledged the propriety of considering all the *facts* that match the enumeration in the profile. Thus, one may properly say: because facts *a*, *b*, *c*, and *d*[146] are present, this plus additional information known to the officers established probable cause. One may not properly say: because facts *a*, *b*, *c*, and *d* are present, the suspect fits the drug courier profile; fitting the drug courier profile plus additional information known to the officers established probable cause.

In the context of *Lewis* the distinction may seem frivolous, but the apprehensions of the court are entirely legitimate. First, the profile is constructed by nonjudicial authority and, if taken too seriously, runs the substantial risk of bypassing a judicial determination of facts for the establishment of probable cause.[147] The problem is complicated by the fact that the profile will inevitably change with the experience of drug enforcement officers and the persistent efforts of narcotics handlers to evade detection.[148] If the relevance of the factors and the reliability of the profile must be determined in each instance, the prosecution has merely inserted an intermediate step in its burden of proof, and the court must still make an ad hoc evaluation of the facts.

Second, the *Lewis* court noted that the "use of the profile could too easily result in giving an undeserved significance to certain facts and distort the appraisal of the sum total of facts."[149] The danger sensed by the court is hypostatization, whereby a concept achieves legitimacy as a fact.[150] Thus, the several empirical observations in the present case are hypostatized into the concept "drug courier." Once a court takes this step, the suspect

145. The phrases were taken from Smith v. United States, 358 F.2d 833, 837 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967).

146. *a* = small bill ticket purchase; *b* = travel to and from major import center in brief time frame; *c* = near empty suitcase; *d* = use of alias.

147. *Cf.* Aguilar v. Texas, 378 U.S. 108 (1964) (conclusory allegations in affidavit for search warrant insufficient).

148. For example, once these profile characteristics are made public through case reports, mass media, and the present article, one may assume that drug couriers will buy their tickets with large bills, will wait until they reach their destination before purchasing their return ticket, and will weigh down their suitcases. So goes the war against crime.

149. 556 F.2d at 389.

150. *See* Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957).

thereafter is viewed as, in all probability, a drug courier. The facts have been transposed into a value judgment, and this value judgment thereafter is treated as a fact.[151] Appraising the facts in *Lewis*, the court found probable cause to sustain the arrest independent of the drug courier profile.[152]

The "drug courier profile" was again the subject of attention of the United States Court of Appeals for the Sixth Circuit in *United States v. Smith*.[153] In *Smith* a narcotics agent observed the accused deplaning in Detroit and was attracted to her by the presence of several characteristics in the profile.[154] In addition, the agent observed an abnormal bulge around the abdomen of the accused which, on the basis of his experience, further suggested that she was carrying illegal drugs. The agent detained the accused outside the airport and asked her to accompany him to the office of the Drug Enforcement Agency in the airport. In the DEA office the accused consented to a search of her carry-on bag and purse. The accused was arrested upon discovery of marijuana in the purse. A search of her person revealed a package of heroin strapped to her body.

Applying the standard established by *Lewis*, the court concluded that the presence of several of the profile characteristics

151. The argument has been advanced frequently that ultimately no fundamental distinction exists between statements of fact, on one hand, and statements of value or opinion, on the other. *See* B. RUSSELL, THE PROBLEMS OF PHILOSOPHY 7-12 (1959); E. D'ARCY, HUMAN ACTS 138 (1963).

Oliphant has contended that the difference between the statements, "This is a table," and, "This injury caused the plaintiff to lose his hearing," is primarily "the number of items of sense experience constituting the basis of the inference in each case and the frequency with which the person involved is called upon to draw the inference." Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127, 133 (1932).

Even assuming, however, that what the law traditionally treats as difference in kind is merely difference in degree, the court in the present case is nonetheless justified in its preference for judicial scrutiny of each description of observed phenomena, as opposed to a systematic organization of that data, which comes closer to resolution of the ultimate question for the court.

152. The court found the facts substantially similar to those in United States v. Prince, 548 F.2d 164 (6th Cir. 1977) (involving the work of one of the same DEA agents), in which probable cause was found.

153. 574 F.2d 882 (6th Cir. 1978).

154. The agent observed that she was a "youth, carrying only a purse and small carry-on bag and picking up no luggage at the airport, traveling alone and being met by no one at the airport, and directly leaving the airport in a hurried and nervous manner." *Id.* at 883.

plus the abnormal bulge provided a sufficient basis for a temporary detention. While moving the accused from the point of detention to the DEA office exceeded the scope of authority to detain temporarily under circumstances short of probable cause,[155] the court concluded that the finding of the lower court that the accused had gone to the office voluntarily was not clearly erroneous.[156] The consent to search was likewise voluntary, and, therefore, the evidence was properly admitted.

B. Search and Seizure

1. Warrant Affidavits

The grounds upon which a facially sufficient search warrant was issued may be controverted by the accused,[157] but this right has been judicially limited to a challenge before the magistrate who issued the warrant.[158] In *State v. Little*[159] the Tennessee Supreme Court held that by virtue of a 1965 statute[160] an attack upon the affidavit may be made at a suppression hearing before the trial court. Adopting the standard fixed for federal courts in Tennessee,[161] the court held that two circumstances authorize the impeachment of a facially sufficient affidavit: "(1) A false statement made with intent to deceive the Court, whether material or immaterial to the issue of probable cause, and (2) a false statement, essential to the establishment of probable cause, recklessly made."[162]

Less than six months after the decision in *Little*, the United States Supreme Court decided *Franks v. Delaware*[163] and held that an accused is entitled to a hearing to challenge the truthful-

155. *See* PRETRIAL RIGHTS, *supra* note 1, at 60-62.

156. 574 F.2d at 886 n.15. *Cf.* United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (taking defendants to airport office after invalid *Terry* stop was an unconstitutional arrest). Judge Edwards dissented in *Smith*, concluding that the accused had been arrested without probable cause when she was taken to the office. 574 F.2d at 887 (Edwards, J., dissenting).

157. TENN. CODE ANN. § 40-514 (1975).

158. *See, e.g.*, O'Brien v. State, 205 Tenn. 405, 326 S.W.2d 759 (1959); Solomon v. State, 203 Tenn. 583, 315 S.W.2d 99 (1958).

159. 560 S.W.2d 403 (Tenn. 1978).

160. TENN. CODE ANN. § 40-519 (1975).

161. United States v. Luna, 525 F.2d 4 (6th Cir. 1975).

162. 560 S.W.2d at 407. *See also* Moore v. State, 568 S.W.2d 632 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

163. 438 U.S. 154 (1978).

ness of factual statements in an affidavit upon "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause."[164] Notably, the standard articulated in *Franks* does not distinguish deliberate from reckless misstatements, and, in all events, requires a finding that the statements in dispute were critical to the determination of probable cause. The United States Court of Appeals for the Sixth Circuit has now revised its standard to comply.[165]

The Tennessee standard, therefore, is more protective in permitting the invalidation of the warrant when "intent to deceive the Court" is present irrespective of materiality. While the Tennessee Supreme Court possibly will now conform its standard to that adopted by the United States Supreme Court as compelled by the fourth amendment, the Tennessee decision cited the state constitution as well,[166] and nothing precludes the state court from adhering to a standard affording a broader protection than that required by the federal constitution.[167]

2. Incident to Arrest

The permissible scope of a warrantless search incident to an arrest was once again scrutinized in *United States v. Chadwick*,[168] in which the United States Supreme Court for the first time drew a distinction between the power to seize and the power to search that which was seized. The accused was arrested while standing

164. *Id.* at 155.

165. United States v. Barone, 584 F.2d 118 (6th Cir. 1978).

166. 560 S.W.2d at 406 (quoting TENN. CONST. art. I, § 7).

167. *But see* State v. Wert, 550 S.W.2d 1 (Tenn. Crim. App.), *cert. denied*, *id.* (Tenn. 1977) (court of criminal appeals rejected the argument that TENN. CONST. art. I, § 7, was broader than U.S. CONST. amend. IV). *See 1976-1977 Survey*, *supra* note 1, at 28. Even if the language employed in the respective provisions is found to be functionally equivalent, however, the Tennessee Supreme Court can nevertheless construe the state constitution to afford greater protection than the United States Supreme Court chooses to construe the Bill of Rights to afford. *See generally* Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976); Falk, *The State Constitution: A More than 'Adequate' Non-Federal Ground*, 61 CALIF. L. REV. 273 (1973); Morris, *New Horizons for a State Bill of Rights*, 45 WASH. L. REV. 474 (1970); Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970).

168. 433 U.S. 1 (1977).

next to the open trunk of an automobile in which he and others had just deposited a 200-pound footlocker. The footlocker was seized at the time of the arrest but was not opened until an hour and a half later. At the time of the search, the locker was safely in the custody of federal officers and was found to contain a large quantity of marijuana.[169]

At trial the government attempted to justify the search as falling within the automobile exception to the warrant requirement,[170] but the court dismissed the relationship between the footlocker and the automobile as purely coincidental. The government did not pursue this argument on appeal but instead argued that the inherent mobility of luggage was analogous to the mobility of automobiles, a factor frequently noted in justifying the warrantless search of vehicles.[171] The Court responded that the key factor was "the diminished expectation of privacy which surrounds the automobile."[172] In contrast, a footlocker was not subject to similar governmental regulation and was frequently intended as a container for personal effects. Moreover, the "mobility" argument carried little weight because the footlocker was in the exclusive control of the authorities.[173] "With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant."[174]

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169. Prior to the arrest, officers had probable cause to believe the footlocker contained marijuana, the contents having been identified by a marijuana-sniffing dog while the container was in transit. Probable cause is not a prerequisite to seizing or searching an item seized incident to an arrest, but the reasonable assumption of the officers as to the contents of the footlocker was significant, first, in providing probable cause for the arrest, and second, in precluding any claim "that the footlocker contained explosives or other inherently dangerous items, or that it contained evidence which would lose its value unless the footlocker were opened at once." *Id.* at 4.

170. *See* Chambers v. Maroney, 399 U.S. 42 (1970).

171. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925).

172. 433 U.S. at 12. " '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.' " *Id.* (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).

173. *Id.* at 13. This distinction is substantially neutralized by the Court's recognition that "we have also sustained 'warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent.' " *Id.* at 12 (quoting Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973)).

174. *Id.* at 13.

In *Chambers v. Maroney*[175] the Court had been unimpressed by the argument that fourth amendment values would be better protected by seizing a vehicle without a warrant, but not searching it until a warrant had been obtained.[176] Once again, the Court found the greater expectation of privacy in the footlocker in *Chadwick* to warrant a different conclusion.[177]

Finally, the *Chadwick* Court addressed the government's attempt to justify the search of the footlocker as simply a search incident to an arrest. In *Chimel v. California*[178] the Court had held that both the person and the area within reach of the arrestee could be searched incident to an arrest.[179] The seizure in *Chadwick*, the government reasoned, fell within the permissible scope of a *Chimel* search, and in *United States v. Robinson*[180] and *Gustafson v. Florida*,[181] the Court held that a cigarette pack seized from the person of the arrestee could be examined for its contents after the object was in the exclusive control of the arresting officer. The latter cases were distinguishable from *Chadwick* in that the search occurred at the moment of the arrest and seizure, while the search in *Chadwick* was remote in time and place from the arrest.[182] *Chimel* had articulated the justifications for the warrantless search incident to arrest as the protection of the arresting officer, the preclusion of escape, and the prevention of destruction of evidence.[183] Since none of these dangers were present in *Chadwick*, the search was invalid.

The dissenting justices in *Chadwick*[184] contended that the search would doubtless have been legitimate had the officers ei-

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175. 399 U.S. 42 (1970).

176. *Id.* at 51-52.

177. It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in *Chambers* unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage.

433 U.S. at 14 n.8.

178. 395 U.S. 752 (1969).

179. *See* Cook, *Warrantless Searches Incident to Arrest*, 24 ALA. L. REV. 607 (1972).

180. 414 U.S. 218 (1973).

181. 414 U.S. 260 (1973).

182. *See* Preston v. United States, 376 U.S. 364 (1964).

183. Chimel v. California, 395 U.S. at 763-64.

184. 433 U.S. at 22-23 (Blackmun, J., dissenting, joined by Rehnquist, J.).

ther waited for the vehicle to leave, leading to a bona fide vehicle search, or searched the footlocker at the time of the arrest. Apparently, however, the opinion of the Court left no room for either of these possibilities. The Court was unequivocal in its assertion that the contents of a footlocker are constitutionally distinguishable from the contents of an automobile[185] and that the reasonable expectation of privacy in the footlocker should not be diminished merely because the locker is placed in a vehicle. As to the second possibility, while a search of the footlocker at the scene of the arrest would make the case comparable to *Robinson* and *Gustafson* in one respect, this fact should not lightly be assumed to be the only distinction in the case. In a final footnote to the opinion the Court observed that "[u]nlike searches of the person, . . . searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest."[186] Such reasoning presumably would apply equally whether the search was made at the time of the arrest or at a later time in a different place.

Chadwick thus indicated the existence of gradations of intrusion upon reasonable expectations of privacy. Certainly the arrest and search of the person of the accused were invasions of privacy, arguably more intrusive than the search of the footlocker. The warrantless arrest for a felony is nevertheless justifiable once probable cause is established,[187] and the search of the person satisfies reasonable protection interests recognized in *Chimel.* The search of the footlocker, however, involved independent privacy interests, in respect to which the chain of reasonableness had been broken.

Privacy interests at an earlier stage in the confrontation were considered in the per curiam opinion of the United States Supreme Court in *Pennsylvania v. Mimms,*[188] a case that may be viewed as a logical extension of *Chadwick,* although that decision

185. "The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. . . . In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Id.* at 13.

186. *Id.* at 16 n.10 (citation omitted).

187. *See* United States v. Watson, 423 U.S. 411, 421-23 (1976).

188. 434 U.S. 106 (1977).

is not cited. The accused in *Mimms* was stopped for the purpose of issuing a traffic summons for the expired license plate on his automobile. An officer requested that the accused alight from the vehicle and produce his driver's license and owner's card. A large bulge was noticed in his jacket, and thereupon the officer frisked the accused and discovered a loaded revolver.

No question was raised as to the reasonableness of stopping the vehicle for purposes of issuing the citation for a violation observed by the officers. Nor was there any doubt that, once the bulge was observed, the frisk and ultimate seizure were justified.[189] The critical issue was the intermediate step: "[W]hether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment."[190] The Court concluded that the order was reasonable because the major intrusion upon the liberty of the accused occurred when he was detained. "We think this additional intrusion [getting out of the car] can only be described as *de minimis*."[191]

The similarity to *Robinson* and *Gustafson* on one hand, and the contrast with *Chadwick* on the other, is obvious: Just as the examination of the contents of a cigarette pack is a minor intrusion given a legal arrest and seizure of the object, so asking Mimms to alight from his automobile added little to the intrusion already occasioned by the detention. The footlocker in *Chadwick*, on the other hand, was protected by privacy interests independent of the arrest of its possessor. Additionally, while in *Robinson*, *Gustafson*, and *Mimms* the arresting officer reasonably could claim that the action taken was for self-protection, no such countervailing interest was present in *Chadwick*.

Lower courts have tended to find exceptional circumstances that will serve to broaden the scope of a *Chimel* search. If, for example, in the course of an arrest the arrestee must go into another portion of the premises prior to being taken into custody, the *Chimel* area follows the arrestee.[192] In *Watkins v. United States*,[193] after the accused was arrested in his residence, the offi-

189. *See* Terry v. Ohio, 392 U.S. 1, 24 (1968).

190. 434 U.S. at 109.

191. *Id.* at 111.

192. *See* PRETRIAL RIGHTS, *supra* note 1, § 44 at 291 n.9 & n.9.12 (Cum. Supp. 1978).

193. 564 F.2d 201 (6th Cir. 1977).

cers followed him into his bedroom to get a shirt. The officers seized a firearm, the butt of which they observed under the mattress of the bed. The United States Court of Appeals for the Sixth Circuit sustained the admission of the evidence.

A stricter approach was deemed appropriate in *United States v. Rowan*,[194] in which an officer of the National Parks Service observed a can of beer on the dashboard of a car, and, after advising the accused that beer was not permitted in the park, the officer asked to see his driver's license and vehicle registration papers. The accused entered the car on the passenger side and endeavored to open the glove compartment, which was stuck. Simultaneously, the officer seized a crumpled brown paper bag that was visible under the seat on the driver's side and, after opening it, found seizable evidence within. The United States District Court for the Eastern District of Tennessee suppressed the evidence, holding that the bag was "not only too far from the defendant but also located in an area too difficult to reach, for the seizure to be justified under *Chimel*."[195]

3. Exigent Circumstances

The exigent circumstances exception to the warrant requirement is utilized when the facts indicate that delaying the search until a warrant is obtained is impossible or unwise.[196] If, for example, officers have reason to believe that a person within given premises is in need of immediate medical attention, a warrantless entry is reasonable, and evidence of criminal behavior fortuitously discovered may be seized.[197] Similarly, officers in hot pursuit of a fleeing felon may enter a residence without a warrant for purposes of making an arrest, and evidence discovered in the process is seizable.[198]

Exigent circumstances are not created, however, simply by the subject matter of the investigation. In *Mincey v. Arizona*[199] the prosecution sought to justify a four-day warrantless search of the apartment of the accused under a so-called "murder scene

194. 439 F. Supp. 1020 (E.D. Tenn. 1977).
195. *Id.* at 1022.
196. *See generally* PRETRIAL RIGHTS, *supra* note 1, § 49.
197. *Id.* at 317 n.12.
198. Warden v. Hayden, 387 U.S. 294 (1967).
199. 437 U.S. 385 (1978).

exception" recognized under state law.[200] The United States Supreme Court held that no such exception existed and that the search could not be justified under any recognized exception. The accused could not be said to have relinquished a reasonable expectation of privacy either because the crime had purportedly occurred on his premises[201] or because he was under arrest before the search occurred.[202] No emergency existed that would support the search as an effort to protect life or limb.[203] Despite a vital public interest in the prompt apprehension of a murderer, the deprivation of fourth amendment rights could not be the price of police efficiency.[204]

4. Open Fields

In 1977 in *State v. Wert*[205] the Tennessee Court of Criminal Appeals held that the open fields exception to the warrant requirement, first recognized in *Hester v. United States*,[206] had been modified by *Katz v. United States*[207] to the extent that any warrantless search must henceforth be evaluated in terms of a reasonable expectation of privacy.[208] The application of the open fields exception arose again in *Sesson v. State*,[209] in which officers

200. State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974); State *ex rel.* Berger v. Superior Ct., 110 Ariz. 281, 517 P.2d 1277 (1974); State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971).

201. In any event, the "murder scene exception" as defined by the Arizona Supreme Court applied to places other than the residence of the accused. "We find nothing in the Constitution . . . which should prevent the police from making a warrantless search of the premises in which the victim is found dead and this is true even if the suspect exercised joint control of said premises along with the victim." State v. Sample, 107 Ariz. at 409, 489 P.2d at 46.

202. The Court reasoned, analogously to United States v. Chadwick, 433 U.S. 1 (1977), that the invasion of privacy caused by the arrest did not compromise the separate privacy interest in the apartment. 437 U.S. at 393-94.

203. "All the persons in Mincey's apartment had been located before the investigating homicide officers arrived there and began their search. And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search." 437 U.S. at 393.

204. *Id.*

205. 550 S.W.2d 1 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

206. 265 U.S. 57 (1924).

207. 389 U.S. 347 (1967).

208. *See 1976-1977 Survey, supra* note 1, at 28-30.

209. 563 S.W.2d 799 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

had placed under surveillance a still located in a wooded area and on three occasions had observed the accused illegally manufacturing whiskey. The court of criminal appeals found *Wert* distinguishable because no evidence in *Sesson* indicated that the accused was either the owner or the lawful possessor of the property involved. Nor was there any assertion of a right of privacy similar to the "no trespassing" signs in *Wert*. The court concluded that the surveillance was therefore justifiable under the open fields doctrine.

Judge Tatum, in a concurring opinion, was inclined to go beyond drawing factual distinctions and preferred to challenge the authority of the *Wert* holding, which he noted had not been embraced by the state supreme court in that or any other case. In *Wert* the court had placed substantial reliance on a federal district court decision[210] that had been effectively overruled by the United States Court of Appeals for the Seventh Circuit.[211] Indeed, Judge Tatum concluded, "Insofar as I know, Tennessee is the only American jurisdiction protecting open fields."[212]

The court in *Wert*, however, did not make the sweeping pronouncement attributed to it by Judge Tatum. It said only that the scope of the open fields exception must be limited by the *Katz* reasonable expectation of privacy concept, a point recognized by the United States Supreme Court[213] as well as by numerous lower courts.[214] Two courts from other jurisdictions, in recent decisions involving facts substantially similar to those in *Wert*, have come to the same conclusion. In *State v. Chort*[215] the accused occupied an unenclosed ten-acre tract of land, within which was a garden enclosed by a board fence with approximately four inch spaces between the boards. An officer rode horseback across the open pasture portion of the property, and, from a vantage point some thirty feet from the garden fence, he recognized mari-

210. United States *ex rel.* Gedko v. Heer, 406 F. Supp. 609 (W.D. Wis. 1975).

211. United States *ex rel.* Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976).

212. 563 S.W.2d at 804. Judge Tatum had dissented in *Wert*. *See* 550 S.W.2d at 3.

213. Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

214. PRETRIAL RIGHTS, *supra* note 1, § 60 at 368 n.4.

215. 577 P.2d 892 (N.M. Ct. App. 1978).

juana plants growing in the garden. The Court of Appeals of New Mexico found the search unreasonable, holding that

> [t]he "open field" doctrine must be viewed in light of the facts of each case subject to the requirements of *Katz* . . . .
>
> . . . [D]efendants, by the placement of the garden surrounded by an almost solid five foot fence, exhibited an actual expectation of privacy. Further, this expectation of privacy was such that society would recognize as reasonable. It would not be unreasonable to expect the shielding of the garden was for the purpose of privacy.[216]

In *State v. Byers*[217] an officer, acting on a tip from a hunter, entered the 640-acre tract of the accused and discovered marijuana in cultivation. The property was not fenced, but, as in *Wert*, "no trespassing" signs were posted. Distinguishing *Hester*, the Supreme Court of Louisiana concluded that the accused had a reasonable expectation of privacy.

As the Supreme Court of Colorado observed in *People v. McLaugherty*,[218] "*Hester* is now viewed as merely an application of the principle that Fourth Amendment protections do not apply where no reasonable expectation of privacy exists."[219] In finding the search in *Wert* unreasonable, the Tennessee court did not foreclose sustaining warrantless searches under the open fields exception when no reasonable expectation of privacy has been invaded.[220]

5. Third Party Consent

Consent to a search may be effective when made by a party other than the accused if that party has an interest in the area searched comparable to that of the accused.[221] In *United States v. Matlock*[222] the United States Supreme Court held that such consent was binding on the accused, notwithstanding his presence at the time consent was secured. In *Matlock* the officer did not ask the accused for his consent, but in *United States v.*

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216. *Id.* at 893 (citations omitted).

217. 359 So. 2d 84 (La. 1978).

218. 566 P.2d 361 (Colo. 1977).

219. *Id.* at 363.

220. Indeed, the court again reached such a conclusion in Delay v. State, 563 S.W.2d 905 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

221. *See* PRETRIAL RIGHTS, *supra* note 1, § 53.

222. 415 U.S. 164 (1974).

Sumlin[223] the officer asked for the accused's consent and it was denied. The Sixth Circuit Court of Appeals in *Sumlin* found no constitutional significance in this additional fact because the rationale of *Matlock* was that a joint occupant has no reasonable expectation of privacy to the extent that he assumes the risk of a co-occupant exposing a commonly shared area. The refusal of the accused to give his consent was immaterial to the question of reasonable expectation of privacy.

This conclusion is not incompatible with the attitude of the Court in *Matlock*, given the fact that the accused in that case was present at the time consent was obtained from the third party. A few lower courts, however, have concluded that *Matlock* is distinguishable when the party in interest is present and objects to the search, notwithstanding consent by the co-occupant,[224] or when the police have been advised that an absent co-occupant objects to the search.[225]

6. Fruit of the Poisonous Tree

When a search has been determined invalid, not only is the evidence that was immediately seized in the course of the search excluded, but any fruits of the search are likewise inadmissible.[226] In *Bentley v. State*[227] officers searched a motel room occupied by defendant under a warrant found to be based on an affidavit of insufficient particularity.[228] Marijuana and purportedly obscene photographs discovered in the search were clearly inadmissible. The photographs, however, led to the arrest and search of a co-defendant, which produced additional photographs introduced in evidence against the first defendant as well. The court of criminal appeals held that the second search was the fruit of the first, and the product was equally inadmissible.

One of the more troublesome fruit of the poisonous tree problems arises when prosecution witnesses have been identified through an illegal search and the defense contends that their

223. 567 F.2d 684 (6th Cir. 1977).

224. People v. Reynolds, 55 Cal. App. 3d 357, 127 Cal. Rptr. 561 (1976); Silva v. State, 344 So. 2d 559 (Fla. 1977); Lawton v. State, 320 So. 2d 463 (Fla. Dist. Ct. App. 1975).

225. People v. Reynolds, 55 Cal. App. 3d 357, 127 Cal. Rptr. 561 (1976).

226. *See* PRETRIAL RIGHTS, *supra* note 1, § 71.

227. 552 S.W.2d 778 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

228. *See* PRETRIAL RIGHTS, *supra* note 1, § 36.

testimony should be excluded.[229] This issue was addressed by the Supreme Court for the first time in *United States v. Ceccolini.*[230] While visiting a flower shop, an officer picked up and examined the contents of an envelope, thereby discovering evidence of gambling activities. An employee identified the accused, who had been under investigation for gambling activities, as the owner of the envelope. The following year, the accused testified before a federal grand jury that he had never taken policy bets. The employee testified to the contrary, and the accused was indicted for perjury. At trial the employee's testimony was excluded as the fruit of what was conceded to be an illegal search, and the ruling was affirmed by the court of appeals.

The Supreme Court reversed, citing two principles it considered uniquely relevant to witness testimony in the fruit of the poisonous tree context. First, "the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application."[231] Second, the exclusion of the testimony "would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the original illegal search or the evidence discovered thereby."[232] The Court was thus led to the conclusion that reliability, while not relevant to the exclusion of inanimate evidence, was properly considered in regard to witness testimony. On the basis of this analysis, the testimony was found to have been improperly excluded.

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229. For earlier cases, see PRETRIAL RIGHTS, *supra* note 1, § 71 at 432 nn. 7 & 8.

230. 435 U.S. 268 (1978).

231. *Id.* at 276.

> The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition.

Id.

232. *Id.* at 277.

C. *Right of Confrontation*

1. Confession of Codefendant

In *Bruton v. United States*[233] the Supreme Court held that when defendants are jointly tried the right of confrontation may be violated by the introduction into evidence of a confession that implicates another defendant if the confessor does not take the stand. The problem is sometimes avoided by removing all references to codefendants,[234] but merely deleting names may be insufficient.[235] In *Alexander v. State*[236] the name of the implicated codefendant was replaced with the phrase "my friend." The court of criminal appeals concluded that the reference was obviously to the codefendant, particularly in light of the admission in the codefendant's own confession that he had been in the company of the confessor at the time in question.[237] The court distinguished *Gwin v. State*,[238] in which "blank" had been substituted for the names of the other participants, because, it said, "there were multiple co-defendants in *Gwin*, and not just two, as here, whose identities were otherwise obvious to the jury."[239] While the cases may be legitimately distinguished, this reason is hardly the proper basis because nothing in the *Gwin* opinion suggests that the number of defendants in the prosecution was critical to the result. Rather, the court found that in addition to the redaction, the other defendants had also confessed, and the jury had been instructed to consider each confession only against its maker. The court concluded that either no error occurred, or, if any had occurred, it was harmless.[240] In *Alexander*, while the appellant also

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233. 391 U.S. 123 (1968).

234. *See* TRIAL RIGHTS, *supra* note 1, § 12 at 50 n.10.

235. *See* Randolph v. Parker, 575 F.2d 1178 (6th Cir. 1978); Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978); Kelley v. Rose, 346 F. Supp. 83 (E.D. Tenn. 1972).

236. 562 S.W.2d 207 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

237. *Id.* at 209. The court found the case comparable to White v. State, 497 S.W.2d 751 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1973), in which the phrase "the other person" had been substituted. *See* 562 S.W.2d at 209.

238. 523 S.W.2d 636 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

239. Alexander v. State, 562 S.W.2d 207, 210 unnumbered footnote (Tenn. Crim. App. 1977), *aff'd, id.* (Tenn. 1978).

240. The harmless error rule was applied to *Bruton* violations in Harrington v. California, 395 U.S. 250 (1969).

confessed, "the substance of the two confessions was not the same,"[241] and instructions limiting the use of the confessions were not given; both factors are adequate to distinguish *Gwin*.

Moreover, the multiple-codefendant distinction would appear inimical to the purpose of the *Bruton* rule. The "multiple codefendants" referred to by the court were in fact three in *Gwin*, as opposed to two in *Alexander*. With the deletion of the specific identifications, the jury was left with an ambiguous reference that it might reasonably conclude applied to one of the two remaining defendants. Actual implication was replaced with speculative implication. If the juror or jurors speculated accurately, the net result would be a violation of the *Bruton* rule. If the speculation was inaccurate, the result would be more offensive than a *Bruton* error since the juror or jurors would thereby inculpate a defendant when no inculpatory statement was actually made.

A *Bruton* error may be harmless, but, according to the Sixth Circuit Court of Appeals in *Hodges v. Rose*,[242] the test for the harmlessness is not the strength of the prosecutor's case; rather, the test is "whether the statement incriminates the defendant against whom it is inadmissible in such a way as to create a 'substantial risk' that the jury will look to the statement in deciding on that defendant's guilt."[243] In cases in which the name of the cross-implicated defendant has been deleted, a consideration of other evidence may be required to determine whether the referent of the confession is apparent, but this approach is quite different from weighing the strength of the prosecution's case independent of the confession. While such a rule is faithful to the *Bruton* rule and sensitive to the persuasive impact of confessions, it would appear at odds with the holding in *Harrington v. California*,[244] the first case in which the Supreme Court found a *Bruton* error harmless. In *Harrington* the accused had been tried with three codefendants, two of whom implicated the accused in their confessions, which were introduced although neither confessor testified. The other codefendant, however, made a similar confession and did testify, and the accused's own confession was similar to that of the codefendants. The Court viewed the challenged confessions as cumulative evidence and concluded that

241. 562 S.W.2d at 209.
242. 570 F.2d 643 (6th Cir. 1978).
243. *Id.* at 647.
244. 395 U.S. 250 (1969).

"the case against Harrington was so overwhelming . . . that this violation of *Bruton* was harmless beyond a reasonable doubt."[245]

2. Laboratory Reports

In *State v. Henderson*[246] the Tennessee Supreme Court addressed the question whether a toxicology laboratory report could be admitted in evidence through a witness other than the one who performed the test. Defendant had been charged with the possession and sale of LSD. At the time of the trial the laboratory assistants who conducted the identification tests were on vacation and unavailable to testify, and the court permitted the evidence to be admitted as an exhibit to the testimony of the director of the laboratory. The supreme court held that in the face of an objection "the State can not prove an essential element of a criminal offense by test results introduced through a witness other than the one who conducted the tests"[247] and quoted the opinion of the court of criminal appeals at length. That court had concluded that defendant had been denied the sixth amendment right of confrontation.

D. Right to Counsel

While the representation of two or more codefendants by a single attorney is not impermissible per se,[248] it may constitute a denial of the sixth amendment right to counsel when the interests of the clients are in conflict.[249] In *Halloway v. Arkansas*[250] appointed counsel for three defendants charged with robbery and rape moved well in advance of the scheduled date for trial that separate counsel be appointed for each defendant because of the possibility of a conflict of interest, and the motion was denied. On the day of the trial the motion was renewed, counsel calling par-

245. *Id.* at 254.

246. 554 S.W.2d 117 (Tenn. 1977).

247. *Id.* at 122.

248. *See, e.g.*, Moran v. State, 457 S.W.2d 886 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1970).

249. Glasser v. United States, 315 U.S. 60 (1942). *Cf.* Mattress v. State, 564 S.W.2d 678 (Tenn. Crim. App. 1977) (assistant district attorney general had previously been assigned, as staff attorney for legal clinic, to defend defendants on different charges. Conflict of interests was sufficiently cured by barring the assistant attorney general from prosecution of the instant case).

250. 435 U.S. 475 (1978).

ticular attention to the possibility that one or two of the defendants might testify and that this would place upon counsel the impossible burden of eliciting favorable testimony from the witness while also cross-examining him in the interest of the codefendants. Although the conflict of interest became increasingly obvious and counsel called the matter to the attention of the court repeatedly, the trial judge adamantly refused to appoint additional counsel. Defendants were convicted on all counts, and the state supreme court affirmed.

In reversing the conviction, the United States Supreme Court held that defendants had been denied the effective assistance of counsel when, notwithstanding the repeated requests of counsel, the trial judge "failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel."[251] Furthermore, the Court held, once such a potential conflict is established, the defendant is not required to prove actual prejudice. The Court found the application of the harmless error rule in this context unmanageable,[252] and therefore reversal was mandatory.

E. Identification

1. Witnesses

The Supreme Court in *Manson v. Brathwaite*[253] clarified the due process requirement for precritical-stage identifications. When the identification of a suspect, either corporeal or photographic, occurs prior to a critical stage in the criminal proceedings, the right to presence of counsel does not apply,[254] but this identification and any subsequent courtroom identification must satisfy due process standards.[255]

In *Simmons v. United States*[256] the Court had held that an

251. *Id.* at 484. *Cf.* United States v. Steele, 576 F.2d 111 (6th Cir. 1978) (rejecting per se rule requiring a conflict of interest hearing in all cases of dual representation).

252. 435 U.S. at 490-91.

253. 432 U.S. 98 (1977).

254. The right to counsel attaches only to corporeal identifications conducted "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972).

255. *Id.* at 690-91.

256. 390 U.S. 377 (1968).

in-court identification did not violate due process unless a prior out-of-court idenfication was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[257] The focus was on the reliability of the courtroom identification in light of the "totality of circumstances" surrounding the witness's observations during the commission of the crime.[258]

If the prosecution seeks to introduce evidence of the pretrial identification, however, the issue is whether the confrontation was "unnecessarily suggestive and conducive to irreparable mistaken identification."[259] In *Stovall v. Denno*[260] the Court had found no due process violation in an admittedly suggestive confrontation, ostensibly because the suggestiveness was not only necessary but "imperative."[261] *Stovall*, thus, implied a prophylactic rule requiring exclusion of evidence of identifications made during an unnecessarily suggestive confrontation.[262]

In *Manson* the Court rejected the apparent implication of *Stovall*. *Manson* involved the admissibility of a precritical-stage photographic identification that was concededly both suggestive and unnecessary.[263] The Court acknowledged that some circuit courts had determined such evidence to be inadmissible per se[264] whereas others looked instead to the reliability of identifications despite unnecessarily suggestive confrontation procedures.[265] The per se approach, however, was dismissed by the Court as unnecessary for deterring police misconduct and inconsistent with ensuring jury access to reliable evidence.[266] Instead, the Court concluded that "reliability is the linchpin in determining the admis-

257. *Id.* at 384.

258. *Id.* at 383.

259. Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

260. *Id.*

261. *Id.* at 302. In *Stovall* the accused, a black, was brought handcuffed by five white police officers and two white members of the prosecutor's staff to the hospital room of the only witness to a murder. *Id.* at 295. The police reasonably feared that the witness might die before any less suggestive confrontation could be arranged. *Id.* at 302 (citing Stovall v. Denno, 355 F.2d 731, 735 (2d Cir. 1966)).

262. *See* 432 U.S. at 120 (Marshall, J., dissenting).

263. *Id.* at 99.

264. *Id.* at 110.

265. *Id.*

266. *Id.* at 112-13.

sibility of identification testimony."[267]

The *Manson* Court listed five factors to be considered in assessing the reliability of the pretrial identification:[268] (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the coincidence of the description of the culprit given by the witness prior to the identification and the actual appearance of the party identified; (4) the level of certainty of the witness at the time of the identification; and (5) the amount of time between the crime and the identification.[269] In *Manson* the identification fared well under each factor: (1) the witness observed the offender for two to three minutes, at a distance of two feet, with adequate lighting; (2) the witness was a trained police officer; (3) the witness's detailed description matched that of defendant; (4) the photographic identification was unequivocal; and (5) the verbal description was given within minutes of the crime, and the photographic identification occurred two days later.[270] Given these factors, the Court saw no reason to exclude evidence of the pretrial identification, notwithstanding its suggestiveness. While presenting the witness with an array of photographs including a number of individuals of similar appearance to the one selected would have been preferable, "[t]he defect, if there be one, goes to weight and not to substance."[271]

Taken together, the holdings in *Stovall* and *Manson* apparently give prosecutors the best of both worlds. Under *Stovall* even an unreliable identification from a suggestive confrontation is admissible if the suggestiveness was necessary in view of the totality of the circumstances.[272] According to *Manson* an identification from an unnecessarily suggestive procedure is admissible if the identification is deemed reliable under the totality of the

267. *Id.* at 114.

268. These factors were first articulated in Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

269. 432 U.S. at 114.

270. *Id.* at 114-16.

271. *Id.* at 117. "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.* at 116.

272. 388 U.S. at 302.

circumstances.[273]

At first blush *Manson* appeared not only to dilute due process protections but also to withdraw the sixth amendment protections extended in *Gilbert v. California.*[274] *Gilbert* and the companion case of *United States v. Wade*[275] established that a postindictment lineup identification without the protection of the right to presence of counsel was inadmissible per se. Although *Manson* was a precritical-stage case, at no point did the Court limit its holding to precritical-stage identifications. Rather, the Court concluded broadly that the criteria set forth "are to be applied in determining the admissibility of evidence offered by the prosecution concerning a post-*Stovall* identification."[276] The more recent decision in *Moore v. Illinois,*[277] however, demonstrates that the *Wade-Gilbert* standard has not been abandoned.

In *Moore* the victim of rape had selected the picture of the accused, along with one or two additional ones, from an array of about ten photographs. A notebook found at the scene contained a letter written by a woman with whom the accused was staying. On the basis of this information, the accused was arrested and the following morning taken for a preliminary hearing. The victim was also taken to the hearing and told that she was going to view a suspect whom she should identify if she could. She also signed a complaint that named the accused as her assailant. At the hearing the accused, unrepresented by counsel, was called to the bench by name and charged with rape and deviant sexual behavior. The victim was then called to the bench and informed that the police had evidence linking the accused to the crime. She confirmed the identification. Evidence of this identification was admitted at the trial of the accused, and he was convicted on all counts.

The Supreme Court held first that the *Wade-Gilbert* standard was applicable to the identification even though the accused had not been indicted at the time of the confrontation.[278] *Wade*

273. 432 U.S. at 114.

274. 388 U.S. 263 (1967).

275. 388 U.S. 218 (1967).

276. 432 U.S. at 117.

277. 434 U.S. 220 (1977).

278. "It is plain that '[t]he government ha[d] committed itself to prosecute,' and that petitioner found 'himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural

and *Gilbert* were no less applicable because the identification was a one-on-one confrontation rather than a lineup.[279] Had the accused been represented by counsel, the Court noted, much of the suggestiveness of the confrontation could have been avoided by, for example, (1) postponing the hearing until a lineup could be arranged, (2) or excluding the victim from the courtroom during the reading of the charges and seating the accused among the spectators for the identification, and (3) permitting cross-examination of the victim to test the identification.[280] In light of the prohibition in *Gilbert* of the use of proof of an identification at which the right to counsel had been improperly denied, the conviction was reversed and the case remanded for a determination whether the admission of the evidence was harmless error.[281] On the other hand, on remand the accused would have the opportunity to show that the in-court identification was itself the product of the improper identification at the preliminary hearing and therefore should also have been excluded.[282] Very likely, the question of harmless error will turn on the success or failure of the defense in urging the latter point.

2. Handwriting

Even when obtained involuntarily, samples of handwriting may be secured for purposes of identification without violating the fourth amendment protection against unreasonable seizures of the fifth amendment privilege against self-incrimination.[283] This principle was subjected to a unique challenge in *United States v. Waller*[284] in which the accused had refused to provide the police with a sample of his handwriting for comparison with the handwriting on several checks that allegedly had been fraudulently signed. At trial, the prosecution offered in evidence a fingerprint card bearing the signature of the accused, at which point the accused left the courtroom, ostensibly to go to the rest-

criminal law.'" *Id.* at 228 (quoting from Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

279. *Id.* at 229. "Indeed, a one-on-one confrontation generally is thought to present greater risks of mistaken identification than a lineup." *Id.*

280. *Id.* at 230 n.5.

281. *See* Chapman v. California, 386 U.S. 18 (1967).

282. 434 U.S. at 332 n.7.

283. *See* TRIAL RIGHTS, *supra* note 1, § 56.

284. 581 F.2d 585 (6th Cir. 1978).

room, but never returned. The trial nevertheless continued, during the course of which the prosecutor observed that the accused had left on the table a yellow pad on which he had been taking notes. The trial judge ordered the seizure of the pad, and subsequently an expert positively identified the handwriting as that present on the checks. The accused was convicted in absentia[285] of eight counts of mail fraud and was apprehended a year later. The accused contended, first, that the notes were a privileged communication in which he had a legitimate expectation of privacy. The United States Court of Appeals for the Sixth Circuit found neither aspect of this argument compelling, observing that the notes were not confidential communications between attorney and client, and that the action of the accused in leaving the note pad prominently displayed in the courtroom was inconsistent with a claim of privacy.[286] Second, the accused argued that the trial court had abandoned its role as an impartial judge in ordering the seizure. Here the appellate court responded that at the time the seizure was ordered, the trial judge had no way of knowing whether the handwriting sample would exonerate the accused or establish his guilt.[287] The seizure had not occurred in the presence of the jury, and apparently the court was doing no more than attempting to determine the facts.

F. Self-Incrimination

A fundamental right secured by the privilege against self-incrimination of the fifth amendment is the right of a defendant in a criminal case not to take the stand. The failure of the defendant to testify is not to be considered evidence of guilt, and any suggestion by the prosecutor or the trial judge to this effect is itself a violation of the privilege.[288] If the defendant requests an instruction on the nature of the privilege, such an instruction should be given.[289] The more difficult question, whether the trial

285. Where an accused voluntarily absents himself from his trial, the proceedings may continue, and the sixth amendment right of confrontation has not been violated. *See* Taylor v. United States, 414 U.S. 17 (1973).

286. From a fourth amendment perspective, the evidence had clearly been abandoned, and therefore the court order might even be superfluous. *See* PRETRIAL RIGHTS, *supra* note 1, § 48.

287. 581 F.2d at 587.

288. *See* Griffin v. California, 380 U.S. 609 (1965). "It cuts down on the privilege by making its assertion costly." *Id.* at 614.

289. *See* TRIAL RIGHTS, *supra* note 1, § 64 at 255 n.98.

court may instruct the jury on the nature of the privilege over the objection of the defendant,[290] was considered by the Supreme Court in *Lakeside v. Oregon.*[291] Defendant contended that the privilege against self-incrimination was violated when the "trial judge [drew] the jury's attention in any way to a defendant's failure to testify unless the defendant acquiesce[d]."[292] The Court disagreed, finding "strange indeed" the suggestion that the privilege could be violated by an instruction "that the jury must draw *no* adverse inferences of any kind from the defendant's exercise of his privilege not to testify."[293]

G. *Confessions*

1. Custodial Interrogation

The parameters of "custody" for *Miranda* purposes arose in *United States v. Lewis.*[294] Defendant mail carrier was the second endorsee on a state welfare check that was made payable to a person who lived on the route defendant served. The payee had reported the nonreceipt of the check, and suspicion quickly focused upon defendant. He was requested to report to the Postal Inspector's Office and did so voluntarily. Although defendant was given *Miranda* warnings, the court assumed an ineffective waiver of those rights for purposes of addressing the issue raised.[295] Nevertheless, on the authority of *Oregon v. Mathiason*[296] and *Beckwith v. United States,*[297] the Sixth Circuit Court of Appeals in *Lewis* concluded that defendant was not in custody since the meeting was mutually arranged and defendant appeared voluntarily. The fact that the officials had taken the precaution of

290. For earlier decisions, see *id.* at 255 nn.99 & 1.

291. 435 U.S. 333 (1978).

292. *Id.* at 338.

293. *Id.* at 339 (emphasis in original). A second argument, that giving the instruction over objection violated the sixth amendment right to counsel, was found to fall of its own weight once it was determined that the instruction itself was constitutionally permissible. "To hold otherwise would mean that the constitutional right to counsel would be implicated in almost every wholly permissible ruling of a trial judge, if it is made over the objection of the defendant's lawyer." *Id.* at 341.

294. 556 F.2d 446 (6th Cir. 1977).

295. *Id.* at 449. Later in the opinion, the court found full compliance with *Miranda.*

296. 429 U.S. 492 (1977).

297. 425 U.S. 341 (1976).

giving *Miranda* warnings did not convert a noncustodial situation into a custodial one.

In *Trail v. State*[298] the Tennessee Court of Criminal Appeals held that "an officer may, in the course of an investigation of an automobile accident, make inquiry of a person to determine if he had been operating a vehicle involved in a collision without giving the *Miranda* advice,"[299] and the response elicited will be admissible. Even though the officer had followed the accused to a hospital where the accused had received treatment and was asked by the officer if he had been driving the car, the inquiry was still the equivalent of an on-the-scene investigation[300] and not a custodial interrogation.

While this reasoning would have been sufficient to answer defendant's argument, the court chose to respond to a theory not advanced by defendant—that the requirement that a motorist involved in an accident identify himself violates the privilege against self-incrimination. The *Trail* court repudiated this theory with *California v. Byers*,[301] in which a similar California statute had been sustained. Defendant in *Trail*, however, had not questioned the validity of the statute. Moreover, even though information may be required by the state without warnings, the conclusion does not follow that the same information can be demanded during custodial interrogation without warnings. By comparison, the Supreme Court has held that warnings are not constitutionally required prior to obtaining a consent to search,[302] but at the same time the Court noted that a different result might be reached if the accused were in custody at the time the consent was sought.[303] By correctly finding that defendant in *Trail* was not in custody at the time of the inquiry, the court adequately disposed of the case; the comparison with *Byers* is both misleading and unnecessary.

298. 552 S.W.2d 757 (Tenn. Crim. App. 1976), *cert. denied, id.* (Tenn. 1977).

299. *Id.* at 758.

300. *See* State v. Morris, 224 Tenn. 437, 456 S.W.2d 840 (1970); Braziel v. State, 529 S.W.2d 501 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

301. 402 U.S. 424 (1971).

302. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

303. *Id.* at 240 n.29.

2. Waiver of Rights

Courts should be reluctant to find a waiver of the rights secured by *Miranda* if the circumstances accompanying the giving of the rights manifest a design to discourage the assertion of the rights.[304] In *Maglio v. Jago*[305] the accused was a sixteen-year-old runaway arrested on suspicion of murder. Upon receiving *Miranda* warnings and being asked if he wished to waive them, he responded, "Maybe I should have an attorney."[306] The officer replied that the accused could not have an attorney at that time, but would have to wait until the following day when one would be appointed by the court. Although the accused was again informed that he did not have to talk without a lawyer, questioning continued, and ultimately an oral confession was obtained. Forty-five minutes later, the prosecutor arrived to tape record a confession. The transcript of this exchange left little doubt that the accused did not fully appreciate his right to the assistance of appointed counsel prior to interrogation.[307] Moreover, the transcript indicated that the accused saw no reason not to give the second confession in light of the previous unrecorded one.[308]

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304. *See* TRIAL RIGHTS, *supra* note 1, § 87 at 339 n.43.

305. 580 F.2d 202 (6th Cir. 1978).

306. *Id.* at 203.

307. "Q. Okay, the next question is this. Do you understand further that if you want a lawyer but didn't feel that you could afford one, that we would have to appoint one for you before you talked to us. Do you understand that?"

"A. Before I did talk to you?"

"Q. Yea, do you understand that—duly appointed for you?"

"A. I understand it now. It's not the way it seemed before, but it doesn't matter."

Id. at 203 (quoting trial court record).

308. "Q. Okay, I have just explained what your rights are, and Dan I am going to ask you this, Dan at this time. Do you wish to go ahead and tell us what you know about this death of Walter Lee Weyrick and talk to us now without a lawyer present?"

"A. Am I just supposed to start talking or?"

"Q. No, do you want to talk to us without a lawyer being present?"

"A. Yes. You two are lawyers anyway."

"Q. Yes, but I'm, do you want a lawyer yourself before you talk to us? You have to say no, you can't just shake your head."

"A. Yea, I know, I forgot. It doesn't matter now."

"Q. In other words, you are willing at this point to go ahead and tell Mr. Rodgers and myself about what happened out there without

The United States Court of Appeals for the Sixth Circuit held that the confession was improperly admitted into evidence. The accused had initially expressed a desire to consult with an attorney, and *Miranda* indicated that the interrogation should cease at that point.[309] Instead, the officer responded in a fashion that would appear designed to discourage the use of the right. Moreover, after indicating that counsel could not be obtained until the following day, the officer resumed interrogation without permitting the accused even to consider the options available to him. The court concluded: "[A] suspect must not be forced to constantly and vigorously assert his or her right to counsel in order to counter a finding of waiver especially when the suspect is only sixteen years old."[310] Even if the rights of the accused were scrupulously honored in the second recorded statement, this confession was inadmissible as the fruit of the prior confession, and the statements of the accused provided a classic instance for application of the "cat out of the bag" theory.[311]

A similar question was raised in *Lee v. State*,[312] in which the accused was advised of his rights, waived them, and then asked to call his attorney who was out of his office at that time. The prosecution contended that the request to consult counsel was made after the confession was given, but the appellate court found no evidence in the record as to when the statements were made. Under an interpretation most favorable to the prosecution, the request to consult with counsel after the confession cast an aura of suspicion on the purported prior waiver and placed a heavy burden upon the prosecution to show that the waiver was voluntarily and knowingly given. In the absence of a clear showing of waiver, the Tennessee Court of Criminal Appeals concluded that the evidence was improperly admitted.

H. Preliminary Hearing

The statutory right to a preliminary hearing[313] has been the

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having your own lawyer here with you, is that correct?"

"A. Yea, it's the same story, it doesn't much matter."

Id. at 207 (quoting trial court record).

309. *Id.* at 205.

310. *Id.* at 206-07.

311. *See* United States v. Bayer, 331 U.S. 532, 540-41 (1947).

312. 560 S.W.2d 82 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

313. TENN. CODE ANN. § 40-1131 (Cum. Supp. 1978).

subject of constant legislative revision[314] and judicial scrutiny and was recently examined by the court of criminal appeals in *Nolan v. State*.[315] Under the 1971 version of the statute,[316] the right to a preliminary hearing ceased once an indictment had been returned, and in any event the hearing was conditioned upon the request of the accused.[317] The 1974 amendment[318] to the statute extended the right to a preliminary hearing to those arrested without a warrant who were already entitled to a hearing under a separate statute[319] and to those arrested with a warrant who had requested a preliminary hearing. In either event the indictment could be abated if no hearing was held, provided the motion for abatement was made within thirty days of the arrest.[320] The requirement that the accused request a preliminary hearing was eliminated by the 1976 amendment[321] to the statute. A party indicted without being arrested prior thereto, however, is not entitled to a preliminary hearing under the statute.[322]

In *Nolan* the accused was arrested with a warrant, was not granted a preliminary hearing prior to indictment, and was denied a motion to abate the indictment. The appellate court indicated that the statutory right to a preliminary hearing obviously had been denied,[323] but the question remained whether the denial could be dismissed as harmless error.[324] If the only legitimate purposes served by a preliminary hearing were to determine probable cause and to fix bail, then apparently the error always would be harmless once an indictment has been returned. Since, at least in theory, the indictment requires more rigorous proof of probability of guilt than that required to establish probable cause at a preliminary hearing, the failure to satisfy formally the lesser stan-

314. For a thorough analysis, see Comment, 43 TENN. L. REV. 635 (1976).

315. 568 S.W.2d 837 (Tenn. Crim. App.), *cert denied, id.* (Tenn. 1978).

316. 1971 Tenn. Pub. Acts ch. 245, § 2.

317. This aspect of the statute was criticized in *1971 Survey*, *supra* note 1, at 268.

318. 1974 Tenn. Pub. Acts ch. 701, § 1.

319. TENN. CODE ANN. § 40-604 (1975).

320. For criticism of the thirty-day limitation, see 43 TENN. L. REV. at 644-45.

321. 1976 Tenn. Pub. Acts ch. 760, § 1.

322. Waugh v. State, 564 S.W.2d 654 (Tenn. 1978); Vaughn v. State, 557 S.W.2d 64 (Tenn. 1977).

323. 568 S.W.2d at 839.

324. *Id.*

dard is analytically insignificant. As to the fixing of bail, the denial of bail (if such was the case) may or may not be harmful error, but if it is, the error is in the denial of bail, not in the denial of a preliminary hearing. The denial of pretrial release is a question of constitutional dimension[325] irrespective of whether there has been a preliminary hearing or indictment. If the question arises following conviction on appeal, the accused must show that the denial of pretrial release adversely affected the fairness and possibly the outcome of the trial.[326]

The legislature, however, intended more when it amended the statute to permit abatement of the indictment: "[T]he Legislature was aware that preliminary hearings were sometimes useful to a defendant for discovering of the State's case, including material for possible impeachment of witnesses at trial."[327] The appellate court saw its responsibility to review the trial record to determine whether "the denial of discovery of at least the prima facie portion of the State's case necessary to establish probable cause upon a preliminary hearing amounted to reversible error."[328] To this end, the court focused upon the cross-examination of prosecution witnesses and concluded, in effect, that defense counsel did a good job. "It does not affirmatively appear that the error affected the result upon the trial."[329]

In a vigorous dissent, Judge Daughtrey contended that the denial of a preliminary hearing violated due process[330] and was prejudicial per se, but even if this were not true, the case must nevertheless be remanded for a determination whether the error was harmless. While the reasoning of the majority on this issue is vulnerable to criticism, Judge Daughtrey's first argument appears to say too much and her second argument says too little.

The due process argument is as follows: While the right to a preliminary hearing is only a statutory right, the United States

325. U.S. CONST. amend. VIII; TENN. CONST. art. 1, §§ 15 & 16.

326. *Cf.* Justice Douglas, as Circuit Justice, in Bandy v. United States, 81 S. Ct. 197, 198, *vacated and remanded*, 364 U.S. 477 (1960) (denial of release on personal recognizance pending appeal from conviction could interfere with effective appeal by preventing defendant's investigation of case and consultation with counsel).

327. 568 S.W.2d at 839.

328. *Id.*

329. *Id.*

330. Apparently under the fourteenth amendment of the United States Constitution, although the basis of the due process right is never made explicit.

Supreme Court held in *Coleman v. Alabama*[331] that a statutorily created preliminary hearing is a "critical stage" for purposes of the right to counsel. From this, the conclusion is drawn,

> If we acknowledge the preliminary hearing to be a "critical stage" of the proceedings, I do not understand how the deprivation of one's right to a preliminary hearing can ever be viewed as "harmless error." Indeed, it seems clear to me that failure to provide the defendant with a hearing at a critical stage of the proceedings is a violation of due process so serious as to constitute prejudice per se.[332]

The conclusion, however, does not follow from the premise. First, the argument is circular because it concludes that an accused is entitled to a hearing at a "critical stage," when the hearing itself is the critical stage. Second, and more fundamentally, the labeling of an event as a "critical stage" in the criminal proceedings does not mean that the accused is therefore entitled to this "stage" as a matter of constitutional right. The Supreme Court has held, for example, that a postindictment lineup is a "critical stage" in the proceedings[333] but has never held that an accused therefore has a right to participate in a lineup to test the identification capability of witnesses. Many lower courts have held that no such right exists.[334]

The dissent cited seven decisions from other jurisdictions in support of the conclusion reached. In cases from California[335] and South Carolina[336] the courts treated the failure to hold a preliminary hearing as fatal to the jurisdiction of the trial court.[337] The California court cited no authority, statutory or otherwise, for its conclusion. The South Carolina court applied a statute[338] that was only applicable when a magistrate issued an arrest warrant

331. 399 U.S. 1 (1970).

332. 568 S.W.2d at 841 (Daughtrey, J., dissenting).

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

334. *See* TRIAL RIGHTS, *supra* note 1, § 52 at 195 n.48. The only case to the contrary appears to be Evans v. Superior Ct., 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974).

335. People v. Bomar, 73 Cal. App. 372, 238 P. 758 (1925).

336. State v. Wheeler, 259 S.C. 571, 193 S.E.2d 515 (1972).

337. In the dissenting opinion two other decisions to the opposite effect are noted. Cline v. Smith, 229 Ga. 190, 190 S.E.2d 51 (1972); Douglas v. Maxwell, 175 Ohio St. 317, 194 N.E.2d 576 (1963). *See* 568 S.W.2d at 841 n.3 (Daughtrey, J., dissenting).

338. S.C. CODE § 22-5-30 (1976).

for a crime committed outside the jurisdiction of the magistrate. The South Carolina court concluded that, "the court of general sessions [is] not to acquire jurisdiction until after such preliminary hearing."[339] The Tennessee statute contains no such language, and the prior interpretations of the statute in its varied forms indicate that the statute is not jurisdictional in nature. The dissent in *Nolan* suggests nothing to the contrary.

A second group of four cases cited by the dissent described the statutory right to a preliminary hearing as "fundamental,"[340] "substantial,"[341] or "valuable."[342] In at least three of the four cases, the judicial attitude may be attributed to the mandatory language employed in the statute.[343] Primary reliance is placed on *Manor v. State*,[344] in which the indictment and conviction of the accused were set aside by the Georgia Supreme Court for want of a preliminary hearing. The sweeping implication of *Manor* was substantially deflated in *Cannon v. Grimes*,[345] however, which emphasized the fact that *Manor* involved "a coerced waiver of a commitment hearing prior to indictment."[346] In *Cannon*, the Georgia Supreme Court held that no preliminary hearing is re-

339. *Id.*

340. State v. Howland, 153 Kan. 352, 363, 110 P.2d 801, 808 (1941); Davis v. State, 121 Neb. 399, 402, 237 N.W. 297, 298 (1931).

341. State v. Howland, 153 Kan. at 363, 110 P.2d at 808; State v. Trow, 49 S.D. 485, 487, 207 N.W. 466, 466 (1926).

342. Manor v. State, 221 Ga. 866, 868, 148 S.E.2d 305, 307 (1966).

343. GA. CODE ANN. § 27-210 (1978): "Every officer arresting under a warrant shall exercise reasonable diligence in bringing the person arrested before the person authorized to examine, commit or receive bail and in any event to present the person arrested before a committing officer within 72 hours after arrest . . . . " KAN. STAT. ANN. § 62-610 (1964) (current version at KAN. STAT. ANN. § 22-2901 (1974)): "Every person arrested by warrant for any offense . . . shall be brought before some magistrate for the same county . . . ;" S.D. COMPILED LAWS ANN. § 23-20-2 (1967) (repealed by 1978 S.D. Sess. Laws ch. 178, § 577 effective July 1, 1979): "No information shall be filed against any person for any offense until such person shall have had a preliminary examination . . . ." No statute is cited in the Nebraska case. The pertinent provisions would appear to be NEB. REV. STAT. § 29-412 (1975): "It shall be the duty of the officer making the arrest to take the person so arrested before the proper magistrate . . . ," and *id.* § 29-504: "When the complaint is for a felony, upon the accused being brought before the magistrate, he shall proceed as soon as may be, in the presence of the accused, to inquire into the complaint."

344. 221 Ga. 866, 148 S.E.2d 305 (1966).

345. 223 Ga. 35, 153 S.E.2d 445 (1967).

346. *Id.* at 35-36, 153 S.E.2d at 446.

quired when the accused is indicted before incarceration "or after arrest but while, in the present case, he is undergoing medical treatment in a hospital until after indictment."[347] Moreover, as the dissent acknowledges, in none of the four cases do the courts resort to constitutional invocations in reaching their decisions.

Finally, a case is cited[348] in which the Arizona Supreme Court concluded that "[d]ue process of law requires that an accused must be given a full hearing meeting the requirements of due process."[349] The court was applying a state constitutional provision, however, which stated unequivocally that "no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."[350]

If the *Nolan* dissent is correct "that the denial of a preliminary hearing violates due process and is prejudicial per se,"[351] then the Tennessee statute is unconstitutional in not guaranteeing a right to a preliminary hearing in *all* cases, including those in which indictment is obtained prior to arrest. None of the cases cited will support such a conclusion. The dissent, however, is not unwarranted in its dissatisfaction with the majority's conclusion that the error was harmless. As Judge Daughtrey observes, "[w]hat we cannot tell from the trial transcript is how much better prepared the defense attorney might have been had he been given the benefit of learning 'the precise details of the prosecution's case' in advance of trial."[352] Moreover, a remand for a consideration of the possibilty of prejudice would not appear adequate. One of the principal reasons the Supreme Court in *Gideon v. Wainwright*[353] made the right to counsel mandatory in all felony cases was the judicial frustration resulting from attempts to second-guess how the presence of counsel might have changed the outcome in any case. Admittedly, the potential for prejudice in the present case is not so great as that entailed in the complete absence of counsel at trial, but when the statutory mandate is clear and calls for no sophisticated exercise of judgment by the

347. *Id.* at 36, 153 S.E.2d at 446.
348. State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965).
349. *Id.* at 232, 403 P.2d at 543.
350. ARIZ. CONST. art. 2, § 30.
351. 568 S.W.2d at 840-41 (Daughtrey, J., dissenting).
352. *Id.* at 843 (Daughtrey, J., dissenting).
353. 372 U.S. 335 (1963).

trial court, judicial economy would suggest automatic reversal when, as in the present case, an abatement of the indictment is sought prior to trial and is denied. Such a solution is not an attractive one in a case such as *Nolan*, which concerned a homicide conviction in which the appellate court failed to perceive any likelihood of prejudice. By addressing the issue of harmless error, however, the court discourages strict adherence to the statute by trial courts and assumes the burden of evaluating the record in each case. As the dissent in *Nolan* pointed out, the conclusion reached will frequently be highly speculative.

I. Indictment by Grand Jury

An indictment may be held constitutionally void if racial discrimination occurred in the selection of the grand jury.[354] The presence of some blacks on grand juries does not foreclose a finding of discrimination, nor does an absence of any blacks compel such a finding.[355] The critical question is whether invidious discrimination was present in the creation of the pool from which grand jurors were selected.[356] Nevertheless, a prima facie case of discrimination may be established through the use of statistical patterns.[357] The burden then shifts to the state to rebut this showing.[358] In *Mitchell v. Rose*[359] the United States Court of Appeals for the Sixth Circuit found the statistics regarding the participation of blacks on grand juries too fragmentary to prove or disprove

354. *See* Strauder v. West Virginia, 100 U.S. 303 (1879).

355. Mitchell v. Rose, 570 F.2d 129, 133 (6th Cir. 1978).

356. *See* Akins v. Texas, 325 U.S. 398 (1945).

357. *See* TRIAL RIGHTS, *supra* note 1, § 119.

358. Once the burden has shifted to the state, it may rebut the prima facie case in several ways. The state may impose any reasonable qualifications it wishes on its grand jurors; for instance, it may require that they be literate, that they not be convicted felons, or that they be registered voters. The neutral imposition of any of these requirements may *possibly* result in the exclusion of more members of one race than another . . . . The state must present some concrete evidence of the effect of its neutral requirements, not merely present to the court unfounded suppositions about the literacy, intelligence and good character of its black citizens. Finally, it should be noted that self-serving protestations from the officials involved that racial considerations played no part in the selection are not enough to rebut a prima facie case.

570 F.2d at 134 (footnote omitted) (emphasis in original).

359. 570 F.2d 129 (6th Cir. 1978).

discrimination but held that petitioner was entitled to relief upon the sufficiently clear showing of discrimination in the selection of grand jury foremen. Not only was there no evidence that a black had ever served as foreman, but a trial judge conceded that he "never really gave any thought to appointing a black foreman."[360] The court held that this was evidence analagous to the concession in *Norris v. Alabama*[361] that the jury commissioners had "never discussed" the inclusion of blacks in the venire, which led to a judicial finding of discrimination.[362] The court was unimpressed by the state's contention that petitioner was in any event unprejudiced because the foreman did not vote on the indictment. Just as no need existed to show prejudice when the grand jury was improperly selected,[363] the court saw no reason to reach a different result when the foreman was improperly selected. The court noted that by statute the foreman had "equal power and authority in all matters coming before the grand jury with the other members thereof,"[364] and that his or her duties included "assisting the district attorney in ferreting out crime,"[365] subpoenaing witnesses, administering oaths,[366] and endorsing indictments,[367] all of which afforded opportunities for the influence of prejudice.[368] Moreover, acknowledging that any foreman, however selected, could be motivated by prejudice, the court observed that the integrity of the judicial process is a separate interest served by the absence of discrimination.[369]

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360. *Id.* at 131.

361. 294 U.S. 587 (1935).

362. "Officials who select grand jurors have a duty to learn who is qualified to fill the position of grand juror, and to consider qualified individuals from all segments of society. Failure to perform that duty, resulting in the exclusion of a qualified segment of society, is unconstitutional discrimination." 570 F.2d 135.

363. Hill v. Texas, 316 U.S. 400 (1942).

364. TENN. CODE ANN. § 40-1506 (1975).

365. *Id.* § 40-1510.

366. *Id.* §§ 40-1510, -1622.

367. *Id.* § 40-1706.

368. It seems clear that the potential for prejudice, given the position of authority and influence the foreman or forewoman holds, is considerable, and in such cases where the fact of prejudice may be impossible to prove, yet its effect could be so insidious and far-reaching, the courts have refused to require proof of prejudice before granting relief.

570 F.2d at 136.

369. *See* Peters v. Kiff, 407 U.S. 493, 498 (1972); Ballard v. United States,

J. Trial by Jury

1. Applicabilty of Right

The circumstances under which the right to trial by jury applies were addressed in *United States v. Stewart*.[370] Defendants had been convicted of what the court characterized as simple battery,[371] an offense carrying a maximum punishment of a $500 fine and six months imprisonment. The Supreme Court had held in *Baldwin v. New York*[372] that an offense calling for punishment in excess of six months was serious, and therefore the right to trial by jury was applicable. In *Stewart* the United States Court of Appeals for the Sixth Circuit held that *Baldwin* did not require a finding that an offense carrying a maximum penalty of six months was serious. Indeed, Congress had classified such offenses as petty.[373] While the court viewed the potential penalty as the "most relevant" consideration, it was not the exclusive one. The court noted that the simple battery was characterized by Blackstone as "the first and lowest stage" of violence[374] and concluded that "the offense is not in common understanding a serious one"[375] that mandated trial by jury.

2. Number of Jurors

In 1970, the Supreme Court held in *Williams v. Florida*[376] that the sixth amendment right to trial by jury could be satisfied with a jury composed of less than twelve members, in that instance six.[377] In *Ballew v. Georgia*[378] the Court held that the line

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329 U.S. 187, 195 (1946) ("The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.").

370. 568 F.2d 501 (6th Cir. 1978).

371. 18 U.S.C. § 113(d) (1976).

372. 399 U.S. 66 (1970).

373. 18 U.S.C. § 1 (1976).

374. It encompasses the kind of conduct which is common enough in daily life, although universally disapproved. Society's knowledge of a person's conviction of simple assault and battery carries with it perhaps the inference that the defendant was quarrelsome or ill-tempered, but without more does not usually attribute to him any more serious or lasting opprobrium.

568 F.2d at 505.

375. *Id.*

376. 399 U.S. 78 (1970).

377. The Court took note that under the procedure challenged the require-

was drawn at six and that a conviction by a unanimous verdict of a five-member jury deprived the accused of the right to trial by jury. Taking advantage of the reservation in *Williams* that "the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community,"[379] the principal opinion, signed by only two Justices,[380] relied upon "recent empirical data"[381] that raised "substantial doubt about the reliability and appropriate representation of panels smaller than six."[382]

3. Juror Bias

A potential juror may be disqualified to serve if his or her relationship to the prosecuting attorney would tend to bias the juror's viewpoint.[383] In *Clariday v. State*[384] defense counsel discovered, subsequent to conviction, that the jury foreman had been a part-time law student enrolled in a class taught by the district attorney general for the county in which the trial occurred. The Tennessee Court of Criminal Appeals found that the voir dire for defendant had been perfunctory, and that the particular juror was not shown to have answered any questions falsely or withheld any requested information. Nevertheless, defendant contended that the undisclosed teacher-student relationship was a per se disqualification under the authority of *Toombs v. State*,[385] in which the first cousin of the prosecuting witness' wife was found

ment of unanimous verdict had been retained. *Cf.* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972) (both sustaining less than unanimous verdicts by twelve-member juries).

378. 435 U.S. 223 (1978).

379. 399 U.S. at 100.

380. Justice Blackmun was joined by Justice Stevens, 435 U.S. at 224. Justices Brennan, Stewart, and Marshall, however, concurred in the opinion but opposed the granting of a new trial, because they considered the obscenity statute under which the accused was tried unconstitutionally overbroad. *Id.* at 246.

381. *Id.* at 232.

382. *Id.* at 239. Chief Justice Burger and Justices White, Powell, and Rehnquist concurred in the judgment.

383. *See* TRIAL RIGHTS, *supra* note 1, § 116.

384. 552 S.W.2d 759 (Tenn. Crim. App. 1976), *cert. denied, id.* (Tenn. 1977).

385. 197 Tenn. 229, 270 S.W.2d 649 (1954).

under an obligation to divulge this fact when asked if he knew any reason why he could not give the parties a fair trial. There, however, the court had found a "very close kinship . . . together with the friendly relations and associations existing between the two families."[386] The *Clariday* court found the circumstances clearly distinguishable and declined to extend *Toombs* to these facts.[387]

4. Deliberations

In the course of deliberations on a second degree murder charge, the jury in *Leach v. State*[388] requested and received supplemental instructions regarding defendant's eligibility for a parole should they convict for a lesser included offense and impose a three year sentence. Thereafter, they returned a verdict of guilty of second degree murder with a sentence of from ten to twenty years in the penitentiary. Defendant contended that once the jury undertook consideration of the lesser included offense, it could not return to a deliberation on the greater offense without violating the right to protection against double jeopardy.

Avoiding what was undoubtedly a bogus double jeopardy claim,[389] the Tennessee Court of Criminal Appeals turned instead to *Farris v. State*,[390] which had held a statute[391] mandating instructions on parole eligibility unconstitutional.[392] Interpreting that decision as mandating reversal when "the charge on the parole statutes brought about the verdict,"[393] the court had no difficulty in surmising that such charge was a factor in the verdict in *Leach*.

Moreover, the challenged instruction was not included in the trial court's original instruction. While acknowledging that subsequent instructions are not improper, the court suggested that "the better practice [would be] to admonish the jury not to place

386. *Id.* at 233, 270 S.W.2d at 651.

387. *See also* Sears v. Lewis, 49 Tenn. App. 631, 357 S.W.2d 839 (1961), *cert. denied, id.* (Tenn. 1962).

388. 552 S.W.2d 407 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

389. The fact that jurors repeatedly consider different charges against an accused in whatever order they choose is obviously their prerogative. *Leach* differs only in that counsel had gotten a glimpse of what was going on in the jury room.

390. 535 S.W.2d 608 (Tenn. 1976).

391. TENN. CODE ANN. § 40-2707 (1975).

392. *See 1976-1977 Survey, supra* note 1, at 49-50.

393. 552 S.W.2d at 408.

undue emphasis on the supplemental instructions and to consider them in conjunction with the entire charge."[394] The failure to so admonish could be, and in this case was, reversible error.[395]

The *Farris* issue also influenced a reversal by the Tennessee Supreme Court in *Sampson v. State*[396] in which the length of the sentence was indirectly argued through the contention that if defendant were found not guilty by reason of insanity he would be "back on the streets."[397]

A novel issue relating to jury deliberations arose in *Rushing v. State*,[398] in which, after deliberations in the accused's rape trial had begun, the trial judge permitted the jurors to separate and return to their homes for the night. Although the parties had agreed at the commencement of the trial that the jury would be permitted to separate, the accused contended on appeal that the agreement was inapplicable once deliberations had begun. The controlling statute provided that upon agreement of the parties, the court "may permit jurors to separate at times when they are not duly engaged in the trial or deliberations of the case."[399] In an explanation worthy of Lewis Carroll, the court held that the jurors were not engaged in deliberations once the trial judge permitted them to separate, and deliberations only resumed when the jury reconvened.[400] Under this reading of the statute, circumstances are difficult to imagine in which the trial judge would have committed error in permitting the jurors to go home if the parties have given their prior consent. The procedure could only be attacked if any of the jurors, having been so released, contin-

394. *Id.* at 409.

395. The court's conclusion was buttressed by a post-trial interview with one of the jurors.

396. 553 S.W.2d 345 (Tenn. 1977).

397. *Id.* at 350. Since the instruction on insanity was found improper for independent reasons, *see* text accompanying notes 128-29 *supra*, the *Farris* aspect may be of little significance.

398. 565 S.W.2d 893 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

399. TENN. CODE ANN. § 40-2528 (1975) (current version in Cum. Supp. 1978).

400. When the trial judge adjourns court and allows the jury to separate, deliberation within the meaning of T.C.A. § 40-2528 ceases, and does not resume until the jurors are reassembled in the proper setting and context of the trial process. We, therefore, hold that the jury was not allowed to separate while deliberating . . . .

565 S.W.2d at 895-96.

ued their deliberations outside the institutional setting. In *Rushing* the trial judge had determined the following morning that none of the jurors had been approached by anyone. The court of criminal appeals held that at a minimum the accused would have to show some prejudice. Evidence indicated that some of the jurors had conversed as they left the courtroom, but the appellate court was satisfied with the absence of any evidence that the case had been discussed.[401]

As a corollary of the principal contention, the accused argued that by permitting the jurors to go home the court had deprived him of the prospect of having a hung jury. The defense suggested that "noises from the jury room" indicated that the jurors were unable to agree, and that ultimate agreement was only possible because of the interruption and the extended rest period.[402] Without dismissing the argument as unmeritorious in theory, the appellate court found the prospect of a hung jury unsupported by the record since the jury foreman had requested that they be allowed to resume their deliberations on the following day.[403]

K. Fair Trial

1. Presumption of Innocence

In *Taylor v. Kentucky*[404] the accused was tried for robbery, and the trial court, while instructing the jury on the prosecution's burden of proving guilt beyond a reasonable doubt, refused instructions requested by defendant on the presumption of innocence and the indictment's lack of evidentiary value. The Supreme Court noted that while "the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen may well draw significant additional guidance from an instruction on the presumption of innocence."[405] While conceding that an instruction including the phrase "presumption of innocence" was not mandated by the due process clause of the

401. A claim that one juror had spoken to the prosecutor was not supported by the record. *Id.* at 896.

402. *Id. Cf.* Hembree v. State, 546 S.W.2d 235 (Tenn. Crim. App. 1976) (a reversal was obtained, probably because of jury fatigue) (discussed in *1976-1977 Survey*, *supra* note 1, at 44).

403. 565 S.W.2d at 896.

404. 436 U.S. 478 (1978).

405. *Id.* at 484.

fourteenth amendment, it was "one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial."[406] The Court noted that the relatively curt instructions placed little emphasis on the requirement of proof beyond a reasonable doubt and did not address the duty to consider only evidence presented in the course of the trial. The significance of these omissions was compounded by the prosecutor's arguments to the jury, which suggested guilt by association and alluded to the arrest and indictment of defendant as evidence of his guilt. Without extending its holding beyond the facts of the case, the Court concluded that the failure to give the requested instruction on the presumption of innocence denied defendant a fair trial as guaranteed by the due process clause.[407]

2. Discovery

While a request to order the prosecutrix in a sexual assault case to undergo a psychiatric examination may not receive judicial sympathy,[408] different questions were raised in *State v. Brown*,[409] in which the accused sought discovery of the medical records of the prosecutrix while she was a patient in a state mental hospital. The prosecution contended that the communications between psychiatrist and patient were privileged by statute,[410] and none of the exceptions to the privilege were applicable in this case. The court noted, however, that such communications were not privileged when sought in a criminal case in which "the mental condition of the patient is an issue."[411] The Tennessee Supreme Court concluded that, "[c]learly, the mental condition of the prosecuting victim was an issue,"[412] which indicated that the supreme court apparently thought the case against the accused was weak, and the credibility of the victim was material. Several facts from the record were cited as significant: (1) the conviction rested solely on the testimony of the victim and her twelve-year-

406. *Id.* at 486.

407. By implication the Court saw no need for a separate instruction respecting the lack of evidentiary value in the indictment.

408. *See* text accompanying notes 18-24 *supra*.

409. 552 S.W.2d 383 (Tenn. 1977).

410. TENN. CODE ANN. § 24-112 (Cum. Supp. 1978).

411. 552 S.W.2d at 385 (quoting TENN. CODE ANN. § 24-112 (Cum. Supp. 1978)).

412. *Id.* at 385.

old grandson; (2) although the victim claimed to have bitten defendant on the hand "real hard," no evidence of this bite was observed at the time of the arrest; (3) both witnesses testified that defendant had been shot in his face, among other places, repeatedly with a BB gun, but no evidence of this was observed at the time of the arrest; (4) defendant put forward a strong alibi defense; and (5) the jury had been "hung" prior to receiving a supplemental charge from the court.

Having determined that the communications were therefore not privileged, the court turned to the question whether the communications were discoverable. A state statute permits discovery by the defendant of documents "obtained from others which are in possession of, or under the control of the attorney for the state."[413] While the documents in question do not appear to be of the sort contemplated by the statute, the court achieved the essential logical leap by holding that "the District Attorney General represents 'the State' and [the hospital] is a 'State' mental health facility."[414] The court concluded that the records should be given an *in camera* examination by the trial court and divulged to defendant if they are found to have probative value for the preparation of the defense.

L. Guilty Pleas

1. Standard for Acceptance

In *State v. Mackey*[415] the Supreme Court of Tennessee, in the exercise of its supervisory power over the state courts, articulated standards for the acceptance of guilty pleas, which it acknowledged went beyond the constitutional minimum mandated by the United States Supreme Court in *Boykin v. Alabama.*[416] First, prior to the acceptance of a plea of guilty, the judge must address the defendant personally in open court and inform him of, as well as determine that he understands, the following: (1) the nature of the charge, the minimum and maximum punishment possible, and the applicability of any punishment enhancement provisions; (2) the right to be represented by counsel, appointed or retained, at every stage of the proceedings; (3) the right to plead

413. TENN. CODE ANN. § 40-2044 (1975).
414. 552 S.W.2d at 385.
415. 553 S.W.2d 337 (Tenn. 1977).
416. 395 U.S. 238 (1969).

not guilty, to be tried by jury, and at the trial to have the assistance of counsel, the right of confrontation, and the right not to testify; (4) in the event the defendant pleads guilty, no further trial will result, other than proceedings for the determination of sentence; (5) in the event the defendant pleads guilty, he may be asked questions regarding the offense by the judge or prosecutor, and, if answers are given under oath in the presence of counsel, they may be thereafter used in prosecution for perjury, and further, any prior convictions may be considered in the determination of sentence.

Second, "[t]he court shall not accept a plea of guilty without first, by addressing the defendant in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement."[417] Additionally, the court is to determine whether the willingness of the defendant to plead guilty is the result of prior discussions with the prosecution.

Third, the court must determine that a factual basis underlies the plea.[418]

Fourth, a verbatim record of the proceedings is to be made including: the judge's admonitions to the defendant; the inquiry on the issue of voluntariness, including any plea agreement; the defendant's understanding of the consequences of the plea; and the inquiry as to the accuracy of the plea.

2. Plea Bargaining

In a series of decisions decided under either the double jeopardy clause or closely related notions of due process, the Supreme Court has affixed constitutional limitations to the imposition of punishment where an earlier determination has been aborted. In *North Carolina v. Pearce*[419] the Court held that an accused cannot receive a more severe punishment following conviction on retrial than he received following conviction at the previous trial, unless the record cited new evidence that would justify harsher treatment by the sentencing court.[420] The same principle led to the

417. 553 S.W.2d at 341.

418. *See* Farmer v. State, 570 S.W.2d 359 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

419. 395 U.S. 711 (1969).

420. "[V]indictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.* at 725.

conclusion in *Blackledge v. Perry*[421] that an accused could not be indicted on a felony charge following a reversal of a misdemeanor conviction based on the same facts.

In *Bordenkircher v. Hayes*[422] the Court was called upon to determine whether this constitutional inhibition of prosecutorial vindictiveness was equally applicable to events occurring in the course of plea negotiations. The accused was indicted for uttering a forged instrument, an offense punishable by from two to ten years in prison. In the course of plea bargaining the prosecution offered to recommend a sentence of five years if the accused would plead guilty to the indictment. If, however, he refused to plead guilty, then the prosecution would seek a further indictment under the habitual criminal act, which, upon conviction, would result in a mandatory life sentence. The accused refused to plead guilty, was indicted under the habitual criminal statute, and was found guilty on both counts.

In sustaining the denial of the writ of habeas corpus by the federal district court,[423] the Supreme Court noted initially that even though the habitual criminal charge had not been obtained until after the negotiations, the intention of the prosecutor was at all times clear. Analytically, the Court saw no difference between this case and one in which the recidivist charge had been obtained at the outset and the prosecution then offered to drop it in exchange for a plea of guilty. If no suggestion of a recidivist charge had been made during the course of the negotiations, and when the accused had refused to plead guilty the prosecution without notice had sought and had obtained the additional count, the Court suggested it might view the case differently.

In *Bordenkircher,* however, the matter complained of was no more than the inevitable give and take of plea bargaining: "[B]y tolerating and encouraging the negotiations of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty."[424] Whether a prosecutor has acted vindictively, or even what that

421. 417 U.S. 21 (1974).

422. 434 U.S. 357 (1978).

423. The United States Court of Appeals for the Sixth Circuit had reversed. *See* Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

424. 434 U.S. at 364.

term means in a constitutional sense is difficult to determine. *Pearce* and *Blackledge* avoided that question by assuming vindictiveness until shown otherwise.

To assume that the prosecutor was not vindictive in *Bordenkircher* may be unconvincing. *Pearce* is distinguishable in that the feared partiality is on the part of the judiciary rather than on the part of a party to the case. *Blackledge,* however, is not so distinguishable; there, the ante was raised after conviction and successful appeal, here, after a refusal to plead guilty. The ultimate explanation for the *Bordenkircher* decision may be in the Court's recognition that, except for a blatant case of vindictiveness, the phenomenon is uncontrollable. Had the Court held the added count invalid in this case, in the future prosecutors would simply gang all conceivable charges against the accused prior to initiating negotiations. Proof of vindictiveness would be virtually impossible so long as the prosecution offered only reductions in the charges or recommended sentences. Such a result would be antithetical to the preference for candor and "could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged."[425]

M. Punishment

1. Determination of Sentence

The issue of the admissibility into evidence of prior convictions of the accused following a plea of guilty was addressed in *State v. Mackey.*[426] In holding such evidence properly admitted, the Tennessee Supreme Court went beyond the facts of the case before it and established guidelines for hearings to determine sentencing following a plea of guilty. Any matter relevant to sentencing may be presented by the defendant or by the prosecution, including, but not limited to (1) matters of fact concerning the offense; (2) the prior criminal record of the defendant, as well as evidence of reputation and character; (3) the educational background of the defendant; (4) the employment background of the defendant, including military record and present employment status and capabilities; (5) the social history of the defendant, including family relationships, interests and religion; (6) the

425. *Id.* at 365.

426. 553 S.W.2d 337 (Tenn. 1977).

medical history of the defendant, with any psychological or psychiatric reports available to both sides; and (7) reports from any social agencies with which the defendant has been involved.[427]

2. Consecutive Sentences

While trial judges have the statutory power to impose consecutive sentences,[428] in *Gray v. State*[429] the Tennessee Supreme Court held that the record should include some reasons for such a judgment.[430] In *Wiley v. State*,[431] however, the court of criminal appeals held that this rule would not apply to sentences imposed prior to the *Gray* decision, particularly in light of the fact that the record clearly showed that defendant was a dangerous offender — one of the categories that would warrant the imposition of consecutive sentences as defined in *Gray*. Consecutive sentences for forgery and uttering a forged instrument that arose in a single transaction[432] were approved by the court of criminal appeals in *Anderson v. State*[433] in light of the fact that defendant was both a persistent and a multiple offender in the terminology of *Gray*.[434]

Whether *Gray*, in delineating five categories of offenders eligible for consecutive sentences, intended its list to be exclusive arose as an issue in *Bethany v. State*.[435] The accused, a scoutmaster, was convicted on six charges of crime against nature perpetrated against young boys in his charge. While recognizing that the facts of the case did not fall squarely within any of the *Gray* categories, the Tennessee Court of Criminal Appeals concluded that a precise definition of every possible factual situation had not been intended. The dissenting judge took the language

427. *Id.* at 344.

428. TENN. CODE ANN. § 40-2711 (1975).

429. 538 S.W.2d 391 (Tenn. 1976).

430. *See 1976-1977 Survey, supra* note 1, at 50.

431. 552 S.W.2d 410 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

432. *See* text accompanying notes 67-75 *supra*.

433. 553 S.W.2d 85 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

434. Judge Galbreath, dissenting, found the result inconsistent with the holding in Patmore v. State, 152 Tenn. 281, 277 S.W. 892 (1925). *See* 553 S.W.2d at 90 (Galbreath, J., dissenting). In a concurring opinion Judge Daughtrey submitted that *Patmore* had been overruled sub silentio by State v. Black, 524 S.W.2d 913 (Tenn. 1975), and Duhac v. State, 505 S.W.2d 237 (Tenn. 1973). *See* 553 S.W.2d at 89 (Daughtrey, J., concurring).

435. 565 S.W.2d 900 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

used in *Gray* at face value: "Types of offenders for which consecutive sentencing should be reserved may be classified as follows."[436] As the present case did not fit within any of the specifications, the dissent concluded that consecutive sentencing was impermissible.

A sentence may only run consecutively to a sentence previously imposed. In *Thompson v. State*,[437] following the entry of a guilty plea, the trial court imposed a sentence to run consecutively to any sentence the accused might thereafter receive in connection with other charges pending in another county at the time. The court of criminal appeals held that the language used in the statute authorizing cumulative sentencing[438] left no doubt that "a sentence may only be run consecutively to a previously imposed sentence."[439]

3. Enhancement Statutes

A habitual criminal is defined by statute[440] as any person convicted three times of a felony within the state with at least two of the felonies being among a designated list or convicted three times of a felony elsewhere with at least two of the felonies such that they would have been among the same list had they occurred in Tennessee. If an accused charged with a felony is found guilty as a habitual criminal, the punishment for the offense is enhanced to life imprisonment without the possibility of parole.[441]

Prior to *Evans v. State*[442] life imprisonment could be imposed by operation of the statutes upon conviction of the third felony as long as other conditions were satisfied.[443] As recently as 1975 the Supreme Court of Tennessee declared in *Pearson v. State*:[444] "The third conviction of one of the prescribed felonies is the triggering mechanism which brings the habitual criminal statute

436. 538 S.W.2d at 393.

437. 565 S.W.2d 889 (Tenn. Crim. App. 1977).

438. TENN. CODE ANN. § 40-2711 (1975).

439. 565 S.W.2d at 890.

440. TENN. CODE ANN. § 40-2801 (1975).

441. *Id.* § 40-2806.

442. 571 S.W.2d 283 (Tenn. 1978).

443. In addition to meeting the felony specification requirement, the three offenses must have been committed on three separate occasions. *See* Harrison v. State, 217 Tenn. 31, 394 S.W.2d 713 (1965).

444. 521 S.W.2d 225 (Tenn. 1975).

into play."[445] In *Evans* this passage was dismissed as "misleading dicta,"[446] and the supreme court declared to the contrary that punishment as a habitual criminal can only follow a *fourth* conviction. However surprising this result may appear, the construction of the statutes given by the court is analytically unassailable. The punishment enhancement section[447] is by its terms operative "when an [*sic*] habitual criminal . . . shall commit" one of the enumerated felonies. Thus, "to bring the defendant within the ambit of the statute, the State must show that he was an [*sic*] habitual criminal *at the time he committed the principal offense.*"[448] The state may not, therefore, use the offense of the instant prosecution as an element of the habitual criminal charge.

Defendant in *Evans* had previously been convicted of five felonies: two charges of felonious escape and one charge of crime against nature all occurring in Tennessee; one charge of larceny from the person, and one charge of attempted breaking and entering, both taking place in Michigan. Since the instant charge of burglary was excluded from consideration, two of the prior felonies must have fallen within the specified list to sustain the habitual criminal charge.[449] Only two of defendant's prior felonies, crime against nature and larceny from the person, were even arguably within the specification, and neither of those were free of difficulty. The statutory list of infamous crimes[450] that are incorporated into the habitual criminal statute included buggery and sodomy, which at common law did not include any form of oral-genital sex. The crime against nature statute,[451] however, had been interpreted to include such acts.[452] Therefore, the court

445. *Id.* at 227.

446. 571 S.W.2d at 285. In a concurring opinion Chief Justice Henry labeled the passage "erroneous dictum." *Id.* at 288 (Henry, C.J., concurring). He would appear to be the more accurate as to both words.

447. TENN. CODE ANN. § 40-2806 (1975).

448. 571 S.W.2d at 285 (emphasis in original).

449. A literal reading of the statute would require *both* specified felonies to have been committed either in Tennessee or in Michigan. While such an interpretation would thwart the purpose of the statute, the fourth felony requirement may be condemned for the same reason, *see* 571 S.W.2d at 289-90 (Henry, C.J., dissenting), and the plain meaning is no less obvious in this instance.

450. TENN. CODE ANN. § 40-2712 (1975).

451. *Id.* § 39-707 (1975).

452. *See* Rose v. Locke, 423 U.S. 48 (1975); Young v. State, 531 S.W.2d 560 (Tenn. 1975).

concluded, a crime against nature could qualify as a specified felony only if the act upon which the conviction was based would have constituted buggery or sodomy at common law.[453] Less troublesome was the conviction for larceny from the person. The incorporated list of infamous crimes referred simply to larceny, but the court concluded that the term was intended to encompass all statutory forms of larceny. The court noted that the statute defining habitual criminality excluded petit larceny from the specified offenses, a proviso that would have been unnecessary if larceny in the incorporated statute had not referred to all forms of the offense. The case was remanded for a new trial on the habitual criminal count, in respect to which the critical inquiry would concern the factual basis for the crime against nature conviction.

Since the habitual criminal statute merely enhances the punishment following conviction of a subsequent felony, Tennessee courts have followed the rule that the accused is not being placed twice in jeopardy for the prior offenses.[454] Apparently following the same principle, the court of criminal appeals in *Glasscock v. State*[455] held that following a conviction for grand larceny the accused could be punished as a habitual criminal, even though the same three prior felony convictions had been used to support a habitual criminal charge in a previous trial for a different felony, and even though the first jury had not found the accused to be a habitual criminal. Conversely, an accused could be sentenced under the habitual criminal statute any number of times, using any or all of the same three felonies to prove the count, as long as each prosecution was brought for a separate subsequently committed felony.[456] If, however, an accused were convicted of a felony and not sentenced under the habitual criminal statute either because no such charge was brought or the jury declined to find the charge proven, and, if on appeal the conviction were reversed, the accused probably could not be charged under the habitual criminal statute on retrial. This result would appear to follow from the United States Supreme Court's holding

453. Chief Justice Henry, dissenting on this point, contended that "crime against nature" and "sodomy" were equivalent terms. 521 S.W.2d at 290 (Henry, C.J., dissenting).

454. *See* Pearson v. State, 521 S.W.2d 225 (Tenn. 1975).

455. 570 S.W.2d 354 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

456. *See, e.g.*, Pearson v. State, 521 S.W.2d 225 (Tenn. 1975).

in *North Carolina v. Pearce*,[457] which precluded greater punishment upon retrial, absent events between the two trials that supported an increase in the sentence. Only in the unlikely event that the accused had been convicted of a different felony between the original trial and the trial on remand would a habitual criminal charge properly be considered at the retrial.

Two constitutional challenges directed at the habitual criminal statute were rejected by the court of criminal appeals in *Marsh v. State*.[458] First, the accused contended that the statute violated the eighth amendment protection against cruel and unusual punishment because it did not provide for the consideration of mitigating or aggravating circumstances. While such considerations have been held essential insofar as the imposition of capital punishment is concerned,[459] the court saw no compelling constitutional reason to limit similarly the imposition of a life sentence that could "hardly be likened to the irretrievable infliction of death."[460] Second, the accused contended that the equal protection clause of the fourteenth amendment was violated by the arbitrary authority of the prosecutor to select those who would be charged under the statute. While conceding that many defendants eligible for prosecution under the statute were not so charged, the court held that the use of such discretion was constitutionally irrelevant.[461]

Under Tennessee statute[462] the use of a firearm in the perpetration of a felony is itself designated a felony. In *State v. Hudson*,[463] however, the Tennessee Supreme Court held that the provision did not create a new felony but rather supplemented other felony statutes by enhancing punishment when a firearm was employed. The court conceded that the statute defined a felony separate and distinct from the underlying felony committed by means of the firearm[464] but nevertheless concluded that to

457. 395 U.S. 711 (1969).

458. 561 S.W.2d 767 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

459. *See* POST-TRIAL RIGHTS, *supra* note 1, § 5.

460. 561 S.W.2d at 770-71.

461. *See* Oyler v. Boles, 368 U.S. 448 (1962). The same conclusion was reached in McPherson v. State, 562 S.W.2d 210 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

462. TENN. CODE ANN. § 39-4914 (1975).

463. 562 S.W.2d 416 (Tenn. 1978).

464. If the legislature had intended to enact a punishment enhancement

sustain separate convictions would violate the protection against double jeopardy.[465]

While the bringing of multiple charges may result in double jeopardy in some cases, the problem is not inherent in the statute. If, for example, the accused were to use a firearm in the perpetration of rape, no double jeopardy problem would arise in convictions for both rape and use of a firearm in committing a felony. Under the *Blockburger* same-evidence test,[466] which the court embraces,[467] "two offenses are distinct and separate if the statutory definition of each requires proof of a fact which the other does not require."[468] In this instance, rape would require proof of carnal knowledge, which is not required for the firearm offense, and the firearm charge would require proof of the use of a firearm, which is not necessary for a conviction of rape. This analysis is equally persuasive in the present case, in which the two underlying felonies were armed robbery and assault with intent to commit murder. The concession made by the state that the use of the firearm charge merged into armed robbery was unnecessary. Armed robbery requires proof of larceny, which is not required for the other charge, and the firearms charge requires proof of the use of a firearm, which is not required for armed robbery since armed robbery can be committed by the use of any number of weapons other than a firearm.[469] The same analysis applies to the charge

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statute it could easily have done so. Compare WIS. STAT. ANN. § 946.62 (West 1975):

> *Concealing Identity.* Whoever commits a crime while his usual appearance has been concealed, disguised or altered, with intent to make it less likely that he will be identified with the crime, may in addition to the maximum punishment fixed for such crime, in case of conviction for a misdemeanor be imprisoned not to exceed one year in county jail, and in case of conviction for a felony be imprisoned not to exceed 5 years.

465. The court cited Brown v. Ohio, 432 U.S. 161 (1977), in which the Supreme Court acquiesced in a state court determination that joy riding was a lesser included offense of auto theft.

466. Blockburger v. United States, 284 U.S. 299 (1932).

467. 562 S.W.2d at 418; *id.* at 421 (Henry, C.J., concurring).

468. *Id.* at 418.

469. *Id.* The court conceded this point but only after it had concluded that to avoid the double jeopardy problem, the firearms provision must be construed as a punishment enhancement statute. Even with this construction it concluded that the statute could not be applied to a charge of robbery by use of a deadly weapon because even though " 'deadly weapon' obviously may include more

of assault with intent to commit murder. For purposes of double jeopardy under the *Blockburger* test, the question is not whether the same evidence (*e.g.*, use of a firearm) was sufficient for both offenses, but whether the definitions of the offenses required proof of the same fact.[470]

A similar but less troublesome question was presented to the Tenneseee Supreme Court in *Key v. State*.[471] The Tennessee burglary statute[472] provides for sentence enhancement when the "person convicted of the crime had in his possession a firearm at the time of the breaking and entering."[473] Defendant in *Key* was not so armed, but his accomplice in the crime was. The court concluded that the legislative intent was not to impose enhanced punishment on one in the position of defendant, contrasting the language of the burglary statute with that used in the robbery statute—"if the robbery be accomplished by the use of deadly weapon."[474] The robbery statute was "aimed at the methodology of the crime,"[475] and, therefore, all parties chargeable as principals could be subjected to the more severe punishment. The burglary statute, by contrast, focused upon "the modus operandi of the individual,"[476] and, therefore, called for sentence enhancement only in respect to parties actually armed. Nor did the general aiding and abetting statute[477] call for a different result because first, the reference to aiding and abetting "any criminal offense" did not encompass an enhanced sentencing provision, and, second, an offense requiring personal participation may not be charged through an aiding and abetting provision.[478] The party charged need not have exclusive control of the weapon, but "[c]onstructive or joint possession may occur only where the

than a 'firearm,' . . . [w]e are not convinced that the legislature meant to twice enhance the penalty for one who commits robbery by means of a firearm." *Id.* at 419.

470. *See* Gore v. United States, 357 U.S. 386 (1958). *See also* Anderson v. State, 553 S.W.2d 85 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977) (discussed in text accompanying notes 67-75 *supra*).

471. 563 S.W.2d 184 (Tenn. 1978).

472. TENN. CODE ANN. § 39-901 (1975).

473. *Id.*

474. 563 S.W.2d at 187 (quoting TENN. CODE ANN. § 39-3901 (1975)).

475. *Id.*

476. *Id.*

477. TENN. CODE ANN. § 39-109 (1975).

478. *See* Looney v. State, 156 Tenn. 337, 1 S.W.2d 782 (1928).

personally unarmed participant has the power and ability to exercise control over the firearm."[479]

N. Probation

In finding an abuse of discretion in the denial of probation in *Moten v. State*,[480] the Tennessee Supreme Court, under the guise of statutory interpretation,[481] held as a matter of public policy that rehabilitation must take precedence over retribution and deterrence in the determination of the propriety of punishment. Defendant had pleaded guilty to a reduced charge of petit larceny, the charge arising from his participation in a scheme to steal carpeting valued at $3,000 from his employer's warehouse. The trial court imposed a sentence of nine months in the workhouse and denied probation because of (1) the circumstances and nature of the offense, (2) the deterrent effect of punishment, and (3) the reduction of the charge from grand to petit larceny.

The court of criminal appeals affirmed, finding "no indication of arbitrary action on the part of the trial judge,"[482] but the Tennessee Supreme Court found none of the reasons given sufficient for denial of probation. In respect to the first factor, the court noted that defendant had no prior criminal record, no violence was involved in the offense, and the property stolen was all recovered. Defendant had been verbally enticed and then bribed to commit the offense. In regard to the second factor, the court held simply that deterrence is not a legitimate consideration in deciding whether to grant probation because "deterrence is a factor which is uniformly present" in all cases.[483] The court was

479. 563 S.W.2d at 188. *See also* Storey v. State (Tenn. Crim. App., Nov. 9, 1978), *abstracted in* TENN. ATT'Y GEN. ABSTRACT, Vol. IV, Nos. 5, 6, p. 11 (*Key* followed in requiring personal use of a weapon under TENN. CODE ANN. § 39-4914 (1975): "Any person who employs any firearm . . . . ").

480. 559 S.W.2d 770 (Tenn. 1977).

481. TENN. CODE ANN. §§ 40-2901 (Cum. Supp. 1977), -2904 (1975).

482. 559 S.W.2d at 770.

483. *Id.* at 773. "Reliance on this factor is no more realistic or reasonable than denying probation on grounds that the defendant committed a crime." *Id.* (*Cf. id.* at 774 (Harbison, J., dissenting, "It seems to me to be legitimate for a trial judge to consider whether the serving of some or all of a sentence would deter the offender from engaging in further criminal activity. . . . [I]t can hardly be contended that every criminal is entitled to a first offense without serving time."). TENN. CODE ANN. § 40-2904 was amended by 1978 Tenn. Pub. Acts ch. 911, § 1 to allow trial judges to "deny probation upon the ground of

similarly displeased with the attitude of the trial court that "the defendant should pay for his crime," because such an approach "places retribution above rehabilitation without reason."[484] Finally, on the authority of a decision of the court of criminal appeals[485] the supreme court held that the fact that the charge had been reduced prior to the plea of guilty was "an improper basis for denial of probation."[486]

O. *Double Jeopardy*

1. When Jeopardy Attaches

The United States Supreme Court had previously held that in a jury trial jeopardy attaches at the time the jury is empanelled and sworn,[487] but, prior to *Crist v. Bretz*,[488] the issue had never been raised in the context of a state proceeding. In *Crist* the prosecution argued that the federal rule was an arbitrary rule of convenience, and the state rule—that jeopardy does not attach until the first witness is sworn[489]—was equally acceptable for constitutional purposes. The Supreme Court disagreed, finding that the federal rule was "an integral part of the constitutional guarantee against double jeopardy."[490]

2. Dismissal of Indictment Subsequent to Trial

In 1975 the Supreme Court held in *United States v. Jenkins*[491] that a dismissal of an indictment at the close of the evidence precluded a retrial for reasons of double jeopardy because the

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the deterrent effect upon other criminal activity." TENN. CODE ANN. § 40-2904 (Cum. Supp. 1978).

484. *Id.* at 773.

485. Mattino v. State, 539 S.W.2d 824 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1976) (discussed in *1976-1977 Survey*, *supra* note 1, at 47-48).

486. 559 S.W.2d at 773. *Moten* was distinguished in Cronan v. State, TENN. ATT'Y GEN. ABSTRACT, Vol. IV, No. 2, p.8, in which the accused, indicted for murder, was convicted of involuntary manslaughter.

487. Downum v. United States, 372 U.S. 734 (1963); Green v. United States, 355 U.S. 184 (1957). *See also* Delay v. State, 563 S.W.2d 905 (Tenn. Crim. App. 1977), *cert. denied, id.* (Tenn. 1978).

488. 437 U.S. 28 (1978).

489. This was the test used in some jurisdictions in nonjury trials. *See* POST-TRIAL RIGHTS, *supra* note 1, § 50 at 127 n.68.

490. 437 U.S. at 38.

491. 420 U.S. 358 (1975).

ambiguity of the reasons for dismissal would require further factual proceedings following a successful governmental appeal. *Jenkins* was expressly overruled in *United States v. Scott*,[492] in which, at the close of the evidence, the trial court granted defendant's motion for dismissal based on pretrial delay. The Court held that

> the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.[493]

Should the prosecution be successful on appeal, retrial would be permitted because the double jeopardy clause "does not relieve a defendant from the consequences of his voluntary choice."[494]

3. Retrial Following Mistrial

The protection against double jeopardy does not prevent a retrial following a mistrial if the mistrial was ordered as a matter of "manifest necessity"[495] and no other reasons preclude a retrial.[496] In *Arizona v. Washington*[497] the first conviction of the accused was reversed and a new trial ordered because the prosecution had withheld exculpatory evidence from the defense. In the opening statement to the jury at the second trial, defense counsel said that at the first trial, "evidence was suppressed and hidden . . . and purposely withheld."[498] At the conclusion of the opening statements, the prosecutor moved for a mistrial, but the trial judge withheld ruling on the motion upon the offer of defense counsel to find some authority supporting the admissibility of proof of the wrongful suppression of evidence prior to the first trial. The following morning the prosecutor renewed the motion

492. 437 U.S. 82 (1978).

493. *Id.* at 98-99.

494. *Id.* at 99.

495. The phrase was first used in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). *See generally* POST-TRIAL RIGHTS, *supra* note 1, § 55.

496. For example, if the manifest necessity for the mistrial were deliberate misconduct on the part of the prosecution, retrial would be barred. *See* POST-TRIAL RIGHTS, *supra* note 1, § 61.

497. 434 U.S. 497 (1978).

498. *Id.* at 499 (quoting from opening argument of counsel for defense).

for a mistrial, and upon no offer of authority by defense counsel, the mistrial was granted. The trial judge did not use the phrase "manifest necessity," nor did he expressly state that alternative solutions to the granting of a mistrial had been considered. The state supreme court refused to review the mistrial ruling.

Thereafter, the accused filed a petition for writ of habeas corpus in a federal district court alleging that retrial would violate the protection against double jeopardy. The writ was granted in the absence of any indication in the record that the trial court had considered alternatives before concluding that a manifest necessity existed for granting the mistrial. The United States Court of Appeals for the Ninth Circuit agreed.

The Supreme Court reversed. Defense counsel had made no further argument that the evidence of the prior indiscretions of the prosecution was admissible, and the Supreme Court agreed that the argument was improper and highly prejudicial. The Court submitted that in such circumstances "a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference."[499] Nor did the Court deem significant the trial court's failure to use the phrase "manifest necessity" in making its ruling. The failure to explain the ruling more completely was insignificant as long as the basis for the mistrial order was adequately disclosed by the record.[500]

At a very early date, the Supreme Court established that the declaration of a mistrial when the jury is hopelessly deadlocked may be followed by a new trial on the same charges without violating the protection against double jeopardy.[501] The decision to dismiss the jury is always subject to challenge on the ground that the trial judge acted too hastily, and if this is found to be the case, retrial will be prohibited.[502] Theoretically, a series of

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499. *Id.* at 514.

> He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

Id. at 513-14.

500. *Id.* at 516-17.

501. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

502. *See generally* POST-TRIAL RIGHTS, *supra* note 1, § 58.

retrials may continue *ad infinitum* without raising a double jeopardy issue,[503] but courts become increasingly receptive to the complaint of the defendant as the proceedings are protracted.[504] In *State v. Witt*[505] defendant had been tried three times for first degree murder and each trial had ended in a mistrial because of a deadlocked jury. After the third mistrial the trial court dismissed the charges, and the prosecution appealed. While finding no constitutionally compelling reason for the dismissal, the Supreme Court of Tennessee affirmed in light of "the inherent authority to terminate a prosecution in the exercise of sound judicial discretion"[506] when repeated trials have resulted in genuinely deadlocked juries and little likelihood of a different result in the future is apparent. The court declined to determine the number of mistrials necessary to warrant a dismissal and cautioned that the action of the trial judge would always be subject to review for abuse of discretion.

While there is nothing explicit in the holding, the court may be assumed to have envisioned a dismissal with prejudice, which would preclude the prosecution from pursuing a new indictment for the same offense. This result would appear to follow from the observation that "[r]equiring defendants to face additional juries with the continuing prospect of no verdict offends traditional notions of fair play and substantial justice."[507] If the dismissal was without prejudice, the prosecution would be only slightly inconvenienced by the dismissal and the intention of the trial court would be effectively thwarted. If, on the other hand, the dismissal is with prejudice, the prosecution will be foreclosed from reviving the charges, even if newly discovered evidence of substantial significance led to the conclusion that a conviction would be more probable.

4. Retrial Following Reversal for Insufficiency of Evidence

From an early date the United States Supreme Court has held that an accused who successfully appeals a conviction can-

503. *Id.* at 145 n.58.

504. *Id.* at 145 n.59.

505. 572 S.W.2d 913 (Tenn. 1978).

506. *Id.* at 917.

507. *Id.* Even the dismissal of the charges will not create a double jeopardy defense so long as the dismissal is not based on an evaluation of the evidence. *See* POST-TRIAL RIGHTS, *supra* note 1, § 52.

not thereafter plead double jeopardy as a bar to retrial.[508] Curiously, this principle had been persistently applied even when the reversal of the conviction was based on an insufficiency of the evidence.[509] The result made little sense, for had the jury returned a verdict of not guilty, or had the trial judge directed a verdict of not guilty, the double jeopardy clause would preclude retrial.[510] In *Burks v. United States*[511] the Court finally acknowledged that in this area "our past holdings do not appear consistent with what we believe the Double Jeopardy Clause commands,"[512] and concluded that retrial was constitutionally impermissible when the prior conviction was reversed for legally insufficient evidence.[513] In a companion case, *Greene v. Massey*,[514] the Court underscored the limited application of *Burks* by remanding the case for a determination whether the reversal of the conviction was based on the insufficiency of the evidence or trial error.[515]

One casualty of the *Burks* holding is the Tennessee procedural rule permitting a trial judge, acting as the "thirteenth juror," to set aside a jury verdict and grant a new trial on grounds of the preponderance of the evidence without entering a judgment of acquittal. In *State v. Cabbage*[516] the Tennessee Supreme Court held that such action could no longer be taken at the trial or appellate level.[517] Moreover, *Burks* required that if the evidence

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508. United States v. Ball, 163 U.S. 662 (1896).

509. United States v. Tateo, 377 U.S. 463 (1964); Foreman v. United States, 361 U.S. 416 (1960); Yates v. United States, 354 U.S. 298 (1957); Bryan v. United States, 338 U.S. 552 (1950).

510. Green v. United States, 355 U.S. 184 (1957).

511. 437 U.S. 1 (1978).

512. *Id.* at 12.

513. [S]uch an appellate reversal means that the Government's case was so lacking that it should not have been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Id. at 16 (emphasis in original). *See also* United States v. Jones, 580 F.2d 249 (6th Cir. 1978).

514. 437 U.S. 19 (1978).

515. *See also* United States v. Scott, 437 U.S. 82 (1978).

516. 571 S.W.2d 832 (Tenn. 1978).

517. Compare Ricketts v. Williams, 248 S.E.2d 673, 674 (Ga. 1978):

[T]here has always been a distinction between a decision holding the

is insufficient to warrant a conviction, the trial judge must direct a verdict of acquittal. In *Overturf v. State*[518] the supreme court held that the trial court cannot deny the motion and instead grant a new trial following a verdict of guilty.

5. Vacation of Guilty Plea

The Supreme Court has never considered the constitutional propriety of increasing the charges against an accused following the vacation of a guilty plea;[519] but the United States Court of Appeals for the Sixth Circuit has held that when the accused pleads guilty to a lesser included offense, subsequent prosecution for more serious offenses is impermissible.[520] In *United States v. Smith*[521] the Sixth Circuit Court of Appeals held that this limitation was only applicable when lesser included offenses were involved. Thus, when the accused had pleaded guilty to one of five substantive counts, he could be prosecuted on all five substantive counts as well as a conspiracy count following vacation of the plea.[522]

6. Identity of Offenses

In *Maples v. State*[523] the accused had been summarily held in contempt and fined for instituting fraudulent divorce proceedings in which he gave false testimony. He was thereafter convicted of perjury for the same false testimony, a conviction that the accused contended was precluded by the protection against double jeopardy. Distinguishing cases in which the accused had been formally tried for contempt,[524] the Tennessee Supreme Court

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"evidence legally insufficient" and the discretionary decision of a trial court that the verdict is against the "weight of the evidence."

We hold that . . . the grant of a new trial by the trial court on the discretionary ground that the verdict is against the weight of the evidence is legally insufficient so as to bar a second trial under the Double Jeopardy Clause of the Federal Constitution.

518. 571 S.W.2d 837 (Tenn. 1978).

519. *See* POST-TRIAL RIGHTS, *supra* note 1, § 80.

520. Rivers v. Lucas, 477 F.2d 199 (6th Cir.), *vacated on other grounds*, 414 U.S. 896 (1973); Mullreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970).

521. 584 F.2d 759 (6th Cir. 1978).

522. *See also* Bordenkircher v. Hayes, 434 U.S. 357 (1978), discussed in text accompanying notes 422-25 *supra*.

523. 565 S.W.2d 202 (Tenn. 1978).

524. *See, e.g.*, People v. Gray, 36 Ill. App. 3d 720, 344 N.E.2d 683 (1976).

held that the use of the summary power to punish for contempt committed in the presence of the court did not preclude a criminal prosecution for the same behavior.[525] Chief Justice Henry dissented, contending that under the *Blockburger* test[526] the two convictions were based on the same evidence. While the same facts are assuredly the basis of both convictions, the question for double jeopardy purposes is whether all of the elements of one offense are subsumed in the other offense. Contrary to Justice Henry's contention that "[t]he contempt statute and the perjury statute do not have distinct elements for purposes of this case,"[527] the elements of the offenses do not vary with the facts of the case.[528] Thus, the United States Supreme Court reaffirmed *Blockburger* in *Gore v. United States*[529] while sustaining a conviction for three offenses—sale of drugs not pursuant to a written order; sale of drugs not in the original package; and sale of drugs with knowledge that they had been unlawfully imported—on the basis of one sale. A single act of the accused was found to have violated three provisions of the narcotics law, each with distinct elements, absent evidence of congressional intent to the contrary.

7. Lesser Included Offenses

The accused in *Jones v. State*[530] was indicted for burglary, larceny, and receiving and concealing stolen property, and was convicted for burglary. On appeal the conviction was reversed, and upon retrial the accused was convicted of larceny. The accused contended on appeal that the conviction for burglary alone in the first trial carried the implication of acquittal on the other

525. "It is a power which in our opinion, is indispensible to the orderly dispatch and conduct of the business of the courts. Its use is not intended to, nor should it, immunize the contemnor from prosecution for violation of specific provisions of the criminal code." 565 S.W.2d at 206.

526. Blockburger v. United States, 284 U.S. 299 (1932).

527. 565 S.W.2d at 209 (emphasis deleted).

528. The dissent would appear to be confusing the "required evidence" test, adopted in *Blockburger*, with the "actual evidence" test, which "focuses on whether the evidence adduced at trial to prove the lesser offense is an integral part of the evidence used to prove the greater offense." 7 BALT. L. REV. 345, 348 (1978). The latter formulation was explicitly rejected in Harris v. United States, 359 U.S. 19 (1959), and therefore cannot be viewed as compelled by the protection against double jeopardy.

529. 357 U.S. 386 (1958).

530. 569 S.W.2d 462 (Tenn. 1978).

charges, and, therefore, retrial on these charges was precluded by the protection against double jeopardy. The argument was, in principle, undeniably correct.[531]

At the first trial, however, the judge had instructed the jury that the burglary charge embraced the larceny charge, and, therefore, the accused could be found guilty of either offense but not of both. As the Tennessee Supreme Court noted, this instruction was an incorrect statement of the law. An element of burglary is the *intent* to commit a felony (any felony), but the felony does not have to be committed.[532] Thus, larceny is never subsumed into burglary, at least in an analytical sense, and, therefore, conviction for both offenses would not run afoul of the protection against double jeopardy.[533] Nevertheless, the instruction placed the jury verdict in a different light. The court of criminal appeals concluded that the jury had expressed no opinion on the larceny charge since the trial judge had denied it the option of finding the accused guilty of both charges. The Tennessee Supreme Court was dissatisfied with this analysis because the accused had been charged with burglary and larceny in the same count. The court found that the jury, by finding the accused guilty as charged, had in fact found the accused guilty of both offenses, and, as a result, upon retrial either or both offenses could be once again considered.[534]

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531. *See* POST-TRIAL RIGHTS, *supra* note 1, § 85.

532. *See* 2 R. ANDERSON, WHARTON'S CRIMINAL LAW & PROCEDURE § 410 (1957).

533. This assumes that the same evidence test, as opposed to the same transaction test, is used. If the second conviction were barred by the same transaction test, such a result would not be reached for constitutional reasons. On the other hand, had the accused been found not guilty of one of the two charges, collateral estoppel might (but not necessarily would) preclude a subsequent trial on the other charge. *See* Ashe v. Swenson, 397 U.S. 436 (1970).

534. The same conclusion had been reached under the reasoning of the court of criminal appeals. 569 S.W.2d at 464.