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One of three defendants was convicted of conspiracy to commit murder and accessory before the fact to first degree murder. Of the two remaining defendants, one previously pled guilty as a principal to second degree murder, and the remaining defendant, following a first degree murder conviction, was awaiting a new trial. The Court of Special Appeals of Maryland, in an unreported decision, affirmed the first defendant's conviction of conspiracy to commit murder and reversed, sua sponte, the conviction of accessory before the fact to first degree murder.

In doing so, the court perfunctorily followed the common law rule that prohibits an accessory's conviction of a greater crime than the principal's. The Court of Appeals of Maryland, however, abrogated the common law rule, holding that an accessory before the fact may be convicted of a greater crime or degree of crime than the principal.

At common law, parties to a felony are classified into four discrete categories: (1) principals in the first degree are the actual perpetrators of the crime; (2) principals in the second degree are those who, without actually committing the offense, aid and abet the perpetrator during the commission of the crime; (3) accessories before the fact procure, counsel, or command the principal, but are not present during the commission of the crime.

2. Jones, 302 Md. at 155, 486 A.2d at 185.
3. Id.
4. Id. Various common law rules protected accessories from capital punishment for felonious crimes. Among these was the rule that prohibited conviction of an accessory of a greater crime than the principal. State v. Ward, 284 Md. 189, 202, 396 A.2d 1041, 1049 (1978); see supra notes 11-15 and accompanying text.
5. Jones, 302 Md. at 161, 486 A.2d at 189. Because the defendant died prior to the court's decision, the case was moot. Judicial mootness occurs when "there is no longer an effective remedy which the court can provide." Hagerstown Reproductive Health Services v. Fritz, 295 Md. 268, 272, 454 A.2d 846, 848 (1983) (quoting Attorney General v. Anne Arundel County School Bus Contractors Ass'n, 286 Md. 324, 327, 407 A.2d 749, 752 (1979)), cert. denied, 103 U.S. 3538 (1983). Prior to Jones, Maryland case law failed to provide a general rule applicable to the disposition of moot cases. Compare Hagerstown Reproductive Health Services v. Fritz, 295 Md. 268, 454 A.2d 846 (1983) (remanding to intermediate appellate court with directions to vacate the trial court's judgment and remand with directions to dismiss the case), with National Collegiate Athletic Ass'n v. Tucker, 300 Md. 156, 476 A.2d 1160 (1984) (per curiam) (dismissing the appeal). The Jones court accepted the majority distinction between appeals of right and discretionary reviews, holding that the proper disposition of a case that becomes moot during discretionary review is dismissal of the writ of certiorari rather than dismissal of the entire indictment. Jones v. State, 302 Md. 153, 158, 486 A.2d 184, 187 (1985). In spite of dismissing the writ, the Jones court considered the merits of the case because there was "an urgency to establish a rule of future conduct on a matter of important public concern." Id.
the felony; and (4) accessories after the fact provide aid to the principal in order to impede his apprehension, conviction, or punishment.7

Capital punishment was originally the exclusive penalty administered to any party convicted of a felony. Certain procedural rules, probably designed to mitigate the harshness of the ubiquitous death penalty, emerged from the principal-accessory distinction.8 First, under the sequence-of-trial rule, an accessory could not be tried, absent his consent, before the principal was tried, convicted, and sentenced.9 Second, the greater-crimes rule prohibited the conviction of an accessory for a greater crime than his principal.10 Third, an accessory who incited the perpetration of a felony in one jurisdiction could be tried only in that jurisdiction, even if the actual crime occurred in a different jurisdiction.11 Finally, a party could be convicted as principal or accessory only if he was so designated in the pleadings.12

Certain illogical consequences followed from these procedural rules.13 For example, if a principal died without being tried or convicted of a crime, the accessory, in spite of the palpability of his guilt, was shielded from prosecution.14 Once most felonies were removed from the capital offense category, however, the primary reason for the principal-accessory distinction ceased to exist.15 Consequently, virtually every state

8. See R. PERKINS & R. BOYCE, supra note 7, at 751-58; see also W. LAFAVE & A. SCOTT, supra note 6 at 499 (identifying the problematic procedural rule that emerged from the principal-accessory distinction). Because the Jones case concerned the single rule that an accessory before the fact could not be convicted of a greater crime or degree of crime than the principal, this casenote will focus primarily on that rule, with some attention given to the closely related sequence-of-trial rule that prohibits the trial of an accessory before the trial and conviction of the principal.
9. W. LAFAVE & A. SCOTT, supra note 6, at 500; R. PERKINS & R. BOYCE, supra note 7, at 755; 4 W. BLACKSTONE, supra note 7, at *323. An additional reason against trying an accessory prior to the final disposition of the principal was the assumption that no accessory could exist unless there was a prior judicial determination, via the conviction of the principal, that a crime had been committed. 4 W. BLACKSTONE, supra note 7, at *4 n. 38. The rule was also thought to prevent the "absurdity" of acquitting a principal but convicting an accessory. Id. at *323.
10. 4 W. BLACKSTONE, supra note 7, at *36; R. PERKINS & R. BOYCE, supra note 7, at 757. A rationale proffered for this rule is that an accessory's guilt is derived from the principal's behavior; therefore, his culpability should not exceed the principal's guilt. 4 W. BLACKSTONE, supra note 7, at *36.
11. See W. LAFAVE & A. SCOTT, supra note 6, at 499; R. PERKINS & R. BOYCE, supra note 7, at 753-54.
12. See W. LAFAVE & A. SCOTT, supra note 6, at 499; R. PERKINS & R. BOYCE, supra note 7, at 754-55. This rule required that no variance between charge and proof exist. Thus, if one was charged as a principal, he could not be convicted on proof that he was an accessory. See Shelton v. Commonwealth, 286 Ky. 18, 86 S.W.2d 1054, 1057 (1935).
15. R. PERKINS & R. BOYCE, supra note 7, at 759.
has statutorily modified the common law accessory-principal distinctions. As a result, the anomalous consequences of the accessoryship rules have disappeared to a large extent.

Statutory modifications have not resulted in universal abrogation of the accessoryship rules. Although practically every jurisdiction permits an accessory to be tried prior to the principal, a minority of jurisdictions permit an accessory to be convicted of a greater crime than the principal when the principal was in custody and prepared for trial. Even so, the majority of reported jurisdictions permit an accessory to be convicted of a


17. See W. LAFAVE & A. SCOTT, supra note 6, at 500. Statutory reform has not been uniform nor has it obviated all the anachronistic procedural consequences of the common law distinction between accessoryship and principals. See R. PERKINS & R. BOYCE, supra note 7, at 759 (describing interpretations of statutes that retain aspects of the common law accessoryship rules).

18. W. LAFAVE & A. SCOTT, supra note 6, at 300-01; see also R. PERKINS & R. BOYCE, supra note 7, at 759-60 (stating that the unavailability of the principal does not bar conviction of an accessory before the fact); 1 C. TORCIA, WHARTON'S CRIMINAL LAW 177 (1978) (no longer necessary for principal to be convicted prior to accessory's trial). But see Feaster v. State, 175 Ark. 165, 299 S.W. 737 (1927) (the court abused its discretion when it permitted the trial of an accessory before the trial of his principal when the principal was in custody and prepared for trial); People v. Wyherk, 347 Ill. 28, 178 N.E. 890 (1931) (when principal and accessory are tried together the statute requires the conviction of the principal to sustain the accessory's conviction).

greater crime than the principal,20 especially in those jurisdictions that have abrogated the distinction between accessories and principals.21

In an early case, Fleming v. State,22 a defendant-accessory was convicted of murder, although the actual perpetrator previously was convicted only of manslaughter.23 On appeal, the defendant, although present during the commission of the murder, argued that he was an accessory.24 Thus, he claimed the court's instructions, which characterized him as "aiding, abetting, and assisting," erroneously permitted a conviction of murder because his principal was convicted only of manslaughter.25 Relying on the statute that abrogated the distinction between an accessory before the fact and a principal,26 the Supreme Court of Mississippi held that an accessory can be convicted of a greater crime than the principal once the guilt of the principal is established.27

On the other hand, some jurisdictions retain the greater-crimes rule.28 In Davis v. State,29 the defendant's petition for postconviction relief was predicated on the proposition that his conviction as an accessory before the fact to murder was improper because the subsequent trial of his principal had resulted in only a conviction for assault and battery.30 The Supreme Court of Indiana stated that "in a situation where there has been two separate judicial determinations on the merits of the respective cases, and where they are contradictory, the law will impose a consis-


21. See Bridges v. State, 263 So.2d 705 (Ala. Crim. App. 1972) (per curiam) (statute abolishes all distinctions between common law parties and allows an aider and abettor to be convicted of a greater crime than the principal); People v. Hines, 28 Ill. App.3d 976, 329 N.E.2d 903 (1975) (under the state's common accountability statute an accessory's murder conviction upheld even though perpetrator pled guilty to only conspiracy to commit murder and armed robbery); State v. Norwood, 217 Kan. 150, 535 P.2d 996 (1975) (citing to statutory authority to support an accessory's conviction to a different crime or degree of crime than his principal); Fleming v. State, 142 Miss. 872, 108 So. 143 (1926) (accessory convicted of higher degree of crime than his principal based upon statutory authority).

22. 142 Miss. 872, 108 So. 143 (1926).

23. Id. at 878, 108 So. at 144.

24. Id. at 880, 108 So. at 144.

25. Id.

26. The statute read: "Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such; and this whether the principal have been previously convicted or not." Id. The current Mississippi statute is identical to the above. MISS. CODE ANN. § 97-1-3 (1972 & Supp. 1985).


29. 267 Ind. 152, 368 N.E.2d 1149 (1977).

30. Id. at 154, 368 N.E.2d at 1150.
Maryland embraces the common law classification of parties to a felony, and, until recently, the courts adhered to the sequence-of-trial and greater-crimes rules. In *State v. Magliano*, the defendant was charged as an accessory after the fact to the statutory crime of escape. When the principal died prior to his trial, the defendant, relying on the sequence-of-trial rule, moved to dismiss the indictment. The trial court granted the motion to dismiss, and the court of special appeals affirmed. In its ruling, the court considered itself bound by Maryland's constitutional incorporation of the common law of England and rejected the argument that the accessoryship rules were anachronistic and should be ignored. The court intimated dissatisfaction with the sequence-of-trial rule, but concluded that the legislature, not the judiciary, was the more appropriate forum for change.

accessoryship rules,45 but still reaffirmed the greater-crimes rule.46 In *Ward*, the defendant was charged as an accessory before the fact to first degree murder, even though the principals, in separate trials, pled guilty to second degree murder.47 The trial court dismissed the indictment,48 but the court of appeals concluded that the statutory nature of the indictment permitted the state to prosecute the defendant as an accessory before the fact to second degree murder.49 Thus, it reversed and remanded with the clear intent that the defendant only be convicted as an accessory before the fact to second degree murder.50 In its affirmation of Maryland's adherence to the greater-crimes rule, the court extended the rule's rationale to include statutorily created degrees of crime and held that an accessory before the fact "may not be convicted of a higher degree of murder than that principal committing that murder."51

*Lewis v. State*52 provided the factual circumstances needed to begin the judicial reform of the accessoryship rules. In *Lewis*, the defendant was convicted as an accessory before the fact to first degree murder and related offenses.53 In an earlier trial, the principal was tried and convicted of first degree murder, but he had not been sentenced prior to the defendant's conviction.54 Relying on the sequence-of-trial rule,55 the defendant appealed. The court of appeals reversed the conviction56 because the principal had not been sentenced prior to the accessory's trial.57 Nevertheless, after establishing its authority to modify the common law58 and discounting any reason for the continuance of the accessoryship rule,59 the court abrogated the sequence-of-trial rule and held prospectively that trials of accessories before or after the fact are not precluded by the failure to try the principal.60

*Jones v. State*61 provided the Court of Appeals of Maryland with an

45. Id. at 192, 396 A.2d at 1044; see State v. Magliano, 7 Md. App. 286, 255 A.2d 470 (1969) (affirming the dismissal of an accessory because the principal died prior to conviction).
46. Id. at 206, 396 A.2d at 1051-52.
47. Id. at 192-93, 396 A.2d at 1044-45.
48. Id. at 193, 396 A.2d at 1045.
49. Id. at 200, 396 A.2d at 1048.
50. Id. at 207-09, 396 A.2d at 1052-53.
51. Id. at 206, 396 A.2d at 1051-52 (emphasis in original).
53. Id. at 707, 404 A.2d at 1074.
54. Id. at 708, 404 A.2d at 1075.
55. Id. at 707, 404 A.2d at 1074.
56. Id. at 714, 404 A.2d at 1078.
57. Id. at 713, 404 A.2d at 1077.
58. Id. at 715, 404 A.2d at 1079. The court stated that it has a right to alter the common law when it "has become unsound in the circumstances of modern life." Id. at 715, 404 A.2d at 1079 (quoting White v. King, 244 Md. 348, 354, 223 A.2d 763, 767 (1966)).
59. Id. at 716, 404 A.2d at 1079.
60. Id. The court did, however, emphasize that the evidence presented at the accessory's trial must be sufficient to establish the occurrence of a felony. Id.
opportunity to reevaluate the greater-crimes rule in light of its *Lewis* decision. In *Lewis*, the court emphasized the illogic of shielding an accessory from punishment when there was overwhelming evidence of his criminal complicity. By abrogating the sequence-of-trial rule, it permitted an accessory to be tried and convicted even though the principal had not been tried or was never to be tried. In *Jones*, the defendant’s appeal of his first degree murder conviction was predicated, inter alia, on the greater-crimes rule. The court of appeals held that “an accessory before the fact may be convicted of a greater crime or greater degree of crime than that of which his principal was convicted.”

The *Jones* court relied heavily on its earlier *Lewis* analysis and holding. The court observed that the *Lewis* decision already had sanctioned an accessory’s greater-crimes conviction when the accessory was convicted of a crime, but the principal was never tried. Within that context, the abrogation of the greater-crimes rule was a mere formalization and slight extension of the practical effect of *Lewis*. In addition, the *Jones* court acknowledged that the *Lewis* decision illogically made the application of the greater-crimes accessoryship rule contingent on the fortuitous circumstance of which party to the crime was tried first. Finally, the *Jones* court, again borrowing from its *Lewis* rationale, argued that an accessory should not be shielded from prosecution merely because the principal entered a plea or was found guilty of a lesser crime by a separate jury.

*Jones v. State* took the predictable and necessary step of abrogating the greater-crimes rule. The *Jones* analysis, however, would have been considerably strengthened by an expanded discussion of the now obsolete rationale for the accessory-principal classifications and concomitant procedural rules. As noted earlier, the statutory elimination of capital punishment for most felonious crimes obviated the need to protect defendants from the ubiquity of the death penalty. In addition, the existence of many sensible reasons for the principal’s conviction of a lesser crime than the accessory made it unnecessary to equate the accessory’s culpability with the principal’s conviction. If the *Jones* court

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64. *Id.* at 161, 486 A.2d at 189.
65. *Id.* at 160, 486 A.2d at 188.
66. *Id.* at 160-61, 486 A.2d at 188.
67. *Id.* at 161, 486 A.2d at 188.
68. *See supra* note 18 and accompanying text.
70. Justice Holmes makes this point succinctly: It is revolting to have no better reason
had strengthened its reasoning by reference to these indicia of obsolescence, it would have helped to counterbalance the court's virtual disregard for the consequences of its decision on the "appearance of evenhandedness in the administration of justice." 71 Although the jurisprudentially sophisticated observer might understand that an accessory may be convicted of a greater crime than the principal, the relatively unsophisticated public 72 may not apprehend that possibility. The ostensible anomaly of a principal's conviction of manslaughter and his accessory's conviction for second degree murder seriously compromises the appearance of justice.

Finally, the Jones court's judicial activism 73 leaves several important accessoriyship related issues unsettled. Of greatest significance is whether it is proper to permit an accessory before the fact to first degree murder to be sentenced to death, especially when the principal may be convicted of a lesser crime or no crime at all. By failing to address the propriety of such death sentencing for accessories before the fact, 74 Jones fails to bar the very harshness the common law accessoryship rules sought to obviate.

The Jones court was correct to abrogate the greater-crimes rule. The court's decision, however, left unanswered some questions posed by the common law rules of accessoryship; therefore, it remains for the legislature to consider the broader picture. Because the original reasons for the principal-accessory distinctions have become obsolete, the legislature should follow the modern trend and abolish the classificatory distinctions. It would be unwise, however, to permit an accessory before the fact to be sentenced to death, especially when the principal, could receive a

for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, The Path of The Law, 10 HARV. L. REV. 457, 469 (1897).


73. Prior Maryland case law supports an activist role in abrogating or altering the common law. See, e.g., Boblitz v. Boblitz, 296 Md. 242, 462 A.2d 506 (1983) (abrogates common law interspousal immunity rule in negligence cases); Moxley v. Acker, 294 Md. 47, 447 A.2d 857 (1982) (eliminates element of force in a common law action of forcible detainer); Williams v. State, 292 Md. 201, 438 A.2d 1301 (1981) (modifies common law principle that prohibits waiving the right to be present at every stage of a criminal trial by the defendant's attorney); Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979) (abrogates common law rule that an accessory before the fact cannot be tried prior to the conviction and sentencing of the principal); Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979) (refused to recognize common law offense of misprision of felony).

lesser penalty. In that instance, not only is the appearance of justice compromised, but the cruel and unusual punishment prohibitions of the eighth amendment are implicated. Thus, the legislature should insulate all accessories from capital punishment, but allow, in all other instances, an accessory before the fact to be treated as a principal.

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75. For a thorough discussion of the constitutional issues involved when an accessory is sentenced to death, see Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17 (1979).