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Criminal Procedure as Defined by the Tennessee Supreme Court

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SPECIAL PROJECT

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I. INTRODUCTION

The Tennessee Supreme Court, elected simultaneously for the first time since the early 1900's, assumed office in September 1974 amid speculation concerning future judicial policy. The court, composed of Chief Justice William H. D. Fones and Justices Ray L. Brock, Jr., Robert E. Cooper, William J. Harbison, and Joe W. Henry, immediately indicated the importance of a uniform judicial policy governing criminal procedure by creating a special commission to revise the state rules of criminal procedure. Additionally, during its present term the court has decided numerous cases directed toward the formation of well-defined rules under which criminal allegations can be adjudged.

This Special Project will examine the supreme court's criminal procedure opinions, focusing specifically on the following areas: jury selection, right to counsel, scope of discovery, admissibility of evidence, limitations on proper prosecutorial argument to the jury, jury instructions, sentencing procedures, and expungement of criminal records.[1] The Tennessee position will be compared with the policies enunciated by the United States Supreme Court, the federal circuit courts, and various uniform acts and standards proposed by legislative advisory groups. Although this Project does not attempt to extract any singular theme underlying the decisions discussed, its analysis should assist in understanding the court's present judicial guidelines in the field of criminal procedure and should indicate the policies that the court will adhere to in future criminal decisions.

II. JURY SELECTION: THE REASONABLE CROSS SECTION REQUIREMENT

The United States Supreme Court has recognized that the sixth amendment right to a jury trial requires selection of both grand and petit juries[2] from a representative cross section of the community.[3] The cross section requirement ensures juries' impartiality by preventing the domination by or exclusion of any special group from

1. This Special Project will examine only those opinions published by March 1, 1977.

2. Peters v. Kiff, 407 U.S. 493 (1972); Alexander v. Louisiana, 405 U.S. 625 (1972); Sims v. Georgia, 389 U.S. 404 (1967); Coleman v. Alabama, 399 U.S. 129 (1964).

3. Peters v. Kiff, 407 U.S. 493 (1972); Williams v. Florida, 399 U.S. 78 (1970). *See also* Taylor v. Louisiana, 419 U.S. 522 (1975).

Prior to *Duncan v. Louisiana*, 391 U.S. 145 (1968), in which the Court ruled that the sixth amendment right to a jury trial is binding on the states by virtue of the fourteenth amendment, the Court, in challenges to jury selection procedure, considered whether the systematic exclusion of segments of the population from juries violated the equal protection clause of the fourteenth amendment. Smith v. Texas, 311 U.S. 128 (1940).

the jury selection process.[4] Thus the Court determined that the pool from which a jury is chosen must represent fairly the distinctive groups within the community.[5]

Responding to the constitutional requirement of impartial jury selection procedures, state legislatures and courts have sought guidance from the Federal Jury Selection and Service Act of 1968[6] and the Uniform Jury Selection and Service Act (Uniform Act).[7] Both acts contain a provision forbidding discrimination in jury selection procedures[8] and envision the random selection of jurors from objectively compiled master jury rolls.[9] Under the Federal Act, master jury roles are composed by the mechanical selection of names from lists of registered or actual voters within a judicial district.[10] This procedure, designed to eliminate subjective criteria for compiling master jury roles, focuses solely on the criteria of residency.[11] The Uniform Act, adopted in whole or in part by eleven states,[12] supplements voter registration rolls with one or several other equally objective lists.[13] Moreover, the Act adopts language that imposes the obligation of jury service on all qualified citizens,[14] thereby effec-

4. Peters v. Kiff, 407 U.S. 495 (1972).

5. Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975); Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

6. 28 U.S.C. §§ 1861-1865 (1970 & Supp. V 1975) [hereinafter cited as Federal Jury Selection Act]. For an excellent discussion of the Federal Jury Selection Act, see Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana,* 43 TENN. L. REV. 1, 85-94 (1975).

7. The Uniform Jury Selection and Service Act was approved by the National Conference of Commissioners on Uniform State Laws in 1970 and by the American Bar Association in 1972.

8. 28 U.S.C. § 1862 (1970 & Supp. V 1975) provides that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."

9. In adopting a declaration of policy, § 1 of the Uniform Act acknowledges reliance on the comparable section of the Federal Jury Selection Act. UNIFORM JURY SELECTION AND SERVICE ACT § 1, Comment.

10. 28 U.S.C. § 1863 (1970 & Supp. V 1975).

11. 28 U.S.C. § 1863(b)(3) (1970 & Supp. V 1975) provides in part:

> These procedures shall be designed to ensure the random selection of a fair cross section of the persons *residing* in the community in the district or division wherein the court convenes.

(emphasis added)

12. California, Colorado, Idaho, Illinois, Indiana, Michigan, Mississippi, Nebraska, North Dakota, Rhode Island, Virginia, and Washington.

13. UNIFORM JURY SELECTION AND SERVICE ACT § 5, Comment. Section 5 provides that actual and registered voter lists should be supplemented by lists reflecting actual residents such as utility customers, property and income taxpayers, motor vehicle registrants, and persons with drivers' licenses. The Comment indicates that the commission recommended these supplementary criteria for compiling the master rolls because the exclusive use of voter lists might have a chilling effect upon exercise of the right to vote.

14. UNIFORM JURY SELECTION AND SERVICE ACT § 2.

tively proscribing statutes adopted in several states that allow specific segments of society to avoid jury service by merely requesting the elimination of their names from jury duty without providing any reasonable grounds for disqualification.[15]

In contrast to the Federal and the Uniform Act, Tennessee has disparate procedures that retain subjective criteria for compiling jury rolls.[16] The principal selection procedures, found in section 22-228 of the Tennessee Code,[17] place responsibility for compiling master jury rolls in the board of jury commissioners for a judicial district, who are directed to choose "upright and intelligent persons known for their integrity, fair character and sound judgment" from tax, voter registration, and other reliable records.[18] These procedures, however, do not apply to the state's four largest urban areas—Davidson, Hamilton, Knox, and Shelby counties. Each of these districts is governed by private acts, which contain language similar to that found in the statewide enactment.[19] In Davidson County, however, an alternative provision allows the criminal court judge or board of jury commissioners to direct compilation of jury venires at random by mechanical tabulation of voter registration rolls, thereby eliminating subjective selection criteria.[20] The objec-

15. Such procedures generally are employed to allow women to reject unconditionally the obligation of jury duty.

16. For a discussion of the various jury selection procedures in Tennessee, see Daughtrey, *supra* note 6, at 94-99.

17. TENN. CODE ANN. § 22-228 (Supp. 1976).

18. *Id.*

19. The applicable private act legislation follows: Davidson County: 1947 Tenn. Priv. Acts 153, ch. 53, *as amended by* 1947 Tenn. Priv. Acts 1967, ch. 497; 1947 Tenn. Priv. Acts 1968, ch. 498; 1949 Tenn. Priv. Acts 953, ch. 358; 1951 Tenn. Priv. Acts 1647, ch. 550; 1963 Tenn. Priv. Acts 519, ch. 167; 1965 Tenn. Priv. Acts 392, ch. 105; 1967 Tenn. Priv. Acts 1234, ch. 329; 1972 Tenn. Priv. Acts 1247, ch. 322; 1975 Tenn. Priv. Acts 327, ch. 85; Hamilton County: 1931 Tenn. Priv. Acts 1516, ch. 564, *as amended by* 1937 Tenn. Priv. Acts 1059, ch. 347; 1951 Tenn. Priv. Acts 778, ch. 294; 1953 Tenn. Priv. Acts 901, ch. 276; 1963 Tenn. Priv. Acts 754, ch. 238; 1967 Tenn. Priv. Acts 347, ch. 90; 1971 Tenn. Priv. Acts 208, ch. 55; Knox County: 1965 Tenn. Priv. Acts 554, ch. 159, *as amended by* 1969 Tenn. Priv. Acts 510, ch. 128; 1970 Tenn. Priv. Acts 1197, ch. 321; 1971 Tenn. Priv. Acts 706, ch. 170; 1973 Tenn. Priv. Acts 452, ch. 134; Shelby County: 1905 Tenn. Priv. Acts 472, ch. 230, *as amended by* 1907 Tenn. Priv. Acts 831, ch. 226; 1907 Tenn. Priv. Acts 1930, ch. 561; 1911 Tenn. Priv. Acts 1939, ch. 640; 1923 Tenn. Priv. Acts 772, ch. 247; 1923 Tenn. Priv. Acts 1606, ch. 418; 1929 Tenn. Priv. Acts 1759, ch. 633; 1929 Tenn. Priv. Acts 2415, ch. 818; 1931 Tenn. Priv. Acts 1189, ch. 447; 1933 Tenn. Priv. Acts 898, ch. 370; 1933 Tenn. Priv. Acts 1167, ch. 370; 1937 Tenn. Priv. Acts 1167, ch. 378; 1949 Tenn. Priv. Acts 635, ch. 236; 1951 Tenn. Priv. Acts 440, ch. 157; 1953 Tenn. Priv. Acts 943, ch. 298; 1955 Tenn. Priv. Acts 334, ch. 118; 1961 Tenn. Priv. Acts 437, ch. 121; 1969 Tenn. Priv. Acts 755, ch. 182; 1970 Tenn. Priv. Acts 755, ch. 316; 1970 Tenn. Priv. Acts 1180, ch. 316.

20. One commentator has suggested that this alternative provision, enacted under 1967 Tenn. Priv. Acts 1234, ch. 329, § 1, provides the only objective criteria for jury selection in Tennessee. *See* Daughtrey, *supra* note 6, at 97-98.

tivity offered by this alternative provision is undermined by a statewide provision that allows any woman to exempt herself from jury duty merely by notifying the court officer that she would like to be excused.[21]

In *State v. Jefferson*,[22] the Tennessee Supreme Court considered the Tennessee jury selection procedures in light of the constitutional mandate that the state must assure that a reasonable cross section of the community will be represented on jury rolls. Challenging the Davidson County selection procedure,[23] the defendant alleged that the process used to prepare jury rolls systematically excluded large segments of the black population and unconstitutionally discriminated against women in their service on the county's juries.[24] In a brief opinion[25] the court remanded defendant's allegations of racial imbalance for a lower court hearing and summarily dismissed consideration of unconstitutional discrimination against the selection of women.[26]

For several reasons, the court's first brush with the cross section requirement was a disappointing one. By focusing on past Tennessee decisions upholding the constitutionality of the specific legislation,[27] the court failed to consider the desirability of a uniform statewide process for objective selection of jury members and thus left unaltered the present disparate Tennessee statutes, which allow for the interplay of subjective criteria, thereby restricting the possibility that the jury will be composed of a reasonable cross section of the community. Moreover, the court's refusal to address the question of discriminatory exclusion of women from the jury selection process allows women to avoid jury service on less than excusable grounds and seriously impairs a defendant's opportunity to be tried by a jury composed of a reasonable cross section of the populace.

21. *See* TENN. CODE ANN. § 22-108 (1955). *See also* note 15 *supra*.

22. 529 S.W.2d 674 (Tenn. 1975).

23. Under the Davidson County procedure, random selection of jurors is not mandatory, and the selecting body otherwise has the discretion to include only "upright and intelligent" qualified residents of the county. 1947 Tenn. Priv. Acts 153, 155, ch. 53. *See* note 20 *supra* and accompanying text.

24. Defendant's strongest assertion was directed at alleged racial imbalance on both grand and petit juries. Defendant argued that because never more than one black had served on a grand jury for a single term of court since 1950, criminal judges and jury commissioners deliberately limited the number of blacks selected for grand and petit juries solely because of their race. 529 S.W.2d at 679.

25. Reference is to the opinion of the court of criminal appeals, which the supreme court published as an appendix to its *per curiam* opinion affirming that court's determination.

26. 529 S.W.2d at 677.

27. Canaday v. State, 461 S.W.2d 53 (Tenn. Crim. App. 1970); Flynn v. State, 203 Tenn. 337, 313 S.W.2d 248 (1958).

The constitutionality of the Tennessee self-exemption provision appears questionable in light of the United States Supreme Court's mandate in *Taylor v. Louisiana*,[28] which determined that a Louisiana statute placing an affirmative burden on women to have their names entered on jury rolls was unconstitutional under the sixth amendment's cross section requirement.[29]

The Supreme Court's emphasis on the sixth amendment's mandate that jury selection procedures include a reasonable cross section of the populace places a significant burden on the Tennessee Supreme Court to ensure that those requirements are met. In subsequent challenges to the Tennessee jury selection process the court should consider the cross section requirement mandated by Supreme Court holdings.[30] The court also should seek guidance from the Federal Act and the Uniform Act, which meet the standards of the cross section requirement by establishing a uniform objective procedure that eliminates the possibility of subjective compilation of master jury rolls.

III. RIGHT TO COUNSEL

A. Standard of Competence for Criminal Defense Counsel

The sixth amendment provides a criminal defendant with the right to representation by counsel.[31] By requiring that an accused be granted "effective assistance of counsel,"[32] the United States Supreme Court has determined that the right to counsel extends beyond the mere presence of an attorney at trial. Additionally, the Court has provided that the denial of this right violates the due process clause of the fourteenth amendment and entitles the criminal defendant to a new trial.[33] The Court, however, has failed to

28. 419 U.S. 522 (1975).

29. For a discussion of the impact of *Taylor v. Louisiana* on § 22-108 of the Tennessee Code, see Daughtrey, *supra* note 6. *See also* 41 MO. L. REV. 446 (1976).

30. *See* notes 2-5 *supra* and accompanying text.

31. U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

32. Powell v. Alabama, 387 U.S. 45 (1932), initially determined that the court has a duty not only to ensure the presence of counsel at defendant's trial, but also to require that counsel provide effective aid in the preparation and defense of the case. *See also* White v. Ragen, 324 U.S. 760 (1945); Betts v. Brady, 316 U.S. 455 (1942); Glasser v. United States, 315 U.S. 60 (1942); Avery v. Alabama, 308 U.S. 444 (1940). *But see* Hester v. United States, 303 F.2d 47 (10th Cir.), *cert. denied*, 371 U.S. 847 (1962); Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); Miller v. Hudspeth, 176 F.2d 111 (10th Cir. 1949).

For a discussion of these cases and the right to effective assistance of counsel, see Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483 (1976).

33. Powell v. Alabama, 287 U.S. 45 (1932).

articulate specific guidelines for measuring the competency of defense counsel.

In the absence of specific guidelines, the federal circuit courts have developed three tests for determining whether the representation afforded a criminal defendant meets the effective assistance requirement. The First,[34] Second, Seventh, and Tenth Circuits[35] strictly adhere to the "farce and mockery" standard announced by the District of Columbia Circuit in *Diggs v. Welch.*[36] Under the *Diggs* standard, a defendant is denied due process if his attorney's conduct makes the trial "a farce, sham, or mockery of justice."[37] The application of this standard generally is predicated on a showing by the defendant that his counsel acted with extreme irresponsibility.[38] The Fourth and Eighth Circuits have modified the "farce and mockery" rule in an attempt to provide more objective guidelines for gauging the quality of representation by defense counsel. The Fourth Circuit, in *Coles v. Peyton,*[39] adopted the general "farce and mockery" approach, but also enunciated specific criteria to aid in a competency determination.[40] Similarly, the Eighth Circuit has followed the basic approach of the "farce and mockery" guideline, requiring the defendant to show that his attorney acted in such a

34. The standard was adopted initially in Bottiglio v. United States, 431 F.2d 930 (1st Cir. 1970). *See also* Moran v. Hogan, 494 F.2d 1220 (1st Cir. 1974). Recent opinions from the First Circuit, however, indicate a strong possibility that the court may adopt the "reasonably competent assistance" rule. *See* United States v. Ramirez, 535 F.2d 125, 129-30 (1st Cir. 1976); Dunker v. Vinzant, 505 F.2d 503, 503-05 (1st Cir. 1974).

35. United States v. Ortega-Alvarez, 506 F.2d 455, 458 (2d Cir. 1974), *cert. denied,* 95 S. Ct. 1559 (1975); United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950); United States *ex rel.* Little v. Twomey, 477 F.2d 767, 773 (7th Cir. 1973); Sims v. Lane, 411 F.2d 661, 665 (7th Cir. 1969), *cert. denied,* 396 U.S. 943 (1970); Johnson v. United States, 380 F.2d 810, 812 (10th Cir. 1967).

36. 148 F.2d 667 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945).

37. 148 F.2d at 670. For a discussion of the "farce and mockery" standard, see 22 WAYNE L. REV. 913, 914-15 (1976).

38. *See generally* Comment, *The Right to Competent Defense Counsel: Emergence of a Sixth Amendment Standard of Review on Appeal and the Persistence of the "Sham and Farce" Rule in California,* 15 SANTA CLARA LAW. 355, 357-64 (1975); 37 MONT. L. REV. 387, 390-93 (1976); 63 KY. L.J. 803 (1975).

39. 389 F.2d 224 (4th Cir. 1968).

40. The principles may be simply stated: Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defenses or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations . . . allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation . . . unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.

Id. at 226. *See also* United States v. Peterson, 524 F.2d 167, 177 (4th Cir. 1975).

manner as to constitute extreme misfeasance or nonfeasance.[41] More recent opinions, however, evidence a movement away from this strict standard toward a test that measures a defense attorney's performance against the customary skill and diligence that a competent attorney reasonably would employ under similar circumstances.[42]

In an effort to overcome difficulties inherent in the subjective "farce and mockery" test, the Fifth,[43] Sixth,[44] and Ninth[45] Circuits have enunciated a second guideline that focuses on the reasonableness of the assistance provided to a defendant.[46] More specifically, the "reasonably effective assistance" test measures the extent to which counsel is likely to render and does render reasonably effective assistance.[47] The District of Columbia Circuit has adopted a similar reasonableness standard, requiring that a defendant receive "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[48] In an attempt to define this standard, the court expressly incorporated the general guidelines set forth in the American Bar Association Standards for the Defense Function.[49]

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41. Garton v. Swenson, 497 F.2d 1137, 1139-40 (8th Cir. 1974). *See also* Cardarella v. United States, 375 F.2d 222 (8th Cir. 1967).

42. United States v. Easter, 539 F.2d 663, 665-66 (8th Cir. 1976); Crismon v. United States, 510 F.2d 356, 358 (8th Cir. 1975). Several of these opinions refer specifically to the ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1971) [hereinafter cited as ABA STANDARDS, THE DEFENSE FUNCTION]. *See* Wolfs v. Britton, 509 F.2d 304, 309-11 (8th Cir. 1975); McQueen v. Swenson, 498 F.2d 207, 213-18 (8th Cir. 1974). For a discussion of *McQueen*, see Note, 43 GEO. WASH. L.J. 1384 (1975).

43. Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974).

44. Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

45. United States v. Elksnis, 528 F.2d 236 (9th Cir. 1975). *See also* United States v. Shuey, 541 F.2d 845, 849 (9th Cir. 1976).

46. For a discussion of general aspects behind the trend away from the "farce and mockery" rule and toward a more liberal standard, see Stone, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427 (1975).

47. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). Although the *Beasley* court adopts a reasonableness test, certain language in the opinion indicates that the standard adopted by the Third Circuit will satisfy this requirement. 491 F.2d at 696. *See* notes 50 & 51 *infra*. *Beasley* also provides that defense counsel "must conscientiously protect his client's interest, undeflected by conflicting considerations," and further, "must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner." 491 F.2d at 696.

48. United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

49. (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . . Counsel should also be concerned with the accused's

In *Moore v. United States*[50] the Third Circuit adopted a third competency test, which provides that the standard of effective legal assistance is "the exercise of the customary skill and knowledge which normally prevails at the time and place."[51] This standard comports with general torts concepts and operates to examine objectively a defense attorney's performance by focusing solely on the conduct reasonably expected of professional counsel.[52]

Although the circuit courts have endeavored to establish a general test by which to measure the "effective assistance" requirement, strong disagreement exists as to the specific standard to be applied in judging adequacy of defense counsel. In an attempt to resolve this dilemma, courts and commentators have focused on the guidelines contained in the American Bar Association Standards Relating to the Prosecution Function and the Defense Function.[53] Incorporating the applicable provisions of the ABA Code of Professional Responsibility,[54] the ABA Defense Function Standards provide specific guidelines that delineate the proper conduct for a defense attorney in situations requiring expertise of professional counsel and set forth detailed criteria to assist the trial court in determining whether the conduct of a defense attorney comports with the "effective assistance" requirement.[55]

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right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or suppression of evidence.

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . .

ABA STANDARDS, THE DEFENSE FUNCTION.

50. 432 F.2d 730 (3d Cir. 1970).

51. *Id.* at 736. *See also* United States *ex rel.* Johnson v. Johnson, 531 F.2d 169, 174 (3d Cir.), *cert. denied,* 96 S. Ct. 2214 (1976); United States v. Mitchell, 540 F.2d 1163 (3d Cir. 1976).

52. *See generally* Gard, *supra* note 32, at 495-96.

53. ABA STANDARDS, DEFENSE FUNCTION, *supra* note 42. While the ABA Defense Function Standards expressly state that they are intended as guides for conduct of lawyers and as the basis for disciplinary action, and are not intended to be criteria for judicial evaluation of the effectiveness of counsel, several courts and commentators have urged the consideration of the standards as criteria for the "effective assistance" requirement. *See id.* at § 1.1(f).

54. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY (1969). Throughout the ABA Defense Function Standards, the drafters indicated strong reliance on various provisions of the *Code of Professional Responsibility.*

55. As paraphrased, the specific criteria enunciated under the defense counsel standards provide that

(1) an attorney must confer with his client as early as possible and as often as necessary;

(2) counsel must advise his client of the charges against him and of his rights;

(3) counsel must ascertain and develop all appropriate defenses;

(4) counsel must conduct all necessary investigations;

Tennessee supreme courts traditionally have followed a strict interpretation of the "farce and mockery" rule.[56] The present supreme court, however, in *Baxter v. Rose*,[57] abandoned the subjective criteria inherent in this rule in favor of the guidelines enunciated by the Sixth and District of Columbia Circuits.[58] As stated by the court, the standard "is simply whether the advice given, or the services rendered by the attorney, are within the range of competence demanded of attorneys in criminal cases."[59] The court thus adopted a test subjecting a defense attorney to the standard of competence reasonably demanded of ordinary defense counsel. Moreover, the court expressly embraced the ABA Defense Function Standards, advising both trial courts and defense counsel to be guided by the standards in determining the boundaries of the reasonable competence requirement.[60] The *Baxter* opinion also reversed a series of prior Tennessee decisions that distinguished competency challenges against court-appointed attorneys from those against privately retained counsel.[61] Acknowledging that constitutional rights must be applied equally to both indigent and non-indigent defendants the present court abolished all distinction between the quality of services rendered by appointed and privately retained counsel.[62]

The *Baxter* opinion forecasts changes in the quality of criminal defense representation in Tennessee. No longer will the subjective "farce and mockery" standard measure the conduct of defense counsel. Instead, both appointed and privately retained counsel are

(5) counsel must allow time for reflection and preparation;
(6) counsel must explore the possibility of disposition without trial, granting deference to the informed decision of the accused;
(7) counsel must conduct the trial in a responsible and efficient manner; and
(8) the lawyer for the accused should be familiar with sentencing alternatives, the right of appeal, and post conviction remedies, and respond to each available situation responsibly and with consent of a fully informed client.

See ABA STANDARDS, DEFENSE FUNCTION, *supra* note 42.

56. *See* State *ex rel.* Richmond v. Henderson, 222 Tenn. 597, 439 S.W.2d 263 (1969); notes 34-37 *supra.*

57. 523 S.W.2d 930 (Tenn. 1975).

58. *See* notes 44 & 48 *supra* and accompanying text.

59. 523 S.W.2d at 936. The language adopted by the Tennessee court was derived expressly from the United States Supreme Court's opinion in McMann v. Richardson, 397 U.S. 759 (1970), which held that the advice rendered by an attorney on the admissibility of a criminal accused's confession must be "within the range of competence demanded of attorneys in criminal cases."

60. 523 S.W.2d at 936.

61. *See* Long v. State, 510 S.W.2d 83 (Tenn. Crim. App. 1974); State v. Bomar, 213 Tenn. 699, 378 S.W.2d 772 (1964).

62. 523 S.W.2d at 936-38.

subject to a reasonable competency standard that more closely comports with the sixth amendment requirement of reasonably effective counsel. Further, the specific provisions of the ABA Defense Function Standards have been proffered to guide trial courts and defense counsel in a determination of reasonable competency. The present court, therefore, has taken an essential step toward promoting a defendant's right to effective counsel and has created a judicial atmosphere conducive to full and adequate representation for all criminal defendants.

B. Right to Have an Attorney Present at a Preliminary Hearing

In *Powell v. Alabama*[63] the United States Supreme Court held that the sixth amendment guarantees a defendant the right to counsel at each stage of a criminal prosecution.[64] During the past decade, the Court has expanded significantly the proceedings at which a state is required to furnish counsel to an indigent accused.[65] The Court in *Coleman v. Alabama*,[66] focusing on the right to counsel at a preliminary hearing, held that the state is required constitutionally to furnish counsel[67] when the statutory scheme establishes the

63. 287 U.S. 45 (1932).

64. *Powell* stated that because there is an overwhelming chance that a defendant who is not provided effective counsel at every step in criminal proceedings will be prejudiced, the state must furnish an opportunity for counsel prior to trial. *Id.* at 69.

65. The right to counsel has been expanded in the following cases: Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in many state misdemeanor cases); Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel at pre-indictment identification); Adams v. Illinois, 405 U.S. 278 (1971); Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel attaches at certain preliminary hearings); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel attaches to a probation revocation hearing); United States v. Wade, 388 U.S. 218 (1967) (right to counsel required in post-indictment lineups); *In re* Gault, 387 U.S. 1 (1967) (right to counsel attaches in juvenile proceedings in which institutional confinement could result); Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel mandated during custodial interrogations); Escobedo v. Illinois, 387 U.S. 478 (1964) (right to counsel attaches during station house interrogations); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel attaches to all felony prosecutions); Douglas v. California, 372 U.S. 353 (1963) (right to counsel for an indigent seeking an appeal in state courts).

For a general discussion of the growth of the right to counsel, see Symposium, *The Right to Counsel and the Indigent Defendant: Preface*, 12 AM. CRIM. L. REV. 587-89 (1975); Note, *Of Trumpeters, Pipers, and Swingmen: What Tune Is the Burger Court Playing in Right to Representation Cases?*, 29 VAND. L. REV. 776 (1976); 41 U. COLO. L. REV. 473 (1969).

66. 399 U.S. 1 (1970). For analysis of the *Coleman* decision, see Note, *Constitutional Right to Counsel at the Preliminary Hearing*, 75 DICK. L. REV. 143 (1970); 9 DUQ. L. REV. 522 (1971); 45 TUL. L. REV. 1056 (1971).

67. 399 U.S. at 9. The Court specifically noted that under the challenged Alabama statute, the sole purpose of a preliminary hearing was to determine whether there is sufficient evidence against an accused to warrant presenting the case to the grand jury, and to fix bond if it is appropriate. 399 U.S. at 8. *See* ALA. CODE tit. 15, §§ 139, 140, 151 (1954).

preliminary hearing as a critical stage in the prosecution of an indigent accused. Stating that the characterization of the preliminary hearing as a critical stage depends upon the statute's inherent potential for substantial prejudice to the defendant's rights and the extent to which the assistance of counsel could reduce that prejudice,[68] the Court specified four factors that are relevant to the critical stage determination: (1) the importance of an attorney's examination and cross-examination in exposing weaknesses in the state's case that may lead a magistrate to release the accused; (2) the use of counsel's examination and cross-examination as a means to preserve vital evidence or to aid in impeachment at trial; (3) the ability of an attorney to use the preliminary hearing as a discovery tool; and (4) the effectiveness of an attorney in making arguments to gain bail or to secure an early psychiatric examination for the accused.[69] Therefore, although *Coleman* did not establish an absolute right to the assistance of counsel at a preliminary hearing, the decision did provide a workable set of criteria for determining whether the scope of the preliminary hearing as established by statute requires the assistance of counsel.

Significantly, legislation proposed or enacted immediately prior to and subsequent to *Coleman* requires a court to furnish an indigent accused the assistance of counsel at a preliminary hearing. As amended in 1970,[70] the Criminal Justice Act of 1964 provides that an indigent accused should be represented by counsel from his initial appearance before a United States magistrate and in all ancillary matters arising in the criminal proceedings.[71] Echoing the policy adopted in the federal act, the American Bar Association further recommends that an accused should be granted the assistance of counsel prior to the commencement of a preliminary hearing.[72] Additionally, the Pre-Arraignment Code drafted by the American Law Institute expressly includes the right to counsel at a preliminary hearing. Noting the value of a preliminary hearing both for discov-

68. 399 U.S. at 9. *See also* United States v. Wade, 388 U.S. 218, 227 (1967).

69. 399 U.S. at 9. The Court stated that the indigent defendant's inability to realize these advantages without the assistance of counsel "compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid [of counsel] . . . as at the trial itself.' " *Id.* at 9-10.

70. 18 U.S.C. § 3006A (1970).

71. 18 U.S.C. § 3006A(c) (1970).

72. ABA STANDARDS, PROVIDING DEFENSE SERVICES § 5.1 (1968) explicitly states:

> Counsel should be provided to the accused as soon as feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest.

Id.

ery and for initially determining the existence of probable cause,[73] the ALI Model Code establishes that a criminal defendant has an absolute right to an adversary preliminary hearing,[74] which necessarily includes a right to the assistance of counsel.[75]

Under section 40-1131 of the Tennessee Code,[76] the criminal defendant is entitled to a preliminary hearing prior to presentment and indictment.[77] Prior to 1974, courts construing section 40-1131 determined that the preliminary hearing granted by the statute is not a critical stage in a defendant's prosecution.[78] In *McKeldin v. State,*[79] however, the present supreme court expressly overruled past decisions, finding the preliminary hearing provided under the Tennessee statute directly analogous to the Alabama procedure that the Court in *Coleman* found to constitute a critical stage requiring the presence of counsel.[80] The *McKeldin* court focused specifically on the ability of counsel to aid a defendant at the early stages of prosecution, stating:

> Every criminal lawyer "worth his salt" knows the overriding importance and the manifest advantages of a preliminary hearing. In fact the failure to exploit this golden opportunity to observe the manner, demeanor and appearance of the witnesses for the prosecution, to learn the precise details of the prosecution's case, and to engage in that happy event sometimes known as a "fishing expedition," would be an inexcusable dereliction of duty in the majority of cases.[81]

Determining that a preliminary hearing under the Tennessee statute is a critical stage in a prosecution and following the rationale

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73. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Proposed Official Draft 1975) [hereinafter cited as the MODEL PRE-ARRAIGNMENT CODE].

74. MODEL PRE-ARRAIGNMENT CODE, *supra* note 73, at §§ 330.1-.9.

75. *See* MODEL PRE-ARRAIGNMENT CODE, *supra* note 73, at § 310.1(5) & §§ 310.1(5), 330.2 Comments.

76. TENN. CODE ANN. § 40-1131 (Supp. 1976).

77. *Id.* The remainder of the statute states:

> If the accused is indicted during the period of time in which his preliminary hearing is being continued, or at anytime before accused has been afforded a preliminary hearing on a warrant, he may abate the indictment on motion to the court. Provided, however, that no such motion for abatement shall be granted after the expiration of thirty (30) days from the date of the accused's arrest.

Id. This provision generally is maintained under the STATE OF TENNESSEE LAW REVISION COMMISSION, CODE OF CRIMINAL PROCEDURE §§ 40-904, 40-907 (Proposed Final Draft 1973) [hereinafter cited as PROPOSED TENN. CODE].

78. *See* Harris v. Neil, 437 F.2d 63 (6th Cir. 1971); Shadden v. State, 488 S.W.2d 54 (Tenn. Crim. App. 1972). In *Harris,* the court distinguished the Tennessee procedure from the Alabama "pretrial type of arraignment where certain rights may be sacrificed or lost." 437 F.2d at 64 (citing Coleman v. Alabama, 399 U.S. 1, 7 (1970)).

79. 516 S.W.2d 82 (Tenn. 1974).

80. *Id.* at 85.

81. *Id.* at 85-86.

expressed in *Coleman*,[82] the court held that the sixth amendment guarantees an indigent accused the right to effective assistance of counsel at a preliminary hearing.[83]

The court's holding in *McKeldin* is a promising step toward ensuring an indigent accused the means to present a fair and reasonable defense. The opinion, expressly rejecting prior decisions, more accurately reflects the nature of the Tennessee preliminary hearing as an important stage in a criminal prosecution and enunciates a policy that comports with the constitutional requirements delineated by the Supreme Court in *Coleman v. Alabama.*

C. *Indigent Defendant's Right to Simultaneous Self-Representation and Assistance of Counsel*

The United States Supreme Court has determined that the sixth amendment guarantees an indigent defendant the right to defend himself without the aid of counsel when that decision is made voluntarily and intelligently.[84] Although the Court also has recognized the right to the assistance of counsel,[85] it has not addressed whether these two constitutional rights are mutually exclusive. Federal courts interpreting the right to self-representation granted by 28 U.S.C. § 1654[86] have adopted an "either-or" approach, mandating that in all but the most extraordinary circumstances a criminal defendant must choose between appointed counsel and self-representation.[87] Following the federal approach, a ma-

82. *See* notes 66-69 *supra* and accompanying text.

83. The procedure recommended by the Tennessee court closely paralleled that expressed in PROPOSED TENN. CODE, *supra* note 77, at § 40-902, which provides that the magistrate must explain the charge and inform the defendant of his right to remain silent and his right to retain or have counsel appointed. Section 40-902 further requires the magistrate to allow the defendant a reasonable time and opportunity to confer with counsel unless the right is waived in writing in accordance with § 40-3202. Although drafted prior to the *McKeldin* decision, the comments to the section expressly overrule the *Harris* opinion, noting that under Tennessee procedure the preliminary hearing is a critical stage in a prosecution. *Id.* at § 40-902.

84. *See* Coleman v. Alabama, 399 U.S. 1 (1970); Powell v. Alabama, 287 U.S. 45 (1932).

85. *See* Faretta v. California, 422 U.S. 806 (1975). For a discussion of the impact of *Faretta* on the right of self-representation, see Comment, *The Constitutional Right of Self-Representation: Faretta and the "Assistance of Counsel,"* 3 PEPPERDINE L. REV. 336 (1976); 29 ARK. L. REV. 546 (1976).

86. 28 U.S.C. § 1654 (1970) provides:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

87. *See* United States v. Conder, 423 F.2d 904 (6th Cir. 1970); United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); Shelton v. United States, 205 F.2d 806 (5th Cir.), *petition for cert. dismissed on petitioner's motion,* 346 U.S. 892 (1953), *motion to vacate denied,* 349 U.S.

jority of states have defined an indigent defendant's right to dual representation as a matter entirely within the discretion of the trial judge and have noted that only on limited occasions should the right be exercised.[88] This qualification persists even in the presence of state constitutional language that provides an accused with the right to defend in person and by counsel.[89] The rationale for this interpretation is that the constitutional provisions merely grant the trial judge the ability to allow simultaneous self-representation and assistance of counsel in those cases in which such procedure is vital to an accused's defense.[90]

In *State v. Burkhart*,[91] the Tennessee Supreme Court considered whether the state or federal constitutions guarantee an indigent defendant the right to dual representation.[92] Focusing initially on defendant's claim under the sixth and fourteenth amendments,[93] the court determined that the federal constitution, although guaranteeing an accused the right to self-representation and the right to appointed counsel, does not require the simultaneous exercise of those rights. The court concluded that under the sixth and fourteenth amendments a defendant must make a choice between self-representation and representation by counsel in the absence of extraordinary situations in which a trial judge, using his discretion,

943 (1955); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943). *See also* Note, *The Pro Se Defendant's Right to Counsel*, 41 U. CIN. L. REV. 927, 927-30 (1972); Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479, 1482 (1971).

88. *See* Thompson v. State, 194 So. 2d 649 (Fla. App. 1967); People v. Bright, 78 Ill. App. 2d 2, 223 N.E.2d 215 (1966); McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947); State v. Townes, 522 S.W.2d 22 (Mo. App. 1974); Stiner v. State, 539 P.2d 750 (Okla. Crim. 1975).

89. In Faretta v. California, 422 U.S. 806, 813 n.10 (1975), the Court points out that statutory or constitutional provisions in twenty-five states, including Tennessee, grant the accused the right to defend in person *and* by counsel. Generally each of these states interprets its constitution or statutory provision to grant the trial judge discretion to allow or disallow dual representation. *E.g.*, Mosby v. State, 249 Ark. 17, 457 S.W.2d 836 (1970); Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970); People v. Richardson, 4 N.Y.2d 224, 173 N.Y.S. 587, 149 N.E.2d 875, *cert. denied*, 357 U.S. 943 (1958); State v. Whitlow, 13 Ore. App. 607, 510 P.2d 1354 (1973). *See also* discussion in State v. Burkhart, 541 S.W.2d 365, 370 (Tenn. 1976); 41 U. CIN. L. REV. 927, 929 (1972). *Faretta* further notes that six states recognize the right to dual representation. 422 U.S. at 813 n.10.

90. *See* note 88 *supra* and accompanying text.

91. 541 S.W.2d 365 (Tenn. 1976).

92. Although the defendant in *Burkhart* sought and received appointed counsel, he additionally wanted to cross-examine witnesses and argue to the jury. *Id.*

93. Defendant alleged that the sixth amendment, when read in conjunction with the fourteenth amendment, guarantees an accused the right to simultaneous self-representation and appointed counsel. *Id.* at 367-68.

allows the assertion of both rights in the same trial.[94] Turning to defendant's claim under Article 1, Section 9 of the Tennessee Constitution,[95] which provides that a defendant has the right to be heard "by himself *and* his counsel,"[96] the court determined that the legislative and judicial history behind the Tennessee provisions did not support the claimed right to be heard in person and by counsel simultaneously.[97] The court, however, affirmed that there are limited circumstances in which a trial judge may permit a defendant, who is represented by counsel, to participate in his own defense through both cross-examination of witnesses and argument to the jury. Acknowledging that this exception to the general rule is a matter entirely within the discretion of the trial court, the *Burkhart* opinion limited this discretionary power to situations in which the defendant has the intelligence, ability, and competence to participate and is not seeking to disrupt trial procedure.[98] By holding that the right to simultaneous self-representation and assistance of counsel is discretionary rather than mandatory under either the federal or state constitution, the supreme court's decision in *Burkhart* comports with the majority of state and federal opinions. To a certain extent, however, the *Burkhart* opinion fails to follow the lead of previous right to counsel questions addressed by the court. The court not only found no constitutional right to dual representation, but it also indicated that a trial court should allow an indigent accused simultaneous self-representation and assistance of counsel only in very rare circumstances. By limiting a defendant's exercise of dual representation, the court failed to focus on the beneficial aspects of allowing a defendant to cross-examine witnesses and to argue his case before the jury. There might be many occasions on which a defendant, granted the opportunity to employ dual repre-

94. In examining the history of judicial decision-making the court noted four conclusions, stating:

> The rules that emerge from these cases are (1) that a criminal defendant has a right to the effective assistance of counsel; (2) that he has a constitutional right to represent himself; (3) that he may not be forced to accept the service of counsel, and . . . (4) that he must make a choice between self-representation and representation by counsel.

Id. at 368.

95. TENN. CONST. art. 1, § 9.

96. *Id.* (emphasis supplied). The statutory right to dual representation is codified in TENN. CODE ANN. § 40-2001 (1975).

97. The court found that the constitutional and statutory provisions were enacted to abrogate common law rules that denied a criminal defendant the right to be a witness in his own defense, and further expressed no guarantee of a right to counsel. 541 S.W.2d at 366-67.

98. *Id.* at 371-72. The court stated, however, that the defendant's participation would be limited to fair comment on the evidence and that unsworn statements would not be permitted.

sentation, effectively could exploit his personal knowledge to present a more effective defense, and at the same time, through advice of counsel, avoid the embarrassment and inefficiency arising from the lack of familiarity of judicial procedures. By failing to outline the positive criteria inherent in the implementation of simultaneous self-representation and assistance of counsel the court overlooked some of the more important attributes of dual representation.

IV. DISCOVERY

A. *Indigent Defendant's Right to Transcript of Prior Criminal Proceedings*

Beginning with *Griffin v. Illinois,*[99] United States Supreme Court decisions[100] have acknowledged an indigent defendant's constitutional right[101] to receive from the state free transcripts of a past trial on which the defendant seeks an appeal and of any collateral proceeding attendant to a criminal prosecution.[102] This right is not absolute, but is conditioned upon an indigent defendant's ability to establish affirmatively a particularized need for such transcript.[103] In an attempt to establish workable guidelines for showing a particularized need, the Court, in *Britt v. North Carolina,*[104] identified a two-prong test that measures both the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and the availability to the defendant of alternative devices that would fulfill the same functions as a transcript.[105] Thus, under the Court's "particularized need" standard, an indigent is entitled to a free trial transcript only upon a showing that denial of a transcript will result in specific harm or that available alternatives do not adequately protect his interests.[106] Further, the Court has deter-

99. 351 U.S. 12 (1956).

100. *See* Britt v. North Carolina, 404 U.S. 226 (1971); Mayer v. City of Chicago, 404 U.S. 189 (1971); Williams v. Oklahoma City, 395 U.S. 458 (1969); Gardner v. California, 393 U.S. 367 (1969); Roberts v. LaVallee, 389 U.S. 40 (1967); Long v. District Court, 385 U.S. 192 (1966); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington Bd. of Prison Terms, 357 U.S. 214 (1958).

101. The decisions have found a violation of both the due process clause and the equal protection clause. *Compare* Gardner v. California, 393 U.S. 367 (1969) *with* Griffin v. Illinois, 351 U.S. 12 (1956).

102. *Griffin* originally applied solely to appellate review. This right, however, has been expanded to include the transcript of any stage in a criminal proceeding in which the transcript is necessary to ensure an adequate defense. *See* Britt v. North Carolina, 404 U.S. 226 (1971). Further, the right is applicable both to indigent misdemeanants and to felons.

103. *See* Williams v. Oklahoma City, 395 U.S. 458 (1969).

104. 404 U.S. 226 (1971).

105. *Id.*

106. *Id.* at 227-31.

mined that a defendant is entitled only to that portion of the transcript required to fulfill his express needs,[107] thereby limiting access to a full record to situations in which a defendant establishes a colorable need for a complete transcript.[108] In applying these standards, the Court consistently has balanced an indigent accused's right to obtain the tools essential to his defense with the financial burdens that would result from requiring the state to provide a full transcript automatically upon the conclusion of each proceeding in a criminal prosecution.[109]

After *Griffin v. Illinois,* the Tennessee legislature enacted statutes governing the state's duty to furnish an indigent defendant seeking an appeal with an official transcript of a prior proceeding.[110] Although the statutes refer only to transcripts for the purpose of appeal, the courts consistently have recognized that an indigent defendant's right to a trial transcript attaches during an ongoing criminal prosecution if a clear need for a record is established.[111] Unfortunately, previous supreme courts failed to clarify what requirements must be met in order to establish a clear need.

Faced with this amorphous concept, the present Tennessee Supreme Court sought to provide specific criteria in *State v. Elliott.*[112] In *Elliott* an indigent defendant sought reversal of homicide and robbery convictions, alleging that the trial court had committed reversible error by failing to provide the transcript of a pretrial hearing at which the defendant had argued for the suppression of an oral confession and also by failing to furnish transcripts of the previous trial of co-indicted defendants. Pointing to the Supreme Court requirement that an indigent defendant establish a "particularized need" in order to obtain a transcript, the court quoted with approval *Britt's* two-prong test as the standard for determining the sufficiency of that need.[113] Because prior case law provided no specific criteria by which an indigent's "particularized

107. Draper v. Washington, 372 U.S. 487, 499 (1963).

108. Mayer v. City of Chicago, 404 U.S. 189, 195 (1971).

109. 372 U.S. 487 (1963).

110. TENN. CODE ANN. § 40-2040 (1975) provides in part:

> If the defendant prays and is granted an appeal, and is determined by the trial judge to be without sufficient funds to pay for the preparation of the transcript of the proceedings, the trial judge shall direct the court reporter to furnish the defendant a complete transcript of the proceedings . . . .

It is important to note that the *Proposed Code of Criminal Procedure* makes no substantive change in the language used. *See* PROPOSED TENN. CODE, *supra* note 77, at § 40-3223(f).

111. Bowers v. State, 512 S.W.2d 592 (Tenn. Crim. App. 1974).

112. 524 S.W.2d 473 (Tenn. 1975).

113. *See* note 105 *supra* and accompanying text.

need" might be evaluated,[114] the Tennessee court attempted to establish more concrete guidelines.

Initially, the court determined that an indigent defendant's right to a transcript is restricted to the right to a record of a prior criminal proceeding in which the indigent himself was a party. The court expressly refused to extend the transcript doctrine to include records of testimony in a third party's trial in which witnesses testified against the indigent defendant.[115] Further, in establishing guidelines for judging the "particularized need" of an indigent accused, the court focused on two controlling criteria. Specifically, the court determined that the transcript right encompasses only occasions in which the trial court finds that the transcript provides significant assistance in preparation for trial or aids in impeaching adverse witnesses.[116] Moreover, the court indicated that the "particularized need" requirement has not been satisfied unless these express criteria are met. Finally, when a trial court determines that a minimal need exists, the present supreme court advises that a transcript be provided to the indigent, thereby eliminating any ground for appeal based on the failure to adhere to the transcript doctrine.[117]

Although the *Elliott* court's formulation is an important advancement in the attempt to establish criteria by which the "particularized need" requirement uniformly can be applied, this formulation contains a major deficiency. By precluding an indigent defendant from obtaining transcripts of prior testimony given in the trial of a codefendant by witnesses expected to testify against the indigent, the court seemingly has restricted an indigent accused's access to material that not only would provide significant assistance in preparation for his trial, but also would aid in the impeachment of adverse witnesses. Under *Griffin,* which grants indigent defendants the same opportunity as wealthier defendants to obtain an adequate defense, a strong argument exists that the court's failure to extend the transcript doctrine to testimony of witnesses in a third party's trial reasonably expected to testify against the indigent accused unduly restricts the boundaries of the transcript doctrine.

114. 524 S.W.2d at 476-77.
115. *Id.* at 476.
116. *Id.* at 477.
117. *Id.*

B. *Scope of Defendant's Right to Inspect Contraband Substances Held by the Prosecution for Use at Trial*

Both courts and legislatures recently have exhibited a keen awareness of the need to update criminal discovery procedures.[118] The United States Supreme Court has issued a series of decisions designed to encourage more liberal inspection by an accused of material prosecution evidence to be introduced at trial.[119] In *Brady v. Maryland,*[120] for example, the Court found a due process violation when the prosecution suppressed material evidence favorable to an accused after the accused had requested inspection.[121] Further, the Supreme Court in *Williams v. Florida*[122] rejected the "game or surprise theory" of criminal discovery, announcing that the policy of discovery is to ensure that both a defendant and the state have ample opportunity to investigate those facts crucial to the determination of guilt or innocence.[123]

Prompted by the Supreme Court, Congress, in 1975, amended rule 16(a) of the Federal Rules of Criminal Procedure[124] to guarantee a defendant the right to inspect government evidence that is material to the preparation of his defense or that the prosecution expects to use at trial.[125] Only one federal district court has interpreted rule 16(a) as applied to a defendant's motion to require the government to furnish samples of contraband substances for inspection and in-

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118. *See* Gaynor, *Defendant's Right to Discovery in Criminal Cases,* 20 CLEV. STATE L. REV. 31 (1970); Kane, *Criminal Discovery—The Circuitous Road to a Two-Way Street,* 7 U. SAN FRAN. L. REV. 203 (1973).

119. *Compare* United States v. Agurs, 96 S. Ct. 2392 (1976); Giglio v. United States, 405 U.S. 150 (1972); Williams v. Florida, 399 U.S. 78 (1970); *and* Brady v. Maryland, 373 U.S. 83 (1963) *with* Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).

120. 373 U.S. 83 (1963).

121. *Id.* at 87.

122. 399 U.S. 78 (1970).

123. The Court defined the "game theory" of justice in the following terms:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.

Id. at 82.

124. FED. R. CRIM. P. 16(a) [hereinafter cited as Rule 16(a)] provides in part:

> (c) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at trial, or were obtained from or belong to the defendant.

125. *See generally* Comment, *Expanding Defendant's Discovery: The Jencks Act at Pretrial Hearings,* 24 BUFF. L. REV. 419 (1975); MacCarthy & Forde, *Discovery in Criminal Cases Under the New Local Rules of the Federal Court,* 52 CHI. B. REC. 41 (1970).

dependent analysis. In *United States v. Pollock*,[126] the Massachusetts District Court expressly found that discovery of this nature is contemplated by rule 16 and determined that a motion requesting such relief should be allowed if the defendant shows that the proposed inspection and analysis is reasonable and might be material to his defense.[127]

Several state jurisdictions also have attempted to define the scope of a criminal defendant's right to inspect prosecution evidence, with particular emphasis on whether a defendant can require the state to furnish the accused samples of contraband substances for independent analysis.[128] As a result of the increased attention given criminal discovery at the state level, two legislative drafts, the American Bar Association's Standards Relating to Discovery and Procedure Before Trial (ABA Discovery Standards)[129] and the Uniform Rules of Criminal Procedure Rule 421,[130] have been promulgated to aid states in their consideration of inspection procedures.

The ABA Discovery Standards primarily encourage a liberal scope of inspection, providing that the policy behind pre-trial discovery should be as "full and free as possible" in order to promote adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.[131] The ABA Discovery Stan-

126. 402 F. Supp. 1310 (D. Mass. 1975).

127. *Id.* at 1312. Generally federal procedure requires a defendant to make an affirmative showing that the discovery procedure will be both reasonable and useful. *See* 1971 WIS. L. REV. 614, 619.

128. The vast majority of state jurisdictions have statutory sections that grant a defendant the general right to inspect prosecution-held evidence. At least ten states have recognized by statute or through judicial construction that the right of inspection includes the opportunity to perform reasonable independent testing of such evidence. *See* WIS. STAT. ANN. § 971.23(5) (West 1971); MONT. REV. CODES ANN. § 95-1803(c) (1969); F.R. CRIM. P. 16(a)(1)(A), (C), (D); Warren v. State, 292 Ala. 71, 288 So. 2d 826 (1973); State v. Migliore, 261 La. 722, 260 So. 2d 682 (1972); State v. Cloutier, 302 A.2d 84 (Me. 1973); Jackson v. State, 243 So. 2d 396 (1970), *aff'd* 261 So. 2d 126 (Miss. 1972); People v. Spencer, 79 Misc. 2d 72, 361 N.Y.S.2d 240 (Sup. Ct. 1974); Terrell v. State, 521 S.W.2d 618 (Tex. Crim. 1975). *Contra* Mobley v. State, 130 Ga. App. 80, 202 S.E.2d 465 (1975).

129. ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Approved Draft, 1970) [hereinafter cited as ABA STANDARDS, DISCOVERY].

130. UNIFORM RULE OF CRIM. PROCEDURE 421 [hereinafter cited as UNIFORM RULE 421].

131. *See* ABA STANDARDS, DISCOVERY, *supra* note 129, § 1.2. Further, ABA STANDARDS, DISCOVERY, § 1.1 details the purpose of discovery:

> (a) Procedures prior to trial should serve the following needs:
>
> (i) to promote an expeditious as well as fair determination of the charges, whether by plea or trial;
>
> (ii) to provide the accused sufficient information to make an informed plea;
>
> (iii) to permit thorough preparation for trial and minimize surprise at trial;
>
> (iv) to avoid unnecessary and repetitious trials by exposing any latent proce-

dards expressly require the prosecutor, upon request by the defendant, to make available for both inspection and testing evidence intended for use at trial.[132]

Subsequent to the publication of the ABA project, the National Conference of Commissions on Uniform State Laws drafted Uniform Rule 421.[133] Although closely resembling the broad inspection procedures found in its ABA counterpart, Uniform Rule 421 contains several significant differences. First, instead of requiring the defendant to secure a court order before allowing access to prosecution-held evidence, Uniform Rule 421 grants an accused automatic access to the information.[134] Further, Uniform Rule 421 provides specific criteria for determining the scope of a defendant's right to perform independent analysis on such evidence.[135] Thus both legislative models promote the liberal development of a defendant's right to inspect prosecution-held evidence by allowing reasonable independent testing by the defendant of contraband substances.

In *State v. Gaddis*[136] the Tennessee Supreme Court accepted the modern view that an accused should be allowed to inspect con-

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dural or constitutional issues and affording remedies therefor prior to trial;

(v) to reduce interruptions and complications of trials by identifying issues collateral to guilt or innocence, and determining them prior to trial; and

(vi) to effect economies in time, money, and judicial and professional talents by minimizing paperwork, repetitious assertions of issues, and the number of separate hearings.

132. ABA STANDARDS, DISCOVERY, *supra* note 129, § 2.2 states in part that the prosecutor's obligations include:

(i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, *tested,* copied or photographed during specified reasonable times; and

(ii) making available to defense counsel at the time specified such material and information, and suitable facilities or other arrangements for inspection, *testing,* copying and photographing of such material and information. (emphasis supplied).

133. *See* UNIFORM RULE 421, *supra* note 130, Comment.

134. *Id.*

135. UNIFORM RULE 421, *supra* note 130, provides:

In affording this access, the prosecuting attorney shall allow the defendant at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made. If a scientific test or experiment of any matter may preclude or impair any further tests or experiments, the prosecuting attorney shall give the defendant and any person known or believed to have an interest in the matter reasonable notice and opportunity to be present and to have an expert ohserve or participate in the test or experiment.

UNIFORM RULE 421, Comments, provide that the limitations "in any reasonable manner" and "reasonable tests" are designed to allow the prosecutor a means by which to place reasonable limitations on the manner in which an analysis is carried out. Moreover, the court is not involved in the discovery procedure at all unless the defendant determines that the limitations placed on testing are unduly restrictive and petitions the court for relief.

136. 530 S.W.2d 64 (Tenn. 1975).

traband material obtained from him by the state and held by the prosecution for use as evidence at trial.[137] *Gaddis* involved a defendant's motion to require the prosecutor to furnish samples of a controlled substance previously seized from the defendant so that the defense could conduct an independent, scientific analysis of the substance.[138] The Tennessee Supreme Court found that section 40-2044 of the Tennessee Code[139] was sufficiently broad to require the prosecutor to furnish the accused samples of tangible evidence for the purpose of independent analysis.[140] In setting guidelines under

137. For recent discussions on the trend toward more liberal discovery procedures, see generally Fahringer, *Has Anyone Here Seen Brady?: Discovery in Criminal Cases,* 9 CRIM. L. BULL. 325 (1973); MacCarthy & Forde, *supra* note 125; Thode, *Criminal Discovery: Constitutional Minimums and Statutory Grants in Texas,* 1 TEXAS TECH. L. REV. 183 (1970); Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose,* 40 U. CHI. L. REV. 112 (1972); Comment, *Suppression: The Prosecutor's Failure to Disclose Evidence Favorable to the Defense,* 7 U. SAN FRAN. L. REV. 348 (1973); 1971 WIS. L. REV. 614, 617-18.

138. Defendant in *Gaddis* was indicted upon a charge of felonious possession of a controlled substance with intent to sell or deliver. The defendant later brought the instant motion before the trial court to obtain a sample of the drug specimen for the purpose of independent examination. Subsequent to a lower court's ruling that denied defendant's motion, the supreme court granted certiorari and reversed.

139. TENN. CODE ANN. § 40-2044 (1975) provides:

> **Copying certain books, papers and documents held hy attorney for state.**—Upon motion of a defendant, or his attorney, at any time after the finding of an indictment or presentment, the court shall order the attorney for the state, or any law enforcement officer, to permit the attorney for the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others which are in possession of, or under the control of the attorney for the state or any law enforcement officer. The order may specify a reasonable time, place and manner of making the inspection, and of taking the copies or photographs and may prescribe such terms and conditions as are just. However, such inspection, copying or photographing shall not apply to any work product of any law enforcement officer or attorney for the state or his agent hy any witness other than the defendant.

The *Proposed Tenn. Code, supra* note 77, § 40-1504 makes little change in the definition of "inspection." Patterned after Rule 16(a), § 40-1504 states:

> **Documents and tangible objects.**—Upon motion of the defendant, the court shall order the district attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or portions thereof, which are within the possession, custody or control of the state and:
>
> (1) which are material to the preparation of his defense; or
>
> (2) which are intended for use by the state as evidence at the trial; or
>
> (3) which were obtained from or helong to the defendant.

140. The present supreme court, in *Gaddis,* expressly overruled Kerwin v. State, 512 S.W.2d 632 (Tenn. Crim. App. 1974), which previously held that TENN. CODE ANN. § 40-2044 (1975) did not envision the right of a defendant to inspect and make analysis of controlled substances. *Kerwin* specifically had determined that defendants from whom the substances had heen seized were not entitled to an independent analysis, hecause they were the "only persons who knew whether or not they had in fact sold a controlled substance and therefore they were not denied anything needed in the ascertainment of truth." 512 S.W.2d at 635. The *Gaddis* opinion ruled that this approach violated a defendant's presumption of innocence. 530 S.W.2d at 68.

which to effectuate independent testing the court mandated that both the prosecutor and the defense counsel must promptly place on the court record the results of all tests.[141] Moreover, in those cases in which a chemical analysis will destroy, exhaust, or alter the identity of the substance, the prosecutor and defense attorney must come to some agreement on the proper procedure for analysis, and in all such cases a defendant must be given the opportunity to have his own expert present at the test.[142] In reaching its decision, the supreme court expressly embraced the policies enunciated by the ABA Discovery Standards,[143] leaving little doubt as to the future direction of criminal discovery in Tennessee.[144]

The *Gaddis* decision is a significant attempt by the present court to bring criminal discovery procedures in line with the requirements of due process. By indicating a willingness to conform to the general policies announced in the ABA Discovery Standards, and by issuing an opinion that attempts to resolve those questions posed under Uniform Rule 421, the supreme court's opinion portends future liberalization of a defendant's ability to discover prosecution evidence.

V. EVIDENCE

A. Search and Seizure: The Automobile

Although under traditional constitutional analysis any search and seizure conducted without court approval presumptively is invalid, and only under exceptional circumstances is a warrantless search and seizure upheld,[145] an exception to the traditional rule, initially carved out by the United States Supreme Court in *Carroll v. United States*,[146] provides that an automobile halted on a public

141. 530 S.W.2d at 69.

142. *Id.*

143. *See* notes 131-32 *supra* and accompanying text.

144. 530 S.W.2d at 69-70. Regarding the future impact of the standards, the court stated:

> While we look upon these standards with general favor, we do not adopt them, at this time, because some of the situations they address are not before the Court in this controversy and for the further, and more important reason, that the commission charged with the responsibility of drafting the Criminal Rules of Procedure is actively engaged in the formulation of these rules and its final report is expected by the end of this year. We defer the formulation of further rules pending the incoming of the Commission's report.

Id. at 70.

145. United States v. Jeffers, 342 U.S. 48 (1951).

146. 267 U.S. 132 (1925).

street or highway may be searched without a warrant[147] when probable cause exists.[148] The rationale behind the exception is the overriding concern that an automobile might travel out of the jurisdiction before a search can be made if police officers first are required to obtain a judicial warrant.

In 1970 the United States Supreme Court seemingly extended the circumstances under which a warrantless search and seizure of an automobile is justified. In *Chambers v. Maroney,*[149] the Court upheld the warrantless search of an automobile that had been removed to the stationhouse after the arrest of its occupants.[150] Unlike *Carroll,* there was little danger that the automobile would be driven out of the jurisdiction prior to the attainment of a warrant. The majority, however, stressing that probable cause existed at the stationhouse,[151] found no need to distinguish the seizure and holding of an automobile before presenting the probable cause issue to the magistrate and the seizure of an automobile followed by an immediate search.[152] Thus the decision in *Chambers* significantly altered the application of the *Carroll* doctrine by making the present mobility of an automobile subordinate to the existence of probable cause in determining the validity of a warrantless search.[153]

In the subsequent case of *Coolidge v. New Hampshire,*[154] how-

147. For a general discussion of the *Carroll* decision, see Miles & Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship,* 4 SETON HALL L. REV. 105 (1972); Murray & Aitken, *Constitutional Limitations on Automobile Searches,* 3 LOY. L.A.L. REV. 95 (1970).

148. Probable cause is defined by the *Carroll* court as "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." 267 U.S. at 149.

149. 399 U.S. 42 (1970). *See also* Texas v. White, 423 U.S. 67 (1975) (*per curiam* opinion).

150. In *Chambers,* pursuant to a police bulletin, officers stopped defendant's automobile, arrested the occupants, and drove the automobile to police headquarters. Subsequently, police searched the automobile, without first obtaining a warrant, and discovered material evidence that was used at trial to gain a conviction against defendant.

151. 399 U.S. at 52.

152. The court apparently reasoned that the automobile might be removed from the jurisdiction before a search could be made. For example, a friend or relative could obtain permission to remove the automobile from police custody. For a discussion of the mobility issue in *Chambers,* see Note, *Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items,* 58 IOWA L. REV. 1134, 1142-1144 (1973).

153. *See* Note, *The Warrantless Automobile Search and Chambers v. Maroney,* 28 BAYLOR L. REV. 151 (1976). The *Chambers* decision turned on the finding of probable cause, unlike *Carroll,* which focused particularly on both probable cause and exigent circumstances. *See* Note, *Warrantless Searches and Seizures of Automobiles,* 87 HARV. L. REV. 835, 842-45 (1974).

The rationale behind the *Chambers* decision is still a viable concept under Supreme Court holdings. *See* Texas v. White, 423 U.S. 67 (1975) (*per curiam* opinion).

154. 403 U.S. 443 (1971).

ever, the Court again confirmed that the mobility of an automobile is crucial to the validity of a warrantless search and seizure conducted with probable cause.[155] Finding that the automobile searched was parked in defendant's driveway under circumstances reasonably indicating that it would not be moved out of the jurisdiction before a warrant could be obtained,[156] the Court overturned the defendant's conviction and ruled that the search and seizure of defendant's automobile without a valid warrant violated the fourth amendment. Further, the Court expressly approved the basic premise in *Carroll*, holding that although probable cause exists, a warrantless search is not justified unless there are reasonable grounds to believe that the automobile will be moved out of the jurisdiction before a warrant may be obtained,[157] thus limiting the broad rationale enunciated in *Chambers*.

The present Tennessee Supreme Court consistently has upheld the reasonableness of a warrantless search conducted with probable cause[158] when there is a likelihood that an automobile will be removed from the jurisdiction before police officers can obtain a war-

155. In *Coolidge* the defendant was arrested in his home, and officers seized his automobile, which was parked in the driveway. The automobile subsequently was towed to the police station and a search with defective warrants produced material evidence. In an attempt to salvage that evidence for use at trial, the prosecutor argued that the search was conducted under reasonable circumstances because it was not practicable to secure a warrant before the vehicle could be moved out of the jurisdiction. 403 U.S. at 458-61.

156. The Court found that the police had known for some time of the probable role of defendant's automobile in the criminal activity. Further, the Court explicitly noted that there was no indication that defendant meant to flee the jurisdiction. 403 U.S. at 460.

157. For a comparison of the *Coolidge* decision to other Supreme Court rulings in cases involving the warrantless search and seizure of an automobile, see 28 RUTGERS L. REV. 766 (1975).

158. The court has defined probable cause in terms of the reasonable belief by the seizing officer that the contents of the automobile violate the law and in terms of the right to arrest. State v. Parker, 525 S.W.2d 128, 131 (Tenn. 1975). Further, the court generally has upheld a broad range of fact patterns as providing probable cause. In State v. Parker, 525 S.W.2d 128 (Tenn. 1975), probable cause for search of an automobile existed based on an informant's tip as to the location of contraband when the prosecution meets the burden of showing the reasonableness of: (1) the underlying circumstances from which the informant drew his conclusions, and (2) the underlying circumstances from which the officer concluded that the information was credible, as mandated by the United States Supreme Court in Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964). Further, in State v. Hughes, Slip op., (Tenn., filed Dec. 6, 1976), the court found that probable cause for search existed even though defendant's automobile was stopped by officers when they knew of no violation of the law, but subsequently smelled the odor of marijuana emanating from inside the automobile. In Miller v. State, 520 S.W.2d 729 (Tenn. 1975), the supreme court determined that a defendant who disclaims ownership of an automobile prior to a search may not subsequently contest the legality of the search and seizure of the automobile if ownership is later established.

rant from a magistrate.[159] In *Knox v. Fuqua,*[160] the court explicitly focused on the dichotomy between *Chambers* and *Coolidge.* In that case, state agents seized without a warrant the defendant's automobile, which was parked in his driveway, and alleged that the automobile had been used to transport contraband drugs.[161] Although determining that probable cause existed, the court held that the seizure violated the search and seizure provisions of both the Tennessee constitution and the fourth amendment. It also noted that the automobile was parked in defendant's driveway and that there was no reason to believe that defendant would attempt to flee the jurisdiction;[162] thus, the exigent circumstances requirement had not been met. Significantly, the court determined that the *Coolidge* decision limited the *Chambers* holding to its peculiar facts and reaffirmed the traditional *Carroll* standard.[163] Finally, the court reasoned that exigent circumstances exist only when the automobile is "moveable" and "fleeting" so that it can escape the jurisdiction before a warrant is obtained.[164]

Clearly the broad rationale of *Chambers* has been rejected by the Tennessee Supreme Court in favor of the *Carroll* requirement, which mandates the presence of both probable cause and exigent circumstances as prerequisites to the warrantless search of an automobile. The *Knox* rationale, if consistently applied to subsequent search and seizure questions, demonstrates a basic respect by the court for an individual's fourth amendment freedoms and encourages the use of reasonable evidentiary procedures both prior to trial and during the course of a prosecution.

B. Scope of the Bruton Rule

In *Bruton v. United States* the United States Supreme Court proscribed the use in a joint trial of the confession of a codefendant who does not take the stand when the confession tends to implicate the nonconfessing defendant.[165] The *Bruton* Court concluded that

159. State v. Hughes, Slip op. at 6 (Tenn., filed Dec. 6, 1976).

160. Slip op. (Tenn., filed Oct. 25, 1976).

161. Defendant had made sales of contraband drugs to undercover agents, using his automobile to transport the contraband. Agents seized the automobile pursuant to the Tennessee Drug Control Act of 1971, TENN. CODE ANN. § 52-1443(a)(4) (1975), which mandates the forfeiture of any automobile used in the transportation of unlawful drugs.

162. The court found that the defendant had been under investigation for 21 days, that at no time during that period had defendant manifested an intent to leave the jurisdiction, and that officers had had reasonable time to obtain a warrant.

163. Knox v. Fuqua, Slip op. at 6 (Tenn., filed Oct. 25, 1976).

164. *Id.*

165. 391 U.S. 123 (1968). Under the rules of evidence such a confession is generally

limiting instructions to the jury could not undo the harm to the nonconfessing defendant caused by admitting the confession implicating him, and held the admission of the confession into evidence to be constitutional error.[166] Not all *Bruton* rule violations require reversal, however; if the error is harmless beyond a reasonable doubt, the conviction can stand.[167] Additionally, the courts have carved out exceptions to the *Bruton*[168] rule. The rule has been held inapplicable when a confessing codefendant testifies at trial about the out-of-court confession, thus subjecting himself to cross examination.[169] The rule also has been held inapplicable when a defendant implicated by his codefendant's confession also has confessed.[170]

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admissible against the confessing codefendant under the traditional admissions exception to the hearsay rule, but against the nonconfessing defendant it is inadmissible hearsay. *See* Delli Paoli v. United States, 352 U.S. 232, 240 (1957). Moreover, when the confessing codefendant does not take the stand, the nonconfessing defendant's sixth amendment right of confrontation, which includes the right of cross examination, is violated since the nonconfessing defendant has no means of cross-examining the person who made the accusatory statements. *See* U.S. CONST. amend. VI, which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *See also* Pointer v. Texas, 380 U.S. 400 (1965).

166. 391 U.S. at 126. *See generally* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 59, at 136-37 (2d ed. 1972). The drafters of the *Uniform Rules of Evidence* have attempted to codify the *Bruton* rule. Rule 804 deals with exceptions to the hearsay rule when the declarant is unavailable, such as when he is exempted by the court from testifying on the ground of privilege. In the section excepting statements against interest from the hearsay rule, the following sentence is found:

> A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating hoth himself and the accused, is not within this exception.

UNIFORM RULE OF EVIDENCE 804(b)(3).

The corresponding section in the Federal Rules of Evidence does not contain the above sentence. The House Committee on the Judiciary attempted to add the codification of the *Bruton* rule, hut the Senate and Conference committees deleted the provision since the general approach of the Rules of Evidence was to avoid constitutional evidentiary principles. The Advisory Committee states that "this rule does not purport to deal with questions of the right of confrontation." FED. RULE EVID. 804(b)(3), Report of House Committee on the Judiciary, Report of Senate Committee on the Judiciary, Conference Report, and Advisory Committee's notes.

167. Harrington v. California, 395 U.S. 250 (1969).

168. *See generally* Annot., 29 L. Ed. 2d 931 (1971), regarding the application of the rule and its exceptions.

169. *See, e.g.*, Nelson v. O'Neil, 402 U.S. 622 (1971) (the Constitution as construed in *Bruton* is violated only when the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for cross examination); United States v. Insana, 423 F.2d 1165 (2d Cir. 1970).

170. *See, e.g.*, United States *ex rel.* Duff v. Zelker, 452 F.2d 1009 (2d Cir. 1971) (when the defendant's confession interlocks with and supports the confession of the codefendant, there is no violation of the *Bruton* rule); United States v. Mancusi, 404 F.2d 296 (2d Cir. 1968) (when the jury has heard not only a codefendant's confession but also the defendant's own confession no such "devastating" risk attends the lack of confrontation as was thought to be

The scope of this latter exception confronted the Tennessee Supreme Court in *State v. Elliott.*[171] Elliott and Mitchum were jointly tried and convicted of murder in the first degree committed while engaged in a robbery. Both defendants made oral statements, which were related at trial by a detective, acknowledging their participation in the robbery. Elliott admitted that he was the driver of a getaway car, but he denied being any closer than a mile and a half from the scene of the robbery, and he denied participating in the shooting of the victim. Mitchum, who admitted being at the scene of the crime and shooting the victim, also made statements that placed Elliott at the murder scene. In determining that the admission in evidence of Mitchum's statements contradicting Elliott's confession, when Mitchum did not testify, violated the *Bruton* rule, the court set forth the following standards: (1) when jointly tried codefendants have confessed and the confessions are similar in material aspects, there is no violation of the *Bruton* rule to admit the confessions into evidence; and (2) when the confession of one nontestifying codefendant contradicts, repudiates, or adds to material statements in the confession of the other nontestifying codefendant, so as to expose the latter to an increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment, the latter defendant is entitled to test the veracity of the statements in his codefendant's confession. A denial to him of this right through the failure of his codefendant to take the stand violates the *Bruton* rule.[172] Although the court found error when these standards were applied, it held the error to be harmless beyond a reasonable doubt since there was overwhelming evidence of guilt other than the confessions.

In the federal courts the problems presented by the *Bruton* rule can be avoided through rule 14 of the Federal Rules of Criminal Procedure, which permits the trial judge to grant a severance of defendants if joinder is prejudicial to one of the defendants.[173] The

involved in *Bruton*); Briggs v. State, 501 S.W.2d 831, 835 (Tenn. Crim. App. 1973). *But see* United States *ex rel.* Johnson v. Yeager, 399 F.2d 508 (3d Cir. 1968), *cert. denied,* 393 U.S. 1017 (1969) (holding that it was error to admit a codefendant's confession, although the defendant had also confessed, since the confessions varied materially).

171. 524 S.W.2d 473 (Tenn. 1975).

172. *Id.* at 477-78.

173. FED. RULE CRIM. P. 14 provides:

> If it appears that a defendant or the government is prejudiced by joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court

ABA Standards Relating to the Administration of Criminal Justice give three alternatives when a defendant moves for severance because the prosecution intends to offer in evidence an out-of-court statement by his codefendant that tends to implicate him: (1) a joint trial at which the statement is not admitted into evidence; (2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the confession will not prejudice the moving defendant; or (3) severance of the moving defendant.[174]

Tennessee presently has no statute dealing with this precise issue,[175] but case law gives the trial court discretion to sever defendants if a joint trial would be prejudicial to one of the defendants.[176] Although severance eliminates the *Bruton* problem, and at the same time allows the state to use the confession against the confessing codefendant, problems arise when the state attempts to take advantage of a joint trial and the codefendant's confession by deleting all references to the nonconfessing defendant. In *Taylor v. State*[177] the Court of Criminal Appeals suggested that a confession properly altered to eliminate all connecting references to the other defendants might be admissible. *White v. State,*[178] however, illustrates the diffi-

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for inspection *in camera* any statements or confessions made hy the defendants which the government intends to introduce in evidence at the trial.

The last sentence was added in order to provide a procedure for dealing with the *Bruton* problem. *See* Proposed Amendments to the Rules of Criminal Procedure for the United States District Courts, Advisory Committee's Notes, 34 F.R.D. 411, 419 (1964).

PROPOSED TENN. CODE, *supra* note 77, at § 40-1606(b), has a similar provision:

If, upon timely motion to sever, and evidence introduced thereon, it appears to the court that a joint trial would be prejudicial to any defendant, the court shall order a severance to the defendant whose joint trial would prejudice the other defendant or defendants.

The Law Revision Commission's Comment to this section states that it "is designed to prevent prejudice to a defendant by the admission in evidence against a codefendant of a statement or confession made by that codefendant," and that it "provides a procedure whereby the issue of possible prejudice can be resolved on the motion for a severance."

174. ABA STANDARDS, JOINDER AND SEVERANCE § 2.3 (1968).

175. *See* PROPOSED TENN. CODE, *supra* note 77, at § 40-1606(b).

176. *See, e.g.,* Hoskins v. State, 489 S.W.2d 544 (Tenn. Crim. App. 1972); Davis v. State, 445 S.W.2d 933 (Tenn. Crim. App. 1969). The motion for severance must be made before the joint trial begins, and the motion must be supported by an affidavit. 489 S.W.2d at 544.

177. 493 S.W.2d 477 (Tenn. Crim. App. 1972).

178. 497 S.W.2d 751 (Tenn. Crim. App. 1973). In this case "the other person" was substituted for the nonconfessing codefendant's name in twenty-two places. The evidence showed that the crime in question had been committed by two males, and two males were being tried jointly. The court stated that to assume that the insertion of "the other person" cured any possible prejudice would be "a mental gymnastic which is beyond not only their (the jurors') powers, but anybody elses." *Id.* at 755. *See also The Supreme Court 1967 Term,* 82 HARV. L. REV. 63, 231-38 (1968), which expresses the view that deletion would be an ineffective method for avoiding tbe *Bruton* holding. *Id.* at 237-38.

culty in avoiding prejudice to the nonconfessing defendant when this method is used. Moreover, if all references to an accomplice are deleted, the confession as admitted may become unfairly prejudicial to the confessing defendant. There may be a few instances in which alternative (2) of the ABA Standards[179] can be met without prejudicing either codefendant, but in most cases it appears that the trial judge should force the state to elect whether to sever the trials of the codefendants or to exclude the confession incriminating both codefendants from a joint trial.[180]

C. *Cross-Examination of a Defendant Who Takes the Stand*

The character of a witness for truthfulness is relevant in determining the credibility of the witness's testimony.[181] Consequently, most courts permit an attack upon the witness's character by cross-examination concerning prior bad acts that have some relationship to the witness's credibility[182] and cross-examination as to convictions for certain kinds of crimes.[183] Courts have taken different views on the kinds of criminal convictions that can be used for impeachment.[184] Some jurisdictions allow the use of any felony or misdemeanor conviction for impeachment, some specify only felonies, and others use the common law concept of "infamous crimes."[185] A few courts, rejecting such rules, exclude evidence of convictions if the prejudicial impact of the evidence exceeds its probative value.[186] Prior to the enactment of the Federal Rules of Evidence, the Uniform Rules of Evidence[187] and the Model Code of Evidence[188] sought

179. *See* note 174 *supra* and accompanying text.

180. The "sever or exclude" rule has received substantial support by commentators. *See, e.g.*, Singer, *Admissibility of Confession of Codefendant*, 60 J. CRIM. L.C. & P.S. 195 (1969); *The Supreme Court 1967 Term*, *supra* note 178, at 231-38; 35 Mo. L. REV. 125 (1970); 47 TEXAS L. REV. 143 (1968).

181. MCCORMICK, *supra* note 166, at § 41.

182. *Id.* § 42. "Bad acts" include any particular misconduct that would tend to discredit the witness's character even though it has not been the basis for conviction of crime. Some courts prohibit altogether cross-examination as to acts of misconduct for impeachment purposes, and other courts permit cross-examination upon acts of misconduct that show bad moral character, and do not require a close relationship to credibility. *Id.* There are dangers of confusion of the issues and unfair surprise to the witness when evidence of prior bad acts is admitted. *See* 3A J. WIGMORE, EVIDENCE § 979 (Chadbourne rev. ed. 1970).

183. MCCORMICK, *supra* note 166, § 43.

184. These views are discussed in MCCORMICK, *supra* note 166, at § 43, and in WIGMORE, *supra* note 182, at § 980.

185. TENN. CODE ANN. § 40-2712 (1975) specifies crimes for which a defendant may be declared infamous, and further provides that the fact of conviction for any of the crimes may be used only as a reflection upon his credibility as a witness.

186. *See* Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

187. UNIFORM RULE OF EVIDENCE 21. After the Federal Rules of Evidence were adopted,

to reform the law by permitting only crimes that involve "dishonesty or false statements" to be used to impeach a witness's credibility since evidence of bad character in other respects is of questionable relevance to the issue of truthfulness and is likely to be misused.[189]

In most states, these impeachment rules pose a cruel dilemma to the criminal defendant with a record who wishes to testify at his own trial.[190] The jury usually will notice the failure of the accused to testify and infer guilt from silence.[191] If, however, the defendant decides to testify, the prosecution is entitled to attack his credibility by cross-examining him as to prior convictions and prior bad acts.[192] Despite instructions limiting the jury's consideration of this evidence to the issue of the defendant's credibility as a witness, there is a danger that the jury will infer either that the defendant probably committed this crime since he committed the previous crime, or that the defendant is a bad person and should be incarcerated regardless of his guilt in this case.[193] To encourage criminal defendants to take the stand, Uniform rule 21 and Model Act Rule 106 provide that a prosecutor may impeach only by a crime involving dishonesty or false statement, and only if the defendant first presents evidence for the sole purpose of supporting his credibility.[194] Section 609(a) of the recently codified Federal Rules of Evidence,[195]

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the Uniform Rules were amended to conform for the most part with the Federal Rules. Therefore Uniform Rules 608(b) and 609 now are substantively the same as Federal Rules 608(b) and 609. *See* UNIFORM RULES OF EVIDENCE 608(b), 609; note 190 *infra* and accompanying text.

188. MODEL CODE OF EVIDENCE rule 106 (1942).

189. *Id.*, Comment.

190. MCCORMICK, *supra* note 166, § 43; Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROB. 215 (1968).

191. MCCORMICK, *supra* note 166, § 43.

192. *See* notes 184-86 *supra* and accompanying text for the rules governing this line of cross-examination.

193. MCCORMICK, *supra* note 166, § 43; Note, *supra* note 190, at 215.

194. UNIFORM RULE OF EVIDENCE 21, Commissioner's Note; MODEL CODE OF EVIDENCE rule 106, Comment.

195. FED. R. EVID. 609(a). This rule as originally proposed was criticized as a regression from the more logical and just standards embodied in the old Uniform Rules and in the Model Act. *See* Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. LAW BULL. 330 (1970); Spector, *Impeaching the Defendant by his Prior Convictions and the Proposed Federal Rules of Evidence: A Half-Step Forward and Three Steps Backward*, 1 LOY. CHI. L.J. 247 (1970). It subsequently was amended, however, to give the trial judge discretion to exclude evidence of prior felony convictions not involving dishonesty or false statements if the trial judge determines that the prejudicial effect of the evidence outweighs its probative value.

FED. R. EVID. 608(b) generally bars extrinsic evidence of prior bad acts by a witness for

however, additionally allows impeachment by crimes punishable by death or by imprisonment in excess of one year if the probative value of admitting the evidence outweighs the prejudicial effect on the defendant.

The Tennessee Supreme Court recently recognized the confusion in this area in *State v. Morgan*[196] and undertook to clarify the scope of cross-examination of a defendant about prior convictions and bad acts in order to achieve a higher degree of consistency and fairness. Applying the Federal Rules of Evidence to reverse a conviction of a defendant who had testified in his own behalf and who had been improperly cross-examined and impeached,[197] the court established standards to govern the scope of cross-examination of the defendant about prior convictions and bad acts, the scope of rebuttal in the event of a denial thereof by the defendant, and procedural rules applicable to such cross-examination. Outlined in simplified hornbook fashion, the standards are as follows:

I. Evidence of Specific Instances of Conduct of the Defendant.
   A. Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than convictions of a crime, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired

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the purpose of attacking his credibility, but does permit, in the court's discretion, specific instances of conduct to be inquired into on cross-examination if they are probative of truthfulness or untruthfulness.

196. Before State v. Morgan, 541 S.W.2d 385 (Tenn. 1976), the Tennessee rule was that a conviction for a crime, either a felony or misdemeanor, was admissible to impeach any witness if it involved moral turpitude. A major problem, however, was that the moral turpitude standard was extremely vague. D. PAINE, TENNESSEE LAW OF EVIDENCE § 202 (1974). In addition, an ordinary witness could be impeached by cross-examination as to prior bad acts involving moral turpitude, or indictments. *Id.* § 206. Whether a testifying criminal defendant could be asked about prior bad acts and indictments, however, seemed unclear. *See id.* § 207; State v. Morgan, 541 S.W.2d 385, 387 (Tenn. 1976). If a witness denied a prior conviction, the record could be produced to rebut him; if a witness denied a prior bad act, however, his answer was conclusive. PAINE, *supra*, at §§ 205, 206. Finally, Tennessee law was unclear whether only recent misconduct or also old sins could be inquired into. *Id.* § 206. *See also* Paine, *Character or Reputation of the Criminal Defendant in Tennessee*, 34 TENN. L. REV. 351 (1967).

197. After receiving incorrect answers from the defendant on cross-examination about prior convictions and penitentiary sentences, the prosecuting attorney called a court clerk to testify that the court records reflected that the defendant had been sentenced to the penitentiary for a conviction of assault to commit voluntary manslaughter twelve years earlier. The clerk related details of the offense in addition to the fact of conviction and the name of the crime, and the trial judge failed to instruct the jury that proof of the prior conviction was admitted solely on the issue of the defendant's credibility as a witness. Additionally, all arguments about the appropriateness of this cross-examination took place in the presence of the jury.

into on cross-examination of the witness concerning his character for truthfulness or untruthfulness.[198]

B. When a witness is sought to be cross-examined as to specific instances of conduct, the court shall conduct a jury-out hearing for the purpose of determining that the probative value of such evidence outweighs its prejudicial impact.[199]

C. When such cross-examination is permitted, the answer of the witness shall be conclusive and the state cannot adduce any evidence to the contrary in rebuttal.[200]

II. Impeachment by Evidence of Conviction of Crime.

A. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.[201]

B. Evidence of a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.[202]

C. The question whether evidence of a particular crime is admissible shall be determined by the trial judge out of the presence of the jury.[203]

D. If the prior crime is in the admissible category, the inquiry in the presence of the jury shall be limited to the fact of a former conviction and of what crime. Details of the prior offense shall not be inquired into or read from the record.[204]

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198. 541 S.W.2d at 388; *see* FED. R. EVID. 608(b).
199. 541 S.W.2d at 390.
200. *Id.*
201. *Id.* at 388-89; *see* FED. R. EVID. 609(a).
202. 541 S.W.2d at 389; *see* FED. R. EVID. 609(b).
203. 541 S.W.2d at 389.
204. *Id.* at 389, 390.

E. A witness's negative answer to a proper question involving a prior conviction is not conclusive; the state may introduce in rebuttal the documentary evidence of the conviction, but nothing more.[205]

III. If proof of a specific instance of conduct or of a prior conviction is admitted to impeach a witness's credibility, the trial judge shall instruct the jury that such proof was admitted solely on the issue of the defendant's credibility as a witness, and cannot be considered as to the defendant's guilt or innocence.[206]

The court appears to have succeeded in bringing order to this area of the law and is to be applauded for adopting the standards of the Federal Rules of Evidence, which appear likely to be the basis for uniformity in the law of evidence.[207]

VI. Improper Prosecutorial Argument to the Jury

The public prosecutor of a criminal case has responsibilities different from those of other advocates; his primary responsibility is not to convict but to seek justice.[208] Consequently, there must be limits on the scope of his closing argument to the jury so that its verdict will be based solely on rational inferences drawn from evidence presented in the trial.[209] The ABA has promulgated the following standards relating to the prosecutor's summation argument:

(a) The prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to inferences it may draw.[210]

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any

205. *Id.* at 390.

206. *Id.*

207. *See* Uniform Rules of Evidence (1974), Commissioners' Prefatory Note.

208. Berger v. United States, 295 U.S. 78 (1935); *see* ABA Code of Professional Responsibility EC 7-13.

209. By virtue of his office the prosecutor's argument is likely to have significant influence on the jury, thus magnifying the necessity that the prosecutor he fair. *See* Berger v. United States, 295 U.S. 78, 88 (1935); ABA Standards Relating to the Prosecution Function, § 5.8, Commentary (1971) [hereinafter cited as ABA Standards, The Prosecution Function].

210. The argument must he confined to the record evidence and the inferences that can reasonahly and fairly he drawn from that evidence. ABA Standards, The Prosecution Function, *supra* note 209, § 5.8, Comment a. Still, the prosecutor generally is given great latitude in drawing inferences. *See* Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case,* 54 Colum. L. Rev. 946, 954-56 (1954).

testimony or evidence or the guilt of the defendant.[211]

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.[212]

(d) The prosecutor should refrain from arguments which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.[213]

Other specific prohibitions on the prosecutor's closing argument include comment on the failure of the defendant to testify at trial[214] or to make a statement to an arresting officer,[215] disclosure of the defendant's character and prior transgressions inadmissible in evidence,[216] suggestions that the prosecutor has unrevealed superior knowledge of the facts of the case,[217] or reference to the possibility of appeal, pardon, or parole if a conviction results.[218] Since assuming office, the Tennessee Supreme Court has had four occasions to review alleged misconduct by the prosecuting attorney in his closing argument to the jury. These cases indicate that the court is concerned with the integrity of the criminal trial and with assuring each defendant a fair trial by restricting improper prosecutorial argument.

Smith v. State[219] sets forth the approach used by the court in ruling on prosecutorial misconduct, suggests the applicability in Tennessee of the harmless error doctrine[220] for such cases, states the

211. The problem with this line of argument is that it consists of unsworn, unchecked testimony and tends to exploit the influence of the prosecutor's office. ABA STANDARDS, THE PROSECUTION FUNCTION, *supra* note 209, § 5.8, Comment b.

212. Predictions as to the consequences of an acquittal on lawlessness in the community would divert the jury from deciding the case on the merits. *Id.* Comment d.

213. *Id.* § 5.8.

214. *See* Griffin v. California, 380 U.S. 609 (1965).

215. *See* Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

216. Note, *supra* note 210, at 953.

217. *Id.* at 955.

218. *Id.* at 956-57.

219. 527 S.W.2d 737 (Tenn. 1975).

220. The harmless error doctrine dictates that a conviction will not be overturned unless the argument was so prejudicial that the defendant was denied a fair trial. This rule was recoguized implicitly in Berger v. United States, 295 U.S. 78 (1935), in which the Court in overturning a conviction stated: "If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached." *Id.* at 89. *See* FED. RULE CRIM. P. 52(a), which provides that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." For a discussion of harmless error in cases involving improper argument, see Singer, *Forensic Misconduct by Federal Prosecutors—and How It Grew,* 20 ALA. L. REV. 227 (1968).

general policy of the law in this area, and illustrates several different kinds of improper argument. In *Smith* the defendants had been convicted of armed robbery and had been sentenced to twenty-five years. The district attorney general recommended to the jury a sentence of 500 years, indicating that there were reasons for his recommendation that he could not reveal. The court determined that the jury could have taken this recommendation of a high number of years to be for the purpose of delaying the date of the defendants' parole eligibility. Predictions also were made as to the consequences that a light sentence would have on lawlessness in the community. The court took a three-step approach in deciding the case. In the first step of its analysis, after noting the general policy that argument of counsel is a valuable privilege that should not be unduly restricted, the court determined that the closing argument of the district attorney general was improper. Under traditional law, the indication that the prosecutor was privileged to evidence not available to the jury, the reference to parole possibilities, and the diversion of the jury's attention from this particular trial to a problem of crime in general all were improper.[221] Secondly, the court determined that the cumulative impact of the improper argument was prejudicial to the defendant,[222] thus apparently recognizing the harmless error doctrine. Turning to the third step of formulating the proper relief for the defendants, the court, since it felt that the evidence of guilt was overwhelming, affirmed the conviction and attempted to remedy the harmful effects by reducing the punishment to ten years, the minimum sentence for armed robbery.[223] This disposition is commendable because it achieves a balance between fairness to the defendant and conservation of judicial resources.

In *Russell v. State*[224] petitioner, convicted of second degree murder, had defended on the ground of temporary insanity and had introduced the testimony of two psychiatrists in support of the defense. The district attorney general in summation attempted to show the possibilities of abusing psychiatric tests in the event an

221. *See* notes 210-16 *supra* and accompanying text. TENN. CODE ANN. § 40-2707 (1975) requires a trial judge in his charge to the jury to inform them of parole possibilities. Since this statute did not become effective until after Smith's trial, the court did not consider whether the statute would allow a prosecutor to use such information in his argument. On policy grounds it appears that the prosecuting attorney should not be able to use this information in arguing to the jury. Whereas the trial judge would be informing the jury in a nonadversarial setting, a prosecutor would attempt in many cases to use the possibility of parole to induce a larger sentence from the jury.

222. 527 S.W.2d at 739.

223. *Id.*

224. 532 S.W.2d 268 (Tenn. 1976).

unscrupulous attorney conspired with an unscrupulous psychiatrist.[225] Applying the *Smith* approach, the court first found the argument improper because it was not predicated on evidence introduced during the trial and was not pertinent to the issues at trial. Because the argument attacked the principal defense, the court found that it had a prejudicial rather than a harmless effect on the jury. Finally, the court determined that a reversal of the conviction and a remand for a new trial was the only way to be fair to the defendant since the issue of temporary insanity would determine the defendant's criminal responsibility.

The court considered whether a prosecutor's comment on the failure of the defendants to make a statement at the time of their arrest[226] was improper in *Braden v. State.*[227] Although initially such comment appears clearly improper,[228] this case had an additional ingredient in that the defendants had testified in their own defense at trial, thus subjecting themselves to impeachment by proof of prior inconsistent statements. In determining whether the prosecutor's statement was improper, the court held that a balance between protecting the privilege against self-incrimination and allowing the defendants' credibility to be tested required that evidence of the defendants' pretrial silence can be admitted only when that silence is patently inconsistent with the defendants' testimony. Finding that the defendants' silence could just as easily indicate that they relied on their right to remain silent, rather than that their story at trial was a fabrication, the court held the district attorney general's argument to be improper. The court found prejudice to the defendants since their credibility was a controlling issue, and reversed the conviction and remanded the case for a new trial.

Although the court has been strict in dealing with arguments based on evidence outside the record and with arguments commenting on the failure of a defendant to make an exculpatory statement at arrest, it adopted the general view of giving broad latitude to the drawing of inferences from the record in *State v. Beasley.*[229] In *Beasley* the pertinent evidence consisted of the victim's identifica-

225. The prosecutor suggested that a psychiatrist might tell the lawyer how his client should answer the 300 questions on the test in order that his client would appear insane.

226. Tennessee Bureau of Investigation agents were surveilling an area where marijuana was hidden. The defendant, after inspecting the area and removing a small amount of marijuana, was arrested and advised of his constitutional rights. The defendant made no statement, and the prosecutor commented on this failure in his argument to the jury.

227. 534 S.W.2d 657 (Tenn. 1976).

228. *See* note 215 *supra* and accompanying text.

229. 536 S.W.2d 328 (Tenn. 1976); *see* note 210 *supra.*

tion of the defendant, a sheriff's testimony that the defendant said that he had been in Alabama at the time of the crime, and two alibi witnesses' testimony that the defendant had been in Nashville at the time of the crime. The court held that it was not error for the prosecutor to state in his closing argument that the alibi witnesses gave false testimony since the evidence supported such an inference, and reinstated the conviction.[230] Because the court felt that the evidence supported the inference, it additionally held that the district attorney general did not violate the Code of Professional Responsibility[231] by interjecting into the argument his own personal opinion.

The *Beasley* case thus raises an issue not often resolved by courts yet thoroughly discussed by commentators:[232] How can misconduct in the prosecution of a criminal case be prevented? Fairness to the defendant, the issue addressed by the Tennessee Supreme Court in *Smith, Russell, Braden,* and *Beasley,* is but one aspect of prosecutorial misconduct for which the appropriate remedy is often appellate reversal. The other aspect of such misconduct is the punishment of the prosecutor to deter future misconduct. Although it is rarely used, commentators almost uniformly believe that punishment for contempt of court may be the ideal remedy for prosecutorial misconduct.[233] This sanction is administered easily and is flexible enough to be used no matter how trivial or how egregious the misconduct may be. The efficacy of such a sanction obviously would depend upon its vigorous use by the trial court.[234] The catalyst to encourage such vigorous use, however, may well be consistent scrutiny by the appellate courts of the integrity of the trial process.[235]

230. The Court of Criminal Appeals reversed the conviction on the ground that the district attorney general's argument was improper. 536 S.W.2d at 329.

231. The *Code of Professional Responsibility* states that "in appearing in his professional capacity before a tribunal, a lawyer shall not . . . assert his personal opinion . . . as to the credibility of a witness . . . ; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(c)(4).

232. *See, e.g.,* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges,* 50 TEXAS L. REV. 629 (1972); Cain, *Sensational Prosecutions and Reversals,* 7 NOTRE DAME LAW. 1 (1931); Singer, *supra* note 220; Note, *supra* note 210; Note, *Prosecutor Forensic Misconduct—"Harmless Error"?,* 6 UTAH L. REV. 108 (1958).

233. *See* Alschuler, *supra* note 232, at 673-74; Singer, *supra* note 220, at 276; Note, *supra* note 210, at 981-82.

234. For views that the duty of correcting this problem of prosecutorial misconduct lies primarily in the trial judge, see Cain, *supra* note 232, at 21; Note, 6 UTAH L. REV., *supra* note 232, at 113.

235. For a discussion of the importance of the appellate court's role, see Alschuler, *supra* note 232, at 675.

As well as encouraging trial judges to force the prosecutors to stay within legal and ethical bounds, such scrutiny also might act as a direct deterrent on the prosecutors themselves.[236] In this series of cases it appears that the Tennessee Supreme Court is calling on trial judges and prosecuting attorneys to conduct their trials in a manner calculated to achieve a just result. If such cases involving prosecutorial misconduct persist, however, the court might achieve its desired result by a strong admonishment in addition to taking whatever action is appropriate to ensure fairness to the defendant.

VII. CHARGE TO THE JURY

A. *Criminal Responsibility*

During the past century Tennessee courts applied a strict interpretation of the traditional *M'Naghten* standard for criminal responsibility, concluding that a defendant may not be excused from criminal responsibility unless it can be established that at the time of the crime he lacked sufficient capacity and reason to distinguish between right and wrong.[237] In recent years, however, substantial criticism has been leveled at the *M'Naghten* "right from wrong" test because it fails to consider the relative responsibility of those persons accused of crime who suffer from serious mental disorders.[238] It has been argued that a defendant might realize that an act is wrong, but be unable to conform his actions to the standard of conduct recognized as "right" because of mental disease.[239] Moreover, critics have noted that the concept of "right and wrong" is essentially an

236. *Id.* at 646-47. The argument is that the prosecutor has the burden of retrial; his superiors will be aware of his misconduct, and a judicial rebuke may be personally and professionally embarrassing.

237. The *M'Naghten* rule originally was adopted as the Tennessee criminal responsibility standard in Dove v. State, 50 Tenn. 348 (1872). *See also* McElroy v. State, 146 Tenn. 442, 242 S.W. 883 (1922); Watson v. State, 133 Tenn. 198, 180 S.W. 168 (1915); Bond v. State, 129 Tenn. 75, 165 S.W. 229 (1914).

238. As originally formulated the *M'Naghten* rule contained two essential tests: (1) knowledge of the nature and quality of an act, and (2) knowledge of the wrongfulness of an act. As the rule developed, however, the first requirement of the *M'Naghten* standard disappeared, presumably under the theory that if an accused did not know the nature and quality of an act, then he could not know that it was wrongful.

The majority of jurisdictions and commentators finding fault with the *M'Naghten* rule have directed severe criticism at the narrow "right or wrong" test. *See generally* Hill v. State, 252 Ind. 601, 251 N.E.2d 429 (1969); Commonwealth v. McHoul, 352 Mass. 544, 226 N.E.2d 556 (1967); State v. Noble, 142 Mont. 284, 384 P.2d 504 (1963); Terry v. Commonwealth, 371 S.W.2d 862 (Ky. 1963). *See also* Snouffer, *The Myth of M'Naghten*, 50 ORE. L. REV. 41 (1970).

239. *See* Comment, *Diminished Capacity: The Middle Ground of Criminal Responsibility*, 15 SANTA CLARA LAW. 911, 913-20 (1975). *See generally* Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JUR. 111, 116-22 (1975).

ethical concept that improperly forces the factfinder to make moral judgments.[240]

In *Graham v. State*,[241] the present supreme court significantly changed the Tennessee test for criminal responsibility. Following the lead of a number of state courts[242] and all but one of the federal circuits,[243] the court rejected the previously applied *M'Naghten* test,[244] and examined possible alternative standards by which to determine criminal responsibility. Initially, the court explored the application of the irresistible impulse test, which focuses on a determination of whether the mental condition of an accused is such as to deprive him of the necessary willpower to resist the impulse to commit a crime, regardless of the defendant's perception of "right and wrong."[245] The court further considered the "product rule" formulated by the District of Columbia Circuit in *Durham v. United States*.[246] Under the *Durham* standard, an accused is relieved from criminal responsibility if his act is "the product of mental disease or defect."[247] The intent behind the *Durham* formulation is to allow

240. *See* 11 HOUS. L. REV. 946, 950-51 (1974).

241. Slip op. (Tenn., filed Jan. 31, 1977).

242. At least seventeen other state jurisdictions have adopted the *Model Penal Code* as the standard for defining criminal responsibility. They include: Alaska, Connecticut, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Missouri, Montana, Ohio, Texas, Vermont, West Virginia, Wisconsin, and District of Columbia. *See* Slip op. at 20 (Tenn., filed Jan. 31, 1977).

243. All federal circuits with the exception of the first have adopted the *Model Penal Code* provision. Slip op. at 20 (Tenn., filed Jan. 31, 1977).

244. The *M'Naghten* rule is the oldest of the tests of criminal responsibility currently in use. It originally was articulated in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), and provided:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury . . . has generally been, whether the accused at the time of doing the act knew the difference between right and wrong . . . .

Id. at 722; *see* 58 IOWA L. REV. 699, 700 (1973).

245. The viability of the "irresistible impulse test" first gained prominence in Parsons v. State, 81 Ala. 577, 2 So. 854 (1887). In those jurisdictions employing the irresistible impulse test, it and the *M'Naghten* standard are both applied so that the factfinder may absolve the accused of criminal responsibility if it finds he did not know the difference between "right and wrong," or if it finds that the defendant lacked the freedom of will to choose "right." 58 IOWA L. REV. 699, 701 (1973).

246. 214 F.2d 862 (D.C. Cir. 1954). Although the District of Columbia originally proposed the "product rule," it subsequently abandoned the standard. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1969).

247. 214 F.2d at 875. The *Durham* court further elaborated on the application of the rule:

the introduction of expert medical testimony within the context of a legal rule.[248] *Durham* expressly recognizes, however, that the determination of mental disease or defect rests solely within the province of the factfinder and cannot be controlled by clinical testimony offered in support or derogation of mental impairment.[249]

Rejecting both the irresistible impulse test and the "product rule" as alternative standards to the *M'Naghten* test, the present court adopted the express language of the ALI Model Penal Code provision, which states:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include any abnormality manifested by repeated criminal or otherwise antisocial conduct.[250]

The ALI Model Penal Code provision promotes the introduction of useful expert testimony on both the volitional and cognitive capacities of an accused, thereby more precisely presenting the issue of criminal responsibility to the factfinder.[251] Moreover, the ALI provision allows the meaningful consideration of clinical testimony by a jury. The *M'Naghten* rule and the irresistible impulse test presuppose a complete impairment of the cognitive capacity or of the capacity for self-control, therefore largely undermining the majority of clinical examinations, which reveal gradations of impairment

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> We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is not capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

Id.

248. 214 F.2d at 875-76. For a discussion of the "product rule," see Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955); 8 NEW ENG. L. REV. 328 (1973).

249. 214 F.2d at 876. *Durham* provides:

> Juries will continue to make moral judgments, still operating under the fundamental precept that "Our collective conscience does not allow punishment where it cannot impose blame." But in making such judgments, they will be guided by wider horizons of knowledge concerning mental life. The question will be simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder.

Id.

250. MODEL PENAL CODE § 4.01 (1962). *See also* Slip op. at 24. (Tenn., filed Jan. 31, 1977). The Tennessee Supreme Court replaced the ALI suggested language in part (1), "criminality of the act," with the words "wrongfulness of the act."

251. MODEL PENAL CODE § 4.01, Comments (Tent. Draft No. 4, 1955). *See also* MODEL PENAL CODE § 4.01, Appendix B (Tent. Draft No. 4, 1955).

rather than the complete inability of an accused to distinguish "right and wrong" or to conform his conduct to the requirements of the law.[252] The *Durham* product rule appeared to the proponents of the Model Penal Code to lack the clarity needed to aid a jury in making a determination of criminal responsibility.[253] The ALI provision, therefore, expressly requires that the defendant's lack of capacity be "substantial" rather than complete, thus enabling experts to testify about an accused's mental condition in probabalistic terms rather than in certainties.[254] The intent of this formulation is to allow the jury to employ its "sense of justice."[255]

To implement the requirements of the ALI provision, the supreme court expressly approved the charge directed to jurors formulated by the Sixth Circuit in *United States v. Smith,*[256] which states:

> The question for jury consideration pertaining to criminal responsibility when defendant offers an insanity defense are as follows:
>
> 1. Was he suffering from a mental illness at the time of the commission of the crime?
>
> 2. Was that illness such as to prevent his knowing the wrongfulness of his act?
>
> 3. Was the mental illness such as to render him substantially incapable of conforming his conduct to the requirements of the law he is charged with violating?[257]

Moreover, the *Smith* court enunciated that a negative finding in response to the first question, or in response to both the second and third questions, would require rejection of the insanity defense, while an affirmative finding to the initial question, plus an affirmative finding to either the second or third questions, would require a

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252. MODEL PENAL CODE § 4.01, Comment 4 (Tent. Draft No. 4, 1955).

253. *Id.*, Comment 5. The Comment specifically states:

> The difficulty with this formulation inheres in the ambiguity of "product." If interpreted to lead to irresponsibility unless the defendant would have engaged in the criminal conduct even if he had not suffered from the disease or defect, it is too broad: an answer that he would have done so can be given very rarely . . . . If interpreted to call for a standard of causality less relaxed than but-for cause, there are but two alternatives to be considered: (1) a mode of causality involving total incapacity or (2) a mode of causality which involves substantial incapacity. . . . But if either of these causal concepts is intended, the formulation ought to set it forth.

Id.

254. 58 IOWA L. REV. 699, 704 (1973). *See* MODEL PENAL CODE, § 4.01, Comment 4 (Tent. Draft No. 4, 1955). *See also* Allen, *The Role of the American Law Institute's Model Penal Code,* 45 MARQ. L. REV. 494, 497-98 (1962).

255. MODEL PENAL CODE § 4.01, Comment 4 (Tent. Draft No. 4, 1955).

256. 404 F.2d 720 (1968).

257. *Id.* at 727; *see* Slip op. at 25 (Tenn., filed Jan. 31, 1977). The *Graham* opinion also commends the changes enunciated in United States v. Brawner, 471 F.2d 969, 1008 (D.C. Cir. 1972), and Wion v. United States, 325 F.2d 420, 430 (10th Cir. 1963), but refuses to adopt their express language. *See* Slip op. at 25 (Tenn., filed Jan. 31, 1977).

jury verdict of "not guilty by reason of lack of criminal responsibility."[258]

With the adoption of the American Law Institute standards, a Tennessee jury can evaluate effectively the presence or lack of volitional capacity and the capacity of self-control, without resorting to the insufficient "right from wrong" determination previously employed. Moreover, the ALI position ensures the reliable use of expert testimony as a key component in any determination of criminal responsibility and allows a jury to measure the individual aspects of clinical evidence without posing the burdens of an "all or nothing" approach. In adopting the Model Penal Code rule, the present court has indicated an awareness of the need to update criminal procedure techniques to meet the advantages that modern scientific and clinical analysis can provide, as well as a responsibility to ensure that the factfinder possesses a clear and reasonable understanding of the requisite elements of criminal responsibility.

B. The Allen Charge

In *Allen v. United States*,[259] the Supreme Court approved an instruction for trial courts confronted with a deadlocked jury. The *Allen* charge instructs the jury to deliberate further and encourages minority jurors to consider whether their decision is reasonable compared with that of the majority.[260] While cautioning that the verdict must reflect the decision of each individual juror and not mere acquiescence in the conclusions of the majority, the *Allen* charge requires each juror to examine the question with candor and with proper regard and deference to the opinions of the majority.[261] Sub-

258. 404 F.2d at 727.

259. 164 U.S. 492 (1896). For a discussion of the impact of the *Allen* charge, see Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U.L. REV. 296 (1972); Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968).

260. 164 U.S. at 501. The relevant portion of the *Allen* charge is set forth below:

> . . . although the verdict must be the verdict of each individual juror, and not mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority . . . .

Id.

261. *Id.* For a discussion criticizing the specific use of this phrase, see 34 TUL. L. REV. 214 (1959).

sequent to *Allen*, an overwhelming majority of federal and state jurisdictions adopted with modification the standard proposed by the Supreme Court.[262]

Focusing on the language that admonishes minority jurors to evaluate their findings with deference to the conclusions of the majority, commentators and the judiciary recently have criticized the charge as coercive and improper because it directs reevaluation only of the minority point of view.[263] It is claimed that this interjects the prestige of the court on behalf of the majority and thereby creates a risk that individual determinations will be changed in favor of a consensus opinion.[264] Criticism also has focused on the time at which an *Allen* instruction is given. Generally, the vast majority of courts have found the deadlock charge to be less coercive when administered with other general instructions prior to initial jury deliberations.[265] Since the instruction typically is not given until after a jury reports to the court that it is unable to reach a verdict, this criticism appears well founded.[266] Further arguments against the use of the *Allen* instruction have centered on both the lack of uniform guidance under the *Allen* decision as well as the administrative burden posed by appellate review of the charge. *Allen* critics have noted that despite frequent urgings from higher courts to remain within the limits set by the original instruction, trial judges continue to revise and vary the basic elements of the charge.[267] Although the overwhelming number of jurisdictions require that the instruction admonish each juror that his decision must be an individual determination, the wording of the overall charge is significantly unregulated. This lack of clarity and uniformity burdens appellate courts that must resolve the application of disparate *Allen* charges.[268]

In response to criticism of the *Allen* instruction, the American Bar Association promulgated a series of standards that establish

262. Comment, *The Faltering Allen Charge and Its Proposed Replacement*, 16 ST. LOUIS U.L.J. 619 (1972).

263. *See* Comment, *Instructing the Deadlock Jury: Some Practical Considerations*, 8 J. MAR. J. PRAC. & PROC. 169, 183 (1974); Comment, *Instructing Deadlocked Juries: The Present Status of the Allen Charge*, 3 TEX. TECH. L. REV. 313 (1972); 8 WILLAMETTE L.J. 468 (1972).

264. *See* ABA STANDARDS RELATING TO TRIAL BY JURY, § 5.4(b), Comment 2 (1968) [hereinafter cited as ABA STANDARDS, JURY TRIAL].

265. 36 TENN. L. REV. 749, 757 (1969). For a discussion of the constitutional implications of this aspect of the *Allen* charge, see Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123, 136-44 (1967).

266. 36 TENN. L. REV. 749, 757 (1969).

267. ABA STANDARDS, JURY TRIAL, *supra* note 264, § 5.4(b), Comments.

268. *Id.*

guidelines for instructing a deadlocked jury.[269] Rather than urging minority jurors to reconsider their decision with a deference to the majority position, the ABA proposal abandons all reference to the majority-minority divisions[270] and instructs each juror to consider the evidence impartially and change his decision only if he determines on reexamination that it was in error.[271] To prevent coerced verdicts and hasty discharges,[272] the standards forbid the court to threaten to require the jury to deliberate for an unreasonable time,[273] and allow the judge to dismiss the jury if there is no reasonable probability of agreement.[274]

Because of the Supreme Court's continued affirmation of the *Allen* decision, circuit courts have been unable to make significant changes in the charge or to develop a uniform approach to the deadlock instruction.[275] The Third, Seventh, and District of Columbia Circuits[276] have required deletion of the minority-majority deference provision as a coercive and improper instruction and have embraced

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269. ABA STANDARDS, JURY TRIAL, *supra* note 264, § 5.4. The specific ABA provisions are set out below:

5.4 Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

Id.

270. *See* 25 VAND. L. REV. 246 (1972).

271. ABA STANDARDS, JURY TRIAL, *supra* note 264, at § 5.4(a)(iv).

272. *Id.* at §§ 5.4(b), 5.4(c), Comments.

273. *Id.* at § 5.4(b).

274. *Id.* at § 5.4(c).

275. For a discussion of the federal approach, see 6 MEM. STATE U.L. REV. 553, 557-58 (1976).

276. United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); United States v. Brown, 411 F.2d 930 (7th Cir.), *cert. denied*, 396 U.S. 1017 (1969).

the guidelines drafted by the ABA.[277] The First,[278] Second,[279] Eighth,[280] and Ninth[281] Circuits continue to use a modified *Allen* charge, but have indicated an awareness of the coercive dangers of the charge. Only the Fourth,[282] Fifth,[283] Sixth,[284] and Tenth[285] Circuits refuse to limit substantially the employment of the *Allen* instruction although they have noted the value of the ABA Jury Trial Standards.

Tennessee courts traditionally adhered to a modified version of the *Allen* charge originally enunciated in *Simmons v. State.*[286] In *Kersey v. State,*[287] however, the present supreme court abandoned the *Allen* formulation,[288] ruling that the *Simmons* charge operated to impose a judicially mandated majority verdict that violated the constitutional right of trial by jury.[289] Although recognizing that a trial judge has a legitimate role in the guidance of a jury, the court determined that forcing a juror to surrender his views violates the jury's constitutional province and unconscionably dilutes the unan-

277. United States v. Thomas, 449 F.2d 1177, 1182-86 (D.C. Cir. 1971); United States v. Brown, 411 F.2d 930, 932-33 (7th Cir.), *cert. denied,* 396 U.S. 1017 (1969); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969). The Third Circuit, although not expressly approving the ABA standards, did adopt virtually identical language by suggesting the employment of the charge recommended in MATTHEWS & DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTION § 79.81 (1965). *See also* 16 ST. LOUIS U.L.J. 619 (1972).

278. The First Circuit recognized the serious questions posed by the *Allen* charge in United States v. Flannery, 451 F.2d 880 (1st Cir. 1971). To mitigate the possibilities of prejudice, the court advised trial judges to balance a supplementary charge so that (1) the onus of re-examination would not be on the minority alone, (2) a jury would not feel compelled to reach agreement, and (3) that jurors would be reminded of the burden of proof. *Id.* at 883. *See also* United States v. Anguilo, 485 F.2d 37 (1st Cir. 1973) (reaffirming *Flannery*).

279. United States v. Kenner, 354 F.2d 780 (2d Cir. 1965). *But see* United States v. Stewart, 513 F.2d 957, 959 (2d Cir. 1975) (modified *Allen* charge expressly upheld).

280. Chicago & E.I. Ry. v. Sellars, 5 F.2d 31 (8th Cir. 1925) (refused to allow recitation of second paragraph in *Allen*).

281. Walsh v. United States, 371 F.2d 135 (9th Cir. 1967); *see* United States v. Contreras, 463 F.2d 773 (9th Cir. 1972) (when jury returns a verdict quickly subsequent to an *Allen* charge, there is strong indication that it is coercive).

282. *See* United States v. Davis, 481 F.2d 425 (4th Cir. 1973). For recognition of ABA standards, see *id.* at 429.

283. Bryan v. Wainwright, 511 F.2d 644 (5th Cir. 1975); United States v. Bailey, 468 F.2d 652 (5th Cir. 1972). For recognition of ABA standards, see 468 F.2d at 667. *See also* Green v. United States, 309 F.2d 852 (5th Cir. 1962).

284. United States v. Harris, 391 F.2d 348 (6th Cir. 1968).

285. Goff v. United States, 446 F.2d 623 (10th Cir. 1971).

286. 198 Tenn. 587, 281 S.W.2d 487 (1955). The *Simmons* charge included the requirement that the minority should listen to the views of the majority with the disposition of being convinced. 281 S.W.2d at 4.

287. 525 S.W.2d 139 (1975).

288. *See* notes 260-61 *supra.*

289. 525 S.W.2d at 144.

imity achieved.[290] To replace the *Simmons* instruction, the court adopted the guidelines promulgated by the American Bar Association[291] and enunciated the express language under which state trial judges are to charge a deadlocked jury.[292] In conformity with the ABA proposal, the adopted instruction repeatedly reminds each juror that his decision must be made individually and that honest convictions should not be relinquished solely because of the majority viewpoint or in an attempt to reach a consensus verdict.[293] Further, no trial judge is allowed to depart from the express language mandated by the *Kersey* opinion. The instruction cannot be altered even if the judge initially included the charge in the general instructions given the jury prior to its original deliberations.[294]

The present court has taken a significant step toward ensuring a defendant the right to receive a verdict determined only by the individual decision of each juror. The *Kersey* opinion proffers a charge that withstands the criticisms of the former *Allen*-type instruction. The *Kersey* formulation eliminates any minority-majority distinction provision and repeatedly states the importance of individual decision-making. Moreover, by expressly requiring the *Kersey* charge to be used by all trial judges, the supreme court effectively eliminates the possibilities of lower court deviation inherent in any general guideline and provides uniform criteria for state appellate review. By requiring the instruction to be given with a court's general charges to the jury, the court has limited the coercive effect of a charge initially spoken only after a jury reports that it is unable to attain a verdict.

VIII. SENTENCING

A. *Non-Lawyer Criminal Judges*

The employment by the vast majority of state jurisdictions of

290. *Id.*

291. *Id.*; *see* note 269 *supra.*

292. The court expressly announced:

> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

525 S.W.2d at 145.

293. *Id.*

294. *Id.*

lay judges in criminal proceedings in which an accused faces possible incarceration has been the target of extensive constitutional examination.[295] Three specific allegations generally are proffered in support of due process challenges to the nonattorney criminal judiciary. The foremost objection is that the increased complexity of criminal law requires the presence of a legally trained judge who understands the constitutional issues inherent in any proceeding that subjects an accused to the possibility of confinement.[296] Accordingly, the California Supreme Court, in *Gordon v. Justice Court of Yuba City*,[297] determined that the use of lay judges in criminal proceedings in which a defendant may be subjected to confinement violates due process.[298] The *Gordon* court found that nonattorney judges were either unaware of or unable to grasp a number of significant constitutional issues present in many criminal misdemeanor cases, so that the use of such judges substantially increases the likelihood that a criminal defendant will not receive a fair trial.[299]

A second argument is that a nonattorney judge is more apt to be swayed by his own personal prejudices, as well as by local pressure,[300] because nonattorney judges lack the required knowledge of the legal and constitutional issues involved in criminal proceedings.[301] Moreover, because a nonattorney judge is not well versed in the legal issues involved in criminal due process, critics of the lay judge system charge that such a judge is highly susceptible to advice from law enforcement officers.[302] This argument assumes that a judge seeking independent legal advice will contact the lawyer with whom he is most familiar, and in many cases this will be someone associated with the prosecutor or police.[303] Obviously such a proce-

295. Current statistics reveal that forty-three of the fifty state jurisdictions and the District of Columbia employ lay judges to some extent. Note, *Limiting Judicial Incompetence: The Due Process Right to Legally Learned Judge in State Minor Court Criminal Proceedings*, 61 VA. L. REV. 1454, 1461-62 (1975). *See also* North v. Russell, 96 S. Ct. 2709, 2712 n.4 (1976).

296. *See* North v. Russell, 96 S. Ct. 2709 (1976); Brief of Amicus Curiae Tennessee Council of Juvenile Judges at 5, State v. Williams, Slip op. (Tenn., filed Nov. 29, 1976) [hereinafter cited as Williams Brief].

297. 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974).

298. For a discussion of *Gordon*, see 5 MEM. ST. U.L. REV. 437 (1975); 6 N.C. CENT. L.J. 339 (1975).

299. 525 P.2d at 76. The court focused its attention directly on procedural problems, evidentiary matters, and jury instructions. *Id.*

300. *See* Note, *The Right to a Legally Trained Judge: Gordon v. Justice Court*, 10 HARV. C.R.-C.L. L. REV. 739 (1975).

301. *Id.*

302. Note, *supra* note 295, at 1468.

303. *Id.*

dure, combining the accusatory and the adjudicatory functions, violates both due process and the notion of trial judge impartiality.[304]

On the other hand, proponents of the lay judge system argue that the use of nonattorney judges relieves the state of a significant financial and administrative burden. It is felt that a judicial system composed only of legally trained judges would require a large increase in judicial salaries and also would disadvantage rural counties in which there are relatively few lawyers.[305] Finally, advocates of the nonattorney system contend that a *de novo* appeal structure corrects any due process defects arising under lay judge determination.[306]

The United States Supreme Court has recently confronted challenges to the use of lay judges in state criminal proceedings. In *North v. Russell,*[307] the defendant contested the constitutionality of a police court ruling by a lay judge that found the defendant guilty of driving while intoxicated and that subjected him to possible imprisonment.[308] Alleging that the right to counsel articulated in *Argersinger v. Hamlin*[309] and *Gideon v. Wainwright*[310] is meaningless without a legally trained judge to understand the arguments of counsel, the defendant asserted that due process requires the presence of such a judge at any criminal proceeding in which an accused faces the possibility of confinement. Focusing directly on Kentucky procedure, the Court found no constitutional infirmity in permitting a nonattorney judge to sentence a defendant to imprisonment since Kentucky law provided for *de novo* appeal in all such cases.[311] Limiting its holding strictly to the situation in which *de novo* appeal is available, the Court held that the mere presence of a nonattorney judge does not violate due process.

Recently, the Tennessee Supreme Court in *State v. Williams,*[312] confronted a constitutional challenge to the use of lay judges in the state juvenile court structure. The defense alleged that the due

304. *See generally* ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE (1968). *See also* 6 N.C. CENT. L.J. 339 (1975).

305. These issues were reached in Gordon v. Justice Court, 525 P.2d 72, 79 (1974). *See also* Williams Brief, *supra* note 296, at 191.

306. Note, *supra* note 295, at 1472.

307. 96 S. Ct. 2709 (1976).

308. The particular statute involved provided that a first offense conviction carried a fine of from $100 to $500, while a subsequent offense carried the same fine as well as imprisonment for not more than six months. 96 S. Ct. at 2710.

309. 407 U.S. 25 (1972).

310. 372 U.S. 335 (1963).

311. 96 S. Ct. at 2712.

312. Slip op. (Tenn., filed Nov. 29, 1976).

process clause of both the federal and state[313] constitutions requires the use of an attorney judge, because a reasonable likelihood of prejudice exists when lay judges preside over juvenile proceedings involving the possibility of incarceration. The court in *Williams,* however, refused to address the charge, dismissing the appeal after finding the bills of exception to be defective.[314] The constitutional challenges to the lay judicial structure in Tennessee, which the present supreme court refused to resolve in *Williams,* are certain to reappear.[315] Present Tennessee law requires that all state court judges be authorized to practice law in the state, with an exception provided for the majority of general sessions judges.[316] This exception allows nonattorney justices to preside over misdemeanor and traffic violation proceedings, as well as state juvenile proceedings. In each of these circumstances the defendant has an absolute right to a *de novo* appeal. Although the United States Supreme Court's holding in *North v. Russell* arguably would preclude due process challenges to a two-tier court system in which a lay judge makes the initial determination, followed by an appeal of right and a *de novo* appearance before an attorney judge, the present state supreme court specifically found that the *North* decision does not affect an examination of the due process issue under the state constitution.[317] The court thus retained the nonattorney due process question for future determination.

B. Recidivist Statutes

(1) Habitual Criminal Statutes

Tennessee's habitual criminal statute[318] defines a habitual criminal as one who has been convicted of three felonies, two of which were for specified serious offenses.[319] If such a defendant is charged

313. TENN. CONST. art. 6, § 1.

314. The court noted that the bills of exception were not signed by the trial judge nor filed within the statutory time limit. Further, the court found that the technical record in the case did not state whether the judge involved was an attorney. Slip op. at 3-5 (Tenn., filed Nov. 29, 1976).

315. The *Williams* court specifically states that this matter is of vital public importance and that the time is opportune for resolution. *See* Slip op. at 2 (Tenn., filed Nov. 29, 1976).

316. TENN. CODE ANN. § 17-119 (Supp. 1976). *See also* TENN. CONST. art. 6, § 1.

317. Slip op. at 2 n.1 (Tenn., filed Nov. 29, 1976).

318. TENN. CODE ANN. §§ 40-2801 to -2806 (1975).

319. TENN. CODE ANN. § 40-2801 (1975). The specified serious offenses include assault with intent to commit murder, assault with intent to commit rape, mayhem, malicious shooting or stabbing, abduction of a female from parents or guardian, "infamous crimes" as defined in TENN. CODE ANN. § 40-2712 (1975), violation of the controlled substances law, or any crime punishable by death. *See generally* Note, *Statutory Structures for Sentencing Felons to Prison,* 60 COLUM. L. REV. 1134, 1157-61 (1960).

with a specified fourth felony, he also may be charged as a habitual criminal and sentenced to life imprisonment without eligibility for parole for thirty years.[320] The United States Supreme Court has determined that conviction as a habitual criminal is not an independent crime or an additional penalty for earlier crimes, but is a status that entitles the state to punish the defendant more severely.[321] As with multiple offender statutes,[322] the justification for the harsher sentence is the necessity of confinement to protect society from further criminal conduct by the defendant.[323]

Although some habitual criminal statutes have been criticized for relying solely on the number of convictions rather than the nature of the crimes committed,[324] the Tennessee statute has escaped such criticism. By requiring three convictions for specified serious crimes, the Tennessee statute reflects the policy adopted by the Model Sentencing Act,[325] the Model Penal Code,[326] and the ABA Standards Relating to Sentencing Alternatives and Procedures[327]

320. TENN. CODE ANN. §§ 40-2802, -2803, -2805, -2806 (1975). Section 40-3613 provides that an habitual criminal may become eligible for parole after serving thirty years in the penitentiary.

321. *See, e.g.*, Oyler v. Boles, 368 U.S. 448 (1962); Gryger v. Burke, 334 U.S. 628 (1948); Graham v. West Virginia, 224 U.S. 616 (1912).

322. *See* Multiple Offender Statutes *infra*.

323. *See* Gray v. State, 538 S.W.2d 391 (Tenn. 1976); ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 3.4(b)(iv) (1968); PROPOSED TENN. CODE, *supra* note 77, § 39-845, Comment; Thomsen, *Sentencing the Dangerous Offender*, 32 FED. PROB. 3 (1968).

324. *See* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99 (1971); Note, *Don't Steal a Turkey in Arkansas—The Second Felony Offender in New York*, 45 FORDHAM L. REV. 76 (1976).

325. The *Model Sentencing Act* is devoid of a provision similar to a traditional habitual criminal statute. Rather, reflecting its general theme of sentencing according to the character of the offender rather than the particular offense, MODEL SENTENCING ACT § 1 & Comment, the *Model Sentencing Act* provides that an extended sentence is appropriate only if incarceration is required for the protection of the public because of the dangerousness of the defendant. MODEL SENTENCING ACT § 5. The Act provides three categories of dangerous offenders: (1) commission of a crime that inflicted or attempted to inflict serious bodily harm, and propensity to commit crime; (2) commission of a crime that, intended or not, seriously endangered the life or safety of another; previous criminal conviction; and propensity to commit crime; (3) participation in organized crime. *Id.*, Comment.

326. The *Model Penal Code* contemplates a two-tiered sentencing system with longer sentences justified for certain categories of offenders. MODEL PENAL CODE §§ 6.06, 6.07, 7.03 (1962); *see* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 56 (1975). One such category, the persistent offender, is one who is over twenty-one years of age and who has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over the age of majority. MODEL PENAL CODE § 7.03 (1962). All categories allude to the defendant's dangerousness. These include a professional criminal, a dangerous, mentally abnormal person, and a multiple offender, all as defined in the Code. *Id. Cf.* 18 U.S.C. § 3575 (Supp. 1976) (increased sentences for dangerous special offenders).

327. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.3

that only those defendants posing a genuine threat to society should be subject to a more severe sentence.[328] Under the Tennessee statute a dangerous defendant is not subject to the harsher sentence until he has committed four crimes—three of which are enumerated in the statute as serious.

In two respects, however, the Tennessee statute is subject to serious criticism.[329] The first is the mandatory life sentence imposed when a habitual criminal is convicted for a fourth serious felony; the second is the denial of parole eligibility until the offender has served a minimum sentence of thirty years.[330] In contrast, the Model Sentencing Act,[331] the Model Penal Code,[332] and the ABA Standards on Sentencing Alternatives and Procedures[333] all give the sentencing court flexibility in the use of extended sentencing provisions. The discretion is allowed so that the judge may give individualized consideration to each defendant. Additionally, none of these proposals allows life imprisonment solely because the defendant is adjudged to deserve an extended sentence.[334] The drafters of these proposals determined that a twenty or thirty year sentence, if necessary, would be ample to protect society and at the same time make the offender psychologically susceptible to treatment other than the passage of time.[335] Finally, these acts all allow any individual, including one committed as a habitual offender or the equivalent, to be eligible for parole.[336] Tennessee's requirement that a habitual

(1968). The habitual criminal section of these standards requires a finding by the court that an additional sentence is necessary to protect the public. *Cf.* PROPOSED TENN. CODE, *supra* note 77, § 39-842 (also requiring a prediction of dangerousness before habitual offender status is justified).

328. The purpose of this policy is to prevent the nuisance offender, rather than the truly dangerous offender, from being subject to the often harsh consequences of such legislation. *See* Katkin, *Habitual Offender Laws: A Reconsideration,* 21 BUFF. L. REV. 99 (1971), which argues that in operation most habitual offender laws "limit the liberty of a group of offenders characterized neither by violence nor dangerousness as much as by inadequacy."

329. *See* Comment, *Out of Sight, Out of Mind: The Plight of the Habitual Criminal,* 26 TENN. L. REV. 259 (1959).

330. *See* note 320 *supra.*

331. MODEL SENTENCING ACT § 5, Comment.

332. MODEL PENAL CODE §§ 6.07, 7.03 (1962) (" . . . may be sentenced to an extended term . . ."; "The court may sentence . . . to an extended term . . . .").

333. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.3(b).

334. The maximum under MODEL SENTENCING ACT § 5 is thirty years, under MODEL PENAL CODE § 6.07(2) is twenty years, and under ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 3.3(a)(ii) is twenty-five years.

335. *See* MODEL SENTENCING ACT § 5, Comment; Rubin, *The Model Sentencing Act,* 39 N.Y.U.L. REV. 251 (1964).

336. The MODEL SENTENCING ACT § 13 allows parole at any time within the discretion of the parole board; no minimum term served as a prerequisite to parole is allowed. The MODEL PENAL CODE §§ 6.06, 6.07, on the other hand, require all felons sentenced to the

offender serve thirty years before becoming eligible for parole, though effective in fulfilling the policy goal of protecting the community, appears to eliminate any rehabilitative benefits the correctional system may have to offer. The Tennessee statute ignores the fact that a parole board with discretion to grant parole after a reasonable time to a habitual criminal, though perhaps with special standards, can adequately protect society and at the same time give a rehabilitated offender a chance to contribute to society when it is safe for him to do so.[337]

The Tennessee Supreme Court's only decision involving the habitual criminal statute deals with the double jeopardy problem. In *Pearson v. State*[338] the court attempted to clarify the law with respect to the appropriateness of using the same felony convictions to establish successive convictions under the habitual criminal statute.[339] Since a defendant's status as a habitual criminal is considered a status entitling the state to punish the defendant more severely for a subsequent crime, rather than an independent crime (or additional penalty for an earlier crime), the court, following what it considered to be the majority view, held that the second use of prior convictions to support a habitual criminal charge in addition to the latest felony conviction does not violate the proscription against double jeopardy. In light of the overwhelming authority upholding the constitutionality of habitual criminal statutes based

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penitentiary to serve a minimum of one year before being eligible for parole; only in the case of an extended sentence for a first-degree felony is this absolute minimum increased (to five years), with discretion in the court to fix the minimum term up to ten years. For a second-degree felony, extended term, the minimum can be fixed from one to five years. The ABA STANDARDS § 3.2 do not require a minimum sentence before parole eligibility, but do give the sentencing judge discretion to impose a minimum sentence. Only in the case of a life sentence would a minimum sentence as long as ten years be allowed.

337. *See* Thomsen, *Sentencing the Dangerous Offender*, 32 FED. PROB. 3 (1968).

338. 521 S.W.2d 225 (Tenn. 1976).

339. The petitioner's record was as follows:

a. Sept. 16, 1964—armed robbery
b. Sept. 16, 1964—burglary
c. Dec. 2, 1964—armed robbery
d. April 26, 1973—armed robbery
e. April 26, 1973—habitual criminal
f. August 2, 1973—armed robbery
g. August 2, 1973—babitual criminal

The September 16, 1964, armed robbery and burglary convictions, the December 2, 1964, armed robbery conviction, and the April 26, 1973, armed robbery conviction resulted in the April 26, 1973, habitual criminal conviction. Petitioner argued that the second use of these convictions, in addition to the August 2, 1973, armed robbery conviction, to sustain the second habitual criminal conviction violated the constitutional proscriptions against double jeopardy, U.S. CONST. Amend. V; TENN. CONST. art. I, § 10.

on the "status" rather than "independent crime" nature of such a conviction, the court's opinion appears to be a reasonable application of the statute.[340]

(2) The Multiple Offender Statute

In contrast to habitual offender laws, which are triggered by a third or fourth conviction and authorize or require the sentencing court to impose more severe penalties on recidivists than on first offenders, multiple offender laws come into play when a defendant is convicted of two or more crimes before a sentence is imposed. In such cases the court typically must decide whether the individual sentence will run consecutively or concurrently. In *Gray v. State*[341] the Tennessee Supreme Court established standards for trial courts to use when determining whether defendants convicted of multiple offenses should be given consecutive sentences.[342] Stating that the objective is to use consecutive sentencing in order to protect society from those who resort to criminal activity in furtherance of an anti-societal lifestyle, the court held that a trial court should impose consecutive sentences only after finding that confinement for such a term is necessary to protect the public from further criminal conduct by the defendant.[343] The court identified the kinds of offenders for which consecutive sentencing may be used as follows: (1) the persistent offender, one who has previously been convicted of two felonies or of one felony and two misdemeanors committed at different times when he was over eighteen years of age; (2) the professional criminal, one who has knowingly devoted himself to criminal acts as a major source of livelihood or who has substantial income or resources not shown to be derived from a source other than criminal activity; (3) the multiple offender, one whose record of criminal

340. As the court noted:

> We see no reason why a first conviction under the habitual criminal law which increases the penalty for the felony conviction with which it is associated should be treated as wiping the slate clean and permitting the defendant to start over again as though he had never been convicted of any felony. Where the very purpose of the habitual criminal act is to penalize the repetition of criminal conduct, we find nothing unfair, much less unconstitutional, in using the same criminal conviction as the basis for the increased punishment for a subsequent felony conviction.

521 S.W.2d at 228 (quoting State v. Losieau, 182 Neb. 367, 154 N.W.2d 762 (1967)).

341. 538 S.W.2d 391 (Tenn. 1976), *reaff'd*, Adams v. State, Slip op. (Tenn. Feb. 28, 1977).

342. TENN. CODE ANN. § 40-2711 (1975) gives the trial court the discretion to impose either concurrent or consecutive sentences.

343. The court here adopted verbatim the policy expressed in ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 3.4(b)(iv) (1968).

activity is extensive; (4) the dangerous mentally abnormal person, one so declared by a competent psychiatrist who concludes as a result of a presentence investigation that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences;[344] and (5) the dangerous offender, one whose conduct indicates that he has little or no regard for human life and no hesitation about committing a crime in which the risk to human life is great.[345] To ensure adherence to these standards and to facilitate review, the court instructed trial judges to include in the record considerations leading to the imposition of consecutive sentences.[346]

With this decision Tennessee is now very much in line with modern thinking regarding consecutive sentences for multiple offenses. The Tennessee Code, section 40-2711, as do the Model Sentencing Act, the Model Penal Code,[347] and the ABA Standards,[348] makes the decision whether to impose concurrent or consecutive sentences one within the trial court's discretion, and the imposition of a consecutive sentence appears to require the affirmative action of the trial court. More importantly, and consistent with the policy underlying the Model Sentencing Act, the Model Penal Code, and the ABA Standards, the consecutive sentence is to be imposed only if, due to the defendant's dangerous character and conduct, a lengthier period of detention is needed in order to protect society.[349] Though

344. The concepts of persistent offender, professional criminal, multiple offender, and mentally abnormal person were adopted from the MODEL PENAL CODE § 7.03 (1962), which sets forth the criteria for a court to use in determining whether to impose an extended term of imprisonment. *See* text accompanying notes 325-27 *supra*.

345. The court also refused to require the trial judge to consider whether all the offenses arose out of one single criminal episode in determining whether the sentences must run concurrently, thus rejecting one aspect of MODEL SENTENCING ACT § 22, and PROPOSED TENN. CODE, *supra* note 77, §§ 39-301, 39-845(c). In so doing the court appears to agree with ABA STANDARDS, SENTENCING ALTERNATIVES AND PEOCEDURES § 3.4, Comment c (1968), that the term "single criminal episode" is too ambiguous to provide a guideline for the occasions when a consecutive sentence should be prohibited; furthermore, the court stated that the concept of a "single criminal episode" is irrelevant in determining how best to protect the interests of society.

346. The court emphasized that the decision to impose consecutive sentences when crimes inherently dangerous are involved should be based upon the presence of aggravating circumstances and not merely on the fact that two or more dangerous crimes were committed.

347. MODEL SENTENCING ACT § 22; MODEL PENAL CODE § 7.06 (1962).

348. ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 3.4(a) (1968).

349. *See* MODEL SENTENCING ACT §§ 1, 5, 22; MODEL PENAL CODE §§ 7.03, 7.06 (1962); ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 3.4(b)(iv) (1968). In addition, PROPOSED TENN. CODE, *supra* note 77, § 39-845(b) & comment, would require the sentencing judge to consider the gravity and circumstances of the offenses and the history, character,

the mechanics and limitations of the Tennessee system and the proposed acts and standards all differ, the policy of looking at the individual defendant and the needs of society in determining whether an extended sentence is necessary is worthwhile, and the court is to be commended for adopting standards to implement this policy.

C. *Capital Punishment*

A series of decisions by the United States Supreme Court in the summer of 1976[350] stimulated a renewed public interest in the capital punishment controversy and led to the first execution in this country in almost a decade.[351] The constitutional status of capital punishment had been in doubt since the 1972 decision of *Furman v. Georgia,*[352] in which the Court held that a death penalty imposed in an arbitrary or capricious manner violates the eighth amendment proscription against cruel and unusual punishment. After *Furman,* thirty-five states adopted new death penalty statutes[353] in an attempt to meet constitutional requirements. Some of these statutes made the death penalty mandatory under certain circumstances, and others put strict limitations on the sentencing body's discretion in the hope of avoiding arbitrariness.[354] In 1976, however, the Court ruled that the eighth amendment requires consideration of the char-

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and rehabilitative needs of the defendant in determining whether consecutive sentences are necessary for the protection of society.

350. Gregg v. Georgia, 96 S. Ct. 2909 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Roberts v. Louisiana, 96 S. Ct. 3001 (1976).

351. Before 1977 the last execution in the United States took place on June 2, 1967, in Colorado. *See* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1773, 1773 n.1 (1970). Commentators discussing sentencing systems have disagreed, as has the population generally, on the appropriateness of a death penalty for certain crimes. The MODEL PENAL CODE § 210.6 (1962) provides for capital punishment under specified conditions. The *Model Sentencing Act,* on the other hand, in keeping with its philosophy that a diagnostic and treatment approach should be taken for all offenders, does not provide for the death penalty. Finally, the ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 1.1 (1968) states that "this report does not deal with whether the death penalty should be an available sentencing alternative . . . ."

352. 408 U.S. 238 (1972). The decision, limited to the application of the death penalty in the three cases before the court, was announced in a per curiam opinion. Five justices concurred in and four dissented from the result, with only Justices Brennan and Marshall concluding that the eighth amendment prohibits capital punishment for all crimes and under all circumstances. *See The Supreme Court 1971 Term,* 86 HARV. L. REV. 50, 76-85 (1972).

353. *See* Gregg v. Georgia, 96 S. Ct. 2909 (1976).

354. Many of the statutes limiting the sentencing body's discretion were modelled after MODEL PENAL CODE § 210.6 (1962). Under that provision the sentencing body would be required to find that at least one specified aggravating circumstance existed and that no specified mitigating circumstance existed before the death penalty could be imposed.

acter and record of the defendant and the circumstances of the particular offense before the death penalty is inflicted.[355] Although determining that the imposition of a mandatory death penalty is unconstitutional, the Court held that the death penalty *per se* does not violate the eighth amendment.[356] Thus a statute that guides and limits the discretion of the sentencing body to minimize the risk of wholly arbitrary and capricious action can pass constitutional muster under the eighth amendment and *Furman v. Georgia.*

In *Collins v. State*[357] the Tennessee Supreme Court considered the constitutionality of the Tennessee death penalty.[358] Under the Tennessee statutes enacted in 1974, the death penalty was mandatory for all persons convicted of murder in the first degree or as accessories before the fact of that crime. After reviewing *Furman v. Georgia*[359] and subsequent United States Supreme Court decisions,[360] the Tennessee Supreme Court declared Tennessee's mandatory death penalty statute unconstitutional and set aside the sentences in the cases under consideration. The court further stated that the effect of its holding was to revive prior law regarding sentences for first degree murder, thereby allowing punishment from twenty years to life imprisonment.[361]

Subsequently, the Tennessee legislature has passed a new capital punishment bill[362] modeled after statutes upheld by the United

355. Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Roberts v. Louisiana, 96 S. Ct. 3001 (1976).

356. Gregg v. Georgia, 96 S. Ct. 2909 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976).

357. Slip op. (Tenn. Jan. 24, 1977).

358. TENN. CODE ANN. §§ 39-2405 to -2406 (1975).

359. 408 U.S. 238 (1972).

360. Gregg v. Georgia, 96 S. Ct. 2909 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Roberts v. Louisiana, 96 S. Ct. 3001 (1976). *See* text accompanying notes 355-56 *supra.*

361. The court remanded the cases to the trial courts for a sentencing hearing. Justice Henry concurred with the holding that the death penalty statute is unconstitutional, but dissented from the disposition of the cases. Since each defendant had a full trial by jury resulting in a first degree murder conviction with no mitigating circumstances, Justice Henry felt the court had the authority to reduce the sentences to life imprisonment in order to conserve judicial resources.

362. Tenn. S. 82; H.R. 59. The caption of this bill indicates its most salient features:

> An Act . . . providing for and defining the crime of murder in the first degree; providing for a punishment including the death penalty or life imprisonment under certain circumstances; specifying certain procedures to be followed by the judge and jury for the imposition of the death penalty or life imprisonment after conviction for murder in the first degree including separate sentencing procedures; making certain requirements for unanimous findings in reaching determination of a death sentence; specifying statutory aggravating circumstances; allowing consideration of mitigating circumstances; providing appellate review procedures . . . .

States Supreme Court.[363] Although the court could follow the lead of the California Supreme Court in *People v. Anderson*[364] and declare capital punishment violative of the state constitutional provision prohibiting cruel and unusual punishment,[365] the reasoning of *Collins v. State* suggests that the court will uphold the proposed statute since the *Collins* court appeared content to apply federal standards to the Tennessee statute without independent analysis of the "cruelty" and "unusualness" of capital punishment in modern society.

D. Harsher Sentences on Retrial

When a conviction is set aside after direct or collateral attack by the defendant, the government may retry the defendant without violating the constitutional guarantee against double jeopardy under the theory that the original conviction has been wholly nullified and the slate wiped clean.[366] And though there is no absolute constitutional bar to the imposition of a harsher sentence upon reconviction,[367] the United States Supreme Court recently recognized that due process requires that vindictiveness against a defendant who successfully attacks his first conviction can play no part in the sentence he receives after a new trial.[368] To protect a defendant from

363. *See* FLA. STAT. ANN. § 921.141 (Supp. 1977); GA. CODE ANN. §§ 27-2534.1 to -2537 (Supp. 1976); *cf.* MODEL PENAL CODE § 210.6 (1962).

364. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972). Even though the death penalty statute recently had been enacted by the California legislature, the court heeded its judicial responsibility to interpret the standards by which the constitution should be applied.

365. It should be noted that the California Constitution prohibits cruel *or* unusual punishment, whereas the Tennessee Constitution, as does the United States Constitution, prohibits cruel *and* unusual punishment. *Compare* CAL. CONST. art. I, § 6 *with* TENN. CONST. art. I, § 16. Nevertheless, the California court found the death penalty to he both cruel and unusual. Thus *People v. Anderson* may be considered persuasive in analyzing the Tennessee Constitution.

366. 493 P.2d at 888; *see The Supreme Court 1971 Term,* 86 HARV. L. REV. 50, 83 (1972).

367. U.S. v. Tateo, 377 U.S. 463 (1964). The guarantee against double jeopardy is found in U.S. CONST. amend. V.

368. North Carolina v. Pearce, 395 U.S. 711 (1969); Stroud v. United States, 251 U.S. 15 (1919). ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURE § 3.8 (1968) and ABA STANDARDS, POST-CONVICTION REMEDIES (1968) require, as a matter of policy, that the original sentence be made the ceiling for any sentence that is imposed after reconviction. The ABA gives three reasons for this proposal: (1) the only class of persons whose sentences may be increased consists of those who have exercised the right to challenge their convictions; (2) the risk of a harsher sentence as the result of assertion of the right of review may act as a deterrent to the exercise of the right; (3) allowing harsher sentences may require inquiry into the motivations of tbe sentencing judge in order to insure that the sentence was not imposed to deter others from asserting their right of review, an inquiry that the ABA committee felt to be undesirable as a matter of policy. *See also* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L.J. 606 (1965), arguing that

retaliation by the sentencing judge, the United States Supreme Court in *North Carolina v. Pearce*[369] established that when a judge imposes a more severe sentence after a new trial the reasons for the harsher sentence must affirmatively appear on the record, and the reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[370]

Some states, such as Tennessee, entrust the sentencing function to the jury rather than to the judge.[371] Reasoning that jury sentencing does not contain an inherent threat of vindictiveness, the Supreme Court in *Chaffin v. Stynchcombe*[372] held that due process does not require extension of *Pearce* restrictions to jury sentencing so long as the jury is not informed of the prior sentence. The Court suggested, however, that *Pearce* might be applied if the jury was informed of the prior sentence because of the highly publicized nature of the prior trial.[373]

In *Sommerville v. State*[374] the Tennessee Supreme Court addressed the issue left open by *Pearce* and *Chaffin*: whether the *Pearce* standards are applicable to harsher sentences imposed by a jury having knowledge of a sentence by a prior jury. In *Sommerville* nine of the twelve jurors at the second trial had read a newspaper report that the defendant's first sentence was for a maximum of twenty years; in actuality the maximum had been set at fifteen years. The second jury imposed a sentence having a maximum term

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harsher sentences on retrial are unconstitutional, a position that the Supreme Court has refused to adopt.

369. 395 U.S. 711 (1969).

370. *Id.* at 726.

371. TENN. CODE ANN. § 40-2707. The prevailing view today is that the trial judge and not the jury should exercise the sentencing function. *See* ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 1.1 (1968); MODEL SENTENCING ACT § 12. If juries are allowed to determine the sentence, there often will be disparity between sentences under similar circumstances since a jury in one case would have no feel for what has been done in similar cases.

372. 412 U.S. 17 (1973). The court pointed out several differences between jury and judge sentencing that would negate the threat of vindictiveness. In *Chaffin* the jurors had no knowledge of the prior sentence, unlike a trial judge who would know the history of the case. Also since they had no personal stake in the prior conviction, there would be no motivation for self-vindication. Finally, a jury would have no institutional motivation to impose a higher sentence to discourage appeal as a judge might.

For arguments supporting the extension of the *Pearce* standards to jury sentencing, see Aplin, *Sentencing Increases on Retrial After North Carolina v. Pearce*, 39 U. CIN. L. REV. 427 (1970); Note, *The Aftermath of North Carolina v. Pearce: A Harsher Sentence on Retrial?*, 7 SUFFOLK U.L. REV. 108 (1972). *See also* Chaffin v. Stynchcombe, 412 U.S. 17, 38 (1973) (Marshall, J., dissenting).

373. 412 U.S. at 28 n.14 (1973).

374. 521 S.W.2d 792 (Tenn. 1975).

of twenty-one years. Agreeing with the *Chaffin* holding, the court stated that jury sentencing, absent knowledge of the prior sentence, is not susceptible to the retaliatory motivations that prompted the *Pearce* limitations. Since the instant jury had knowledge of the prior sentence, however, the court concluded that there was a possibility of vindictiveness underlying the longer sentence and characterized the sentence as "tainted with the implication of vindictiveness."[375] Having found knowledge of the previous sentence and possible vindictiveness, the court remanded the case to the trial court with instructions to enter judgment pronouncing the same sentence imposed by the first jury or, in the discretion of the trial judge, to grant a new trial.[376]

Although the court held that a harsher sentence meted out by a second jury with knowledge of the sentence imposed by the first jury is tainted with the implication of vindictiveness condemned by *Pearce* as being violative of the due process clause, the court did not hold the *Pearce* standards applicable under such circumstances. Rather, the court held that a juror with knowledge of the verdict and sentence of a prior jury shall be subject to challenge for cause, unless the examination unequivocally demonstrates that he is impartial.[377] Since failure to challenge for cause or to use available peremptory challenges if a challenge for cause is denied precludes reliance upon the juror's disqualification on appeal, the court apparently believed that the problem of a harsher sentence by a jury having knowledge of a prior sentence could be eliminated at the early stage of the second trial.[378] Still, there remains the possibility that during trial the jury will be informed that there was a prior trial and conviction. For example, when a witness's testimony at a previous trial is introduced to impeach him or to refresh his memory at the second trial, this testimony informs the jury of a prior trial and could give rise to an inference of vindictiveness if the jury imposes a harsher sentence. If a defendant is reconvicted by a jury that has obtained such knowledge during the course of the second trial, the sentence should

375. *Id.* at 797.

376. The statutory authority for this disposition is TENN. CODE ANN. § 40-2701 (1975).

377. 521 S.W.2d at 797. The court further held that whenever there is believed to be a significant possibility that a juror has knowledge of the jury verdict at a prior trial, the examination of that juror with respect to his exposure must take place outside the presence of the other chosen and prospective jurors.

378. Since the court in *Sommerville* was confronted with the combination of state action in the form of court appointed counsel for the defendant and an error of constitutional dimension, it did not invoke the waiver rule because of defendant's failure to challenge for cause and use available peremptory challenges.

be limited to that imposed in the original trial, a result consistent with the reasoning of *Sommerville v. State*.[379]

IX. EXPUNGEMENT OF RECORDS

The Tennessee Supreme Court twice[380] has considered and upheld the constitutionality of the recently enacted "expungement" statute.[381] This statute allows a person who has not been indicted or convicted, or one whose conviction was reversed on appeal, to petition the court to have the public records concerning that incident removed and destroyed.[382] In *Martin v. State*[383] the statute was attacked on the ground that it violated Article III, Section 17 of the Constitution of Tennessee[384] by impliedly amending the statutory duties of court clerks[385] without reciting in its caption or body the title or substance of the law amended. Although recognizing that the expungement act by implication amended a portion of existing statutory law prescribing the duties of clerks, the court reaffirmed the well-established doctrine in Tennessee that Article II, Section 17 does not apply to repeals or amendments by implication.[386] The

379. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 41 n.3 (1973) (Marshall, J., dissenting); Note, *The Aftermath of North Carolina v. Pearce: A Harsher Sentence or Retrial?*, 7 SUFFOLK U.L. REV. 108 (1972).

380. Underwood v. State, 529 S.W.2d 45 (Tenn. 1975); Martin v. State, 519 S.W.2d 793 (Tenn. 1975). In Skiles v. State, 516 S.W.2d 75 (Tenn. 1974), the trial court held the expungement statute unconstitutional, but the supreme court ruled that the constitutionality of the statute should not have been addressed since the statute was not applicable. In *Skiles* the defendant plead guilty to reduced charges; he was not acquitted.

381. TENN. CODE ANN. § 40-4001 to -4004 (1975), *as amended* § 40-4001 (Supp. 1976).

382. TENN. CODE ANN. § 40-4001 was amended in 1975 to eliminate the requirement that the cost of expungement be borne by the petitioner. Section 40-4002 requires the chief administrative officer of the governmental unit and the clerk of the court where the records are recorded to remove and destroy the records within 60 days of the disposition of the charge; § 40-4003 provides for retroactivity; and § 40-4004 provides penalties for violations of the act.

The present statute has been attacked recently because the accused has to petition the court in order for his records to he expunged. The critics argue that the records should be expunged automatically in order that indigent defendants may be able to benefit from its provisions without having to hire an attorney to prepare a petition. *See* The Tennesseean, Mar. 23, 1977, at 35.

383. 519 S.W.2d 793 (Tenn. 1975).

384. TENN. CONST. art. II, § 17 provides in pertinent part:

> All acts which repeal, revise or amend formers [sic] laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revised or amended.

385. The statutory duties of court clerks are found in TENN. CODE ANN. §§ 18-105, -402 (1955 & Cum. Supp. 1976).

386. 519 S.W.2d at 795-96 (citing Brown v. Knox County, 187 Tenn. 8, 212 S.W.2d 673 (1948)). In addition, the court found no merit in the argument that expungement might prevent a defendant from relying on the double jeopardy clause. A defendant must only obtain a certified copy of the document reflecting the favorable disposition to ensure this protection.

court reaffirmed *Martin* in *Underwood v. State*[387] and also considered whether the statute is unconstitutionally vague or violates the separation of powers provisions of the Tennessee Constitution.[388] Noting that making and keeping court records requires the cooperation of the judicial, legislative, and executive branches, the court determined that the expungement statute, which does not frustrate or interfere with the judicial function, does not constitute an impermissible encroachment upon the judiciary.[389] The court additionally found that the language of the statute was sufficiently clear to prevent its invalidation for being vague, ambiguous, or overbroad.

This litigation raises questions concerning the costs and benefits of the expungement statute. On the one hand, the retention of arrest records of a person who is not convicted may be useful in effective law enforcement. If that person is arrested again in the future, his personal data would already be on file. Such data might help the victim of another crime identify the perpetrator. Furthermore, accurate arrest records are needed in compiling statistical profiles when changes of laws or procedures are being considered.[390] On the other hand, an arrest, even though it does not lead to a conviction, often results in irreparable injury to the person arrested. Job opportunities may be lost,[391] business or professional licenses may be denied,[392] police may consider the previously arrested person a suspect in subsequent crimes, and judges may rely on a prior arrest in denying pretrial release or imposing sentences.[393] Although

387. 529 S.W.2d 45 (Tenn. 1975).

388. TENN. CONST. art. II, § 1 divides the powers of government into three branches, and § 2 prohibits a person belonging to one branch from exercising the powers properly belonging to another.

389. Since the power to establish guidelines for court clerks and records is within the legislative function, the court felt that control of the use of such records is also a legislative function.

390. *See generally* Comment, *Branded, Arrest Records of the Unconvicted,* 44 MISS. L.J. 928 (1973); Annot., 46 A.L.R.3d 900 (1972).

391. The National Advisory Commission on Criminal Justice Standards and Goals, in stating that there is little doubt that arrest records are a barrier to employment, cites to a survey indicating that 75% of employment agencies contacted in New York City would not recommend an individual with an arrest record, regardless of the disposition of the charges against him. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 57 (1973) [hereinafter cited as NATIONAL STRATEGY]. *See generally* Comment, *Employment of Criminal-Record-Victims in Missouri: Restrictions and Remedies,* 41 MO. L. REV. 349 (1976).

392. *See* Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction,* 13 CRIME & DELINQUENCY 494, 497 (1967).

393. *See* Comment, 21 N.Y.L.F. 85 (1975). The commentary to ABA STANDARDS RELATING TO CRIMINAL JUSTICE, PROBATION § 2.3 (1970) suggests that an arrest not resulting in a conviction shall not be included in a pre-sentence report since such information often is extremely misleading.

the criminal justice system is based on a presumption of innocence,[394] the failure of many segments of society to distinguish an arrest and subsequent acquittal from a conviction has necessitated laws such as the Tennessee expungement statute. Although technical violations may be the sole reason for the erasure of all records, it is necessary to preserve the rights of the truly innocent.[395] The Tennessee legislature has made this determination, and the supreme court appears willing to support its judgment.

X. CONCLUSION

Three developments have combined to establish Tennessee criminal procedure in its present state. First, the United States Supreme Court, in a series of landmark decisions, has formulated substantial protections for those accused of crimes and has modernized both trial and sentencing procedures. Secondly, the drafters of various uniform acts and standards, building on these decisions, have attempted to rationalize and systematize procedures for the arrest, trial, and punishment of criminal defendants. Finally, the Tennessee Supreme Court, elected in 1974 with a mandate to modernize Tennessee law, has responded to the opportunity to reform state criminal procedure presented by the prior developments. Particularly in the areas of right to counsel, scope of discovery, admissability of evidence, jury instructions, and expungement of records the court is to be commended for its careful analysis of recent trends and its willingness to break new ground in an attempt to formulate well-defined rules under which criminal allegations can be adjudged.

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394. For a discussion of the failure of the presumption of innocence in the arrest-record context, see NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CRIMINAL JUSTICE SYSTEM, § 8.3, Commentary (1973); Hess & Le Poole, *supra* note 392, at 502 (1967).

395. Some commentators advocate the further step of enacting statutes that prohibit employers from inquiring about purged criminal records or that prohibit discrimination against persons with criminal records. *See* NATIONAL STRATEGY, *supra* note 391, at 57; Note, *Employment of Former Criminals,* 55 CORNELL L.Q. 306 (1970); *cf.* A.B.A. STANDARDS RELATING TO PROBATION § 4.3 (1970); Kogan & Laughery, *Sealing and Expungement of Criminal Records—The Big Lie,* 61 J. CRIM. L.C. & P.S. 378 (1970).