Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

I. BURDEN OF PROOF

A. Self-Defense

In State v. Bolton the defendant appealed a conviction of manslaughter to the South Carolina Supreme Court. Relying on the United States Supreme Court decision in Mullaney v. Wilbur, he argued that he was deprived of due process of law since he had been required to bear the burden of proving self-defense by a preponderance of the evidence. The South Carolina Supreme Court, however, found Mullaney inapplicable and affirmed the conviction, holding that to require a defendant to prove self-defense does not deny due process. In Mullaney, a Maine case, the defendant had been accused of homicide. The lower court instructed the jury that once the prosecution proved the common elements of murder and manslaughter — unlawful killing and intent — a conclusive implication arose that the killing was done with malice aforethought, the element which made the crime murder. The burden was then upon the defendant to show by a fair preponderance of the evidence that he acted in the heat of passion upon sudden provocation to reduce the charge to manslaughter. The United States Supreme Court found this procedure improper, holding that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."

This requirement that the prosecution prove every element of the crime had been examined by the Supreme Court earlier in In re Winship. The Court there explained that the requirement

2. 421 U.S. 684 (1975). The Mullaney decision, however, in no way affected the requirement that the defendant put his defense in issue:

Many States do require the defendant to show that there is "some evidence" indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt . . . . Nothing in this opinion is intended to affect that requirement.

Id. at 701-02 n.28.
3. 266 S.C. at 449, 223 S.E.2d at 865-66.
4. 421 U.S. at 685-87.
5. Id. at 704.
6. 397 U.S. 358 (1970). The Court narrowly phrased the Winship question as
was based not on construction of state law but on constitutional mandates: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Although the Mullaney decision dealt only with heat of passion, a statutory element of the crime under Maine's statute, the defense in Bolton argued that Mullaney when read with Winship was equally applicable to the plea of self-defense, an affirmative defense in South Carolina.

At common law, the defendant had to prove all affirmative defenses or "circumstances of justification, excuse, or alleviation." Today, however, the Model Penal Code states that justification for any behavior is considered an affirmative defense which the prosecution must disprove beyond a reasonable doubt after the defendant has given some evidence in support of his defense. Only in "some exceptional situations" would the drafters place the burden on the defendant. The Code is in line with the majority of states in requiring the defendant to raise the issue of self-defense, but then shifting the burden to the prosecution to negate this defense beyond a reasonable doubt.

The minority of states, however, including South Carolina, treat affirmative defenses as an exception to the rule that the prosecution prove every element of the crime beyond a reasonable doubt, and South Carolina has traditionally required the defendant to prove self-defense, an affirmative defense, by a greater weight of the evidence.

"whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." Id. at 359.

7. Id. at 364.
8. 421 U.S. at 693 (quoting 4 W. BLACKSTONE, COMMENTARIES *201).
10. Id. These situations would be ones where no defense exists under law at the time, but the Code is trying to introduce a mitigation, which the prosecution might have difficulty in overcoming because of problems in obtaining evidence.
12. Some courts have been reluctant to apply Winship and Mullaney to the affirmative defenses because of the Supreme Court decision in Leland v. Oregon, 343 U.S. 790 (1952), where the Court upheld a state statute requiring the defendant to prove insanity beyond a reasonable doubt. Although Leland was decided before Winship, Justice Rehnquist and the Chief Justice, concurring in Mullaney, 421 U.S. at 705-06, reaffirmed the validity of the Leland decision.
The essential problem with Bolton was in the classification of self-defense: was it properly considered to be a statutory element of the crime, or as it has been more commonly held, an affirmative defense, and, if it were an affirmative defense, was it valid to distinguish between the crime and the defense by requiring the state to prove all elements of the crime beyond a reasonable doubt, but making the defendant prove the defense by a preponderance of the evidence.

Although Mullaney dealt with a statutory element of the crime, one state court has held that Mullaney is applicable to affirmative defenses as well. The court explained that Mullaney should apply to the "most blatant and visible [constitutional heresy] . . . where the jury is instructed that a defendant must prove mitigation (or justification or excuse or whatever) by a preponderance of the evidence." The Supreme Court, however, in a very recent decision, Patterson v. New York, affirmed a conviction under a New York statute which required the defendant in a prosecution for second degree murder to prove by a preponderance of the evidence extreme emotional disturbance, an affirmative defense which would reduce the crime to manslaughter. The Supreme Court affirmed the continued validity of a distinction between affirmative defenses and elements of the crime as defined by each state and upheld the requirement that the state must prove only those facts defined by statute as elements of the crime. The Court, recognizing that at common law and at the time of adoption of both the fifth and fourteenth amendments, the burden of proof for affirmative defenses rested on the defendant, held that states may choose to recognize by statute mitigating factors. "The Due Process Clause . . . does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict . . . . To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case.

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15. Id. at 715, 349 A.2d at 346. A recent law review article also indicates that the Winship-Mullaney decisions warrant a change in analysis from "an improper focus on the traditional separation of elements from excuses and justifications." Note, Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant, 64 Geo. L.J. 871, 879 (1976).
17. Id. at 2323.
in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.\textsuperscript{18} The Court held:

We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.\textsuperscript{19}

However, in \textit{Patterson}, the Court found that the state had proved the defendant guilty beyond a reasonable doubt of all the statutory elements of murder: intent to cause the death of another and causing the death of such person.\textsuperscript{20} The statute provided for no element of malice aforethought, and the mitigating circumstance involved, extreme emotional disturbance, bore no direct relation to any element of the crime. This was the distinction between \textit{Mullaney} and \textit{Patterson}. Since Maine’s statute provided for malice aforethought as an element of the crime, it was therefore held unconstitutional to allow a presumption of malice to force the defendant to prove the opposite of malice, heat of passion, by a preponderance of the evidence.

The Court in \textit{Patterson} emphasized that the \textit{Mullaney} holding did not mean that the prosecution had to prove beyond a reasonable doubt every fact affecting the degree of criminal culpability, only that it must prove beyond a reasonable doubt every statutory element.\textsuperscript{21} Therefore, in light of this decision, in order for the Supreme Court to require that the prosecution prove self-defense beyond a reasonable doubt, self-defense would have to be classified as an element of the crime. The defense in \textit{Bolton} argued this classification of self-defense.

The South Carolina Code defines murder as “the killing of any person with malice aforethought, either express or implied,”\textsuperscript{22} and manslaughter as “the unlawful killing of another without

\textsuperscript{18} Id. at 2326.
\textsuperscript{19} Id. at 2327.
\textsuperscript{20} Id. at 2325.
\textsuperscript{21} Id. at 2330.
malice, express or implied."\(^{23}\) The defense in *Bolton* argued that self-defense went to the lawfulness of the killing, and that for the defendant to be convicted even of manslaughter, the killing had to be unlawful. Because it is excusable to kill in self-defense in South Carolina,\(^ {24}\) the defense claimed self-defense would operate to relieve the defendant of punishable guilt.

A similar argument had been used in *Mullaney*. The statute under which the defendant there was convicted provided: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life,"\(^ {25}\) and the trial court in *Mullaney* recognized that the state had to prove beyond a reasonable doubt that the homicide was intentional and that it was unlawful. "Unlawful" was defined as neither justifiable nor excusable, with examples of "unlawful" given as "a soldier in battle, a policeman in certain circumstances, and an individual acting in self-defense."\(^ {26}\) Although Maine had adopted the majority rule requiring the state to prove self-defense beyond a reasonable doubt prior to *Mullaney*,\(^ {27}\) which could of itself explain this burden on the prosecution, nevertheless, Maine's definition of unlawful indicates that self-defense is crucially related to unlawfulness, which is a required element of manslaughter. If it violates due process to require a defendant to prove heat of passion to reduce his conviction from murder to manslaughter, it would follow that it is equally unreasonable to require a defendant to prove self-defense to maintain his presumed innocence from any guilt.

North Carolina recognized this principle in *State v. Hankerson*\(^ {28}\) when its supreme court stated that the jury instructions had unconstitutionally relieved the prosecution of proving malice and unlawfulness beyond a reasonable doubt. The defendant in *Hankerson* was convicted of second degree murder, after pleading self-defense. The trial judge had charged the jury that the state had to prove that the defendant intentionally and without justification or excuse and with malice shot the deceased, but that once the state had proved the intentional killing with a


\[24. \text{State v. Martin, 216 S.C. 129, 134, 57 S.E.2d 55, 57 (1949).} \]


\[26. 421 \text{ U.S. at 685 and n.1.} \]

\[27. \text{State v. Millett, 273 A.2d 504 (Me. 1971).} \]

\[28. 288 \text{N.C. 632, 220 S.E.2d 575 (1975), rev'd, 97 S. Ct. 2339 (1977).} \]
deadly weapon, two presumptions arose: that the killing was unlawful and that it was done with malice. To excuse his act, the defendant had to prove, to the jury's satisfaction, that he acted in self-defense. The North Carolina Supreme Court found that unlawfulness was an essential element of the crime and that the burden was on the state to prove unlawfulness, which in this case was the absence of self-defense.

Therefore, although the Patterson decision narrows Mullaney by allowing the state to place the burden of proof on the defendant for affirmative defenses, Patterson does not decrease the state's burden as to any statutory element of the crime. Furthermore, self-defense, traditionally classified as an affirmative defense, has been held by North Carolina in Hankerson to go to the unlawfulness requirement under its statute as an element of murder. Since South Carolina's statute also provides that murder be done with malice aforethought and that manslaughter be an unlawful killing, unlawfulness could be interpreted, as North Carolina has done, to be an essential element of the crime.

B. Retroactivity

In Hankerson, the North Carolina Supreme Court also held that, although it was error under Mullaney to place the burden of proof on the defendant as had been done, the conviction would stand because Mullaney could not be applied retroactively. The court reasoned that a retroactive application could lead to the possible catastrophe of releasing many convicted murderers upon society.

The Supreme Court reversed, however, and held that Mullaney was to be given full retroactive effect. The Court held that Ivan v. City of New York, where the court had held that In re Winship retroactively applied to state juvenile proceedings, controlled. The Court stated:

"Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule...

29. Id. at 647, 220 S.E.2d at 586.
30. Id. at 651, 220 S.E.2d at 589.
31. Id. at 655-57, 220 S.E.2d at 592.
has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances. "

II. THE DEATH PENALTY

In State v. Rumsey the South Carolina Supreme Court held that the South Carolina death penalty statute was unconstitutional in light of the July 2, 1976, United States Supreme Court decisions in Gregg v. Georgia, Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina, and Roberts v. Louisiana. The defendant Rumsey was convicted of murder during an armed robbery and under section 16-52 of the South Carolina Code was sentenced to death. He appealed on several grounds, but after these Supreme Court decisions, abandoned all allegations of error except the constitutionality of the death penalty under section 16-52. The supreme court reversed in part, remanding to the lower court for resentencing to life imprisonment.

The South Carolina Supreme Court based its decision primarily on the North Carolina case Woodson v. North Carolina because of the similarity of the North Carolina statute to that of South Carolina. North Carolina’s statute had provided that for first-degree murder, imposition of the death penalty was mandatory. The North Carolina Legislature had enacted this statute

33. Id. at 204 (1972) (quoting Williams v. United States, 401 U.S. 646, 653 (1971)).
40. S.C. Code Ann. § 16-3-20 (1976) is the current citation.
43. The North Carolina statute provided:

Murder in the first and second degree defined; punishment. — A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State’s prison.

in response to the 1972 Supreme Court decision in *Furman v. Georgia*, where the Court held that imposition of the death penalty under the circumstances of the case presented constituted cruel and unusual punishment, violating the eighth and fourteenth amendments. The circumstances were state statutes allowing broad discretion in the judge or jury to impose or withhold the death penalty.

Since the Supreme Court in *Furman* did not rule on the question of whether a mandatory death penalty would be constitutional, the North Carolina General Assembly thought that removal of any discretion from the jury in first-degree murder cases would bring their statute in line with the decision in *Furman*. However, the Supreme Court in *Woodson* explained that this was not a constitutionally acceptable alternative for several reasons: some jurors throughout the years had been reluctant to convict a defendant where the death sentence would be an automatic consequence; society itself has not been in favor of automatic death sentences; and the jury would be precluded from considering any relevant circumstances of the individual case before sentencing.

The South Carolina statutory changes after *Furman* were similar. The 1962 Code had provided:

**Punishment for murder.** — Whoever is guilty of murder shall suffer the punishment of death; *provided, however*, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner.

Then like North Carolina and many other states, in response to

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44. 408 U.S. 238 (1972).
45. *Id.* at 257 (Douglas, J., concurring).
46. *Woodson v. North Carolina*, 428 U.S. 280, 300 (1976) (referring to the state's brief in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973)). This brief indicated that the legislature sought to remove "all sentencing discretion [so that] there would be no successful *Furman* based attack upon the North Carolina statute."
47. 428 U.S. 280 (1976).
48. *Id.* at 293, 302-03.
49. *Id.* at 297.
50. *Id.* at 303-04.
the *Furman* decision, South Carolina enacted a new statute which removed from the jury any discretion in imposition of the death penalty. It was mandatory under certain defined circumstances and allowed no jury consideration of mitigating conditions.

Whoever is guilty of murder under the following circumstances shall suffer the penalty of death:

1. Murder committed while in the commission of the following crimes or acts: (a) rape; (b) assault with intent to ravish; (c) kidnapping; (d) burglary; (e) robbery while armed with a deadly weapon; (f) larceny with use of a deadly weapon; (g) housebreaking; (h) killing by poison; (i) lying in wait.

2. Murder committed for hire based on some consideration of value.

3. Murder of a law-enforcement officer or correctional officer while acting in the line of duty.

4. The person convicted of committing the murder had previously been convicted of murder, or was convicted of committing more than one murder.

5. Murder that is willful, deliberate and premeditated.53

The South Carolina Supreme Court believed that the legislature's effort to comply with *Furman* was successful, since it interpreted *Furman* as condemning legislation which vested the jury with discretion in imposing the death penalty. Because section 16-52 allowed no such discretion, but rather provided specific circumstances in which the death penalty might be imposed, it was in compliance with that decision.54 However, according to the more recent Supreme Court decisions in *Woodson* and the other cases, this statute was unconstitutional, and the South Carolina court in *Rumsey*55 held it so.

The line between the jury discretion condemned in *Furman* and the inability of the jury to consider mitigating circumstances condemned in *Woodson* is narrow. The two cases together indicate that although the death penalty constitutes cruel and unusual punishment if it can be imposed by the trier without guidelines, it is constitutional if the type of offenses upon which it may be imposed is limited and defined, and if the trier can consider relevant facts which have been statutorily defined.

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This refinement was based upon the eighth amendment requirement that the state’s power to punish be “exercised within the limits of civilized standards.” These civilized standards throughout United States history have indicated both repudiation for an automatic death sentence and approval for jury discretion. “[O]ne of the most important functions any jury can perform” is to choose between life imprisonment and capital punishment because they are the “link between contemporary community values and the penal system.” Although these standards had simply been reflective of society’s policy, the Supreme Court in Woodson held that the eighth amendment, with its roots in fundamental respect for humanity, demanded that in order to inflict the death penalty in capital cases, the jury must consider the character and record of the defendant and the particular circumstances of the crime.

To avoid uncontrolled discretion, however, the standard under which the jury is to perform must be enunciated. Furman requires “objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.” This requirement is not satisfied by narrowing the scope of offenses for which the death penalty must be applied because this still would not allow jury consideration of the circumstances nor would it establish any standards for this decision. What is acceptable is a statute like that of Georgia which provides for a bifurcated trial, where in the first stage, the defendant’s guilt or innocence is determined, and if he is found guilty, then in the second stage, a presentence hearing is held to hear any mitigating or aggravating circumstances. Georgia’s statute additionally specifies ten aggravating circumstances, the existence of any one of which must be found by the jury beyond a reasonable doubt before the death penalty may be imposed. The judge is bound by the jury’s recommendation, and there is an automatic appeal to the Georgia Supreme Court. That court must look for any

57. Id. at 295 (quoting Justice Stewart for the majority in Witherspoon v. Illinois, 391 U.S. 510, 519 and n.15 (1968)).
58. Id. at 304.
59. Id. at 303.
60. See Roberts v. Louisiana, 428 U.S. at 333.
arbitrary factor which might have influenced the sentence and consider whether the death penalty was in proportion to the penalty in similar cases, which must be cited if the death penalty is affirmed.  

On June 7, 1977, the South Carolina Legislature passed a new death penalty bill. It provides for a separate sentencing procedure before the jury after a verdict of guilty, with additional evidence being heard in extenuation, mitigation, or aggravation of the punishment. The statute lists both aggravating and mitigating circumstances and requires that the jury indicate which aggravating circumstance it found in order to recommend the death penalty. The court must sentence the defendant to death when the jury finds one of the aggravating circumstances and recommends death. There is an automatic appeal to the supreme court which must look for arbitrary factors, including whether the evidence supports a finding of an aggravating circumstance and whether the death sentence is excessive in relation to the penalty imposed in similar cases.

III. COMMENT ON ASSERTION OF CONSTITUTIONAL RIGHTS

In State v. Middleton the defendant was convicted of the rape of a sixteen year old female and armed robbery by the Charleston County Court of General Sessions. Within an hour after the incident, the police arrived on Middleton's street where he was standing with friends and asked him to accompany them to the station; without being either arrested or charged, he was given Miranda warnings and asked to consent to a combing of his pubic area. Middleton agreed initially; however, after being told that he did not have to consent, he withdrew permission, asking to be charged or released, and was released.

63. Id. at § 27-2537.
67. Id. at 154; id., vol. 2, at 197.
68. Id., vol. 2, at 328, 333.
69. Id. at 202.
70. The record does not indicate that there was probable cause for arrest or for a search at the police station. If there had been probable cause, the transitory nature of the evidence sought, since it could have been destroyed by showering, would have supplied the exigent circumstances necessary for a search without warrant. The police also indi-
At trial the defendant’s refusal to consent to the combing was introduced into evidence over objections by his counsel, and this constituted one allegation of error on appeal. The South Carolina Supreme Court, however, affirmed the conviction, but the United States Supreme Court granted certiorari, remanding for consideration in light of its recent decision of Doyle v. Ohio.71

Doyle was a 1976 case based on the fifth amendment in which the prosecution attempted to use the defendant’s silence after Miranda warnings to impeach his testimony and an exculpatory story he told later at trial. The prosecution’s argument was that if he really did have an explanation, the normal course of action would have been to tell the police immediately after the Miranda warning rather than to remain silent. The Supreme Court held that it was fundamentally unfair and violated due process to allow the state to offer this silence as evidence: even though Miranda had no express assurances that the defendant’s silence would not be used against him, this protection was implicit in the Miranda holding. In addition, the Court reaffirmed a statement made in a previous case on the ambiguity of silence after Miranda warnings.

[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.72

The South Carolina Supreme Court, however, found that Doyle was factually distinguishable and held it inapposite, reaffirming the defendant’s conviction. According to the supreme court, Doyle was based on Miranda, a case not applicable to the facts of Middleton since there was no custodial interrogation of Middleton, and therefore the rights which Miranda was designed to protect had not yet vested in the defendant.73

71. 96 S. Ct. 2240 (1976).
72. Id. at 2245.
73. No. 20360 (S.C., filed Feb. 9, 1977).
The difficulty in *Middleton* was in classifying the defendant's rights as arising under either the fourth or the fifth amendment.

There are two possible interpretations of the Supreme Court's remand in light of *Doyle*. One is that Middleton's refusal was an implied testimonial inference which was compelled in violation of the fifth amendment. This has been recognized in a few cases\(^\text{74}\) and noted by one commentator as the correct interpretation in similar cases.\(^\text{75}\) The introduction of this refusal is probative of the "'probable state of belief to be inferred from his conduct' — an implied admission of guilt by conduct or silence."\(^\text{76}\) The other interpretation is that *Doyle* stands for the broader teaching that comment on the rightful exercise of a constitutional privilege is impermissible as a violation of the Constitution, whether the privilege arises under the fourth or fifth amendment.\(^\text{77}\)

The view which appears to be most consistent with the United States Supreme Court decisions is the latter: that *Middleton* was a fourth amendment case, but that *Doyle* was applicable despite its fifth amendment base, for its broader meaning, that the exercise of a constitutional right is protected within that amendment. It is believed that it was this broader reading that the United States Supreme Court was suggesting in its remand of *Middleton* for consideration in light of *Doyle*. *Doyle* was to be used by analogy, in the absence of a case stating specifically that it is unconstitutional to penalize an individual for asserting his fourth amendment rights.

In both fourth and fifth amendment cases, there are two types of evidence which a defendant may give: testimonial and physical. Testimonial, or as it is sometimes called, communicative evidence is excluded under the fifth amendment privilege against self-incrimination if the evidence was obtained involuntarily.\(^\text{78}\) "[T]he privilege [against self-incrimination] protects

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\(^{74}\) E.g., United States v. White, 355 F.2d 909 (7th Cir. 1966), cert. denied, 389 U.S. 1052.


\(^{76}\) Id. at 628 (citing C. McCormick, *Law of Evidence* § 247(6) at 528 (1954)).

\(^{77}\) Judge Traynor in People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966), suggests another method of analyzing the problem: as a right of privacy issue under the fifth amendment.

\(^{78}\) E.g., Schmerber v. California, 384 U.S. 757 (1966).
an accused . . . from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." 79

With physical evidence, as well, the defendant may exercise his right to refuse, and the evidence may be taken by force over his refusal only in situations involving probable cause. The Rochin line of cases indicates what degree of force is acceptable and what violates the fourteenth amendment due process clause. 80 Rochin excluded from evidence two morphine capsules which the state had obtained through induced vomiting. Later cases, however, limited Rochin to cases involving brutality to an individual 81 and allowed blood samples to be taken from an unconscious person 82 and forcible blood samples to be taken from an unwilling defendant in Schmerber v. California. 83 Schmerber, however, enunciated several safeguards which must be present to avoid offending the Rochin "sense of justice" 84 and the fourth amendment protections: there must be probable cause for arrest suggesting the relevance and likelihood of success of the test; there must be exigent circumstances which would justify proceeding without a warrant because of the imminent possibility of destruction of the evidence; and the test must be one that is both reasonable in nature and reasonably performed. 85

Within the category of physical evidence, however, there are certain identification procedures which are generally allowed, sometimes even without full probable cause for arrest. These include participation in line-ups, 86 voice identification, 87 finger-

79. Id. at 761.
84. 342 U.S. at 173.
85. Schmerber v. California, 384 U.S. at 768-72. In Cupp v. Murphy, 412 U.S. 291 (1973), the defendant went voluntarily to the police station for questioning in the stranglecase of his wife. When the police saw blood on his finger, this created enough probable cause to take warrantless scrapings. In addition, in United States v. Smith, 470 F.2d 377 (D.C. Cir. 1972), the court allowed evidence of a benzidine test performed on defendant without a warrant for his arrest. The court in United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972), however, held that for a defendant not in custody a search warrant was needed to take X-rays, blood, and hair samples.
printing, and handwriting samples.

A defendant who refuses to participate in an identification test can be subject to comment on this refusal at trial. The court in People v. Ellis explained this in the context of voice identification by contrasting speaking for identification purposes with speaking for testimonial purposes; a defendant's refusal to speak was considered non-testimonial and was, therefore, admissible as circumstantial evidence of his consciousness of guilt. The court, however, continued with the qualification that comments were allowed only on those identification procedures which involved no intrusion into privacy and held no disclosure of private information. These procedures, although involving physical characteristics, are distinguished from giving blood samples or taking breathalyzer tests, where, without the defendant's consent, probable cause is still necessary. For example, the Supreme Court in Davis v. Mississippi has indicated that detention for the purpose of obtaining fingerprints under narrowly defined circumstances may be upheld without probable cause. These circumstances include prior approval by a judicial officer.

There was no judicial order in Middleton, but even more important, the purpose of the requested search was not to obtain a sample of the defendant's hair as an identification procedure, but rather was to search his body for alien hairs, particularly those of the victim. Therefore without considering the intimate nature of the requested search as contrasted with the less serious intrusions dealt with in Davis, the search clearly was not to have been conducted for identification purposes. Moreover, not only would the search itself have been prohibited under Davis, but also any comments on Middleton's refusal could have been disqualified under the Ellis rule, since this procedure involved a high degree of intrusion into privacy.

89. United States v. Bailey, 327 F. Supp. 802 (N.D. Ill. 1971). The court here stated that the fourth amendment was designed not only to redress, but also to prevent prohibited intrusions. Id. at 805.
90. 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
91. Id. at 535, 421 P.2d at 396, 55 Cal. Rptr. at 388.
93. Proposed Fed. R. Crim. P. 41.1 and the Model Code of Pre-Arraignment Procedure § 170.2 (Proposed Official Draft, 1975) indicate that this order may issue on reasonable grounds or reasonable cause.
If the proper classification of the evidence sought in Middleton is physical evidence sought for probative value rather than for identification purposes, as seems indicated by the record, there is more difficulty in determining the permissibility of comments at trial, since courts have gone both ways in allowing these comments into evidence. It has been noted that if the results of the search would have been admissible, then no violation of constitutional privilege would occur in commenting on the refusal.95 One commentator96 has suggested a distinction between situations in which the defendant had a constitutional or statutory right of submitting to the test and those in which he did not, citing Judge Traynor's decision in People v. Sudduth.97

The disparate results found in other jurisdictions may be ascribed to the presence or absence of an underlying constitutional or statutory right to refuse to produce the physical evidence sought. States that recognize a right to refuse to take such tests exclude evidence of a refusal. States that recognize no right to refuse allow testimony and comment on the refusal.98

Under either view, the comments in Middleton should not have been allowed into evidence. The results of the search would have been excluded since there was neither probable cause nor exigent circumstances, and the police warnings, both the right to remain silent and the right not to have to consent to the search, indicated Middleton's privilege to refuse. Therefore, physical evidence could have been taken only from a willing defendant.

The prosecution in Middleton, however, argued a very narrow fourth amendment reading: that there could be no violation since no search of the defendant ever occurred. The state added that the only remedy for a fourth amendment violation was the exclusion of the wrongfully taken evidence, and that since no actual search and seizure had taken place, the fourth amendment supplied no remedy.99 The South Carolina Supreme Court agreed.100

The state and the South Carolina Supreme Court believed

98. Id. at 547, 421 P.2d at 403-04, 55 Cal. Rptr. at 395-96. For a list of states, see Annot., 87 A.L.R.2d 370 (1963).
100. No. 20360 (S.C., filed Feb. 9, 1977).
that the case should be considered on fifth amendment grounds: since the refusal was verbal, it would be protected, if at all, by the fifth amendment privilege against self-incrimination. This view was based on two South Carolina cases, *State v. Green* and *State v. Smith.* Green held that introduction of the results of a compulsory physical examination, as non-testimonial evidence, was not violative of the fifth amendment, where the examination was not aided by the defendant's positive action or enforced testimony. Smith allowed a comment at trial on the defendant's refusal to take a test for drunken driving. The defense in Middleton, although first arguing that these cases were not applicable because they applied only when the defendant asserted fifth amendment rights which Middleton had not yet done, then countered the argument, stating that these cases were overruled or at least modified by the more recent Supreme Court decision in *Schmerber.*

In a footnote, Schmerber discussed a breathalyzer test which the defendant had refused to take and the evidence of which refusal had been admitted into evidence without objection. The Court indicated that general fifth amendment principles would govern and cited Miranda, although holding that the defendant was foreclosed to object because of his earlier failure to do so. The Miranda citation was to a footnote where the Miranda Court had stated: "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."  

Although the South Carolina Supreme Court has labeled this Schmerber reference dictum and has stated that it contained nothing to cause a reversal of Smith, nevertheless the decision of the United States Supreme Court in *Doyle v. Ohio* seems to give new weight to this statement. Doyle and an earlier case, *United States v. Hale,* dealt with

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104. 227 S.C. at 6, 86 S.E.2d at 600.
105. Brief of Appellant at 15.
the ambiguity of silence. *Hale* distinguished between the allowable use of prior inconsistent statements to impeach and the unconstitutional use of prior silence. The Court stated that "[i]n most circumstances silence is so ambiguous that it is of little probative force" and held that the defendant's silence was not inconsistent with his exculpatory testimony later at trial. Middleton's refusal to consent was not inconsistent with his assertions of innocence and was ambiguous enough not to be used as probative of his guilt because there could have been several rational explanations for his refusal to allow the search.

In addition to penalizing the assertion of a fourth amendment right, the prosecutor's comment in *Middleton* also deprived the defendant of due process by calling attention to his refusal. *United States v. Hale* indicated that to call attention to a defendant's silence after *Miranda* warnings and to insist that a jury draw an unfavorable inference about later testimony at trial based on this silence deprived the defendant of fundamental fairness. In order to introduce this testimony at all, the state had the burden of establishing a threshold inconsistency between a defendant's refusal to consent and his later plea of not guilty. Whatever probative force this refusal might have, the court in *Hale* indicated that this value would be far outweighed by its prejudicial nature, since it is likely that the jury assigned far more weight to the refusal than was warranted.

Similarly, in *Johnson v. United States*, once the court had granted the defendant the privilege not to testify to a question, even though the court might have demanded an answer had it chosen to, it was error for the court then to comment on the defendant's silence. Although the dissent in *Doyle* felt that this due process argument sounded like estoppel, nevertheless the holding was that if the defendant were advised that he might remain silent and did so, it was presumed to be in reliance on the warning and, therefore, under certain circumstances unfair to use this silence against him.

Although obviously dealing with the protection of a fifth amendment right, *Doyle* and its rationale are applicable because

110. *Id.* at 176.
111. *Id.*
112. *Id.* at 180.
113. 318 U.S. 189 (1943).
114. 96 S. Ct. 2240, 2246 (Stevens, Blackmun, & Rehnquist, J.J., dissenting).
its teaching is broad enough to furnish protection for the exercise of a fourth amendment right. The fundamental concept exists that within the protection offered by each amendment must be included the right that exercise of any privilege within that amendment is also protected. It is as much a violation of the fourth amendment to penalize its exertion as it is to do an actual search in the absence of consent or probable cause. Justice Black recognized this when he stated in the context of the fifth amendment, "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them."115

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