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Criminal Law in Tennessee in 1980 - A Critical Survey

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CRIMINAL LAW IN TENNESSEE IN 1980 — A CRITICAL SURVEY

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I. INTRODUCTION

In substantive criminal law in 1980 the Tennessee Supreme Court allowed inferences drawn from surrounding circumstances to sustain charges of homicide[1] and of fraudulent drawing of bad checks.[2] In the law of defenses, the court in *Kennamore v. State*[3] rejected the "true man" rule of self-defense and in *State v. Jones*[4] declared entrapment to be a defense in Tennessee. In procedural matters, the Tennessee Supreme Court applied the right to counsel to preliminary hearings,[5] clarified the State's burden of proof after a showing that jury separation was potentially prejudicial,[6] and discussed various constitutional issues arising in the fair cross-section requirement,[7] the multiple offender rule,[8] the right to counsel aspects of confessions,[9] and the Tennessee Habitual Criminal Act.[10]

During the same period the United States Supreme Court

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1. *See* text accompanying notes 21-33 *supra*.
2. *See* text accompanying notes 39-42 *supra*.
3. 604 S.W.2d 856 (Tenn. 1980). *See* text accompanying notes 43-53 *supra*.
4. 598 S.W.2d 209 (Tenn. 1980). *See* text accompanying notes 54-62 *supra*.
5. *See* text accompanying notes 125-37 *supra*.
6. *See* text accompanying notes 221-30 *supra*.
7. *See* text accompanying notes 205-20 *supra*.
8. *See* text accompanying notes 256-62 *supra*.
9. *See* text accompanying notes 158-62 *supra*.
10. *See* text accompanying notes 236-39 *supra*.

struggled to clarify seizure under the rule in *Terry v. Ohio*[11] and interrogation under the rule in *Miranda v. Arizona*.[12] The high Court also addressed the exigent circumstances exception to the warrant requirement,[13] the propriety of searching individuals found on premises for which a search warrant had been issued,[14] the admissibility of suppressed evidence for cross-examination impeachment purposes,[15] the conflict of interest problems raised by representing multiple defendants,[16] and the constitutional standard of effectiveness for retained counsel.[17] The United States Supreme Court reaffirmed the reasonableness limits of electronic surveillance orders,[18] disapproved government action that appeared to retaliate against an accused who was exercising his constitutional rights,[19] and sustained the power of the legislature to establish criminal punishments.[20]

II. Offenses

A. Homicide

1. Murder

A conviction for first degree murder requires proof of premeditation, except when the prosecution relies on the felony murder theory.[21] Premeditation may be difficult to prove, however, when there are no witnesses to the crime. This difficulty is illustrated in the case of *Houston v. State*.[22] The defendant in *Houston* was accused of the first degree murder of a service station operator, who was shot three times during an attempted robbery. Instead of using the felony murder theory and avoiding the need to prove premeditation, the prosecution had elected to

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11. 392 U.S. 1 (1968). *See* text accompanying notes 63-89 *supra*.
12. 384 U.S. 436 (1966). *See* text accompanying notes 163-77 *supra*.
13. *See* text accompanying notes 90-99 *supra*.
14. *See* text accompanying notes 100-09 *supra*.
15. *See* text accompanying notes 114-24 *supra*.
16. *See* text accompanying notes 143-47 *supra*.
17. *See* text accompanying notes 138-42 *supra*.
18. *See* text accompanying notes 148-52 *supra*.
19. *See* text accompanying notes 187-204 *supra*.
20. *See* text accompanying notes 231-35 *supra*.
21. Tenn. Code Ann. § 39-2402 (Supp. 1980).
22. 593 S.W.2d 267 (Tenn. 1980).

nolle prosequi the felony murder count and to proceed on the remaining counts of common-law murder and armed robbery.[23] The defendant in *Houston* was convicted, and his conviction was sustained on the authority of prior cases that inferred premeditation from repeated blows.[24] Justice Henry, dissenting, conceded that while evidence of repeated blows normally could satisfy the premeditation requirement, the only other evidence of the manner of the killing in this case came from the defendant's confession.[25] If the defendant's testimony that the pistol had fired when he and the victim were wrestling was believed, a finding of premeditation was excluded. The jury could separate the defendant's statement and choose to believe the accused's confession to the crime, but disbelieve his rendition of the details as self-serving. Since the confession was the *only* direct evidence of murder[26] and since presumably a conviction could not have resulted without the confession, the dissent found "it difficult . . . to give full faith and credit to [defendant's] admission that he killed and robbed the victim and simultaneously to reject out-of-hand his explanation of all details favorable to him"[27] especially since the defendant had received the death penalty. The dissent preferred to reduce the conviction to second degree murder and the sentence to life imprisonment.[28]

Malice, an essential element of second degree murder, has been implied more freely in vehicular homicide cases in Tennessee than in other jurisdictions.[29] In *Farr v. State*[30] the accused had driven his truck across a bridge at a speed of twenty-five to thirty miles per hour. While attempting a necessary ninety-degree turn at the end of the bridge, defendant's door flew open

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23. State v. Bullington, 532 S.W.2d 556 (Tenn. 1976); Franks v. State, 187 Tenn. 174, 213 S.W.2d 105 (1948).

24. 593 S.W.2d at 279 (Henry, J., dissenting).

25. *Id.* (Henry, J., dissenting).

26. *Id.* (Henry, J., dissenting).

27. *Id.* at 280 (Henry, J., dissenting).

28. *Id.* (Henry, J., dissenting).

29. *See, e.g.*, State v. Johnson, 541 S.W.2d 417 (Tenn. 1976); Staggs v. State, 210 Tenn. 175, 357 S.W.2d 52 (1962); Eager v. State, 205 Tenn. 156, 325 S.W.2d 815 (1959); Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957); Tarvers v. State, 90 Tenn. 45, 16 S.W. 1041 (1891).

30. 591 S.W.2d 449 (Tenn. Crim. App. 1979).

and he fell from the truck. The passenger in the vehicle was unable to regain control, and the vehicle ran over and killed a bystander.[31] The accused was arrested for driving while intoxicated and for reckless driving.[32] The evidence included testimony from the investigating officer and from the defendant's ex-wife that he had been intoxicated, that his truck was in poor condition, and that he was aware that the doors were likely to come open. The court of criminal appeals found sufficient evidence of malice, even without considering defendant's intoxication. The court concluded that defendant's operation of the truck "implied such a high degree of conscious and wilful recklessness as to amount to that malignity of heart constituting malice."[33]

2. Involuntary Manslaughter

Involuntary manslaughter, an unintentional killing caused by an unlawful act,[34] was the crime involved in *Hemby v. State*.[35] The defendant was convicted of involuntary manslaughter in the death of his infant child under the theory that, while in a drunken stupor, he fell asleep on a bed with the child, rolled over, and smothered the child to death. The county medical examiner testified that his findings would be consistent with death resulting either from smothering or from "sudden infant death syndrome—or 'crib death'—wherein a previously healthy baby, with perhaps at most a history of the sniffles, dies suddenly and unexpectedly, and the autopsy reveals nothing more than hypoxia."[36] The defendant contended that when two causes of death are equally possible, and the defendant would not be responsible under one cause, then he cannot be found guilty.[37] The court responded that the inconclusiveness of the clinical evidence could be eliminated by evidence of the case history and the circumstances surrounding the infant's death. Thus, the

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31. *Id.* at 450.
32. *Id.*
33. *Id.* at 451.
34. TENN. CODE ANN. § 39-2409 (1975).
35. 589 S.W.2d 922 (Tenn. Crim. App. 1978), *cert. denied, id.* (Tenn. 1979).
36. *Id.* at 926.
37. *Id.* at 927.

court in *Hemby* found sufficient evidence from which the jury could conclude "that this infant's death was caused by smothering brought about by the defendant overlaying its tiny body."[38]

B. *Bad Check Law*

The use of computer technology to perpetrate fraud arose in the case of *State v. Denami*.[39] The accused was convicted of two counts of drawing a check with insufficient funds.[40] He had requested a branch bank official to cash a check for $15,500 drawn on his account. Because of the large amount of money involved and because he did not know the accused, the bank official dialed the bank's computer and requested a mark-up of the check, which resulted in a hold for the amount against the contingent balance of the account.[41] Although the computer accepted the hold, the bank official remained suspicious and requested the book balance—the balance at the end of the previous day—which was zero. The official declined to cash the check and suggested that the accused go to the bank's main office to check on his account. Minutes later, the accused was successful in similar efforts at a different branch bank where he received $5,000 in cash and a $10,500 cashier's check. On the third attempt at another branch bank, the accused was taken into custody.

The accused had worked at the bank in its data programming department, and prior to the date of the fraudulent transactions, he had instructed tellers on the use of the computer. While the computer indicated an excess of $78,000 in contingent funds, the account actually had no balance. The accused's be-

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38. *Id.*

39. 594 S.W.2d 747 (Tenn. Crim. App. 1979), *appeal denied, id.* (Tenn. 1980).

40. TENN. CODE ANN. § 39-1959 (Supp. 1980).

41. The contingent balance shows the amount in the account at a particular time during the day, including any deposit the customer has made during that day, if he requested that it be "marked up," so that those funds are available for withdrawal during the same day. This contingent balance survives only until the end of the banking day, when it is superseded by the book balance—an amount ascertained by the bank's bookkeeping department from actual physical records of transactions. In other words, the contingent balance is valid beyond one day only if the bank receives proof that funds were deposited to match the amount shown in the contingent balance. 595 S.W.2d at 748.

havior afforded sufficient proof that he was aware of that fact,[42] and thus, the court concluded that the jury was warranted in finding that the checks were delivered with fraudulent intent.

III. DEFENSES

A. Self-Defense

In *State v. Kennamore*[43] the court addressed the issue whether the victim of an unprovoked assault was obliged to retreat before resorting to self-defense, or, in the unfortunate language used by the court, "whether the so-called 'true man' rule of self-defense should be adopted in this state."[44] The accused was kneeling to add fuel to a campfire when the deceased struck him on the head with a soft drink bottle and caused him serious injury.[45] A witness testified that the accused immediately attacked the deceased and that the witness had pulled the two apart. The accused then ran to his truck, took a shotgun from it, and shot the deceased who, some twenty to twenty-five feet away, was suffering the effects of the beating. The accused testified that the deceased had kicked him after hitting him with the bottle and that his pleas for help to the witness went unanswered. Fearing further attack, the accused seized the shotgun and fired in self-defense. The accused was convicted of voluntary manslaughter. On appeal, the accused challenged the trial court's refusal to give a requested jury instruction regarding circumstances that do not require retreat when one is threatened by a deadly assault.[46]

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42. Additionally, a search of the accused's automobile had turned up some 15 or 20 checks, cut by a check protector, each in the amount of $15,500, and a page from the telephone directory listing all the branch offices of the bank. *Id.* at 749.

43. 604 S.W.2d 856 (Tenn. 1980).

44. *Id.* at 857.

45. "Appellant sustained a scalp laceration three or four inches in length, which required extensive sutures, and he was hospitalized for about four days following the incident." *Id.*

46. The requested instruction stated:

> "If the defendant when assaulted was without fault and in a place where he had a right to be and was placed in reasonable apparent danger of losing his life or of receiving great bodily harm, he need not retreat, but may stand his ground, and repel force by force, and if, in

At common law the victim of such an assault was required to retreat if it was reasonable to do so, except when the assault occurred in the victim's own home[47] or when the victim was executing an official duty.[48] A minority of jurisdictions, however, hold that as a general rule there is no obligation to retreat from a deadly assault.[49] The Tennessee Supreme Court concluded that this minority rule should not be adopted; rather, "the availability of an avenue of retreat and the practicability of using it"[50] were *factors* to be considered in determining if self-defense was asserted legitimately. The court proposed the following instruction on the issue of retreat:

> The law of excusable homicide requires that the defendant must have employed all means reasonably in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat, if, and, to the extent, that it can be done in safety.[51]

While the instruction would appear to have no exception, the *Kennamore* opinion noted *Morrison v. State*,[52] a case that recognized no duty to retreat. Thus, the *Kennamore* court concluded that the decision should be limited "to the defense of one's house or habitation,"[53] a caveat that presumably will be added

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the reasonable exercise of his right of self-defense, he kills his assailant, he is justified and should be acquitted."

Id. at 858.

47. State v. Foutch, 96 Tenn. (12 Pickle) 242, 247, 34 S.W. 1, 2 (1896); Fitzgerald v. State, 1 Tenn. Cases (Shannon) 505, 510 (1875).

48. 2 WHARTON'S CRIMINAL LAW AND PROCEDURE § 126 (14th ed. 1979).

49. *See generally* R. MORELAND, LAW OF HOMICIDE 259 (1952). *See also* Runyan v. State, 57 Ind. 80 (1877); State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902); Erwin v. Ohio, 29 Ohio St. 187 (1876).

50. 604 S.W.2d at 859.

51. *Id.* at 860.

52. 212 Tenn. 633, 371 S.W.2d 441 (1963).

53. 604 S.W.2d at 859.

Justice Henry, dissenting, noted that in the present case the court of criminal appeals had correctly noted that *Morrison* "does not limit the application of the retreat doctrine to the home. It adopts the broad general proposition that one who is where he has a lawful right to be is under no duty to retreat and then treats the particular proposition of a specific place." *Id.* at 860-61 (Henry, J., dissenting). *See also* Kendrick, *Criminal Law and Procedure—1963*

to the above instruction when appropriate.

B. *Entrapment*

> Tennessee is the only jurisdiction in the United States that does not recognize the defense of entrapment. More accurately, it is the only jurisdiction that professes that the defense is not recognized. With this opinion we bring our secession to a close and reconstruct our decisional law so as to bring it into harmony with that of our sister states and of the federal system.
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> From this day forward entrapment is a defense to a Tennessee criminal prosecution.[54]

Thus Justice Henry, speaking for a unanimous court, parted from precedent in *State v. Jones*.[55] The court tentatively adopted the subjective test[56] for entrapment:

> [E]ntrapment occurs when law enforcement officials, acting either directly or through an agent, induce or persuade an otherwise unwilling person to commit an unlawful act; however, where a person is predisposed to commit an offense, the fact that the law enforcement officials or their agents merely afford

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Tennessee Survey, 17 VAND. L. REV. 977, 979 (1964). While not arguing against the retreat rule, Justice Henry maintained that the accused was entitled to an explication of the law regarding retreat, even without a special request:

> The jury should have been charged that there must be an available, safe and effective avenue of retreat; that there must have been ample time; that defendant's physical and mental condition were factors that should be taken into consideration; that consideration must be given to all the circumstances as they reasonably and honestly appeared to the defendant; and that the whole transaction should be looked to as a series of events. Moreover, the jury should have been instructed that all factors should be considered in the light of the fact that failure to retreat is a circumstance to be considered, along with all others, in order to determine whether the defendant went further than he was justified in doing and that a failure to retreat is not categorical proof of guilt. This is a fair resume of the holdings of our courts.

Id. at 862 (Henry, J., dissenting).

54. State v. Jones, 598 S.W.2d 209, 212 (Tenn. 1980).

55. *Id.* at 209.

56. *See id.* at 220.

an opportunity does not constitute entrapment.[57]

This subjective standard was qualified to the extent that "outrageous police behavior" or "over-involvement" could render predisposition irrelevant.[58]

Because entrapment is an affirmative defense, the burden of proof rests upon the accused to establish a prima facie case.[59] Once entrapment is shown, the burden shifts to the prosecution to prove predisposition beyond a reasonable doubt.[60] Predisposition may be shown by evidence of prior crimes of a similar character and by the reputation of the accused.[61]

Ironically, the *Jones* court concluded that the defense of entrapment was unavailing in the case at hand, which involved solicitation to commit robbery. The court reasoned that entrapment was logically impossible when the charge was solicitation since the gist of solicitation is the volitional act of the accused. Therefore, "[o]ne may not be solicited into soliciting. He is either the solicitor or the solicitee. If the former, he may not be the latter."[62]

IV. PROCEDURE

A. Arrest

1. What Constitutes a Seizure

A fourth amendment liberty interest is not implicated unless the party raising the issue is detained against his or her will.[63] If, for example, a suspect voluntarily accompanies an officer to the stationhouse, no arrest occurs.[64] Whether the actions

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57. *Id.*

58. *Id.* (citing Hampton v. United States, 425 U.S. 484, 492-93 (1976) (Powell, J., concurring) and United States v. Russell, 411 U.S. 423, 431-33 (1973)).

59. *Id.* at 220.

60. *Id.*

61. *Id.*

62. *Id.* at 221.

63. *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRE-TRIAL RIGHTS § 12 (1972) [hereinafter cited as COOK, PRE-TRIAL RIGHTS].

64. See Morales v. New York, 396 U.S. 102 (1969), remanding for a determination, *inter alia*, whether an arrest had in fact occurred.

of the suspect were actually voluntary may be difficult to determine if the suspect claims an absence of any real choice.[65] In *United States v. Mendenhall*[66] federal narcotics agents observed the accused disembark from an airplane. After noting that her behavior fit the "drug courier profile"[67]—"an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs"[68]—one agent approached the accused and requested to see her identification and airline ticket. The identification and ticket bore different names, and the accused's only explanation for the difference was that she "just felt like using that name."[69] When the agent declared his official identity, the accused became very nervous. Her ticket and identification were retained, and she was asked to accompany the agent to the airport Drug Enforcement Administration office about fifty feet away for further questioning. There, the agent asked if the accused would allow a search of her person and handbag, but advised her that she could refuse permission. The accused responded, "Go ahead,"[70] and a female police officer, after being assured by the accused of her consent, carried out the body search. In the course of this search, two packages of heroin were found in the accused's undergarments. The accused was convicted of possession with intent to distribute heroin.

The district court denied a motion to suppress the evidence by reasoning that the initial detention was a permissible investigative stop under the standard articulated in *Terry v. Ohio*[71] and that the accused's subsequent conduct was voluntary and consensual. The Court of Appeals for the Sixth Circuit re-

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65. *See* Cook, *Subjective Attitudes of Arrester and Arrestee as Affecting Occurrence of Arrest*, 19 KAN. L. REV. 173 (1971).

66. 446 U.S. 544 (1980).

67. The United States Court of Appeals for the Sixth Circuit has previously wrestled with the legitimacy of the profile. *See* United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977).

68. 446 U.S. at 547 n.1. The factors impressing the agents were (1) arrival from Los Angeles, from which came much of the heroin to Detroit; (2) last off the plane and nervous appearance; (3) no baggage claimed; and (4) a change of airlines for a flight out of Detroit. *Id.*

69. *Id.* at 548.

70. *Id.*

71. 392 U.S. 1 (1968).

versed[72] finding its decision in *United States v. McCaleb*[73] to be controlling. In the *McCaleb* case the court had disapproved the use of the drug courier profile and had characterized a similar confrontation as an arrest without probable cause. Thus, the *McCaleb* court invalidated the subsequent consent search as the fruit of an illegal detention.[74]

In an opinion written by Justice Stewart, the Supreme Court reversed the Sixth Circuit's opinion in *Mendenhall*. Justice Stewart, joined by Justice Rehnquist, first concluded that under *Terry* and its progeny "a person is 'seized' only when by means of physical force or a show of authority, his freedom of movement is restrained;"[75] further, the fourth amendment is implicated "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[76] Applying this standard, no seizure of the accused had occurred: "[N]othing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way . . . ."[77] It was not essential that the accused be told expressly that she need not cooperate,[78] nor did her behavior, although it was inconsistent with her self-interest, imply that she had acted under compulsion.[79]

Notably, not only did the four dissenting justices[80] take issue with this reasoning, but an additional three justices,[81] while concurring with the result in *Mendenhall*, declined to join this portion of the opinion. The concurrence instead preferred to as-

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72. United States v. Mendenhall, 596 F.2d 706 (6th Cir. 1979).

73. 552 F.2d 717 (6th Cir. 1977).

74. *Id.*

75. 446 U.S. at 553.

76. *Id.* at 554.

77. *Id.* at 555.

78. *Compare* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

79. 446 U.S. at 557-58. The Court stated: "It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily." *Id.* at 555-56.

80. *Id.* at 566 (White, J., dissenting). Justice White was joined by Justices Brennan, Marshall, and Stevens. *Id.* (White, J., dissenting).

81. *Id.* at 560 (Powell, J., concurring). Justice Powell was joined by Chief Justice Burger and Justice Blackmun. *Id.* (Powell, J., concurring).

sume that, while there was a seizure, the circumstances were sufficiently suspicious to justify it.[82] Justice Powell, speaking for the concurring Justices, noted that he did "not necessarily disagree with the views expressed" in this portion of the opinion, but that "the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two government agents for her driver's license and ticket is extremely close."[83] Thus, this portion of the opinion would appear to be dubious precedent.

The Court then turned to the contention that, irrespective of the impropriety of the initial confrontation, the accused's fourth amendment rights were violated when she was accompanied to the Drug Enforcement Administration office. On this contention the Court found adequate support for the district court's conclusion that the accused voluntarily consented to the further detention. Because the detention was not unlawful, the Court only needed to determine whether the search was consensual. Again, the Court found ample support for the district court's conclusion. First, the Court noted that the accused, a twenty-two year old with an eleventh grade education, was capable of giving a knowing consent. Second, the accused had been advised twice by the officers of her right to decline consent; this "substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive."[84]

The *Mendenhall* issue was again presented in *Reid v. Georgia*,[85] in which narcotics agents in an airport observed the accused carrying a shoulder bag and occasionally looking back at another man who was carrying a similar shoulder bag. The two met in the lobby, spoke briefly, and left the terminal together. The agent approached them outside, asked to see their ticket stubs and identifications, and requested them to consent to a search. The accused initially agreed to the search but then broke and ran, dropping the shoulder bag, which contained heroin.

The state appellate court held that the initial detention was reasonable, because the suspect fit the agent's "drug courier pro-

82. *Id.* at 561-66 (Powell, J., concurring).
83. *Id.* at 560 n.1. (Powell, J., concurring).
84. *Id.* at 559.
85. 448 U.S. 438 (1980).

file."[86] This profile did not satisfy a majority of the Supreme Court, who found that the observed behavior was insufficiently suspicious and that "[t]he other circumstances describe a very large category of presumably innocent travellers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."[87]

In a concurring opinion Justice Powell, joined by Chief Justice Burger and Justice Blackmun, agreed that the seizure was not justified but noted that, as in *Mendenhall,* the question whether there was a seizure at all had not been addressed;[88] that issue remained open for consideration by the lower court on remand. Justice Rehnquist, relying upon his position in *Mendenhall,* maintained that there had been no seizure, and therefore no fourth amendment rights were implicated.[89]

2. Warrant Requirement

The United States Supreme Court has long held that a warrant is not required for a felony arrest when the arresting officer has probable cause.[90] In recent years, however, the Court has suggested that a warrant might be required if officers entered residential premises to make the arrest and no exigent circumstances were present.[91] In *United States v. Watson*[92] the Court

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86. State v. Reid, 149 Ga. App. 85, 255 S.E.2d 71 (1979).

> Specifically, the court thought it relevant that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were travelling together, and (4) they apparently had no luggage other than their shoulder bags.

448 U.S. at 440-41.

87. *Id.* at 441.

88. *Id.* at 442-43 (Powell, J., concurring).

89. *Id.* at 442 (Rehnquist, J., dissenting).

90. *See* Carroll v. United States, 267 U.S. 132 (1925).

91. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court noted that

> It is clear . . . that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth

rejected defendant's contention that officers should have obtained an arrest warrant since they had ample opportunity to do so, emphasizing the fact that the arrest was made in a public place.[93] The following year in *United States v. Santana*[94] the Supreme Court sustained a warrantless arrest within a dwelling, but only because the arrestee had retreated when the officers approached, and thus, the entry was made in hot pursuit.[95] The issue of warrantless arrests in residential premises finally was addressed directly in *Payton v. New York*.[96] Having assembled ample evidence to establish probable cause, six officers went to defendant Payton's house early in the morning. When no one answered the door, the officers sought additional assistance and used crowbars to break into and enter the apartment. The officers found no one on the premises, but did locate and seize a shell casing that was in plain view. The shell casing was admitted into evidence at the defendant's trial.[97] The Supreme Court held that the evidence was illegally seized because the entry had not been made pursuant to a warrant and because no exigent circumstances justified forgoing the warrant requirement.[98] The Court added that since an arrest warrant would be a sufficient authorization to enter the suspect's dwelling when there is reason to believe he or she is within, a search warrant would not be required.[99]

Amendment law that searches and seizures inside a man's house without warrants are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

Id. at 477-78.

92. 423 U.S. 411 (1976).

93. *Id.* at 424.

94. 427 U.S. 38 (1976).

95. *Id.* at 42-43.

96. 445 U.S. 573 (1980). Justice White, joined by Chief Justice Burger and Justice Rehnquist, dissented. *Id.* at 603 (White, J., dissenting). Justice Rehnquist also dissented separately. *Id.* at 620 (Rehnquist, J., dissenting).

97. *Id.* at 576-77.

98. *Id.* at 602.

99. In *Carroll* the Court stated the general rule to be that "a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony. . . ." *Id.* at 156.

B. Search and Seizure

1. Execution of Search Warrants

In *Ybarra v. Illinois*[100] the propriety of searching individuals who were on premises for which a search warrant had been issued came before the Supreme Court. A warrant authorized the search of a tavern and of its bartender for heroin and related evidence. In executing the warrant, nine of the thirteen customers were frisked, ostensibly for weapons. During the frisks what was described by an officer as "a cigarette pack with objects in it"[101] was detected, removed from defendant's pocket, and found to contain packets of heroin.[102] The defendant was convicted for possession.

The Supreme Court reversed the conviction on the ground that the search violated the fourth amendment.[103] Nothing in the complaint on which the warrant was issued suggested that patrons of the tavern might be in possession of seizable evidence. Furthermore, nothing observed at the tavern when the officers arrived to execute the warrant provided probable cause to believe that the defendant held seizable items. Therefore, the Court concluded, the warrant gave the officers "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers."[104]

The prosecution alternatively argued that the defendant was legitimately subject to a *Terry* frisk and that the risk provided probable cause to believe he was in possession of narcotics.[105] Because the Court found no basis for suspecting that the defendant was armed, the frisk was improper from the outset.[106] The Court was unimpressed by the argument that the *Terry* power should be expanded to permit evidence searches of individuals found on premises subject to a search warrant when the police had suspected those individuals of involvement in drug

100. 444 U.S. 85 (1979).
101. *Id.* at 88.
102. People v. Ybarra, 58 Ill. App. 3d 57, 373 N.E.2d 1013 (1978).
103. 444 U.S. at 96.
104. *Id.* at 92.
105. *Id.*
106. *Id.* at 92-93.

trafficking.[107] The Court cited *United States v. Di Re*,[108] which held that an individual who was seated in an automobile with a suspect who was believed to possess illegal contraband did not forfeit his fourth amendment protection.[109] An even stronger argument could be made in *Ybarra* that the presence of the accused in a public tavern carried no implication of suspicion.

2. Incident to Arrest

The power to carry out a warrantless search incident to an arrest was limited significantly in *United States v. Chadwick*.[110] The *Chadwick* Court precluded the search of a locked foot locker which was seized within the parameters of *Chimel v. California*.[111] Although *Chimel* allowed the search of an arrested person and items within his immediate control, the Court reasoned that a greater privacy interest attached to the closed container in *Chadwick*. In *United States v. Montano*[112] the accused was arrested in a motel room for a narcotics offense. During the arrest a suitcase was observed protruding from under the bed. An officer opened the suitcase and found $40,000 and several bags of cocaine. The Sixth Circuit, finding no probability that the suitcase might have been opened by one of the suspects to procure a weapon or to destroy evidence, concluded that the search was unreasonable under *Chadwick*. Judge Weick, dissenting, maintained that the officers "justifiably feared a potentially dangerous situation as they entered the motel room," and it was therefore "reasonable for the agents to act quickly to secure the premises and eliminate any opportunity for either escape or for the use of weapons."[113]

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107. *Id.* at 94.
108. 332 U.S. 581 (1948).
109. *Id.* at 587.
110. 433 U.S. 1 (1977).
111. Chimel v. California, 395 U.S. 752, 763 (1969).
112. 613 F.2d 147 (6th Cir. 1980).
113. *Id.* at 159 (Weick, J., dissenting).

The majority charged the dissent with attempting to alter the rules for a valid search by reference to the crime under investigation and the common use of weapons in connection therewith. It noted that the Supreme Court had declined a similar opportunity in Mincey v. Arizona, 437 U.S. 385 (1978), in which a so-called murder scene exception to the warrant requirement was in-

3. Illegally Seized Evidence as Impeachment

Although *Mapp v. Ohio*[114] prohibits the introduction of illegally seized evidence and its fruits, the Supreme Court has held that such evidence is admissible for the limited purpose of impeaching the testimony of the accused.[115] In *Walder v. United States*[116] the accused asserted on direct examination that he had never dealt in or possessed any narcotics. For impeachment purposes the prosecution introduced narcotics that were illegally seized from the premises of the accused. The *Walder* Court noted first that since the evidence introduced was not substantively relevant to the pending charges, the question whether the jury could limit its consideration of the evidence to the question of credibility was logically, though perhaps not actually, absent.[117] The Court also noted that since the accused had made the challenged statement on direct examination, the prosecution had not intentionally created an opportunity to introduce otherwise inadmissible evidence.[118]

Both of these qualifications noted in *Walder* were repudiated by the Court in subsequent decisions. In *Harris v. New York*,[119] a case involving the introduction of a confession obtained in violation of *Miranda*, the Court dismissed the collateral evidence aspect of *Walder* as immaterial to the holding. Likewise, the significance of the second factor was repudiated in *United States v. Havens*.[120] Havens had accompanied McLeroth on a flight from Peru to Miami. At the end of the flight a customs officer found cocaine sewed into makeshift pockets in McLeroth's t-shirt. McLeroth implicated the defendant, and thereafter a search of defendant's luggage revealed a t-shirt from which pieces had been cut that matched those sewn into McLeroth's shirt. This evidence was suppressed prior to the defendant's trial. McLeroth pleaded guilty and alleged in his testi-

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validated. 613 F.2d at 150.

114. 367 U.S. 643 (1961).

115. *See* COOK, PRE-TRIAL RIGHTS, *supra* note 63, § 73.

116. 347 U.S. 62 (1954).

117. *Id.* at 65.

118. *Id.* at 65-66.

119. 401 U.S. 222 (1971).

120. 446 U.S. 620 (1980). *See generally* 48 TENN. L. REV. 721 (1981).

mony that the defendant had devised the means for transporting the cocaine and had sewn the pockets shut. The defendant denied any involvement and was asked on cross-examination if he had anything to do with the makeshift pockets in McLeroth's t-shirt. He denied that he had and further denied that the t-shirt from which the pieces were cut was in his luggage. The t-shirt taken from defendant's luggage subsequently was admitted for purposes of impeaching the defendant's credibility. While conceding that the precedents had not involved false testimony first given on cross-examination, a majority of the Court held nevertheless that "the reasoning of those cases controls this one."[121] Four Justices dissented[122] and noted that prior to *Walder* the Court had held in *Agnello v. United States*[123] that it was constitutionally impermissible to use illegally seized evidence to rebut statements of the accused made during cross-examination.[124]

4. Electronic Surveillance

Beginning with *Katz v. United States*[125] the Supreme Court required prior judicial authorization in virtually all electronic interceptions of conversations. Whether this authority applied to the use of electronic tracking devices was the issue in *United States v. Bailey*.[126] Undercover narcotics agents had arranged to sell an ingredient for a controlled substance to a suspect. Prior to delivery, the agents obtained a warrant from a federal magistrate which authorized the installation of an electronic beeper in one of the drums of chemicals to aid in tracking the container to the manufacturer. Sometime after the location of the drum was confirmed by the emitted radio signals, the agents obtained a second warrant for the seizure of the device and the chemicals.

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121. *Id.* at 626.

122. Justice Brennan, joined by Justices Marshall, Stewart, and Stevens dissented. *Id.* at 629 (Brennan, J., dissenting).

123. 269 U.S. 20 (1925).

124. The majority sought to explain away *Agnello* as "a case of cross-examination having too tenuous a connection with any subject opened upon direct examination to permit impeachment by tainted evidence." United States v. Havens, 446 U.S. at 625.

125. 389 U.S. 347 (1967).

126. 628 F.2d 938 (6th Cir. 1980).

At the trial for conspiracy to manufacture narcotics, evidence obtained by use of the electronic tracking device was excluded because the warrant contained no time limitation.

In affirming the ruling, the court of appeals found that installing the device in the container, which was then in the lawful possession of the government, did not violate the fourth amendment since no reasonable privacy interest of the accused was violated. A different result was reached, however, with regard to the monitoring of the beeper's signal since that occurred after ownership and possession had been transferred to the accused. The court concluded that "[b]eeper surveillance of non-contraband personal property in private areas trenches upon legitimate expectations of privacy . . . ."[127]

While a warrant had been obtained for the surveillance, thus raising a presumption of validity, the question remained whether the warrant was itself adequate. The court of appeals agreed with the district court that, under the authority of *Berger v. New York*,[128] an electronic surveillance order must contain reasonable time limitations, and that absent such specifications, the warrant was rendered invalid.[129]

C. Right to Counsel

1. Preliminary Hearing

In the 1974 decision of *McKeldin v. State*[130] the Tennessee Supreme Court held that the right to counsel applied to preliminary hearings and that the state must provide counsel for an accused indigent at the preliminary hearing.[131] The court recognized, however, that the failure to provide counsel might be harmless error.[132] When the error *was* determined in subsequent

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127. *Id.* at 944.

128. 388 U.S. 41 (1967).

129. In a concurring opinion, Judge Keith favored an explicit recognition by the court "that privacy of movement is protected by the Fourth Amendment." 628 F.2d at 949 (Keith, J., concurring).

130. 516 S.W.2d 82 (Tenn. 1974).

131. *See* Cook, *Criminal Law in Tennessee in 1974: A Critical Survey*, 42 TENN. L. REV. 187, 220-22 (1975).

132. 516 S.W.2d at 87.

proceedings to be harmless,[133] the accused petitioned for a federal writ of habeas corpus.[134] McKeldin, charged with armed robbery, had been represented at his preliminary hearing by court-appointed counsel who was not a licensed attorney. Thereafter, he retained a licensed attorney to represent him at trial and was convicted and sentenced to twenty years. Three issues were raised on appeal: (1) whether the accused was entitled to counsel at his preliminary hearing; (2) if so, whether a court-appointed nonlawyer satisfied that entitlement; and (3) if not, whether the error was harmless.

The federal constitutional standard, established in *Coleman v. Alabama*,[135] made the dispositive factor whether under state law the preliminary hearing was regarded as a critical stage of the prosecution. While the Sixth Circuit Court of Appeals had held that *Coleman* would not apply to a preliminary hearing in Tennessee,[136] in *McKeldin v. Rose*, the habeas corpus proceeding, the federal district court found that precedent dubious for two reasons:[137] first, the case would have required a retrospective application of *Coleman*, and second, the preliminary hearing statute had been replaced, and unlike the old statute, the new one required a preliminary hearing in all cases upon the request of the accused.[138] Because of the change in the law, the Sixth Circuit accepted the Tennessee Supreme Court decision in *McKeldin v. State* that the preliminary hearing was a critical stage in the prosecution. Having determined that the right to counsel applied, the court had no difficulty in concluding that the right was not satisfied by the appointment of a nonlawyer.[139]

The court then turned to the harmless error issue and

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133. McKeldin v. State, 534 S.W.2d 131 (Tenn. Crim. App. 1975).

134. McKeldin v. Rose, 482 F. Supp. 1093 (E.D. Tenn. 1980).

135. 399 U.S. 1 (1970).

136. Harris v. Neil, 437 F.2d 63 (6th Cir. 1971).

137. 482 F. Supp. at 1096.

138. TENN. CODE ANN. § 40-1131 (1971). Under the old law, the right to a preliminary hearing attached only when the grand jury was not in session. 482 F. Supp. at 1096.

139. The court, in reaching its conclusion, relied on Harrison v. United States, 387 F.2d 203 (D.C. Cir. 1967), *rev'd on other grounds*, 392 U.S. 219 (1968). 482 F. Supp. at 1096.

looked for guidance to *Holloway v. Arkansas*,[140] a case decided subsequent to *McKeldin v. State*. In *Holloway* the court said that

> the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." . . . Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.[141]

In *McKeldin v. Rose* the district court expanded the reasoning of *Holloway* to hold that "when a defendant is denied assistance of counsel at a critical stage of the prosecution it cannot be treated as harmless error."[142] Thus, at least in the United States District Court for the Eastern District of Tennessee, the harmless error exception to the *McKeldin* rule is inapplicable.

2. Effective Assistance of Retained Counsel

Lower courts often have disagreed on whether the standard for effective assistance of counsel is affected by whether counsel is appointed or retained. Many courts took the view that the same standard should apply in all cases.[143] Other courts, however, concluded that greater deference must be shown to retained counsel since by selecting the attorney, the defendant, to a degree, has endorsed the work of counsel.[144] Still other courts held that retained counsel could never be incompetent for sixth amendment purposes, because there was no governmental action.[145] The question finally was answered in *Cuyler v. Sulli-*

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140. 435 U.S. 475 (1978).

141. *Id.* at 489 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)) (citation omitted).

142. 482 F. Supp. at 1098.

143. *E.g.*, Moore v. United States, 432 F.2d 730 (3d Cir. 1979); Goodwin v. Cardwell, 432 F.2d 521 (6th Cir. 1970); McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

144. *E.g.*, Root v. Cunningham, 344 F.2d 1 (4th Cir.), *cert. denied*, 382 U.S. 866 (1965); Stewart v. Wainwright, 309 F. Supp. 1023 (M.D. Fla. 1969); Williams v. United States, 304 F. Supp. 691 (E.D. Mo. 1969).

145. *E.g.*, Plaskett v. Page, 439 F.2d 770 (10th Cir. 1971); United States

van,[146] in which the United States Supreme Court concluded that defendants who retain counsel are entitled to the same degree of constitutional protection against ineffective assistance as are those defendants who are represented by appointed counsel.[147]

3. Conflict of Interest

Two other issues before the Supreme Court in *Cuyler v. Sullivan*[148] were issues that were expressly reserved in *Holloway v. Arkansas*.[149] The Court had to decide whether a state judge must inquire into the propriety of multiple representation when the question has not been raised by one of the parties and whether the mere possibility of a conflict of interest is sufficient to find a deprivation of the right to counsel. On the first issue, the Court held that the sixth amendment does not require that trial courts consider the propriety of multiple representations in every case. Given the ethical obligation of the attorney to avoid conflicts of interest and to advise the court whenever they arise, trial courts could assume that no conflict existed or that the parties affected had waived any objection absent the existence of special circumstances.[150] On the second issue, the Court concluded that except in cases in which a defendant was not given an opportunity to show the potential conflict, a reviewing court should not presume that a possible conflict resulted in ineffective assistance of counsel.[151] If the issue is raised at trial, the

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ex rel. O'Brien v. Maroney, 423 F.2d 865 (3d Cir. 1970); Shaw v. Henderson, 303 F. Supp. 183 (E.D. La. 1969), *aff'd*, 430 F.2d 1116 (5th Cir. 1970).

146. 446 U.S. 335 (1980).

147. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the state in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

Id. at 344-45 (footnotes omitted).

148. 435 U.S. 475 (1978).

149. 446 U.S. 335 (1980).

150. *Id.* at 346-47.

151. *Id.* at 348.

defendant should be afforded the opportunity to demonstrate the conflict. If no objection is made at trial, then on appeal the defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[152]

D. Identifications

In *Summitt v. Bordenkircher*[153] the issue for the Sixth Circuit Court of Appeals was whether due process required a hearing outside the presence of the jury to determine the admissibility of identification evidence. While acknowledging that such a procedure would be preferable, the court was persuaded that there was no such constitutional requirement.[154] Although the Supreme Court had held that a trial judge must find a confession to be voluntary before submitting it to a jury,[155] it subsequently held that the issue of voluntariness need not be resolved outside of the presence of the jury.[156] The *Summitt* court found that holding to be pertinent and thus allowed the admissibility of identification evidence to be determined in the jury's presence.[157]

E. Confessions

1. Right to Counsel

In *Massiah v. United States*,[158] a decision predating *Miranda*, the Supreme Court held that the sixth amendment right to counsel had been violated when government agents surreptitiously recorded a conversation between an indicted defendant and a coconspirator, with the consent of the coconspirator. A

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152. *Id.*

153. 608 F.2d 247 (6th Cir. 1979).

154. *Id.* at 250-51.

155. Jackson v. Denno, 378 U.S. 368 (1964).

156. Pinto v. Pierce, 389 U.S. 31 (1967).

157. Judge Merritt, dissenting, preferred to follow United States v. Driber, 546 F.2d 18 (3d Cir. 1976), and suggested requiring a hearing on the admissibility of identification evidence outside the presence of the jury, unless the request for a hearing was frivolous. 608 F.2d at 254 (Merritt, J., dissenting).

158. 377 U.S. 201 (1964).

substantially similar issue arose in *State v. Berry*,[159] in which a law enforcement officer was covertly placed in jail with the accused, who had been indicted for first degree murder. Counsel for the accused had contacted the sheriff who, with full knowledge of the arrangements that had been made, promised that the accused would not be interrogated in the absence of counsel. Ostensibly, the undercover operation was intended to determine whether the accused intended to kill a particular law enforcement agent who had played a major role in the investigation. At the murder trial the undercover agent testified regarding numerous incriminating statements made by the accused. While the statements had been made in the course of a voluntary conversation with a "tough character" whom the defendant sought to hire to kill the investigator, the appellate court saw "no essential difference between this and a normal interrogation wherein a police officer takes a statement from one accused of crime."[160] Under the authority of *Massiah* and its recent application in *Brewer v. Williams*,[161] the court concluded that the accused had been denied the right to counsel[162] and that the conviction therefore must be reversed.

2. Interrogation

The *Miranda* requirements are only pertinent to incriminating statements elicited by interrogation.[163] A frequently recognized exception to *Miranda* is the voluntary statement rule.[164]

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159. 592 S.W.2d 553 (Tenn. 1980).

160. *Id.* at 556.

161. 430 U.S. 387 (1977).

162. 592 S.W.2d at 561.

> All will agree that had the officer entered the cell, identified himself, and asked questions which produced incriminating information, such information would not have been admissible. The law will not permit law enforcement officials to do by ruse, trickery, deceit and deception that which it is not permitted to do openly and honestly. Nor will the law permit the State to dishonor its commitment and renege on its promise to defendant's counsel.

Id.

163. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

164. "Any statement given freely and voluntarily without any compelling influences is . . . admissible in evidence." *Id.* at 478. *See, e.g.*, People v. Mer-

Interrogation is not confined, however, to dialogues between officials and defendants in which the officials' statements are followed by question marks; interrogation may be subtle as well as explicit.[165]

Whether an exchange amounted to interrogation was the dispositive issue before the Supreme Court in *Rhode Island v. Innis*.[166] Innis had been arrested, unarmed, shortly after he had purportedly robbed a taxicab driver with a sawed-off shotgun. After receiving his *Miranda* rights, Innis indicated that he wished to speak to an attorney. On the way to the stationhouse, two of the officers accompanying the accused expressed concern about the missing shotgun, particularly because a school for handicapped children was located near the scene of the alleged crime. One officer expressed the fear that " 'there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and . . . might hurt themselves.' "[167] The accused interrupted the conversation and told the officers to turn the car around so that he could direct them to the place where he had hidden the shotgun. At trial the accused sought to suppress the shotgun and his statements about its location as products of a violation of his *Miranda* rights. The trial court, without addressing the question whether an interrogation had occurred, ruled that the accused had waived his right to remain silent. The Rhode Island Supreme Court set aside the conviction, relying in part on *Brewer v. Williams*[168] for the conclusion that the accused had invoked his right to counsel and thereafter had been interrogated without first waiving the right to counsel.[169]

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cer, 257 Cal. App. 2d 244, 246, 64 Cal. Rptr. 861, 863 (1967) (escaping prisoner's statement "I did it. No one else was involved" when stopped by officer was voluntary); People v. Leffew, 58 Mich. App. 533, 536, 228 N.W.2d 449, 451 (1975) (suspect's statement about rings he was wearing when stopped by officer was voluntary); Commonwealth v. Whitman, 252 Pa. Super. 66, 71-72, 380 A.2d 1284, 1287 (1977) (suspect's statement that he committed the robbery but did not shoot anyone held to be voluntary).

165. Commonwealth v. Simala, 434 Pa. 219, 252 P.2d 575 (1969).

166. 446 U.S. 291 (1980). *See generally* 48 TENN. L. REV. 785 (1981).

167. *Id.* at 294 (quoting the trial transcript).

168. 430 U.S. 387 (1977).

169. The Supreme Court's summary of the lower court's proceedings can

The Supreme Court vacated the judgment of the state court and remanded the case. The Court acknowledged that interrogation was not limited to express questioning of an accused. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[170] Applying this standard, the Court concluded that no interrogation occurred in the present case, because the "conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited."[171] The Court also found that there was no reason for the officers to believe that their conversation would likely elicit an incriminating response.

The facts surrounding the incriminating statement in *Innis* are remarkably similar to those in *Brewer*. In *Brewer* officers transporting an accused who was suspected of murdering a child expressed regrets that the body might not be found prior to an impending snowfall, and, therefore, might not receive a "Christian burial."[172] The accused, known to be vulnerable to such religious appeals, directed the officers to the place where he had hidden the body. The Court in *Brewer* held that the statements of the accused were inadmissible because they were obtained in violation of the sixth amendment right to counsel. The *Brewer* decision was dismissed as irrelevant in a footnote in *Innis* on the ground that in *Brewer* formal charges had been brought and therefore the right to counsel had attached and had been invoked.[173] By contrast, in *Innis* formal charges had not yet been instigated, and what right to counsel the accused had was derivative of the fifth amendment protection accorded by *Miranda*.

Justice Marshall, joined by Justice Brennan, dissented, expressing agreement with the Court's definition of "interrogation" but disagreeing with the application of the definition in

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be found in 446 U.S. at 296-97.

170. *Id.* at 301 (footnotes omitted).

171. *Id.* at 302.

172. 430 U.S. at 392-93.

173. 446 U.S. at 300 n.4.

the *Innis* case.[174] Justice Stevens' dissent suggested three ways in which the officer might have expressed his apprehension:

> He could have:
>
> (1) directly asked Innis:
>
> Will you please tell me where the shotgun is so we can protect handicapped school children from danger?
>
> (2) announced to the other officers in the wagon:
>
> If the man sitting in the back seat with me should decide to tell us where the gun is, we can protect handicapped children from danger.
>
> or
>
> (3) stated to the other officers:
>
> It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself.[175]

The dissent viewed the first statement clearly to be interrogation. The third statement—essentially what had occurred—was not interrogation according to the majority. Justice Marshall was persuaded that the second statement also would not satisfy the definition as interpreted by the majority since it was not a direct question and it would not be reasonably likely to elicit an incriminating response.[176] Such diverse results, in the view of Stevens' dissent, are arbitrary "because all three [statements] appear to be designed to elicit a response from anyone who in fact knew where the gun was located."[177]

3. Silence as Impeachment

The silence of the accused following the *Miranda* warnings may not be used to impeach his testimony, because the warnings inform him of his right not to speak.[178] This principle is not applicable, however, to prearrest silence. In *Jenkins v. Anderson*[179] the accused, charged with first degree murder, maintained that he had acted in self-defense. At trial the prosecution established

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174. *Id.* at 305 (Marshall, J., dissenting).
175. *Id.* at 312 (Stevens, J., dissenting).
176. *Id.* at 313 (Stevens, J., dissenting).
177. *Id.* at 312 (Stevens, J., dissenting) (footnote omitted).
178. Doyle v. Ohio, 426 U.S. 610 (1976).
179. 447 U.S. 231 (1980).

that the accused was not apprehended until two weeks following the killing and suggested, in closing argument, that the accused would have spoken out sooner if he had killed in self-defense. The Supreme Court held that the use of the accused's prearrest silence for purposes of impeachment did not violate the privilege against self-incrimination protected by the fifth amendment or fundamental fairness protected by the due process clause. Unlike silence following the *Miranda* warnings, "[i]n this case, no governmental action induced petitioner to remain silent before arrest."[180]

4. Inconsistent Statements as Impeachment

The United States Supreme Court held in *Doyle v. Ohio*[181] that the silence of the accused at the time of his arrest and after receipt of his *Miranda* warnings could not be used to impeach his trial testimony. The accused had given an exculpatory story on direct examination and on cross-examination was asked why he had not offered this explanation to the arresting officer. In *Charles v. Anderson*[182] the Sixth Circuit Court of Appeals was concerned with the application of *Doyle* to an accused who did not remain silent but made a statement inconsistent with his trial testimony. The prosecution maintained that since the accused had not asserted the privilege against self-incrimination, the cross-examination was "a legitimate attempt to explore this inconsistency."[183] The court concluded that *Doyle* applied and then distinguished several cases in which prior statements had been used to demonstrate inconsistency with trial testimony.[184] In *Charles* the court viewed the cross-examination as focusing upon the silence of the accused—the failure to offer the explanation testified to on direct examination.[185] Judge Merritt, dissenting, found nothing in *Doyle* to suggest that the Supreme Court

180. *Id.* at 240.

181. 426 U.S. 610 (1976).

182. 610 F.2d 417 (6th Cir. 1979).

183. *Id.* at 420.

184. United States v. Mireles, 570 F.2d 1287 (5th Cir. 1978); Twyman v. Oklahoma, 560 F.2d 422 (10th Cir. 1977), *cert. denied*, 434 U.S. 1071 (1978); United States v. Mitchell, 558 F.2d 1332 (8th Cir. 1977).

185. 610 F.2d at 421-22.

would have reached the same result had the accused made an inconsistent statement at the time of the arrest.[186]

F. Prosecutorial Vindictiveness

In a series of cases the United States Supreme Court has disapproved governmental action that was apparent retaliation for the exercise of constitutionally protected rights. In *North Carolina v. Pearce*[187] the Court found that imposing a greater sentence on retrial when a conviction has been overturned and when no legitimate reason for the increase existed was a deprivation of due process. In *Blackledge v. Perry*[188] the *Pearce* principle was applied to a prosecutor's increase in the severity of the charges after the accused demanded a trial *de novo* on appeal. Conversely, in *Bordenkircher v. Hayes*[189] the Court found nothing inappropriate when the prosecution obtained an additional indictment against the accused after he refused to plead guilty, viewing this as part of the " 'give-and-take' "[190] of plea bargaining.

In *United States v. Andrews*[191] the accused were indicted for narcotics and firearms offenses and, at the request of the prosecution, were denied bail. The ruling was appealed, and the accused were admitted to bail. Thereafter, the prosecution obtained additional indictments for conspiracy. The accused sought to have these charges dismissed on the ground that they represented a retaliation to the exercise of their constitutional right to bail. The federal district court granted the motion and dismissed the conspiracy count[192] because of the appearance of vindictiveness. The court ruled that a superseding indictment would be legitimate only if, without fault of the Government, changed circumstances or newly discovered evidence were present.

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186. *Id.* at 424 (Merritt, J., dissenting).
187. 395 U.S. 711 (1969).
188. 417 U.S. 21 (1974).
189. 434 U.S. 357 (1978).
190. *Id.* at 362 (quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970)).
191. 612 F.2d 235 (6th Cir. 1979).
192. 444 F. Supp. 1238 (E.D. Mich. 1978).

The Fifth Circuit Court of Appeals vacated the judgment and concluded that the "appearance of vindictiveness" standard was not compelled by the United States Supreme Court decisions.[193] The court noted that in both *Pearce* and *Blackledge* "there was a substitution of charges—the same conduct on the part of the defendant was the basis for the diverse sentences imposed in *Pearce* and underlie both the misdemeanor and felony charges in *Blackledge*."[194] In *Andrews* the conspiracy charge was separate and distinct from the original charges on the substantive crimes. Thus, the court noted that in *Pearce* "the sentencing court [had] made a final decision as to the appropriate punishment for the offense of which the defendant was convicted;"[195] in *Blackledge*, the conduct would "support only a single charge, with the prosecution having the option of charging the defendant under different provisions of the law carrying varying penalties."[196] Under either of those circumstances and absent any explanation, the more punitive action smacked of vindictiveness. In *Andrews*, however, as in *Bordenkircher*, "when the defendants were charged with the two substantive offenses the full extent of prosecutorial judgment and/or discretion had not been exercised."[197]

Relying primarily upon decisions from the Fifth Circuit Court of Appeals that addressed the issue of prosecutorial vindictiveness,[198] the court indicated that its concern was with "the realistic likelihood of vindictiveness in the prosecutor's conduct, . . . bearing in mind that resolution of such issue must take into account a reasonable apprehension of retaliatory motivation on the part of the defendant."[199] The *Andrews* court envisioned three possibilities: (1) If the prosecution substitutes charges, thereby increasing the severity of the potential punishment, a prima facie case of vindictiveness is presented that may be rebutted by proof that intervening circumstances, of which the

193. 612 F.2d at 238.
194. *Id.* at 240-41.
195. *Id.* at 241.
196. *Id.*
197. *Id.*
198. Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977).
199. 612 F.2d at 244 (citation omitted).

prosecution could not reasonably have been aware, warranted the charge;[200] (2) if new charges relatively distinct from the original charges are added, then the accused must show actual vindictiveness even though "a prima facie case may be made out of the mere fact of the added charge if no plausible explanation is offered by the prosecution";[201] and (3) if a new charge is added "for a different and distinct offense which was a different and distinct consequence of the same basic conduct underlying the original charge,"[202] a prima facie case of vindictiveness would arise "subject to rebuttal by the prosecution offering evidence of facts that reasonably explain or justify the action taken and negate any inference of vindictiveness in fact."[203] The court noted that the standard placed primary emphasis on the apprehension of retaliatory motivation in the first example, the intent of the prosecutor in the second, and both in the third.[204]

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200. *Id.*

201. *Id.*

202. *Id.* at 245.

203. *Id.* (footnote omitted).

204. *Id.* at 244-45.

Judge Merritt, concurring, found the vindictiveness concept "unmanageable" and concluded that, in light of *Bordenkircher*, "the kind of vindictive behavior proscribed by the due process clause relates to double jeopardy values and . . . the concept is limited to prosecutorial vindictiveness after the first trial is over." *Id.* at 247 (Merritt, J., concurring).

Judge Keith, dissenting, favored a balancing approach:

> A court should first decide as a threshold matter whether a prosecutor's action in seeking a heavier second indictment appears to be vindictive. If so, the court should examine the facts and weigh the extent to which allowing the second indictment will chill defendant's exercise of the right in question with the extent to which forbidding the second indictment infringes on the prosecutor's charging authority. If the balance falls in favor of the defendant, then the government would have a heavy burden of offsetting the appearance of vindictiveness. If the balance favors the government then there would arise a prima-facie case of vindictiveness, but all the government need do is provide neutral explanations to demonstrate that it did not, in fact, act vindictively.

Id. at 252 (Keith, J., dissenting).

G. Trial by Jury

1. Discrimination in Selection

The sixth amendment right to trial by jury requires that juries "be drawn from a source fairly representative of the community."[205] While the issue of a fair cross-section usually has arisen in cases involving claims of exclusion on the basis of race[206] or national origin,[207] the constitutional requirement is not so limited. The test was articulated in *Duren v. Missouri*:[208]

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[209]

In *State v. Nelson*[210] the accused sought a reversal of his conviction on the ground that members of a local group known as "The Farm" were not included on the master jury list and therefore were not included in the grand jury that indicted him or in the panel from which his trial jury was selected. The Farm was a religious commune that previously had been involved in a criminal prosecution for the propagation of marijuana. The conviction of its leader for the manufacture of marijuana had been sustained by the Tennessee Supreme Court.[211] By the time of the trial in *Nelson*, approximately 1,100 people including 700 adults were living on the Farm. The court described the group as a

> religious community of people dedicated to a common set of spiritual beliefs. The Farm is substantially autonomous, in that it is agriculturally self-sufficient and maintains its own school for the education of Farm children. The Farm also controls the

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205. Taylor v. Louisiana, 419 U.S. 522, 538 (1975).
206. *See* Strauder v. West Virginia, 100 U.S. 303 (1880).
207. *See* Hernandez v. Texas, 347 U.S. 475 (1954).
208. 439 U.S. 357 (1979).
209. *Id.* at 364.
210. 603 S.W.2d 158 (Tenn. Crim. App. 1980).
211. Gaskin v. State, 490 S.W.2d 521 (Tenn. 1973).

> ingress and egress of all outsiders, as well as that of its own members. In this sense, the group is somewhat self segregated from the mainstream of Lewis County life.[212]

Many of the members of the sect worked outside the commune, and more than half of those eligible had registered to vote. Nevertheless, the trial judge had concluded that the group " 'walled themselves away from the mainstream of socio-economic political structure and activity' " of the county and therefore " 'were not part of a viable or even a prima facie cross section of Lewis County.' "[213]

The question under the *Duren* test, however, was, first, whether those excluded formed a "distinctive group,"[214] a point conceded by the trial court. The second *Duren* requirement, under-representation in venires, was easily satisfied in *Nelson* by the absolute exclusion of the Farm members from jury service, even though they constituted approximately twelve percent of the population of the county.[215] The statistical disparity also was sufficient to satisfy the third requirement—systematic exclusion from jury selection.[216] Moreover, the court found direct evidence of systematic exclusion. The statutory requirement that potential jurors be "known for their integrity, fair character and sound judgment"[217] was misinterpreted to require jurors to be personally known by the jury commissioners.[218] Such practice had been held explicitly unconstitutional forty years earlier in *Smith v. Texas*.[219]

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212. 603 S.W.2d at 162 (footnote omitted).

213. *Id.* at 163 (quoting the trial judge's holding).

214. The court adopted the criteria for cognizable groups articulated in United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973): "(1) the presence of some quality or attribute which defines and limits the group; (2) a cohesiveness of attitudes or ideas or experience which distinguishes the group from the general social milieu; and (3) a community of interests which may not be represented by other segments of society." 603 S.W.2d at 163.

215. *Id.* at 164.

216. *Id.* at 165.

217. TENN. CODE ANN. § 22-228(a) (1955) (currently codified as TENN. CODE ANN. § 22-2-302(a) (1980 Repl.)).

218. 603 S.W.2d at 166.

219. 311 U.S. 128 (1940). "Where jury commissioners limit those from

A prima facie case of discrimination thus established, the burden in *Nelson* shifted to the prosecution to prove that a significant state interest was served by the exclusion. In the absence of any proof the court concluded that the indictments should have been dismissed and the jury venire quashed. Finally, the court recommended the adoption of the key number system in order to avoid the constitutional vulnerability of subjective criteria in the selection process.[220]

2. Separation of Jury

From an early date, Tennessee courts have held it improper to separate the jurors during the course of a felony trial. When the jurors are separated, the burden of proof rests with the prosecution to show an absence of prejudice.[221]

The law on jury separation was summarized in *Hines v. State*:[222]

> The principles laid down in these cases are, 1. That the fact of separation having been established by the prisoner, the possibility that the juror has been tampered with, and has received other impressions than those derived from the testimony in court, exists, and prima facie, the verdict is vicious; but 2nd this separation may be explained by the prosecution, showing that the juror had no communication with other persons, or that such communication was upon subjects foreign to the trial, and that in fact, no impressions, other than those drawn from the testimony, were made upon his mind. But 3. In the absence of such explanation, the mere fact of separation is sufficient ground for a new trial.[223]

Given the presumption favoring the defense on this issue, a

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whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them." *Id.* at 132.

220. 603 S.W.2d at 167.

221. Hickerson v. State, 141 Tenn. 502, 213 S.W. 917 (1919); Long v. State, 132 Tenn. 649, 179 S.W. 315 (1915); Sherman v. State, 125 Tenn. 19, 140 S.W. 209 (1911); Cartwright v. State, 80 Tenn. 620 (1883); Hines v. State, 27 Tenn. 597 (1848); M'Lain v. State, 18 Tenn. 241 (1837).

222. 27 Tenn. 597 (1848).

223. *Id.* at 602.

new trial would appear to be unavoidable whenever potentially prejudicial influence is shown. Such was the case in *Gonzales v. State*.[224] The *Gonzales* defendants were charged with felonious child abuse.[225] The jury had been sequestered the first evening of the trial, and seven members expressed an interest in voting in an election held the second day of the trial. It was clear that the case could not be completed before the polls closed, so the judge informed counsel that he intended to permit the jury to return to their homes for the evening after instructing them in a strong admonition to avoid all newspaper, radio, and television accounts of the trial. Both defendants opposed jury separation in light of the widespread publicity given the case. Nevertheless, the trial judge permitted the jurors to return to their homes. The following morning the trial judge asked the jurors if any of them had read or heard anything that would affect their ability to render an impartial verdict in the case. Defense counsel was permitted to question the jurors regarding their exposure to any information through the media or through personal contacts regarding the case. None of the jury confessed to any untoward events.[226]

After their conviction for felonious child abuse, the defendants moved for a new trial, contending that on the evening the jury was separated, a motion picture entitled "Sybil," which depicted child abuse, was aired on a local television station. According to a witness for the defense, "the movie depicted vivid scenes of abuse administered by a mother upon her daughter of tender years and the resulting adverse affect [*sic*] upon the child's personality in later years."[227] There was, however, no evidence that any of the jurors had actually viewed the movie.[228]

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224. 573 S.W.2d 288 (Tenn. 1980). *See generally* 48 TENN. L. REV. 146 (1980).

225. The statute under which the defendants were charged was Tennessee Code Annotated § 39-601(b)(4) (Supp. 1978).

226. 593 S.W.2d at 289-90.

227. *Id.* at 290.

228. At the reconvening of the trial, "neither the trial judge nor defense counsel asked any specific questions about what the jurors saw on television, if anything." *Id.* At the hearing on the motion for a new trial, defense counsel had told the court that they had not learned about the airing of the motion picture until after the trial. *Id.*

Nevertheless, the supreme court concluded that the possibility of prejudice clearly was established,[229] and "[w]hen the evidence of that possibility for prejudicial impressions was presented the burden was imposed upon the State to show that the jurors were not exposed to the movie 'Sybil', or if exposed that it had no prejudicial effect upon them."[230] In the absence of such proof by the State, the decision was reversed and the case was remanded for a new trial.

H. Punishment

1. Disproportionality

Courts traditionally have been reluctant to examine claims of disproportionality between punishment and offense.[231] The conventional view has been that a sentence falling within the statutory limits is constitutional.[232] In *Rummel v. Estelle*[233] the United States Supreme Court sustained the application of the Texas recidivist statute that imposed a mandatory sentence of life imprisonment upon an accused convicted of three nonviolent theft offenses in which the total amount stolen was $229.[234] The majority simply held that "the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction."[235]

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229. "It is beyond question that 'Sybil' conveyed impressions potentially prejudicial to defendants in this case and that the nature of the charges were such as were 'likely to excite the commuunity against them.' " *Id.* at 293.

230. *Id.*

231. *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—POST-TRIAL RIGHTS § 6 (1976).

232. *See* Hardin v. State, 210 Tenn. 116, 355 S.W.2d 105 (1962); French v. State, 489 S.W.2d 57 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1972).

233. 100 S. Ct. 1133 (1980).

234. *Id.* at 1134-35. The defendant had been convicted of fraudulent use of a credit card to obtain $80 in goods and services, passing a forged check for $28.36, and obtaining $120.75 by false pretenses. *Id.*

235. *Id.* at 1145. Justice Powell, joined by Justices Brennan, Marshall, and Stevens, dissented.

2. Habitual Criminal

The Tennessee Habitual Criminal Statute enhances punishment for an offense to life imprisonment upon proof of three prior convictions "for separate offenses, committed at different times, and on separate occasions."[236] In *Clayborne v. State*[237] the accused and a companion used a gun to take two leather jackets from a shop. From the shop, they ran to an apartment complex and, again at gunpoint, deprived another individual of his automobile. The prosecution maintained that the two offenses were not committed simultaneously and were not directly related; therefore, they should qualify as separate offenses for purposes of the habitual criminal statute. The court disagreed and concluded that "[t]he two felonies were committed on one occasion";[238] thus, the statutory requirement that separate offenses be committed at different *times* was not met.[239]

I. Probation

In *State v. King*[240] the accused pleaded guilty to public drunkenness and to carrying a dangerous weapon with intent to go armed. The trial court sentenced him to two six-month sentences to run concurrently, but credited him with time already served[241] and suspended the remainder of the sentence. The state appealed, contending that suspension of the sentence was improper, because the trial judge had failed, as required by statute,[242] to order and consider a probation report and to state reasons for granting probation. The Tennessee Court of Crimi-

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

237. 596 S.W.2d 820 (Tenn. 1980).

238. *Id.* at 821.

239. *Id.* at 821-22. The supreme court noted that the court of criminal appeals, in reaching the same conclusion, had relied upon Frazier v. State, 485 S.W.2d 877 (Tenn. 1972), in which five burglaries committed against separate tenants in the same building on the same day were counted as one offense for purposes of the habitual criminal act. *Id.* at 821.

240. 603 S.W.2d 721 (Tenn. 1980).

241. The trial court gave the credit in accordance with Tennessee Code Annotated § 40-3102 (1975), which provides that "[t]he trial court shall . . . allow the defendant credit on his sentence for any period of time for which he was committed and held . . . pending his arraignment and trial."

242. *Id.* § 40-2904.

nal Appeals ruled that these statutory requirements did not apply to a subsequent statute that granted trial judges wide discretion in suspending sentences without imposing probation.[243] The Tennessee Supreme Court disagreed, concluding that the provisions must be read *in pari materia*, and that the subsequent statute was only concerned "with the time frame within which trial judges may exercise the power to suspend sentences,"[244] and not with the manner in which eligibility for suspension was to be determined. The court further held that, contrary to the judgment of the trial court, under the pertinent statute[245] "there can be no suspension of a sentence without probation."[246] While the appellate court had concluded that it would be absurd to require a probation report in every case in which sentence was suspended,[247] the supreme court responded, first, that this was simply what the statutes required, and second, that it previously had held that a probation report was not required if a probation officer was unavailable.[248] In such cases, "the relevant factors to be considered in granting or denying suspension of sentence and probation . . . should be fully developed at the hearing."[249]

An abuse of discretion in the denial of probation may constitute reversible error.[250] For such a result, the appellate court must find "that the record contains no substantial evidence to support the conclusion of the trial court that the defendant is not entitled to probation or suspended sentence."[251] In *State v. Barber*[252] the accused was convicted of selling one ounce of marijuana to an undercover agent. Because of the continuing undercover investigation, he was not arrested for the offense until twenty months later. The record indicated that the accused had "ceased his unlawful activities within days of the sale, and [had]

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243. *Id.* § 40-2903.
244. 603 S.W.2d at 724.
245. TENN. CODE ANN. §§ 40-2901 & -2902 (1975).
246. 603 S.W.2d at 725.
247. *Id.*
248. *Id.* The court referred to an earlier case, State v. Welch, 565 S.W.2d 492 (Tenn. 1978), to support its conclusion.
249. 603 S.W.2d at 725 (citation omitted).
250. State v. Grear, 568 S.W.2d 285 (Tenn. 1978).
251. *Id.* at 286.
252. 595 S.W.2d 809 (Tenn. 1980).

lived the life of an example citizen in the twenty months between the sale and his arrest."[253] Finding that the accused's record was in all other respects honorable,[254] the court concluded that his rehabilitation without incarceration made him an "ideal prospect for probation,"[255] and the denial of the request for probation was, therefore, an abuse of discretion.

J. Double Jeopardy

1. Multiple Offenses

In a long line of cases Tennessee courts have held that only one conviction may result when an accused simultaneously injures more than one person with a single act.[256] In the leading case, *Smith v. State*,[257] the accused struck two people with his automobile, killing one and injuring the other. The court held that convictions of both manslaughter and assault and battery could not stand, because the facts showed "a single transaction, involving a single criminal intent."[258]

Smith was overruled in *State v. Irvin*.[259] The court concluded that the analysis in the prior decisions "improperly focuse[d] upon the fictional 'intent' of the accused rather than upon the elements of the criminal offense with which he is charged."[260] While all the cases reviewed by the court that had applied the *Smith* rule involved assaults with motor vehicles,[261]

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253. *Id.* at 810.

254. He has no prior criminal record, his military service was honorable, his social history is without blemish other than the conviction under consideration, he is working and supporting his wife and her four children . . . his work record is good, and there is no adverse reference in the record to either his mental or physical condition.

Id. at 810-11.

255. *Id.* at 811.

256. Crocker v. State, 204 Tenn. 615, 325 S.W.2d 234 (1959); Huffman v. State, 200 Tenn. 487, 292 S.W.2d 738 (1956); Smith v. State, 159 Tenn. 674, 21 S.W.2d 400 (1929).

257. 159 Tenn. 674, 21 S.W.2d 400 (1929).

258. *Id.* at 681, 21 S.W.2d at 402.

259. 603 S.W.2d 121 (Tenn. 1980).

260. *Id.* at 123.

261. *Id.* The specific overruling of *Smith* was narrow: "It is overruled insofar as it purports to hold that there can be only one conviction when there

the *Irvin* holding would appear to be applicable to all instances of multiple criminal results from a single act.[262]

2. Guilty Plea

In *Rivers v. Lucas*[263] the Court of Appeals for the Sixth Circuit held that a defendant indicted for first degree murder who pleaded guilty to manslaughter could not be prosecuted for murder after the manslaughter conviction was set aside without violating the prohibition against double jeopardy. The court reasoned that by accepting a guilty plea to a lesser included offense, the trial court made a determination equivalent to a jury's refusal to convict for the greater offense.[264]

The court concluded in *Hawk v. Berkemer*[265] that the Supreme Court's holding in *United States v. Scott*[266] required that *Rivers* be overruled. In *Scott* the trial court erroneously had dismissed two of three counts of an indictment at the end of the proof on the ground of prejudicial preindictment delay. The jury acquitted on the third count. The Supreme Court held that the accused could be retried on the counts that were dismissed erroneously. The Court reasoned that "a defendant is acquitted only when 'the ruling of a judge, whatever its label, actually represents a resolution . . ., correct or not, of some or all of the factual elements of the offense charged.' "[267] In *Hawk* the court concluded that "[t]his [reasoning] flatly conflicts with *Rivers'* idea of an implicit acquittal,"[268] and therefore that the *Rivers* holding must be disregarded.

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are multiple victims of a vehicular accident involving criminal conduct." *Id.*

262. "It seems illogical to us, as a general proposition, to hold that when two persons have been killed by an accused, he has committed only one homicide." *Id.* at 123. Clearly, the decision is not limited to multiple homicides, for such a holding would not have necessitated the overruling of *Smith.*

263. 477 F.2d 199 (6th Cir. 1973), *vacated on other grounds,* 414 U.S. 896 (1976).

264. 477 F.2d at 202.

265. 610 F.2d 445 (6th Cir. 1979).

266. 437 U.S. 82 (1978).

267. *Id.* at 97 (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

268. 610 F.2d at 447.